

RESEARCH ARTICLES

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The Protection of Intangible Cultural Heritage in Armed Conflict: Dissolving the Boundaries Between the Existing Legal Regimes?

Abstract: The themes of measures of cultural heritage protection and the accountability of perpetrators of crimes against cultural heritage in armed conflict have been receiving growing attention in international fora and international scholarship. The applicable law for the protection of cultural heritage in times of conflict is the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols; however, the protection that this body of rules provides to intangible cultural heritage (as opposed to tangible cultural heritage) is questionable. This paper seeks to critically present the intersection of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage with other international legal regimes, especially the norms of the 1949 Geneva Conventions and their Additional Protocols and human rights law, with the aim of establishing that intangible cultural heritage enjoys legal protection in all phases of an armed conflict.

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Definition of Intangible Cultural Heritage

Cultural heritage includes tangible heritage, composed of structures and objects of historical, religious, or cultural value, as well as intangible cultural heritage (ICH), comprised of customs, beliefs, traditions, skills, languages, artistic expressions, and folklore. In 2016, UNESCO celebrated the 10th anniversary of the entry into force of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage (“the 2003 Convention”).¹ In just these ten years after its entry into force in 2006, this instrument has received wide acceptance from the international community, with 174 States Parties having ratified it to date.² The 2003 Convention, along with the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage³ (“the 1972 Convention”) present the two sides of the protection of cultural heritage in international law, and it is widely acknowledged that the popularity of both instruments has rather exceeded the aspirations of their drafters. The widespread support for both instruments demonstrates a general *opinio juris* on the need to preserve and safeguard both forms of cultural heritage.

States had originally considered the inclusion of intangible heritage within the framework of the 1972 Convention, but in the end they decided against doing so.⁴ However, even at the time of the elaboration of the 1972 Convention, States from Africa, Asia, the Pacific region, and Latin America voiced their concerns over the Eurocentric definition of cultural heritage, which did not emphatically acknowledge the interrelations between tangible and intangible elements of the cultural heritage of groups.⁵ The Preamble to the 2003 Convention rectified this shortcoming by recognizing the “deep-seated interdependence between the intangible cultural heritage and the tangible cultural and natural heritage”. This interdependence is also asserted in other UNESCO normative texts.⁶ Thus, the decision to ex-

¹ Convention for the Safeguarding of the Intangible Cultural Heritage, 17 October 2003, 2368 UNTS 1.

² <https://ich.unesco.org/en/states-parties-00024> [accessed: 12.05.2017]. The wide acceptance of the 2003 Convention is also reflected in the fact that only a handful of States have deposited reservations and declarations.

³ Convention Concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972, 1037 UNTS 151.

⁴ For more on this issue, see A.F. Vrdoljak, *Minorities, Cultural Rights and the Protection of Intangible Cultural Heritage*, 2005, <http://www.esil-sedi.eu/sites/default/files/Vrdoljak09-05.pdf> [accessed: 27.03.2017].

⁵ *Ibidem*.

⁶ See UNESCO General Conference, Thirtieth session, *Amendment to the Draft Programme and Budget for 2000-2001 (30 C/5)*, 15 October 1999, UNESCO Doc. 30C/DR.84, <http://unesdoc.unesco.org/imag->

clude the intangible elements of cultural heritage from the framework of the 1972 Convention in fact turned out to be a catalyst for the maturation of norms on the protection of ICH and for the international community to realize that ICH must be protected in its own right, as an integral part of and form of resources for the enjoyment of other human rights.⁷

While the 1972 Convention covers natural and cultural heritage, for example structures and remains of historical, religious, or cultural value of “outstanding universal value”, the 2003 Convention creates a broader protection scheme for the intangible dimensions of cultural heritage.⁸ Under Article 2 of the 2003 Convention, “intangible cultural heritage” includes: “practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage”.

The 2003 Convention does not aim at safeguarding every single ICH that exists in the world; the rationale is that communities and groups themselves, as the sole rightful holders and bearers of ICH practices, should recognize the need to safeguard their ICH for future generations. The definition of intangible cultural heritage in the 2003 Convention acknowledges two dimensions to ICH. The temporal dimension relates to the fact that the intangible cultural heritage must be “transmitted from generation to generation” and be “constantly recreated”;⁹ therefore, ICH essentially has to meet the “test of time”. The spatial dimension relates to the fact that ICH must be recreated “in response to their [communities’ and groups’] environment, their interaction with nature and their history”.¹⁰ In this context, ICH is identified by determining its value for the relevant holders, i.e. communities, groups, and individuals (as opposed to the “outstanding universal value” of tangible heritage), as they are the ones who can define what their ICH is and ensure its preservation into the future. Ultimately, this ICH should provide communities and groups “with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity”.¹¹

es/0011/001176/117605e.pdf [accessed: 21.09.2017]; UNESCO World Heritage Committee, *The Yamato Declaration on Integrated Approaches for Safeguarding Tangible and Intangible Cultural Heritage*, 25 November 2004, UNESCO Doc. WHC-04/7 EXT.COM/INF.9, Annex I.

⁷ See the possible scenarios drafted by Janet Blake in: J. Blake, *Developing a New Standard-setting Instrument for Safeguarding Intangible Cultural Heritage – Elements for Consideration*, UNESCO, Paris 2001, pp. 88-93.

⁸ It again should be kept in mind that States had originally considered the inclusion of intangible heritage within the framework of the 1972 Convention, but eventually decided against it. See UNESCO General Conference, Thirtieth session, *Amendment...*; J. Blake, *Developing a New Standard-setting Instrument...*, p. 72.

⁹ 2003 Convention, Article 2.

¹⁰ Ibidem.

¹¹ See UNESCO Executive Board, *Report on the Preliminary Study on the Advisability of Regulating Internationally, Through a New Standard-Setting Instrument, the Protection of Traditional Culture and Folklore*, 16 May 2001, UNESCO Doc. 161 EX/15, Annex, p. 3; UNESCO Intergovernmental Committee for the Safeguarding

Much like a living human being, some ICH practices may die out if their socio-cultural values are disentangled from the lives and practices of the communities and groups which engage in them. If communities stop practicing their ICH, or if communities and groups become extinct, then their ICH is doomed to disappear.¹² The need to protect ICH is thus of crucial value to both the protection of the heritage element itself, as well as for the preservation of the cultural identity of the communities and groups which practice it. In this sense, the 2003 Convention not only protects ICH as an end-result of a human practice, but it affords protection to the agents of the communities and groups that produce, enact, and perpetuate the ICH element concerned, as well to the conditions within which ICH is practiced. To this end, the material application of the 2003 Convention extends protection to both the agents who give life to the intangible heritage in question and the objectified or tangible form of intangible heritage, whether it be cultural, religious, or spiritual practices, instruments, costumes, etc.¹³ From this point of view, the 2003 Convention endorses a tangible dimension to the ICH that is protected, thus bringing the scope of the Convention in line with the broad and holistic definition of cultural heritage that has been promoted by the UN.¹⁴ Furthermore, the 2003 Convention does not purport to be solely a legal instrument for heritage preservation/management, but places the safeguarding of intangible cultural heritage within the basic premises of human rights law, which guarantees the exercise of the right to participate in cultural life; the right to access and enjoy cultural heritage; the right to freedom from discrimination; the right to freedom of thought, conscience, and religion; and the right to freedom of artistic expression and creativity, etc.

On the eve of the 10th anniversary of the entry into force of the 2003 Convention, during the sixth session of its General Assembly in May/June 2016, Greece issued a statement requesting enhanced cooperation and the development of synergies with the other UNESCO Conventions in the field of culture, and invited the Secretariat to pursue further deliberations in order to elaborate on the value of ICH and its safeguarding in cases of armed conflict, as well as its role in the recon-

of the Intangible Cultural Heritage, Decision 11.COM 15, 31 October 2016, para. 6, <https://ich.unesco.org/en/Decisions/11.COM/15> [accessed: 21.09.2017].

¹² M. Pier, *Cécile Duvelle and UNESCO Intangible Cultural Heritage*, "Best Cultural Destinations" 2017, <https://bestculturaldestinations.com/preservation1/cecile-duvelle-unesco-intangible-cultural-heritage> [accessed: 21.09.2017].

¹³ The objectification of intangible heritage has been also observed in relation to inventorying. See M.L. Stefano, P. Davis, G. Corsane, *Safeguarding Intangible Cultural Heritage*, The Boydell Press, Rochester, NY 2012, p. 187; B. Kirschenblatt-Gimblett, *Intangible Heritage as Metacultural Production*, "Museum International" 2004, Vol. 56(1-2), pp. 52-65.

¹⁴ United Nations General Assembly, *Report of the Special Rapporteur in the Field of Cultural Rights*, 3 February 2016, A/HRC/31/59, para. 49.

ciliation process.¹⁵ Measures on cultural heritage protection and the accountability of perpetrators of crimes against cultural heritage during armed conflicts are themes that have been receiving growing attention in both international fora and international scholarship. The applicable law for the protection of cultural heritage in times of conflict is the 1954 Hague Convention and its two Protocols;¹⁶ however the protection that this body of rules could provide to ICH (as opposed to tangible cultural heritage) is questionable.¹⁷ The following sections critically address the intersection of the 2003 Convention with other international legal regimes, especially the norms of the 1949 Geneva Conventions and their Additional Protocols,¹⁸ as well as human rights law, with the aim of establishing that intangible cultural heritage enjoys legal protection in all phases of an armed conflict.

The Threat and Impact of Armed Conflict on Tangible and Intangible Cultural Heritage

Armed conflict, whether international or non-international, often constitutes a substantial threat to cultural heritage. Tangible and intangible heritage are interlinked, and when attacks on one materialize they are usually accompanied by assaults of the same destructive force on the other.¹⁹ The scale and effects of attacks on cultural heritage in times of war can vary, and the predominance of the attacks on tangible over the intangible dimension of cultural heritage can vary as well. Recent armed conflicts, as seen in the cases of Mali, Iraq, and Syria, have highlighted the multidimensional character of the many phases of destruction of cultural heritage, whether tangible or intangible. During an armed conflict, it is usually tangible heritage that is primarily affected by the ongoing hostilities. But the damage caused to tangible heritage also has a severe impact on the intangible dimension of this cultural heritage. This point was raised in the 2016 report of the Special Rapporteur in the field of cultural rights: “Ancient languages and religious practices,

¹⁵ Permanent Mission of Greece, Geneva, *Note Verbale*, 10 June 2016, Ref. No. 6171.2/35/1097, <http://www.ohchr.org/Documents/Issues/CulturalRights/DestructionHeritage/States/Greece.pdf> [accessed: 21.09.2017].

¹⁶ Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 240; Protocol for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 358; Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, 2253 UNTS 212.

¹⁷ C. Johannot-Gradis, *Protecting the Past for the Future: How Does Law Protect Tangible and Intangible Heritage in Armed Conflict?*, “International Review of the Red Cross” 2015, Vol. 97, p. 1256.

¹⁸ Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 (“GC IV”); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), 8 June 1977, 1125 UNTS 3 (“API”); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609 (“APII”).

¹⁹ United Nations General Assembly, *Report of the Special Rapporteur...*, A/HRC/31/59, para. 77.

tied to sacred spaces and structures and cultural landscapes of northern Iraq and the Syrian Arab Republic, are being lost as the populations are displaced and objects, texts and historic structures are destroyed”.²⁰

Acts of deliberate destruction of cultural heritage have a transformative impact on the *psyche* of the population affected: their morale is damaged; they are intimidated; their traditions, skills, and cultural practices are halted, severely impeded, or lost through conflict-related deprivation and enforced displacement; and the cultural underpinnings (in the form of identity, beliefs, and dignity) of their very existence as a group, a community, or a nation are dismantled. The International Criminal Court (ICC) Prosecutor Fatou Bensouda emphasized the importance of cultural heritage to a community’s identity: “[such an attack] against a building dedicated to religion and historic monuments [...] [destroys] the roots of an entire people [and profoundly and] irremediably affects its social attitudes, practices and structures”.²¹ Hence, intangible cultural heritage could be affected in many ways during an armed conflict. For instance, the destruction of intangible heritage could be a result of the deliberate targeting of this heritage for the cultural affiliations it displays, or it could be the result of military negligence or even “collateral damage” in the form of destruction of the intangible dimension of the affected tangible heritage. In any of these scenarios, cultural heritage should be viewed in broad and holistic terms, which means that each category of cultural heritage entails some dimension of the other (i.e. tangible-intangible, intangible-tangible), and when either of these two categories is affected by armed conflict, the loss of either form of cultural heritage deeply affects the population and contributes to the erosion of the people’s identity.²²

Acts of cultural heritage destruction not only terrorize local populations, but ultimately lead to the cultural annihilation of such peoples. In many of the recent examples, such acts of deliberate destruction were identified as being part of a plan of “cultural engineering”, “cultural cleansing”, or even “cultural genocide”.²³ For example, the Special Rapporteur in the field of cultural rights has described the destruction of cultural heritage as “part of the ‘cultural engineering’ sought by diverse extremists who, rather than preserving tradition as some claim, seek to radically transform it, erasing what does not concur with their vision”.²⁴ Along the

²⁰ Ibidem.

²¹ International Criminal Court, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the Opening of Trial in the Case Against Mr Ahmad Al-Faqi Al Mahdi*, 22 August 2016, <https://www.icc-cpi.int/legalAidConsultations?name=otp-stat-al-mahdi-160822> [accessed: 21.09.2017]; United Nations General Assembly, *Report of the Special Rapporteur on Minority Issues on Her Mission to Iraq*, 9 January 2017, A/HRC/34/53/Add.1, p. 16.

²² United Nations General Assembly, *Report of the Special Rapporteur...*, A/HRC/31/59, paras. 48, 77.

²³ E. Novic, *The Concept of Cultural Genocide: An International Law Perspective*, Oxford University Press, Oxford 2016.

²⁴ United Nations General Assembly, *Report of the Special Rapporteur...*, A/HRC/31/59, paras. 66-81.

same lines, the UNESCO General Director has condemned acts of systematic destruction of cultural heritage and acts of targeting minorities due to their cultural identity, as well as acts targeting individuals for their role in the transmission of knowledge regarding cultural heritage and values.²⁵

The destruction of a group's cultural heritage, which is the symbol of their identity, is a form of "cultural" warfare. The examples of recent conflicts and the responses of the international community indicate that on one hand the protection of intangible cultural heritage in times of war has been erroneously overlooked in the past in previous armed conflicts, and on the other hand that the destruction of cultural heritage, whether tangible or intangible, can be peculiarly complex as it can have a destructive impact on the other (usually intangible) dimension of cultural heritage, with various domestic and external players bearing responsibility for these acts.

The Protection of ICH in Armed Conflict: Dissolving the Boundaries between the Existing Legal Regimes?

The law of armed conflict prescribes various norms that can be applied to the creation of, participation in, and transmission of intangible cultural heritage. Article 27 of GC IV and Article 46 of the Hague Regulations²⁶ provides that

protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

A similarly-worded provision is included in the two Additional Protocols of the Geneva Conventions (Article 75 API; Article 4(1) APII). As regards ICH, this protection covers the physical and intellectual integrity of the individuals, groups, or communities who participate in the expression of their intangible cultural, religious,²⁷ or spiritual heritage, i.e. the performance of rituals, spiritual ceremonies and services. It encompasses both individual and collective entitlements.²⁸ The protection under

²⁵ I. Bokova, *Fighting Cultural Cleansing. Harnessing the Law to Preserve Cultural Heritage*, "Harvard International Review", 24 August 2015, <http://hir.harvard.edu/article/?a=11723> [accessed: 18.09.2017].

²⁶ Hague Regulations Concerning the Laws and Customs of War on Land, 1899 and 1907, 187 Parry's CTS 429, 208 Parry's CTS 77.

²⁷ On PoW's religious practices rights see Articles 33-37 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135. On internees' religious practices rights see Article 93 GC IV; Article 5(1) APII.

²⁸ A.F. Vrdoljak, *Cultural Heritage in Human Rights and Humanitarian Law*, in: O. Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law*, Oxford University Press, Oxford 2011, p. 259.

Article 27 of GC IV is not limited to having physical access to spaces where heritage is expressed, but refers also to having access to instruments, objects, and artefacts that are necessary for enacting the heritage. I would suggest that these provisions, when read in light of the 2003 Convention, encompass protection for the bearers of ICH as well as the cultural references, actions, and means prerequisite for the enactment of intangible heritage and the preservation of the cultural identity of the group/community. First, the wording “customs and practices” should be read in conjunction with the 2003 Convention as a scheme of protection that holistically extends to oral traditions and expressions, including language as a vehicle of intangible cultural heritage; performing arts; social practices, rituals, and festive events; knowledge and practices concerning nature and the universe; and traditional craftsmanship. Second, it can be argued that the wording “customs and practices” indirectly encompasses the “knowledge” that is transmitted and preserved from generation to generation to ensure the heritage’s continuation. Of course, the transmission of knowledge, for example of methods of preparing food, may be affected, even irrevocably, due to environmental damage, lack of resources, etc. The components of such intangible heritage will also have to draw legal protection from other instruments that deal with indigenous and minority issues, such as the 1989 ILO Convention No. 169²⁹ or the United Nations Declaration on the Rights of Indigenous Peoples,³⁰ etc.

The Geneva Convention (I)³¹ and the Additional Protocols contain provisions that create specific protection for spiritual leaders and ministers of religion. The wording of Article 24 GC I, Article 15(5) API, and Article 9 APII cannot be interpreted however to include other types of intangible heritage actors. Johannot-Gradis points out that the GC and the Additional Protocols do not provide the necessary legal protection of certain intangible cultural heritage actors, bearers, or custodians, such as musicians, dancers, writers, painters, poets, puppeteers, or story-tellers and their functions (even though they enjoy protection as civilians). In such cases, Johannot-Gradis argues that the “law of armed conflict proves deficient [...] and the necessary legal protection must therefore be sought in other bodies of law, such as international human rights, in particular the ICCPR, ICESCR, as well as the UNESCO cultural property conventions”.³² Although ICH comes in a variety

²⁹ ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, C169, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169 [accessed: 1.10.2017]. For a conceptual overview, see A. Xanthaki et al., *Indigenous Peoples’ Cultural Heritage: Rights, Debates, Challenges*, Brill-Nijhoff, Leiden 2017.

³⁰ UN Declaration on the Rights of Indigenous Peoples, 13 September 2007, UN Doc. A/RES/61/295 (2007). This Declaration has been adopted by 147 States.

³¹ Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31 (“GC I”).

³² C. Johannot-Gradis, op. cit., p. 1272.

of forms, I would suggest that the protection scheme for these kinds of custodians of intangible heritage should still be based on Article 27 GC IV and the provisions of the 2003 Convention.

Furthermore, the transmission of knowledge of customs and practices from generation to generation is facilitated through education. Under Article 24 GC IV children are afforded special protection so they can exercise their religion and education in accordance with their cultural tradition wherever possible. Along these same lines, Article 4(3) APII provides that “they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care”. During international armed conflicts, places of worship and schools – in other words, properties that are associated with tangible elements of cultural heritage – are protected as civilian properties under Article 52 API. Vrdoljak and Sandoz correctly point out that the intangible elements of civilian life are not covered by this provision.³³ Finally, under Article 53 API it is prohibited:

- (a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; (b) to use such objects in support of the military effort; and (c) to make such objects the object of reprisals.

It should be noted that the International Committee of the Red Cross Commentary maintains that this provision does not encompass

any and all places of worship, as such buildings are extremely numerous and often have only a local renown of sanctity which does not extend to the whole nation. Thus, the places referred to are those which have a quality of sanctity independently of their cultural value and express the conscience of the people.³⁴

Article 16 APII similarly prohibits the targeting of such cultural property as a military objective.

Article 85(4)(d) API, which is applicable only in relation to an international armed conflict, provides for the suppression of grave breaches of the provisions on the protection of cultural heritage, such as the extensive targeting of “[...] clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization [...]”. Such special protection is afford-

³³ A.F. Vrdoljak, *Cultural Heritage in Human Rights...*, p. 262; Y. Sandoz, Ch. Swinarski, B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, International Committee of Red Cross, Brill-Nijhoff, Geneva 1987, pp. 633-634.

³⁴ Y. Sandoz, Ch. Swinarski, B. Zimmermann (eds.), op. cit., para. 2067, p. 647. The cultural property protected under this provision enjoys immunity without the military necessity proviso.

ed to cultural heritage that is publicly inscribed, for example, in the 1954 Hague Convention list or the 1972 World UNESCO lists. Therefore, inventories such as the 1972 Convention lists can guide States' forces with respect to their compliance with the rules of the law of armed conflict. The UNESCO military manual, published in 2017, states that

the inclusion of a cultural site on the World Heritage List or on a 'tentative list' submitted [...] by a state party and, when it comes to forces in the field, the presence on or near a cultural site of the World Heritage Emblem [...] are in practice conclusive indicators that the site is of sufficient importance to the cultural heritage of the state concerned to be considered 'cultural property' for the purposes of the 1954 Hague Convention and other relevant rules of [the law of armed conflict].³⁵

What is debatable though is whether the inclusion of an ICH element on the 2003 Convention lists would make it covered by the protections provided in Article 85 API. A number of scholars are in favour of the view that the inclusion of cultural heritage in the lists established under the 2003 Convention satisfies the requirements of Article 85.³⁶

The 1954 Hague Convention and its two Protocols serve as *lex specialis* with regard to the protection of cultural heritage during armed conflict, covering thus both movable and immovable property. The 1954 Hague Convention imposes on States the obligation to respect cultural property within their own territory and that of other States, both in times of peace, war, and belligerent occupation, and to take precautionary measures against attacks on such cultural property. The question remains though: Is the 1954 Hague Convention applicable to intangible cultural heritage? The predominant view is that the States' obligations under the 1954 Hague Convention apply to "the material culture associated with intangible heritage".³⁷ The Hague Convention protects cultural property "of great importance to the cultural heritage of every people"; and even though the "importance of cultural property" is not determined solely by the States, the predominant view is that it should at least be of national importance. The rationale for the protection of ICH³⁸ stems from the fact that there is a normative recalibration of the protection of cultural heritage, which is reflected in the human rights and cultur-

³⁵ R. O'Keefe et al., *Protection of Cultural Property: Military Manual*, UNESCO, Paris 2016, para. 26. It is further stated therein that "compliance with the relevant rules of LOAC guarantees compliance with the World Heritage Convention. Conversely, however, breach of LOAC can amount further to a breach of the World Heritage Convention". By analogy, this could be argued in favour of the 2003 Convention, too.

³⁶ A.F. Vrdoljak, *Cultural Heritage in Human Rights...*, p. 265, fn 102-103, citing Y. Sandoz, Ch. Swinarski, B. Zimmermann (eds.), *op. cit.*, pp. 1002-1003, 3517, and E. Roucouas, *Les infractions graves au droit humanitaire (Article 85 de Protocole additionnel I aux Conventions des Genève)*, "Revue Hellénique de Droit International" 1978, Vol. 31, pp. 113-114.

³⁷ J. Blake, *Developing a New Standard-setting Instrument...*, p. 83.

³⁸ A.F. Vrdoljak, *Cultural Heritage in Human Rights...*, p. 273, citing also R. O'Keefe, *The Protection of Cultural Property in Armed Conflict*, Cambridge University Press, Cambridge 2006, pp. 101-111.

al heritage instruments. Accordingly, the general framework for the protection of cultural heritage “is no longer dependent on its universal importance to humanity but rather relates to the significance of the heritage to peoples”. Leaving aside the dangers of cultural nationalism when putting together the national inventories on intangible cultural heritage and preparing the nomination files for the inscription in the 2003 UNESCO Representative List of the Intangible Cultural Heritage of Humanity, it could be argued that the inscription in any of the 2003 Convention lists (List of Intangible Cultural Heritage in Need of Urgent Safeguarding and the Representative List of the Intangible Cultural Heritage of Humanity) indicates sufficient importance of the cultural heritage to peoples (and not States) to be considered as “cultural property” for the purposes of the 1954 Hague Convention and other relevant rules of the law of armed conflict.³⁹ This protection could also be extended to the intangible elements of heritage associated with the sites inscribed on any of the 1972 lists mentioned above. However, a certain confusion still exists as to whether only the cultural heritage enlisted on the 1972 World Heritage List fulfils the criteria for “enhanced protection” under the Second Protocol to the 1954 Hague Convention.⁴⁰ For example, can other cultural heritage elements than just the World Heritage (and by association, the 2003 Convention) inscriptions be eligible for the status of enhanced protection? This is a matter that has to be clarified and resolved by (primarily) the States Parties to the 1972 Convention and the Second Protocol to the 1954 Hague Convention, and subsequently by the States Parties to the 2003 Convention.⁴¹

Another question that arises is whether more extensive protection for intangible cultural heritage in armed conflict is within the scope of the 2003 Convention. Very little is said in the Operational Directives when it comes to the protection of intangible cultural heritage in the event of armed conflict.⁴² Unlike the Operational Guidelines of the 1972 Convention,⁴³ which provide for a number of measures to protect cultural heritage in the event of armed conflict, i.e. the inscription on the List of World Heritage in Danger of those properties which face potential danger from the outbreak or the threat of an armed conflict that could have deleterious effects on the property’s inherent characteristics and the provision of internation-

³⁹ A.F. Vrdoljak, *Cultural Heritage in Human Rights...*, p. 281.

⁴⁰ *Ibidem*, p. 265.

⁴¹ This is a matter of assessing whether the definition of “outstanding universal value” of cultural properties is broader than that of properties of the “greatest importance to humanity”. See A. Prins, *UNESCO’s Culture Conventions: Synergies and Operational Guidelines*, Netherlands National Commission for UNESCO, The Netherlands 2014, p. 24.

⁴² UNESCO Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage, 2016 version, https://ich.unesco.org/doc/src/ICH-Operational_Directives-6_GA-PDF-EN.pdf [accessed: 24.06.2017].

⁴³ Operational Guidelines 98, 109, 179/180, <http://whc.unesco.org/en/guidelines/> [accessed: 3.03.2017]; Article 11(4) of the 1972 Convention.

al assistance, the Operational Directives to the 2003 Convention only provide for international assistance in the form of financial support when intangible heritage or the agents of the heritage in question are in an emergency situation.⁴⁴

The wording of the text of the 2003 Convention does not explicitly refer as to its applicability with respect to either peacetime or times of armed conflict. However, by analogy to the 1972 Convention, which does not cease to be applicable in armed conflicts, there is room to presume that the 2003 Convention likewise applies in armed conflict as well. Under the 1972 Convention States' obligations are not limited to positive ones, but they also include (negative) obligations to *not* take deliberate measures that might damage protected sites, even during armed conflict. On a similar note, Article 11 of the 2003 Convention imposes on States Parties the obligation to take all necessary measures to ensure the safeguarding of the intangible cultural heritage present in their territory. According to the 2003 UNESCO Committee, this obligation is enforceable in all contexts, including in situations such as emergencies and armed conflicts that have "catastrophic consequences for the intangible cultural heritage as well as communities, groups and, if applicable, individuals who are the bearers of this heritage".⁴⁵ Thus, States Parties to the 2003 Convention are obliged to take such measures for the protection of intangible cultural heritage in times of war, and if they fail to do so they will incur state responsibility.⁴⁶ The Operational Directives affirm the obligation of the States to "reduce the vulnerability of expressions, practices and representations of intangible cultural heritage (as contributors to dispute prevention and peaceful conflict resolution) during and in the aftermath of conflicts".⁴⁷ One may posit that support for this argument can be found in the Ethical Principles for Safeguarding Intangible Heritage that have been developed by the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage to prevent disrespect and misappropriation of such heritage, specifically Principle 9, which stresses that "the dynamic and living nature of intangible cultural heritage should be *continuously* respected".⁴⁸ The continuity and non-disruption or non-suppression of intangible cultural heritage practice and its transmission is premised on the assumption that its protection will be guaranteed at all times, even during armed conflict.

⁴⁴ UNESCO Operational Directives..., I.14, para. 50.

⁴⁵ Ibidem. See UNESCO Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, Decision 5.COM 10.2, 18 October 2010, <https://ich.unesco.org/en/Decisions/5.COM/10.2> [accessed: 19.09.2017].

⁴⁶ A. Jakubowski, *State Responsibility and the International Protection of Cultural Heritage in Armed Conflicts*, "Santander Art and Culture Law Review" 2015, Vol. 2, pp. 147-174.

⁴⁷ UNESCO Operational Directives..., paras. 195(b.iii), 196-197.

⁴⁸ UNESCO Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, Decision 10.COM 15.A, 15 October 2015, Annex, Principle 9, <https://ich.unesco.org/en/decisions/10.COM/15.A> [accessed: 21.09.2017] (emphasis added).

The Protection of Intangible Cultural Heritage in Armed Conflict: Dissolving the Boundaries Between the Existing Legal Regimes?

Furthermore, the fact that 2003 Convention instrument has been placed since its inception within the rubric of human rights law (see the discussion above), a body of law which is enforceable in times of armed conflict, provides further support for this argument. The International Court of Justice has affirmed States' human rights obligations in such situations, and as regards the relationship between international humanitarian law and human rights law, the Court has accepted that both branches of international law are enforceable, with the latter serving as *lex specialis*.⁴⁹ UN bodies have also affirmed the extraterritorial application of economic, social, and cultural rights in instances of armed conflict.⁵⁰ Furthermore, the axiomatic principle of the indivisibility of human rights and the interdependence of the right to participate in cultural life with other human rights related to culture, such as the right of freedom of thought, conscience, and religion (i.e. Article 18 ICCPR⁵¹), freedom of expression (i.e. Article 19 ICCPR), freedom of movement (i.e. Article 12 ICCPR), freedom of assembly (i.e. Article 21 ICCPR) and the right to development, all offer legal protection to various forms of culture and cultural heritage during armed conflict.

The right of access to and enjoyment of cultural tangible and intangible heritage is part of international human rights law, especially cultural rights and the right to take part in cultural life.⁵² This has been confirmed by UNESCO⁵³ and the UN Human Rights Council, which has stated in its latest Resolution that “the destruction of or damage to cultural heritage may have a detrimental and irreversible impact on the enjoyment of cultural rights”.⁵⁴ Cultural rights have both individual (i.e. the right to participate in cultural life, to enact cultural practices, speak languages, etc.) and collective entitlements (i.e. the right of people to so-

⁴⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports 2004, para. 106. See also United Nations Human Rights Office of the High Commissioner, *International Legal Protection of Human Rights in Armed Conflict*, New York-Geneva 2011, p. 11, http://www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf [accessed: 11.08.2017].

⁵⁰ See, for example, *Legal Consequences...*, p. 180; United Nations Committee on Economic, Social and Cultural Rights, *Guidelines on Treaty-Specific Documents to Be Submitted by States Parties Under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights*, 24 March 2009, E/C.12/2008/2; United Nations Human Rights Council Resolution No. 6/19, 28 September 2007, A/HRC/RES/6/19 (2007).

⁵¹ International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

⁵² United Nations General Assembly, *Report of the Independent Expert in the Field of Cultural Rights, Farida Shaheed*, 21 March 2011, A/HRC/17/38, paras. 58-76; United Nations Human Rights Council Resolution No. 6/1, 27 September 2007, A/HRC/RES/6/1 (2007).

⁵³ J. Blake, *Development of 2003 UNESCO's Convention: Creating a New Heritage Protection Paradigm?*, in: M.L. Stefano, P. Davis (eds.), *The Routledge Companion to Intangible Cultural Heritage*, Routledge, London 2017, pp. 11-21.

⁵⁴ United Nations Human Rights Council Resolution No. 33, 27 September 2016, A/HRC/33/L.21 (2016); United Nations General Assembly, *Report of the Independent Expert...*, A/HRC/17/38, para. 2. Extremists not only target cultural heritage, but can affect the enjoyment of particular groups within cultural groups, such as women. For more on this issue, see the United Nations General Assembly, *Report of the Special Rapporteur in the Field of Cultural Rights*, 17 July 2017, A/72/155, paras. 62-97.

cially interact in their participation in cultural life) which can be affected during an armed conflict.⁵⁵ The obligation of States Parties under Article 15 of the 2003 Convention to ensure the widest possible participation of communities, groups, and individuals, including displaced persons, to ensure their access, to the extent possible, to the instruments, objects, artefacts, cultural and natural spaces, and places of memory whose existence is necessary for expressing their intangible cultural heritage⁵⁶ is commensurate to the obligation under Article 11 of the 2003 Convention. In this vein, Principle 5 of the Ethical Principles for Safeguarding Intangible Cultural Heritage confirms the applicability of a similarly-worded provision in the context of armed conflict, as follows:

Access of communities, groups and individuals to the instruments, objects, artefacts, cultural and natural spaces and places of memory whose existence is necessary for expressing the intangible cultural heritage should be ensured, including in *situations of armed conflict*. Customary practices governing access to intangible cultural heritage should be fully respected, even where these may limit broader public access.⁵⁷

In essence, the 2003 Convention creates obligations for the States Parties to ensure the means, enabling conditions and skills conducive to creativity and necessary for the agents of the communities to create, enact, and transmit the intangible cultural heritage concerned.⁵⁸ The Ethical Principles for Safeguarding Intangible Cultural Heritage make reference to the “right” of communities, groups, and individuals to continue such ICH practices and to prevent the loss of such cultural references, as it could constitute a violation of their cultural rights and/or a “primary source of their livelihood”.⁵⁹ Thus, it is important to ensure that even persons that have become displaced due to an armed conflict “can continue to practice their intangible cultural heritage”.⁶⁰ The fact that intangible cultural heritage has a human

⁵⁵ This was affirmed by the International Criminal Tribunal for the Former Yugoslavia in Trial Chamber II, *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Judgment of 31 January 2005, para. 232: “The victim of the offence at issue [was] to be understood broadly as a ‘people’, rather than any particular individual”. See V. Vadi, *Cultural Heritage in International Investment Law and Arbitration*, Cambridge University Press, Cambridge 2014, p. 39; M. Lostal, E. Cunliffe, *The Aftermath of Destruction of Cultural Heritage: Factoring in Cultural Rights in Post-Conflict Recovery Processes*, 9 June 2016, http://www.ohchr.org/Documents/Issues/CulturalRights/DestructionHeritage/NGOS/M.Lostal_E.Cunliffe.pdf [accessed: 8.11.2017]; A.F. Vrdoljak *The Criminalisation of the Intentional Destruction of Cultural Heritage*, 2016, http://www.ohchr.org/Documents/Issues/CulturalRights/DestructionHeritage/NGOS/A.P.Vrdoljak_text1.pdf [accessed: 21.09.2017].

⁵⁶ UNESCO Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, Decision 11.COM 15, para. 7.

⁵⁷ UNESCO Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, Decision 10.COM 15.A, Annex, Principle 5 (emphasis added).

⁵⁸ UNESCO Executive Board, *Report on the Preliminary Study...*, Annex, p. 2.

⁵⁹ UNESCO Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, Decision 10.COM 15.A, Annex, Principle 2.

⁶⁰ UNESCO Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, Decision 11.COM 15, para. 12.

rights law underpinning, with both individual and collective entitlements, leads teleologically to the assumption that the minimum core of human rights law obligations are applicable in the context of safeguarding intangible cultural heritage during armed conflict.⁶¹ While General Comment No. 21 on the right to take part in cultural life does not explicitly refer to the destruction of cultural heritage as a violation of Article 15 of CESCR,⁶² nevertheless a number of normative texts endorse the view that States must respect, protect, and preserve cultural heritage in all its forms as a “record of human experience”⁶³ or as a “wellspring of creativity”⁶⁴ in times of both peace and war.

Hence, there is a progressive dissolution of the boundaries between the various legal regimes for the protection of cultural heritage in times of conflict. Most interestingly, this development is taking place in parallel to the normative shift that international organizations endorse as to the recognition of an indisputable human rights’ dimension to the broad concept of cultural heritage, one that recognizes equally the tangible and intangible elements it displays. This shift did not occur overnight, but it has been the outcome of a “lengthy period in international law” which initially saw the convergence of various branches of law, such as minority and cultural rights.⁶⁵ Today we have reached the second phase of this maturation period by recognizing that the protection of intangible cultural heritage *per se* in armed conflict is part of States’ obligations to comply with international human rights law, under both the 2003 Convention, the law of armed conflict, as well as human rights instruments.

Conclusions

The general interest of humanity in protecting and safeguarding cultural heritage is well-established in international law.⁶⁶ As Judge Trindade has noted: “The ultimate *titulaires* of the right to the safeguarding and preservation of their cultural and spiritual heritage are the collectivities of human beings concerned, or else human-

⁶¹ For the minimum core obligations see United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 21, Right of Everyone to Take Part in Cultural Life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, E/C.12/GC/21, para. 55; United Nations General Assembly, *Report of the Special Rapporteur...*, A/HRC/31/59, para. 53.

⁶² International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3.

⁶³ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 21...*, para. 50(a).

⁶⁴ UNESCO Universal Declaration on Cultural Diversity, 2 November 2001, UNESCO Doc. 31C/Res. (2001), Article 7.

⁶⁵ A.F. Vrdoljak, *Minorities, Cultural Rights...*, p. 24.

⁶⁶ UNESCO General Conference, Twenty-seventh session, *Resolution 3.5. Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 1954)*, 13 November 1993, UNESCO/RES/27C/3.5 (1993).

kind as a whole”.⁶⁷ This normative shift, which has been taking place at the universal level, shows that there is an osmosis between human rights, humanitarian law, and cultural heritage instruments, based on which the protection of cultural heritage is not limited to being an obligation for States Parties to such instruments. The resolutions of the Security Council and the Human Rights Council have confirmed that all States bear international responsibility for the international destruction of cultural heritage.⁶⁸ Along the same lines, the responses of the international community in recent conflicts attest to the fact that there is a growing acceptance that the safeguarding of intangible cultural heritage can amount to an *erga omnes* obligation. The UN Special Rapporteur has noted that “all of humanity has a link to such objects which represent the ‘cultural heritage of all [hu]mankind””.⁶⁹ Moreover, the Human Rights Council has recognized, in a recent Resolution on cultural rights and the protection of cultural heritage, that “damage to cultural heritage, both tangible and intangible, of any people constitutes damage to the cultural heritage of humanity as a whole”.⁷⁰

The threat to tangible and intangible heritage in armed conflict is not only of general interest to humanity, but a major challenge for the international community for a number of reasons. The following conclusions are offered as suggestions of the changes that need to take place in order to assure the protection of intangible and tangible cultural heritage in armed conflict. The obliteration of the cultural identity of the concerned populations through this cultural warfare we have been witnessing indicates that:

- There are still a number of States that have little respect for the existing applicable norms – some of which have been recognized to have acquired customary international law status – aimed at protecting both cultural heritage and people who are the bearers of the cultural heritage; and this is often complicated by the fact that non-state actors may also be involved in an armed conflict, such as for example in the case of Syria.⁷¹ States Parties to the conflict may have no training on the applicable rules, or certain States

⁶⁷ *Request for the Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Separate Opinion of Judge Cañado Trindade, ICJ Reports 2013, p. 606, para. 114.

⁶⁸ See United Nations Security Council Resolution No. 1483, 22 May 2003, S/RES/1483 (2003); United Nations Human Rights Council Resolution No. 6/11, 28 September 2007, A/HRC/RES/6/11 (2007); UNESCO General Conference, Thirty-second session, *Resolution 33. UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage*, 17 October 2003, UNESCO Doc. 32C/Res.33 (2003).

⁶⁹ United Nations General Assembly, *Report of the Special Rapporteur...*, A/HRC/31/59, para. 48.

⁷⁰ United Nations Human Rights Council Resolution No. 33; United Nations General Assembly, *Report of the Special Rapporteur...*, A/HRC/31/59; United Nations General Assembly, *Report of the Special Rapporteur in the Field of Cultural Rights*, 9 August 2016, A/71/317. See also UNESCO Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, Decision 10.COM 15.A, Annex, Principle 12.

⁷¹ M. Lostal, *International Cultural Heritage Law in Armed Conflict*, Cambridge University Press, Cambridge 2017, pp. 103 et seq.

The Protection of Intangible Cultural Heritage in Armed Conflict: Dissolving the Boundaries Between the Existing Legal Regimes?

may not be parties to certain international conventions. More States need to ratify the Second Protocol to the 1954 Hague Convention.⁷² The criticisms that the 1954 Hague Convention received prior to the adoption of the Second Protocol focused on the fact that it had “little or no success as an enforceable body of law”.⁷³ If more national laws and courts allow for the investigation and prosecution of any violations of the 1954 Hague provisions, the international community will eventually attain a considerable body of case-law that cements at least criminal sanctions against the destruction of the tangible manifestation of (intangible) cultural heritage.⁷⁴ At the same time, States have to realize that it is their (primary) responsibility to protect their cultural property. As Ukraine correctly pointed out during the deliberations on UN Security Council Resolution No. 2347 (2017): “Failure to achieve that goal is the result not of a lack of existing international instruments, but rather of States’ will to abide by their commitments and obligations”.⁷⁵

- There is a persistent refusal to acknowledge, or ignorance of, the holistic and multi-dimensional form of cultural heritage, especially in the context of an armed conflict. Thus, while all parties to a conflict should be expected to take precautionary measures to protect both forms of cultural heritage, the majority of national military manuals do not make an explicit reference to the protection of intangible heritage.⁷⁶ Furthermore, there is no common understanding as to how the cardinal principles relating to the conduct of hostilities – such as the principles of military necessity, distinction, proportionality, and precaution – apply with respect to intangible cultural heritage. There is therefore a need for the military, policy-making, and

⁷² For example there are 129 States Parties to the 1954 Hague Convention, 107 States Parties to the Protocol, and 73 States Parties to the Second Protocol. See <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByTopics.xsp> [accessed: 20.10.2017]. Out of the UN Security Council’s permanent Member States, only France and the UK have ratified all three instruments.

⁷³ M.D. Thurlow, *Protecting Cultural Property in Iraq: How American Military Policy Comports with International Law*, “Yale Human Rights and Development Law Journal” 2005, Vol. 8, pp. 153, 161.

⁷⁴ For an analysis of how the 1954 Hague Convention could interact with the 1972 Convention in the case of the destruction of cultural property in Syria, see M. Lostal, op. cit., pp. 111-120.

⁷⁵ United Nations Security Council Meeting Record, 7907th meeting, *Maintenance of international peace and security*, 24 March 2017, S/PV.7907 (2017), p. 12.

⁷⁶ For example, M. Lostal, op. cit., pp. 105-106. See, for example, the Joint Doctrine and Concepts Centre, *The Joint Service Manual of the Law of Armed Conflict*, 2004, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf [accessed: 4.10.2017]; USA Department of Defense, *Law of War Manual*, 2015, https://www.defense.gov/Portals/1/Documents/law_war_manual15.pdf [accessed: 4.10.2017]. However, there may be room for the protection of intangible heritage through civil-military exercises. See, for example, Y. Foliant, *Cultural Property Protection Makes Sense: A Way to Improve Your Mission*, Civil-Military Cooperation Centre of Excellence (CCOE), The Hague 2015, <http://www.cimic-coe.org/wp-content/uploads/2015/11/ CPP-Makes-Sense-final-version-29-10-15.pdf> [accessed: 8.11.2017].

academic communities to collaborate on the development of manuals and training seminars on the protection of ICH.

- There is a lack of strategies and information-awareness campaigns concerning the obligations of non-state actors with regard to the prohibition of any acts of hostility against both tangible and intangible cultural heritage.⁷⁷ This is especially important in the context of non-international armed conflicts and in cases where the exercise of a State's due diligence to prevent the human rights violation is impossible to implement and/or non-existent. Perhaps it is time to revisit the Operational Guidelines of the 2003 Convention and take stock of all previous experience with regard to the protection of cultural heritage in times of armed conflict.
- There is a need for holding non-state actors accountable for their acts. Individual criminal responsibility arises from offences against cultural heritage. Intentionally directing attacks against cultural property, such as buildings dedicated to religion or historic monuments, may amount to a war crime.⁷⁸ This has been affirmed in Security Council Resolution No. 2347.⁷⁹ Furthermore, the destruction of cultural property with a discriminatory intent can constitute a crime against humanity.⁸⁰ Also, the intentional destruction of cultural and religious property and symbols can be deemed as evidence of an intent to commit genocide under the 1948 Genocide Convention.⁸¹ Recently, the ICC successfully prosecuted Ahmad al-Faqi Al-Mahdi for "directing attacks against historic monuments and/or buildings dedicated to religion, including nine mausoleums and one mosque in Timbuktu, Mali".⁸² With one exception, the monuments were designated as UNESCO World Herit-

⁷⁷ See, generally, K. Hausler, *Culture under Attack: The Destruction of Cultural Heritage by Non-State Armed Groups*, "Santander Art and Culture Law Review" 2015, Vol. 2, pp. 129-141.

⁷⁸ Trial Chamber I, *Prosecutor v. Miodrag Jokić*, Case No. IT-01-42/1-S, Sentencing Judgment of 18 March 2004; Trial Chamber, *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgment of 3 March 2000; Appeals Chamber, *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgment of 29 July 2004; Trial Chamber, *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Judgment of 26 February 2001; Trial Chamber II, *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Judgment of 31 January 2005; Trial Chamber III, *Prosecutor v. Jadranko Plić et al.*, Case No. IT-04-74-T, Judgment of 29 May 2013.

⁷⁹ United Nations Security Council Resolution No. 2347, 24 March 2017, S/RES/2347 (2017).

⁸⁰ Trial Chamber II, *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Judgment of 31 July 2003; Trial Chamber I, *Prosecutor v. Milan Babić*, Case No. IT-03-72-S, Sentencing Judgment of 29 June 2004; Trial Chamber, *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Judgment of 26 February 2009.

⁸¹ Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277. See also United Nations General Assembly, *Report of the Special Rapporteur...*, A/HRC/31/59, para. 64; United Nations General Assembly, *Report of the Independent Expert...*, A/HRC/17/38 and Corr. 1, para. 15; Trial Chamber, *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Judgment of 2 August 2001, para. 580; K. Hausler, *Protection of Cultural Heritage in Armed Conflict*, in: S. Casey-Maslen (ed.), *The War Report: Armed Conflict in 2013*, Oxford University Press, Oxford 2014, p. 379.

⁸² *Prosecutor v. Ahmad Al Faqi Al Mahdi* (Case No. ICC-01/12-01/15), Judgment and Sentence, No. ICC-01/12-01/15-171, 27 September 2016.

age sites. Even though there are precedents from other criminal tribunals which have adjudicated cases dealing with the destruction of places of worship and historic monuments, this was the first time that a war crime against cultural property constituted the principal charge in an ICC proceeding. However, there are still a number of States that have not ratified the ICC statute, i.e. Syria, thus raising the issue of whether particular crimes against cultural heritage fall within the ICC's jurisdiction. Furthermore, the ICC has dealt with the crime of destruction of cultural property in this recent case because the "outstanding universal value" of the UNESCO-protected sites was a proxy for the gravity required for admissibility under Article 8(2)(e) (iv) of the ICC statute.⁸³ Previous jurisprudence has considered the enlisting of a site on the World Heritage List as an "aggravating factor" when sentencing those convicted of war crimes for the destruction of or damage to cultural property.⁸⁴ Given the legislative history of the international criminal tribunals and the ICC, crimes against cultural heritage that is not included in the UNESCO lists of the 1972 Convention or the 2003 Convention are unlikely to be covered by the current international criminal law regime. This fact illustrates the need for a change in the mentality of the international criminal tribunals when identifying the gravity of the destruction in question; this should be assessed by reference to the use and significance of the cultural heritage to the cultural identity of the affected group, community, or population.⁸⁵

- There is need to establish national and transnational inventories of cultural heritage, including items of historical, cultural, and religious importance and intangible value. A step in this direction was taken by Security Council Resolution No. 2347, which calls on States "to inventory cultural property and other items of archaeological, historical, cultural, rare scientific and religious importance which have been illegally removed, displaced or transferred from armed conflict areas, and coordinate with relevant UN entities and international actors, in order to ensure the safe return of all listed items"⁸⁶ and "to take preventive measures to safeguard their nationally owned cultural property and their other cultural property of national importance in the context of armed conflicts, including as appropriate through documentation and consolidation of their cultural property in a network of 'safe havens' in their own territories to protect their property, while taking into account the cultural, geographic, and historic specif-

⁸³ Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90.

⁸⁴ See the cases in footnotes 78 and 80.

⁸⁵ P. Casaly, *Al Mahdi before the ICC: Cultural Property and World Heritage in International Criminal Law*, "Journal of International Criminal Justice" 2016, Vol. 14, pp. 1199-1220.

⁸⁶ Para. 17(j).

cities of the cultural heritage in need of protection”. Resolution No. 2347 also takes note of the draft UNESCO Action Plan, “which contains several suggestions to facilitate these activities”.⁸⁷ Even though the operative paragraphs of Resolution No. 2347 do not make a specific reference to ICH, the preamble makes reference to, *inter alia*, the 2003 Convention, thus placing the ICH within this new protection scheme.

While traditional interstate wars are becoming less common, they are being replaced by contemporary conflicts which tend to be asymmetric, with strong religious and ethnic dimensions and defined by the use of non-conventional methods of warfare and politics of identity.⁸⁸ The UN⁸⁹ and UNESCO⁹⁰ have taken steps to affirm that the protection of cultural heritage is a “political and security imperative” and have approved exceptional measures to this end. There is therefore an ongoing process of the “securitization” of cultural heritage from destruction and the protection of cultural heritage through the prism of the fight against terrorism. In this context, the international protection of cultural heritage has been brought into the Security Council’s normative sphere and some resolutions with respect thereto have been adopted on the legal basis of Chapter VII of the UN Charter.⁹¹ Most recently, the Security Council has upgraded the mandate of peacekeeping operations to include a cultural component in cases where cultural heritage is at risk, with the aim of protecting “cultural heritage from destruction, illicit excavation, looting and smuggling in the context of armed conflicts”.⁹² However, there is no reference to

⁸⁷ Para. 16. See also the Inter-Parliamentary Union Resolution on Ensuring Lasting Protection Against Destruction and Deterioration for the Tangible and Intangible Cultural Heritage of Humanity, 23 March 2016, UN Doc. A/70/893/Rev.1, https://digitallibrary.un.org/record/838407/files/A_70_893_Rev.1-EN.pdf [accessed: 25.08.2017].

⁸⁸ P. Foradori, P. Rosa, *Expanding the Peacekeeping Agenda – The Protection of Cultural Heritage in War-Torn Societies*, “Global Change, Peace and Security” 2017, Vol. 29, p. 148; S. Van der Auwera, *Contemporary Conflict, Nationalism and the Destruction of Cultural Property During and After Armed Conflict: A Theoretical Framework*, “Journal of Conflict Archaeology” 2012, Vol. 70, p. 50.

⁸⁹ United Nations Security Council Resolution No. 2199, 12 February 2015, S/RES/2199 (2015); United Nations Security Council Resolution No. 1483, 22 May 2003, S/RES/1483 (2003), paras. 15-17.

⁹⁰ UNESCO General Conference, Thirty-eighth session, *Resolution 48. Reinforcement of UNESCO’s Action for the Protection of Culture and the Promotion of Cultural Pluralism in the Event of Armed Conflict*, 2 November 2015, UNESCO/Res/38C/48 (2015).

⁹¹ V. Négri, *Cultural Heritage Through the Prism of Resolution 2199 (2015) of the Security Council*, 25 March 2015, http://obs-traffic.museum/sites/default/files/ressources/files/Negri_RES2199_Eng.pdf [accessed: 21.09.2017].

⁹² United Nations Security Council Resolution No. 2347, 24 March 2017, S/RES/2347 (2017), para. 19. In 1993 the UNESCO Executive Board recommended the establishment of a link between UN peacekeeping activities and the protection of cultural heritage during armed conflict (UNESCO General Conference, Twenty-seventh session, *Resolution 3.5.*, UNESCO/RES/27C/3.5 (1993), para. 5). See also UNESCO’s strategy action for the protection of culture in the event of armed conflict (UNESCO General Conference, Thirty-eighth session, *Resolution 48...*, UNESCO/Res/38C/48 (2015)), and the UNESCO World Heritage Committee, *Bonn Declaration*, 29 June 2015, para. 23, <http://www.39whcbonn2015.de/highlights-and-results/bonn-declaration.html> [accessed: 21.09.2017].

the protection of intangible cultural heritage as such. Perhaps in a future Resolution States will be more accepting of the idea that intangible heritage needs to be incorporated into the peace and security agenda of the Security Council.

All the challenges mentioned above need to be addressed at both the global and regional levels. International cultural heritage law has come a long way; it has broadened and it has been fertilized with human rights norms and is now moving into new normative spheres. Intangible cultural heritage in armed conflict will be attracting more attention in the years to come. However, the accession by a large number of States to the UNESCO legal instruments does not negate the challenges faced in applying them or overcome the concerns related to inventorying and to the politics associated with inscribing heritage elements in the UNESCO inscription lists. However, key developments in the protection of ICH in armed conflict should emerge when the synergies between the 1954 Hague Convention and other UNESCO instruments, particularly the 2003 Convention, are strengthened. Consensus on this point can be found in the deliberations of the Committee for the Protection of Cultural Property in the Event of Armed Conflict and the Committee for the Safeguarding of the Intangible Cultural Heritage.⁹³ Finally, the success of such synergies between the cultural heritage conventions will greatly depend on the support of regional military organizations, such as NATO and ECOWAS.⁹⁴

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⁹³ UNESCO Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, Decision 10.COM 15.A, Annex, para. 5.

⁹⁴ UNESCO Committee for the Protection of Cultural Property in the Event of Armed Conflict, Ninth meeting, *Development of Synergies with Other Relevant UNESCO Normative Instruments and Programmes and Strengthening Partnerships*, 15 October 2014, UNESCO Doc. CLT-14/9.COM/CONF.203/7.

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Kalliopi Chainoglou

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