

THE PROTECTION OF CULTURAL HERITAGE IN INTERNATIONAL CRIMINAL LAW

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“What is at stake here is not just walls and stones.”
Fatou Bensouda

Introduction

The cultural heritage of a nation is an integral part of its identity. Throughout history, one can trace the cases of the destruction of the cultural assets of one nation during armed conflicts, precisely in order to weaken its moral strength, and then its defence. In this way, numerous civilization assets were destroyed, the churches and mosques were burned and destroyed, as well as palaces, monuments and temples; the bridges were bombed, the movable cultural property was looted. In addition to the fact that once upon a time cultural goods, even entire cities, were collateral damage of armed conflicts, modern armed conflicts are characterized by attacks that are deliberately and precisely directed towards objects of the cultural heritage of a nation. Modern armed conflicts pose a greater threat to protected goods due to the use of modern weapons of great destructive power. In that way the cultural heritage of the whole of humanity is endangered.

Recognizing that the protection of cultural property provided within the framework of international humanitarian law and law of armed conflict is not sufficient, a step further has been made - by providing protection within the framework of international criminal law by stipulating that attacks against protected objects, including objects of cultural importance constitute a war crime. It is justified to ask what are the scopes of international criminal law protection of cultural property during armed conflicts and whether the application of international criminal law in this sphere can have a deterrent effect. This is due to the fact that in recent years there has been a tendency to expand international criminal law protection, for example to natural assets (Author, 2022: 372) (Author, 2021), and therefore the question arises as to whether international criminal law can achieve one of its goals (Author, Soković, & Banović, 2023) - to act generally preventively - through this dilution of international criminal law protection.

As cultural property is the object of attack even in modern armed conflicts, the need to provide protection to cultural heritage is recognized within the international criminal justice system through first trials held against perpetrators of this crime. It is important to emphasize the first verdict rendered before the International Criminal Court for a war crime against cultural heritage in the *Al Mahdi case*. This indicates the need for a detailed analysis of the positions taken in the *Al Mahdi case*, which will serve as a precedent in international criminal law. Bearing in mind the destruction and endangerment of the Serbian cultural heritage during the past conflicts, but also the fact that some items of this heritage are still endangered, in domestic doctrine, as well as judicial practice, the positions taken in the *Al Mahdi case* may have great significance.

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Bearing in mind all of the above stated, the purpose of the paper is to point out the international rules of criminal law protection of cultural property during armed conflict, as well as the practice of international criminal courts in terms of trials for the war crime against cultural heritage. In that sense the legal dogmatic method of legal norms analysis and content analysis method will be used.

The main findings of the work will be related to the etiological-phenomenological dimension of the attack on cultural property during the armed conflicts, which could help us understand insufficiency and impossibility of a wide range of international rules (outside of international criminal law) to protect cultural heritage during armed conflicts. Bearing in mind reasons why cultural heritage is the object of destruction during almost all conflicts, it is crucial to find out if it is justified to set international criminal law protection of cultural heritage, and to question the possibilities and boundaries of this kind of protection.

In the light of the judgement in the *Al Mahdi case* before the International Criminal Court and with the understanding of etiological-phenomenological dimension of the crime of attacking protected objects, the originality of the paper will be reflected in discussion on some new findings related to international criminal law protection of cultural heritage during armed conflicts, which could be useful for the protection of Serbian cultural heritage endangered, damaged and destroyed during former conflicts.

The Protection of Cultural Property During Armed Conflicts in International Instruments

History has shown many cases of destruction of cultural assets during armed conflicts, such as the destruction of Carthage by the Romans, the destruction of the Hindu civilization by the Muslims in South Asia, the extensive destruction of entire cities during the First and Second World Wars (Jončić & Petrović, 2012: 151). The destruction of the nation's immovable cultural assets and the theft of movable cultural assets was almost common practice during armed conflicts (Tesla, 2016: 218-220).

Destruction of cultural heritage is also present in modern wars. During the war in the former Yugoslavia, many cultural and historic monuments were destroyed, such as Dubrovnik old city centre, Old bridge in Mostar, Orthodox Church of St. Nicholas in Karlovac, etc. During the NATO bombing of Serbia in 1999, 176 cultural monuments were destroyed according to official statistical data (Đorđević, 2013: 300). The Afghanistan war was also well-known for destruction of cultural heritage. In Afghanistan, the Taliban announced that they would carry out the politics of destruction of cultural heritage representing religious and spiritual traditions different to Islam, which culminated in the destruction of two ancient Buddhas of Bamiyan in 2001 (Francioni & Lenzerini, 2003: 625). The destruction of the two Buddhas was the part of a well-organized plan with the intention to completely eradicate ancient Afghan cultural heritage (Francioni & Lenzerini, 2003: 627). The US invasion of Iraq in 2003 resulted in vandalism towards archeological heritage of Iraq (Obšust). A large number of archeological sites and other objects of cultural heritage were completely destroyed in Syria during 2015 by the so-called Islamic State. The destruction of the heritage of mankind in Syria was aimed to attract world media attention during 2015, in order to promote Islamic State and its goals (Obšust). In the digital age, the destruction of cultural sites is being recorded and released in media, so it is not directed only to the combatants in conflict, but it also has the aim to gain media attention worldwide and to shock the international community (Vrdoljak, 2017: 59). Also, the vandalism toward cultural heritage had the purpose of finding valuable artifacts and selling them in order to provide source for Islamic State war operations (Obšust).



The protection of cultural property during armed conflicts in international instruments is provided on two levels: through the *general protection* of civil objects, and through *special protection* of those properties which represent cultural heritage of people. The very fact that over time the general protection of cultural assets within the framework of all civil objects has changed to their special protection exclusively as objects of cultural heritage, indicates a change in the real world where there is a practice of deliberately directing attacks towards certain objects precisely because they are a sign of people's cultural identity, which now requires the prescription of more intensive protection of cultural assets during armed conflicts.

Throughout history, protection of property, including cultural assets, during armed conflicts can be traced in numerous national and international acts, but initially it was incomplete and sporadic. Although there are many international acts that prohibit the destruction of cultural heritage during an armed conflict, in this paper we will point out only those acts that are the most important from the point of view of international criminal law protection of cultural heritage. The first direct protection of cultural property during the armed conflict was prescribed in Art. 27 of the Hague Convention (IV) respecting the laws and customs of war on land from 1907 and its annex - Regulations concerning the laws and customs of war on land², in the following way: "In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes. It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand."

The First World War, and especially the Second World War, are known for the destruction of entire cities, the destruction of immovable cultural assets and the theft of movable cultural assets, which resulted in the adoption of the Convention for the protection of cultural property in the event of armed conflict³ with regulations for the execution of the Convention in the Hague on 14th May 1954. This Convention provides the first direct and comprehensive protection to cultural property during armed conflict, and was the first conflict-related instrument to use the term "cultural property" (Abtahi, 2001: 7). It stipulates that for the purposes of the Convention, the term 'cultural property' shall cover, irrespective of origin or ownership: (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above; (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a); (c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as 'centres containing monuments'. It can be seen that the concept of cultural property in the Convention is set very broadly, with the intention of using this term to cover all objects of importance for the cultural identity of the people, especially taking into account which kinds of cultural property were destroyed during previous armed conflicts. In Art. 28 of the Convention it is prescribed that "The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be

2 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

3 Convention for the protection of cultural property in the event of armed conflict, the Hague, 14th May 1954.



committed a breach of the present Convention”. Beside the obligation imposed to countries to protect cultural property during armed conflicts, the countries have additional obligation to prosecute those responsible for destruction of cultural property.

Among the international instruments, it is important to mention the I Protocol to the Geneva conventions from 1977⁴, whose Article 53 prescribes that it is prohibited: a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; (b) to use such objects in support of the military effort; (c) to make such objects the object of reprisals.

There are many other international documents which provide protection to cultural heritage during armed conflict, which implies that there is an increased effort of international community to fight against those responsible for the destruction of cultural heritage during wars (Wierczynska & Jakubowski, 2017: 701). Although the mentioned documents do not list the same objects that they seek to protect, they all have the same goals: to provide protection to objects that represent the cultural identity of a group of people, and therefore part of the cultural heritage of all humanity; to provide that such objects are not being used for military purposes; and to encourage national states to prosecute persons responsible for the destruction or attacks on cultural objects during armed conflict. At the same time, the most complete protection is provided by the Convention for the protection of cultural property in the event of armed conflict, bearing in mind that the subject of its regulation is exclusively the protection of cultural heritage during armed conflicts, while other international instruments deal with this protection in addition to the abundance of other issues they regulate.

The Protection of Cultural Heritage in International Criminal Law

The development of the rules related to the protection of cultural heritage is also visible within the international criminal law. While the first trials for the destruction of cultural assets were held before the International Military Tribunal in Nuremberg (IMT), the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Court (ICC) have made a step forward in the development of the rules on individual criminal responsibility for the crimes committed against cultural heritage.

International Military Tribunal in Nuremberg

The first international criminal trials for crimes against cultural property were held after World War II in Nuremberg, and those crimes were committed by a Nazi military unit – Einsatzstab Rosenberg, specially formed for plundering works of art. Alfred Rosenberg, as the main defendant, and some less known defendants, were found guilty of war crime involving destruction and pillage of cultural property (Mrlić, 2009: 809). The International Military Tribunal in Nuremberg stated that persecution of Jews, as a crime against humanity, was particularly apparent in the “pogroms which were organized, which included the burning and demolishing of synagogues” (Nuremberg judgment, 1946: 76). So, in the case law of IMT, there was a double protection of cultural heritage, direct - through the war crime of destruction and pillage of cultural property, and indirect - through the act of persecution as crime against humanity.

4 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, 8 June 1977.



International Criminal Tribunal for the former Yugoslavia

Unfortunately, during the war in the former Yugoslavia, we witnessed the massive destruction of cultural monuments, regardless the fact that Yugoslavia had ratified the Convention for the protection of cultural property in the event of armed conflict in 1955⁵. According to some reports based on the ICTY investigations during the war in the former Yugoslavia, approximately 2000 cultural and religious objects were destroyed. Some authors find that the reason for targeting cultural property in Yugoslavia war lies in ethnic and religious causes of war (Abtahi, 2001: 2).

As in the trials before the ICTY the emphasis was placed on crimes against persons, the gravity of crimes against cultural objects was explained in some ICTY judgments, in order to justify the trials for these crimes as well. Considering the seriousness of the offence of damage to cultural property, the Trial Chamber in *the Strugar case* finds that “such property is, by definition, of great importance to the cultural heritage of every people”. Further, the Chamber states that “even though the victim of the offence at issue is to be understood broadly as a “people”, rather than any particular individual, the offence can be said to involve grave consequences for the victim” (The Prosecutor v. Pavle Strugar, 2005: 106-107). The Trial Chamber in the *Jokić case* stated that the destruction and damage inflicted to the Old Town of Dubrovnik were very serious crimes, and that “since it is a serious violation of international humanitarian law to attack civilian buildings, it is a crime of even greater seriousness to direct an attack on an especially protected site, such as the Old Town of Dubrovnik” (The Prosecutor v. Miodrag Jokić, 2004: 14).

In the ICTY Statute⁶ crimes against cultural property are prescribed in Art. 3(d) as violation of the laws or customs of war in the following way: “seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science”. The terms “cultural heritage” and “cultural property” are not used in the ICTY Statute, but the object of the protection is clearly determined, and it refers to all objects which reflect cultural identity of people. Although according to ICTY case law (The Prosecutor v. Tihomir Blaškić, 2000: 56-57), violations enumerated in Art. 3 of the Statute do not present *numerus clausus* and there are some other violations that could be classified in this list according to other international instruments, the list provided in Art. 3(d) could be considered as a “closed list” referring to “all institutions which may clearly be identified as dedicated to religion or education and which were not being used for military purposes at the time of the acts” (The Prosecutor v. Tihomir Blaškić, 2000: 61).

In the ICTY practice, the question of relation between cultural heritage objects and legitimate military objectives arose. Analysing the international instruments on the protection of cultural heritage, the Trial Chamber made the following conclusion: “the crime of destruction or wilful damage done to institutions dedicated to religion or education comprises the following elements: (1) an intentional act or omission; (2) causing destruction or damage to a cultural or religious object of property; (3) the property did not constitute a military objective within the meaning of Article 52 of Additional Protocol I and (4) the act or omission is perpetrated with intent to destroy the cultural or religious property”. According to ICTY position, the protection to cultural heritage could be provided as long as cultural heritage objects are not used for military needs or purposes (Wierczynska & Jakubowski, 2017: 707).

Beside this direct protection of cultural property in Art. 3(d), it is worth mentioning that the ICTY Statute and case law provide indirect protection to cultural property as well, through grave breaches

5 Law on ratification of the Convention for the protection of cultural property in the event of armed conflict, “Sl. list FNRJ - Međunarodni ugovori i drugi sporazumi” (FNRY Official Gazette), No. 4/56.

6 Statute of the International Criminal Tribunal for the former Yugoslavia, United Nations, Security Council, Resolution no. 827, adopted on 25 May 1993.



of the Geneva Conventions of 1949 (for example in Art. 2(d)), some other violations of the laws and customs of war (for example, Art. 3(b), (c) and (e)), and through crimes against humanity (for example Art. 5(h)) (Abtahi, 2001: 13-28). Without going into a detailed analysis of the indirect protection of cultural property according to the Statute and practice of the ICTY, it is important to emphasize that in the practice of this Court, as well as in the practice of the International Military Tribunal in Nuremberg, the position was taken that the destruction of cultural property can constitute persecution as a crime against humanity. Namely, in Kordić and Čerkez Trial Judgment, the Trial Chamber found that the attack to cultural property, “when perpetrated with the requisite discriminatory intent, amounts to an attack on the very religious identity of a people” (The Prosecutor v. Dario Kordić & Mario Čerkez, 2001: 58). In Blaškić Trial Judgment the Chamber stated that “persecution may thus take the form of confiscation or destruction of private dwellings or businesses, *symbolic buildings* or means of subsistence...” (The Prosecutor v. Tihomir Blaškić, 2000: 76). Later, the Trial Chamber explained that cultural property that was destroyed was placed in the village of Ahmići, which was of particular significance for the Muslim community in Bosnia, because many imams and mullahs came from there, and in that way this village symbolized Muslim culture in Bosnia (The Prosecutor v. Tihomir Blaškić, 2000: 137).

International Criminal Court

Provisions within the Rome Statute⁷ related to attacking protected objects during an armed conflict relate to and basically restate the content of the above mentioned Art. 27 of the Convention (IV) respecting the laws and customs of war on land. But, unlike Art. 27, the Rome Statute does not prescribe the obligation for the besieged to identify protected objects and notify the enemy of them (Fenrick, 1999: 214), which represents the step forward in the development of these rules.

The war crime of “intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives” falls within the *ratione materiae* jurisdiction of the Court pursuant to Arts. 5, 8(2)(b)(ix) and 8(2)(e)(iv) of the Rome Statute. Art. 8(2)(b)(ix) provides protection to protected objects during the armed conflict of an international character, while Art. 8(2)(e)(iv) provides the protection to protected objects during the armed conflict that is not of an international character. According to the Elements of crimes⁸, five elements need to be established in order to prove that the war crime of attacking protected objects was committed: 1. The perpetrator directed an attack. 2. The object of the attack was one or more buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives. 3. The perpetrator intended such building or buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives, to be the object of the attack. 4. The conduct took place in the context of and was associated with an international armed conflict (in the case of Art. 8(2)(b)(ix))/ armed conflict not of an international character (in the case of Art. 8(2)(e)(iv)). 5. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.

The Al Mahdi case was the first case before the ICC in which the Court was applying Article 8(2)(e)(iv) of the Rome Statute, and this case was of particular importance because prosecuting crime against cultural heritage for the first time sends the message that the destruction of cultural heritage is a war

⁷ The Rome Statute of the International Criminal Court, adopted at a diplomatic conference in Rome, Italy, on 17 July 1998 and entered into force on 1 July 2002.

⁸ Elements of Crimes, adopted at the 2010 Review Conference are replicated from the Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May -11 June 2010.



crime of great concern to the international community and that accountability for cultural crimes is possible (Sterio, 2017: 68-69). So the Court found itself addressed to interpret this crime and its elements. When it comes to *the first element* of directing an attack, the Chamber considers that this element encompasses any acts of violence against protected objects, no matter whether they are carried out in the conduct of hostilities or after the object have fallen under the control of an armed group (The Prosecutor v. Ahmad Al Faqi Al Mahdi, 2016: 9). Contrary to the ICTY Statute, the *actus reus* of war crime in Rome Statute is not the destruction of the cultural heritage, but the directing the attack, meaning that such war crime does not have to lead to the destruction of attacked properties, but some lesser attacks or acts of vandalism can reach the degree of war crime (Wierczynska & Jakubowski, 2017: 702-703). In this sense, the Rome Statute provides broader protection to cultural heritage than other international instruments.

The second element refers to the objects of the attack, and these are special kinds of civilian objects which are of particular importance for cultural heritage of people. In *the Al Mahdi case*, the objects of the attack were mausoleums and mosques qualified as both religious buildings and historic monuments, which were an integral part of the religious life of local inhabitants and had an important role in their cultural life. These objects also presented a common heritage for the community, and were frequently visited by their residents for prayer and sometimes as a place for pilgrimage. Further, nine of these building had the status of UNESCO World Heritage sites (The Prosecutor v. Ahmad Al Faqi Al Mahdi, 2016: 18, 26). There is a justifiably asked question in the literature whether the objects of an attack have to bear the status of UNESCO World Heritage sites in order to be considered as objects of war crime against cultural heritage (Marković, 2017: 141). Because crimes against property are generally considered as crimes of lesser gravity than crimes against persons, the facts that the property which is the object of an attack is under UNESCO protection should indicate that the gravity threshold is passed and that the case is admissible before the ICC according to Art. 17 of the Rome Statute, but the question still remains if this is a necessary element of the war crime.

Bearing in mind the fact that crimes against property are considered of lesser gravity than crimes against persons in case law of the International Criminal Court (The Prosecutor v. Germain Katanga, 2014: 19), the importance of protected objects was explained at the opening of the confirmation of charges hearing in the case against Al Mahdi, in the statement of the Prosecutor. She emphasized that “at stake here is not just walls and stones”, because destroyed objects were important from religious, historical and identity point of view. These crimes present an assault to dignity and identity of the entire population, destroy the roots of the whole population, disturb the daily life of local people, and deter tourists’ visits. There are people behind those walls and stones. When crimes against cultural property are committed, the perpetrators’ main goal is to harm the population whom the cultural property represents. When destroying cultural heritage during armed conflicts, the main goal is to harm the population to whom cultural heritage belongs (Bensouda, 2016). This anthropocentric approach requires the establishment of a link between cultural property and the group of individuals that it represents, and that is why there is often a tendency to place crimes against cultural property below crimes against persons in respect of their gravity. It is a fact that there is a huge difference between murder, rape, torture on the one side, and destroying cultural heritage on the other side, but specific long-term effects of the latter must be recognized (Abtahi, 2001: 3).

In order to determine the appropriate sentence, the Chamber in the *Al Mahdi case* once again had to analyse the gravity of the committed war crime. The Chamber emphasized again that the defendant had not committed crime against persons, but crimes against property which, even if inherently grave, are generally considered as crimes of lesser gravity (The Prosecutor v. Ahmad Al Faqi Al Mahdi, 2016: 36-37). Still, the gravity of the case was established based on the facts that some of the protected ob-



jects were completely destroyed, the impact of the attack on the population was heightened by the fact that it was announced in media, the fact that the attacked objects were placed in a city which played a crucial role in the expansion of Islam in the region and which was the heart of Mali's cultural heritage, while the attacked objects themselves were used for prayer and as pilgrimage locations. As protected objects were of symbolic and emotional significance for the local community and some of them were recognized as UNESCO World Heritage sites, their destruction affected not only local people, but also the entire population of Mali, as well as the international community (The Prosecutor v. Ahmad Al Faqi Al Mahdi, 2016: 37-38). By stating this, the Chamber recognized and emphasized both - the civilian use and culture-value characteristics of attacked property (Badar & Higgins, 2017: 513).

The third element refers to the perpetrator's intent to attack protected objects, and in the *Al Mahdi case* this intention was established based on the circumstances of the attack, as well as the perpetrator's statements that the purpose of the operation was to destroy these buildings (The Prosecutor v. Ahmad Al Faqi Al Mahdi, 2016: 27).

Concerning *the fourth element* which refers to the existence of an armed conflict not of an international character, the Chamber stated that there was no evidence of any foreign intervention in opposition to the Malian forces in the relevant time period, nor had the parties claimed that there was any involvement by the other State, meaning that there was no evidence that the armed conflict became internationalised (The Prosecutor v. Ahmad Al Faqi Al Mahdi, 2016: 28).

The fact that Al Mahdi and the attackers were based and present in the city where the protected objects were attacked, led the Chamber to conclude that the perpetrators were aware of the factual circumstances which established the existence of the armed conflict, the *fifth element* of the crime thereby having been established (The Prosecutor v. Ahmad Al Faqi Al Mahdi, 2016: 28).

Findings

The fact is that cultural heritage can be endangered, damaged or destroyed during a period of peace and during armed conflicts, but the most extensive and the most devastating destructions of cultural heritage occur during armed conflicts. According to some authors, there is a *specific psychology* behind the destruction of cultural heritage during armed conflicts. The destruction of cultural heritage of one nation or other group has as its goal not only to weaken present generations or destroy the identity of specific nation or other group, but also to make influence to future generations and destroy their understanding of who they are and where they come from (Abtahi, 2001: 2).

The etiology of the crimes against cultural heritage is very specific. The main reason for targeting the objects of cultural heritage is not in their simple physical destruction, but in what such destruction will cause to the group to which the cultural heritage belongs, which is to make harm to the group, to destroy its historical, religious and cultural identity, to destroy its roots. There is a strong connection between the material and immaterial dimensions of cultural heritage (Lostal, 2017: 51). This further affects the entire international community, because the destruction of civilizational assets represents the destruction of the cultural heritage of all humanity. This etiology of committing crimes against cultural heritage during armed conflicts is confirmed in modern armed conflicts, which are characterized by the recording and publication in the media of the destruction of cultural heritage objects, in order to have an impact on the entire international community. Parties in some armed conflicts, such as conflicts in Libya, Egypt and Yemen, have even adopted the destruction of cultural heritage as their *modus operandi* (Lostal, 2017: 47), which indicates that they are aware of the broad and multilevel effects of the destruction.



It is interesting that history has shown different treatment of cultural heritage during armed conflicts depending on whether the warring parties have the same civilizational and cultural values or not. In the case where they share the same civilizational assets, more care is taken to protect the cultural heritage, while in the case when the warring parties do not share the same civilizational assets, the cultural heritage can often be the target of attacks (Jončić & Petrović, 2012: 150).

The specific etiological-phenomenological dimension of crimes against cultural heritage was recognized in ICC practice, when the Prosecutor in the *Al Mahdi case* showed his intention to prosecute these crimes which had previously been under-prosecuted, demonstrating in that way that the protection of cultural heritage had become a valuable goal of international criminal justice (Wierczynska & Jakubowski, 2017: 712).

Although in the public the guilty verdict in the *Al Mahdi case* is praised as a great success of the ICC because it is the first case in which the defendant was charged exclusively with war crime of attacking cultural property and was convicted at the same time, and because this case should serve as a precedent for future cases related to attacking cultural heritage. Still, the fact is that *the Al Mahdi case* provides minimal guidelines for future cases. The reason lies in the fact that the Trial Chamber in *the Al Mahdi case* did not determine the framework and limits of the protection provided to cultural heritage in the Rome Statute. Given that the defendant Al Mahdi admitted his guilt, the ICC used this to omit a more detailed analysis and explanation of the war crime against cultural heritage (Gerstenblith, 2016: 1982). The big shortcoming of the judgment in *the Al Mahdi case* is the failure to make the demarcation between objects of cultural, historical and religious importance, and thus make it clear whether the protection provided by the Rome Statute to cultural heritage applies to all the mentioned objects. Also, Al Mahdi was found guilty of demolishing ten buildings, nine of which are under UNESCO protection and one is not. The Trial Chamber failed to explain the demarcation of objects under and without UNESCO protection, so in future cases there may be different positions among different Chambers on whether cultural heritage objects not protected by UNESCO enjoy protection under the Rome Statute or not (Gerstenblith, 2016: 1983-1984). Bearing in mind the abovementioned strong connection between material and immaterial dimensions of cultural heritage, it is clear that UNESCO protection of some cultural assets could only be one of the guidelines for the ICC in the future to decide whether the gravity threshold is passed or not, but it should not be seen as an element that determines whether the war crime against cultural heritage is committed or not. It is rational to assume that in some cases where destroyed objects of cultural heritage are not under UNESCO protection, the war crime will still be committed due to the importance and value of these objects for cultural identity of one group. This approach could be very useful for the criminal law protection of Serbian cultural heritage in Kosovo.

Even after the end of the armed conflict, the destruction or endangering of the objects of cultural heritage of a population can be done with the aim of pressuring the population to move out of a certain territory and for the purpose of erasing their cultural identity, which is the case with Albanian separatist pressure on the Serbs in Kosovo (Đorđević, 2013: 293). Such a practice makes the re-establishment of peace impossible, and can actually lead to re-escalation of the conflict.

Conclusion

Regarding cultural heritage, there are many different issues that have to be discussed and analysed, and many different branches of law that could be involved in terms of proposing the definition of cultural heritage, determining its types and providing protection (Manacorda, 2011: 18). This paper focuses



on immovable cultural heritage objects, their definition in international instruments, their endangerment or destruction during armed conflicts and their protection within international criminal law.

There are two ways of thinking about cultural property: as a component of common human culture, and as part of a national cultural heritage (Merryman, 1986: 831-832). But, in the Preamble to the Convention for the protection of cultural property in the event of armed conflict it is correctly stated that “damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world”.

Bearing this in mind huge efforts are made within the international community to protect cultural heritage during armed conflict. Many international instruments, mainly within international humanitarian law, prescribe protective measures for cultural heritage. It is very important to implement protective measures during the period of peace, because the preservation of cultural heritage during the armed conflict helps to rebuild ruined communities and re-establish their cultural identity after the cessation of hostilities (Bokova, 2017: 8)

Although all international instruments contribute to the overall protection of cultural heritage during armed conflicts, history has shown that the provisions contained in international instruments that are not exclusively of a criminal law nature do not represent a sufficient measure of protection, i.e. do not show a sufficient deterrent effect towards potential perpetrators of crimes against cultural heritage. In this sense, criminal legal protection should be improved through its strengthening in international instruments of an exclusively criminal legal character, such as the Statute of the permanent International Criminal Court, and through the application of the provisions of these instruments in the practice of national and international criminal courts. When it is visible that crimes against cultural heritage committed during armed conflicts are tried at the national and international level, a deterrent effect can be achieved. In addition, it is necessary to make such trials visible and covered by the media. *The Al Mahdi case* before ICC presents the step forward in this sense, because it shows that international criminal justice system is willing to support the protection of cultural heritage and thus affect the way the international community responds to attack on cultural heritage (Wierczynska & Jakubowski, 2017: 712). However, based on the guilty plea, the judgment in Al Mahdi case does not provide clear guidelines for future cases before the ICC or before national criminal courts. Still, this judgment must serve as an incentive, especially for the national judiciary, to prosecute the perpetrators of crimes against cultural heritage, and will serve to raise awareness of international community about gravity of crimes against cultural heritage and about importance of its protection.

It must be kept in mind that the role of the ICC in the protection of cultural heritage is limited, based on the principle of complementarity. More important and more effective is the role of national courts. It is crucial for national authorities to ratify international instruments related to the protection of cultural property, to create the conditions for the application of preventive measures in practice, but also to create a legal and factual framework for the prosecution of perpetrators of crimes against cultural heritage. Because, as stated at the beginning, “what is at stake here is not just walls and stones”. Bearing in mind the long-term effect of the destruction of cultural heritage to the group whom the cultural heritage belongs to, efforts have to be made to prosecute perpetrators of crimes against cultural heritage before national courts as well.

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