

**URBAN WARFARE AND CULTURAL HERITAGE:
CURRENT CHALLENGES AND FUTURE PERSPECTIVES***

Abstract

One of the byproducts of the inexorable rise of urbanization is the urbanization of armed conflicts. Such a dynamic is causing devastating consequences to civilian population, hospitals, schools, infrastructures, and cultural heritage. After having secured a thorough definition of “urban warfare”, still lacking in international law, this paper will focus on the protection of urban cultural heritage, which is often targeted as specific military object or transformed into battlegrounds. The analysis will set out to outline innovative and concrete solutions to contrast this scenario, particularly through a reassessment of the relevant international and national regulations. It will also explore effective ways to strengthen accountability mechanisms, thereby contributing to guaranteeing deterrent effects to future violations. Particular attention will be placed on the International Criminal Court jurisdiction over armed attacks against urban cultural heritage. Lastly, the role of relevant international and regional organizations will be analyzed, with a view to propose pioneering practices, such as the establishment of a permanent annual forum for cooperation on this matter.

Keywords: Urban warfare, cultural heritage, International Criminal Court (ICC)

Résumé

L'un des sous-produits de la montée de l'urbanisation est l'urbanisation des conflits armés. Cette dynamique a des conséquences dévastatrices sur les populations civiles, les hôpitaux, les écoles, les infrastructures et le patrimoine culturel. Après avoir proposé une définition approfondie de la « guerre

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urbaine », qui fait encore défaut en droit international, cet article se concentre sur la protection du patrimoine culturel urbain. Ce dernier est souvent ciblé comme objectif militaire spécifique ou transformé en champ de bataille. Cet article esquisse des solutions innovantes et concrètes pour contrer ce scénario, notamment par une réévaluation des réglementations internationales et nationales pertinentes. Il explore également les moyens de renforcer les mécanismes de responsabilité afin d'accroître la dissuasion et de potentiellement limiter les violations futures. Une attention particulière sera accordée à la juridiction de la Cour pénale internationale sur les attaques armées contre le patrimoine culturel urbain. Enfin, le rôle des organisations internationales et régionales sera analysé en vue de proposer des pratiques pionnières, telles que l'établissement d'un forum annuel permanent de coopération sur cette question.

Mots-clés : Guerre urbaine, patrimoine culturel, Cour Pénale Internationale (CPI)

INTRODUCTION. THE TREND OF URBANIZATION IN WAR

Cities have become the center of our life. In 2007, for the first time in history, population living in cities has exceeded the one settled in the countryside (from 30 per cent in 1950 to 55 per cent in 2007). The UN Department of Economic and Social Affairs has highlighted that global urban population is projected to grow of 2.5 billion between 2018 and 2050, with nearly 90 per cent of the increase concentrated in Asia and Africa. In 1950, only 86 cities had a population of more than a million. This number grew to 400 cities in 2002, and to roughly 550 in 2021.¹

While cities grow and expand, armed conflicts spill into urban areas, making cities the battlefields of our time. The trend of ever-increasing urbanization makes Ralph Peters' alarming quote become more and more real: "an urbanizing world means combat in cities, whether we

¹ United Nations, Department of Economic and Social Affairs, Population Division (2019). World Urbanization Prospects: The 2018 Revision (ST/ESA/SER.A/420). New York: United Nations, 1-3

like it or not”.²

Between the 1960s and the early 21st century, we can count seven examples of cities affected by war, including Hue, Sarajevo, Fallujah and Grozny. In 2003 the latter was called by the United Nations “the most destroyed city on Earth”.³ Only in the last eight years, there have been 12 major urban battles around the world.

According to John Spencer we have entered in a new era of urban warfare⁴ and even if “in modern history, cities have rarely, if ever, been killed. That does not mean that it will never happen again”.⁵ Armed forces have a long history of fighting for cities, but not inside them.⁶ This has changed in the last decades, where there has been a shift to “fighting within the cities” as opposed to merely “for them”.

Sana'a, Mosul, Raqqa, Gaza, Sabratha or Lubumbashi represent recent examples of the evolution of the famous historical cases such as Carthage or Troy. The earliest forms of urban warfare, which can be traced back to the Greeks and the Romans, primarily involved sieges to the fortifications surrounding cities. For a long time, sieging remained a dominant military option, as a form of constant, low-intensity conflict, characterized by one party holding a static

² Ralph Peters, 'Our Soldiers, Their Cities' (1996) Parameters <https://www.iwp.edu/wp-content/uploads/2019/05/20131016_PetersOurSoldiersTheirCities.pdf> accessed 16 February 2021

³ 'Scars remain amid Chechen revival' *BBC News* (3 March 2007) <http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/6414603.stm> accessed 23 April 2021

⁴ John Spencer, 'The Destructive Age Of Urban Warfare; Or, How To Kill A City And How To Protect It' (2019) Modern War Institute <<https://mwi.usma.edu/destructive-age-urban-warfare-kill-city-protect/>> accessed 4 March 2021

⁵ *ibid*

⁶ John Spencer, 'The City Is Not Neutral: Why Urban Warfare Is So Hard' (2020) Modern War Institute <<https://mwi.usma.edu/city-not-neutral-urban-warfare-hard/>> accessed 15 April 2021.

and defensive position in the city. Even after the advent of gunpowder, urban warfare, as we understand it today, remained fairly uncommon and limited to domestic uprisings. World War II has been characterized by important urban fighting, such as the battle of Berlin, Stalingrad or Ortona, but these were still part of wider military campaigns predominantly fought in uninhabited areas.⁷

While until the World War II large armies were fighting in open battlegrounds, with huge manoeuvring space, today armed confrontation occurs in reduced urban areas. The ongoing armed conflicts in Syria and Yemen and the conflict that affected Libya until the consolidation of a de facto truce (June 2020), involving important urban areas, prove that the new urban dimensions of International Humanitarian Law need to be accounted for in any consideration on the future of war.⁸

PART 1. THE DEFINITION OF URBAN WARFARE

A clear and consistent definition of urban warfare is still lacking in international law. Scholars underline that urban warfare can take many forms, from guerrilla attacks to militia patrols and gang violence, but, despite their attempts, they do not clearly define the phenomenon. This section of the paper sets out to secure a thorough definition of “urban warfare”, by delimiting the concept under a juridical point of view and by exploring its legal and political consequences, with a special focus on urban cultural heritage.

Three elements are deemed essential to define urban warfare: the spatial dimension, the human factor and the critical infrastructures together with the buildings where people’s private

⁷ *ibid*

⁸ Cf Spencer (n 4).

and public lives take place.

Urban terrain is a man-made environment, composed of angular forms, rarely present in non-urban terrain.⁹ Not only are these forms angular in planimetric pattern (as a grid street pattern), but also in the third dimension. High buildings become of great importance, offering combatants a wide-ranging view of the battlefield. Large cities, in many instances, also provide a subterranean level such as sewage tunnels¹⁰ or a subway system. These can be used as a shelter, in order to move from one part of the city to another, or as undetected points from which to launch surprise armed attacks. Therefore, even if the total area of a city is not very extended, its aggregate surface space (including the floor area) is much greater than it appears, making it large also when compared to open battlefields such as jungles and countryside. In urban warfare, also airspace is used in a different way and for different purposes, *inter alia* for bombing strategic points of the city, or for enemies' surveillance, thereby identifying, tracking and locating their movements. Due to all these features, "urban terrain cannot be manipulated to the advantage of whichever side has better tactics or is better trained".¹¹ In the majority of cases, the attackers tend to be more exposed than the defenders, as they must use the open streets more often, and tend to be unfamiliar with the secret and hidden routes known instead to the defenders. At the same time there are some open spaces, such as squares, large parking slots or parks, where both attackers and defenders are in the same position and none of them can take any kind advantages from the specific urban battlefield.¹²

⁹ Richard A. Ellefsen, 'Urban Terrain Zone Characteristics' (1987) Human Engineering Laboratory 12 <<https://apps.dtic.mil/dtic/tr/fulltext/u2/a185640.pdf>> accessed 16 February 2021

¹⁰ An example being the tunnel of Cu Chi during the Vietnamese war mainly used for sabotage operation.

¹¹ Cf Spencer (n 4)

¹² Cf Spencer (n 4)

This has warranted the creation of new warfare tactics, which challenge the basic principles of International Humanitarian Law (IHL), causing devastating consequences to civilian population (human factor).¹³ During urban warfare, civilians have few possibilities to find a secure place to hide or live. Meanwhile, the existence of military objectives within densely populated urban areas makes it difficult for the combatants to respect IHL provisions for the protection of civilian population. Herold finds that the majority of civilian deaths that occurred in 2001 in Afghanistan were recorded in areas of high population density.¹⁴ During urban warfare, it is more difficult to promptly evacuate civilians in order to limit the damage to what we called “human factor”. Historical urban combat shows that, even if military personnel is committed to, and manages to evacuate cities before major assaults, some civilians always remain within danger areas. Moreover, the trend of urbanization – and the consequent high density of urban centers – has made it difficult to create gathering points in safe areas, where civilians are sheltered from the major risk.¹⁵ A clear picture of this phenomenon is represented in the last Report of the UN Secretary-General Protection of civilians in armed conflict¹⁶, where it is highlighted that “the nature of the urban environment, with a high occupancy level of dwellings, narrow streets and blind corners, challenges the ability of parties to accurately assess

¹³ Dominique Loyer, 'Urban Warfare And The Humanitarian Concerns Of The International Committee Of The Red Cross' (2020) 58(2) The Military Law and the Law of War Review

¹⁴ Marc W. Herold, 'A Dossier On Civilian Victims Of United States' Aerial Bombing Of Afghanistan: A Comprehensive Accounting' (2004) Afghanistan Centre at Kabul university <http://www.afghandata.org:8080/xmlui/bitstream/handle/azu/20925/azu_acku_pamphlet_ds371_412_h476_2002_w.pdf?sequence=1&isAllowed=y> accessed 2 April 2021

¹⁵ Often the organization of the evacuation of a city is not only very dangerous, but also very slow, giving time to the opposing faction to gain advantages.

¹⁶ Esther Kimani, 'Protection of Civilians in Armed Conflict' S/2020/366 Report of the Secretary-General (2020) United Nation <<https://undocs.org/s/2020/366>> accessed 30 April 2021

and anticipate harm to civilians and civilian objects”¹⁷

Damage of urban critical infrastructures and key urban services upon which the city depends, such as water supply, wastewater collection and treatment, mass communication mechanisms, schools and transportation, should also be considered. The interconnectedness of urban services implies that damaging just one infrastructure, both due to reverberating effects and intentional attacks, can affect several other infrastructures.¹⁸ For instance, an armed attack against a military objective located in the vicinity of an electrical system that ensures the running of a hospital may foreseeably disrupt the functioning of the hospital and lead to loss of civilian life or injury to civilians.¹⁹ This dynamic is aggravated by the fact that, in developing countries, rapid and massive population growth has not always been followed by an appropriate and proportional strengthening of critical infrastructures, which are insufficient to serve all of the population.²⁰

In order to precisely define urban warfare, it is also important to highlight the role played by Armed Non-State Actor (ANSA), which often strongly characterize urban fighting. Due the very broad definition of ANSAs, it is safe to say that groups belonging to this category have

¹⁷ Report of the UN Secretary-General Protection of civilians in armed conflict, S/2020/366.

¹⁸ Margarita Konav, 'The Future of Urban Warfare in the Age of Megacities' (2019) 88 *Focus stratégique* 27
<https://www.ifri.org/sites/default/files/atoms/files/konaev_urban_warfare_megacities_2019.pdf>
accessed 15 May 2021

¹⁹ ICRC, 'Explosive Weapons In Populated Areas: Humanitarian, Legal, Technical And Military Aspects' (2011) 5 <<https://www.icrc.org/en/doc/assets/files/publications/icrc-002-4244.pdf>> accessed 2 April 2021

²⁰ In a city, separating military targets from the civilian populations can be extremely difficult because the critical infrastructure relied upon can also be used by enemy forces for military purposes.

affected all recent and current urban battlefields. In Hama²¹, for instance, the Syrian Armed Forces have fought against Tahrir al-Sham, the Free Syrian Army and the Turkistan Islamic Party²². In Homs, from 2011 to 2014, the governmental forces challenged the Free Syrian Army, the Islamic Front and the al-Nusra Front. In Aleppo²³, one of the cities which has been most affected by ANSAs, the Syrian army fought against the Free Syrian Army in all the residential areas, with house-to-house tactics²⁴. Armed Non-State Groups are significantly present also in Benghazi and Tripoli²⁵.

ANSAs aim at controlling cities and residential centers, rather than uninhabited areas such as the desert or the woods. By taking control over the major urban strategic points, and over the routes in and out of a city (as well as the road connecting one city to another), ANSAs can more easily gain political and military ground. Furthermore, it is more frequent for ANSAs to be born and develop in urban contexts, acquiring new members through massive campaigns

²¹ Thomas Joscelyn, 'Analysis: Insurgents launch major offensive against Assad regime in Hama province' The Long War Journal (24 March 2017) <<https://www.longwarjournal.org/archives/2017/03/analysis-insurgents-launch-major-offensive-against-assad-regime-in-hama-province.php>> accessed 30/07/2021

²² Angus McDowall, 'Syrian rebels launch attack near Hama' Reuters (21 March 2017) <https://www.reuters.com/article/us-mideast-crisis-syria-hama-idUSKBN16S2DC> accessed 30/07/2021

²³ ICRC 'Syria: Aleppo civilians under attack' ICRC (22 April 2014) <https://www.icrc.org/en/doc/resources/documents/news-release/2014/04-22-syria-damascus-aleppo-violence-civilians.htm> accessed 30/07/2021

²⁴ Aaron Y. Zelin, 'The Syrian Islamic Front: A New Extremist Force' The Washington Institute for Near East Policy (4 February 2013) <https://www.washingtoninstitute.org/policy-analysis/syrian-islamic-front-new-extremist-force> accessed 30/07/2021

²⁵ Munive Jairo Finn Stepputat and Thomas Mandrup, 'From the Power of Guns to Civilian Acceptance' (2017) Danish Institute for International Studies accessed 30 July 2021 <<http://www.jstor.org/stable/resrep13225>>

among civilian population²⁶. Some of them - such as ISIS²⁷ or Al Qaeda²⁸ – have acquired new members through recruitment urban offices, and thanks to a capillary organization.

Dwellers often enroll in ANSAs for ideological reasons, or because they believe such groups can fight for their social or political demands.²⁹ But civilians can also be coerced into joining these groups under threats of physical or economic retaliation against them or their families. ANSAs have a strong impact on the “human factor” of urban warfare, also in virtue of the frequent use of kidnapping, forced recruitment, rape and fearmongering among the civilian population.³⁰

ANSAs also target critical infrastructures, relevant to the sustenance of the population, in particular power plants or oil wells, upon which their economical sustenance depends on.³¹

In order to precisely define urban warfare, this paper takes into account the material field of application of non-international conflict provided by art. 1 of the 1977 II Additional

²⁶ James W. Moore, ‘Understanding Armed Non-state Actors: Identities, Roles and Strategies’ (2013) Defence R&D Canada 17 https://publications.gc.ca/collections/collection_2016/rddc-drdc/D68-6-082-2011-eng.pdf accessed 4 March 2021

²⁷ Suleyman Ozeren, Hakan Hekim, M. Salih Elmas Halil and Ibrahim Canbegi, ‘An Analysis of ISIS Propaganda and Recruitment Activities Targeting the Turkish-Speaking Population’ (2018) 56 Cambridge University Press 105 doi:10.1017/crj.2018.14

²⁸ Farrall Leah, ‘How Al Qaeda Works: What the Organization's Subsidiaries Say About Its Strength’ (2011) *Foreign Affairs* 90(2) *JSTOR* 128–138. <www.jstor.org/stable/25800463> accessed 30 July 2021

²⁹ *ibid*

³⁰ Cf Moore (n 26)

³¹ ANSAs often use power plants or oil wells as source to acquire their income, from the illegal oil trade for example, and to purchase of weapons and means to continue fighting.

Protocol to the Geneva Conventions.³² According to this provision, the II Additional Protocol applies to armed conflicts “which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”.³³

By including the three elements abovementioned in this definition, we can qualify, through *analogia legis*, urban warfare as an armed confrontation linked to urbanization. It takes place in a man-made environment that touches every urban structure, where Armed Non-State Actors are fighting against State military forces and/or other Armed Non-State Actors. The armed groups involved are supposed to carry out prolonged and intense fighting in a city (or in a part of it), adopting urban warfare tactics that endanger civilian population and critical infrastructures upon which the whole city depends.

While the material field of application of Additional Protocol II limits itself to armed conflicts between State armed forces and dissident armed forces or other organized armed groups, the definition provided to urban warfare is broader, including also armed confrontation between Non-State Armed Groups. This reflects the situation on the ground, for instance in

³² International Committee of the Red Cross (ICRC), ‘Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)’ 1125 UNTS 609 (8 June 1977) <<https://www.refworld.org/docid/3ae6b37f40.html>> accessed 31 July 2021

³³ The starting point in assessing the existence of a Non-International Armed Conflict (NIAC) is Common Article 3 of the 1949 Geneva Convention: "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, "course, that neither the text nor the commentary to this article provides definitive guidance regarding what is meant by the phrase "conflict not of an international character."

Kobane, where, in 2014, ISIS attempted to capture the city where Kurdish forces (People's Protection Units and Women's Protection Units) were located.³⁴

The inclusion of combat amongst ANSAs in the definition of urban warfare is also in line with the position of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadic* Case.³⁵ The ICTY stated that an armed conflict exists whenever there is a resort to armed force between States, protracted armed conflict between governmental authorities and organized Non-State Armed Groups, or between such groups within a State.

In line with the provision of the Additional Protocol II and the Statute of the International Criminal Court related to non-international armed conflict³⁶, situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, gang violence and other acts of a similar nature, should not be considered urban warfare. This does not mean that there is no international legal protection applicable to these situations, as they remain covered by human rights international law, which always apply, including during armed conflict. Moreover, in situations of internal disturbances and tensions, the fundamental principles of Common art. 3 of the 1949 Geneva Conventions are still applicable, as well reconstructed by the International Committee of the Red Cross in its latest Commentary on common art. 3 to the

³⁴ Miriam Karouny and Jonny Hogg, 'Islamic State defies air strikes by shelling Syrian Kurdish town' (27 September 2014) Reuters accessed 5 March 2021

³⁵ The Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para.70 ICTY.

³⁶ See Article 8(2)(f) of the Rome Statute: [It] applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

Geneva Conventions.³⁷

The II Additional Protocol to the Convention also contains a catalogue of fundamental guarantees prohibiting, at anytime and anywhere, *inter alia*, violence to life, health and physical or mental wellbeing of persons, murder, torture, mutilation or any form of corporal punishment; collective punishments; or taking of hostages and acts of terrorism.

Finally, whenever the threshold of “prolonged and intense fighting” – necessary to detect the existence of urban warfare – is not reached, domestic legislation continues to apply.

PART 2. INTERNATIONAL AND NATIONAL REGULATIONS REGARDING CULTURAL PROPERTY: A NEED FOR REASSESSMENT?

International regulations In urban warfare, cultural sites are often destroyed as specific military targets, especially by ANSAs (i.e., Palmyra)³⁸, or transformed into battlefields (i.e., Aleppo and the Damascus Citadels). Moreover, urban cultural heritage is increasingly suffering the reverberating effects of armed attacks, as shown in Sana’a, Mosul, Raqqa, Gaza, Sabratha, Lubumbashi and Donetsk.³⁹

This phenomenon dates back to the fall of Carthage, Alexandria, Constantinople, Samarqand and Vijayanagar, which hugely endangered urban cultural heritage. In ancient

³⁷ See para 420.

³⁸ Zoe Howe, ‘Can the 1954 Hague Convention Apply to Non-State Actors? A Study of Iraq and Libya.’ (2012) 47(2) Texas International Law Journal 403, 425 <<https://www.aiamilitarypanel.org/wp-content/uploads/2019/01/Howe403.pdf>> accessed 2 March 2021

³⁹ Christina Wille, ‘The Implications of the Reverberating Effects of Explosive Weapons Use in Populated Areas for Implementing the Sustainable Development Goals’ (2016) UNIDIR <<https://unidir.org/publication/implications-reverberating-effects-explosive-weapons-use-populated-areas-implementing>> accessed 2 March

Greece and Rome, wars were aimed at complete annihilation of the enemy, including the destruction of temples and statues and by the looting of entire cities⁴⁰.

The relevant modern international law concerning the protection of cultural property can be traced back to the Lieber Code, published in 1863 (Instructions for the Governance of the Army of the United States in the Field),⁴¹ which stressed that, *inter alia*, works of arts must be protected from injury even in fortified places, while these were being bombarded. Thereafter, the 1874 Brussels Declaration, the 1880 Oxford Code, the Fourth Hague Convention on Laws and Customs of War, carried forward these principles, for instance by prohibiting bombardment or willful damage to historical monuments or works of art.⁴²

The destructiveness of World War II prompted the international community to strengthen and tailor the legal protection of cultural heritage. The obligation to respect cultural heritage in the event of armed conflict, in particular by abstaining from acts of willful destruction and damage, is currently recognized in several international instruments and increasingly accepted as an international custom.⁴³

⁴⁰ Patty Gerstenblith, 'Frameworks for cultural heritage protection: from ancient writing to modern law' (2017) <<https://www.khanacademy.org/humanities/special-topics-art-history/arches-at-risk-cultural-heritage-education-series/xa0148fd6a60f2ff6:documenting-and-protecting-cultural-heritage/a/frameworks-for-cultural-heritage-protection-from-ancient-writing-to-modern-law>> accessed 24 May 2021

⁴¹ See art 118 of the Lieber Code: <https://www.loc.gov/rr/frd/Military_Law/Lieber_Collection/pdf/Instructions-gov-armies.pdf> accessed 23 April 2021

⁴² Neeru Chadha, 'Protection Of Cultural Property During Armed Conflict: Recent Developments' (2001) International Humanitarian Law Yearbook <<http://www.worldlii.org/int/journals/ISILYBIHRL/2001/12.htm>> accessed 14 May 2021

⁴³ The content of this custom mirrors - to a large extent - the rules embodied in treaty form in the 1954 Hague Convention and its two Protocols.

It is also beginning to be recognized “as part of a growing body of international law that builds on the human dimension of cultural heritage [...] its connection to human rights and to foreshadow the idea of an integral obligation owed to the international community as a whole (*erga omnes*) rather than to individual states on a contractual basis”.⁴⁴ According to Karima Bennouna, the UN Special Rapporteur in the field of cultural rights, cultural heritage is a human rights issue to which we must take a human rights approach. Beyond safeguarding an object or a manifestation in itself, a human rights approach obliges one to take into account the rights of individuals and populations in relation to such objects or manifestations.⁴⁵ In addition, the Human Rights Council highlighted that the destruction or damage to cultural heritage may have a detrimental and irreversible impact on the enjoyment of cultural rights⁴⁶. Indeed, cultural heritage is a fundamental resource for the protection and the promotion of human rights and fundamental freedoms, including not only cultural rights but also the rights to freedom of expression, freedom of thought, conscience and religion, as well as the economic rights of the many people who earn a living through tourism related to such heritage. This also in line with the preamble of the 2003 UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage “cultural heritage is an important component of cultural identity and of social

⁴⁴ Francesco Francioni, ‘The Human Dimension of International Cultural Heritage Law: An Introduction.’ (2011) 22(1) European Journal of International Law 9,12 DOI <10.1093/ejil/chr018> <https://academic.oup.com/ejil/article/22/1/9/4367039-16> accessed 14 May 2021

⁴⁵ Karima Bennouna speech is available here: <https://en.unesco.org/news/karima-bennouna-cultural-heritage-human-rights-issue>

⁴⁶ On 22 March 2018, the Human Rights Council adopted unanimously resolution A/HRC/RES/37/17 (HRC /Council Resolution 33/20 (2016) on cultural rights and the protection of cultural heritage). This resolution, which will be presented triennially, reiterates the engagement of States to respect, protect and fulfil cultural rights in the field of cultural heritage

cohesion, so that its intentional destruction may have adverse consequences on human dignity and human rights”.

The 1954 Hague Convention provides a rather comprehensive definition of cultural property, including both movable and immovable properties,⁴⁷ seen as “valuable to all of mankind, not just to the citizens of the country where the property resides”.⁴⁸ The First Protocol to the Convention obliges every Contracting Party to prevent the exportation, from an occupied territory during an armed conflict, of cultural property as defined in the same Convention.⁴⁹ The 1999 Second Protocol strengthens the Convention, by creating a new category – “enhanced protection” – for cultural property of the greatest importance for humanity⁵⁰ and by establishing the Committee for the Protection of Cultural Property in the Event of Armed Conflict.

Without prejudice to the provisions of the 1954 Hague Convention, both the 1977 Additional Protocols to the 1949 Geneva Conventions prohibit any act of hostility directed against historical monuments, works of art or places of worship and to use them in support of the military efforts.⁵¹ In case of a contradiction between the Protocols and a rule of the 1954

⁴⁷ The definition includes architectural, artistic or historical monuments, archaeological sites, works of art, manuscripts, books and other objects of artistic, historical or archaeological interest, as well as scientific collections of all types.

⁴⁸ Cf Howe (n 21)

⁴⁹ In addition, each High Contracting Party undertakes to take into its custody cultural property imported into its territory either directly or indirectly from any occupied territory.

⁵⁰ The 1954 Hague Convention already provides the possibility to grant special protection to a limited number of refuges, but depending on the willingness of the belligerent parties and on the recurrence of strict circumstances: (a) are situated at an adequate distance from any large industrial center or from any important military objective (b) are not used for military purposes.

⁵¹ The only difference between the I Additional Protocol (art. 53) and the II Additional Protocol (art. 16)

Convention, the latter is applicable, though, of course, only if the Parties concerned are bound by that Convention.

Although there is a well-organized international legal framework for protecting cultural property in times of war, violations are continuing nevertheless. Moreover, all these international instruments, as well as the relevant international customs, lack any specific provision concerning urban warfare, where cultural heritage is actually more threatened.

The obligation to respect cultural property situated “within their own territory” as well as “within the territory of other High Contracting Parties” (1954 Hague Convention and its Protocols) seems vague and unable to prevent and combat the destruction of cultural heritage in urban context. Furthermore, the Hague Convention does not apply in its entirety to internal armed conflict and is barely implemented by States. A better implementation and/or a revision of the existing international regulations, by mainstreaming the urban dimension into all of them would appear to be in order.

The creation of an “urban-based approach” for the protection of cultural heritage could take off by introducing an obligation for the belligerents to place under “enhanced protection”⁵²

to the 1949 Geneva Conventions is that the latter does not refer to “other applicable international instruments”, limiting to take into account the 1954 Hague Convention. In the absence of an explanation on this point in the Official Records, it may be recalled that the Hague Conventions of 1907 and the treaty for the Protection, in Time of War and Peace, of Historic Monuments, Museums and Institutions of Arts and Science (Roerich Pact), are taken into account only by the I Additional Protocol. However, art. 53 applies even if all the Parties concerned are bound by another international instrument insofar as it supplements the rules of that instrument.

⁵² “Enhanced protection” is a mechanism established by the 1999 Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. It aims to ensure full and effective protection of specifically designated cultural property during international or non-

the most important movable and immovable urban cultural property. The Committee for the Protection of Cultural Property, responsible to grant, suspend or cancel enhanced protection (art. 27 of the 1999 Protocol), could be tasked to automatically grant this status to a selected number of urban cultural properties.

Their inclusion in the List of Cultural Property under Enhanced Protection⁵³ would force the belligerent parties to ensure the immunity of that property, hence having combatants refrain from making such property the object of attack or from using the property – or its immediate surroundings – in support of military action.

It would also be desirable to use the special distinctive emblem (art. 6, 16 and 17 of the Hague Convention and art. 20 of the Regulations for its Execution) to facilitate the identification of urban cultural property, thereby establishing special units within the military forces to be responsible for the protection of these properties. According to the Convention, the placement of the emblem is not mandatory for objects under general protection, but the competent national authority must authorize its placement. Introducing an obligation to mark the most important

international armed conflicts. Cultural property under enhanced protection is included in a special list and benefits from high level immunity which requires the parties to a conflict to refrain from making such property the object of attack or from any use of the property or its immediate surroundings to support military action. In case where individuals do not respect the enhanced protection granted to a cultural property, criminal sanctions have been laid down by the 1999 Second Protocol.

⁵³ The list is available here: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Enhanced-Protection-List-2019_Eng_04.pdf Italy, Cyprus and Belgium have the higher number of cultural sites in the list, including urban cultural sites. The Italian properties in the list are Castel del Monte, National Central Library of Florence, Villa Adriana. Belgium listed properties are House & Workshop of Victor Horta, Neolithic flint mines at Spiennes, The Plantin-Moretus House-Workshops-Museum Complex and the Business Archives of the Officiiana Plantiniana. Cyprus: Choirokoitia, Painted Churches in the Troodos Region, Paphos.

urban cultural heritage with the special distinctive emblem would therefore mark a very significant progress.

Relying on art. 27 (g) of the 1999 Protocol, the Meeting of the Parties could assign the Committee a specific function regarding urban cultural heritage, with a view to effectively implement the “urban-focused approach” aforementioned. This could also lead to a new revision of the Guidelines for the Implementation of the Protocol, focused on urban cultural properties. In that regard, the collaboration of the Committee with the UNESCO Director-General, the International Committee of the Blue Shield (ICBS) and of the International Committee of the Red Cross (ICRC) would guarantee to achieve comprehensive and tangible results.

Meanwhile, the Fund for the Protection of Cultural Property in the Event of Armed (art. 29)⁵⁴ could be tasked by the Committee to provide financial assistance in support of specific measures focused on the protection of urban cultural property, both in peacetime and emergency. For instance, the Fund could provide expert advice on peacetime preparatory measures for the protection of movable and immovable urban cultural property (producing and updating inventories, surveys, maps, publications, websites, etc.), and offering training for staff and specialists at all levels. During emergencies and armed conflicts, the Fund could promote urban *ad hoc* organizational measures for drawing up emergency plans, while also establishing specific facilities or creating refuges for movable urban cultural property.

The urban dimension should also be taken into account in the periodic reporting mechanism established by the 1954 Hague Convention and its two Protocols. The periodic reports, submitted by each State every four years to the UNESCO Director-General, represent

⁵⁴ For a more detailed analysis of the Fund please consult: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/images/Fund-2020_eng1.pdf

an essential source of information for cultural heritage professionals, researchers and policy makers about measures taken by Governments. Introducing into these reports a specific chapter on urban cultural heritage would significantly encourage States to implement measure for its protection.

Lastly, tangible advancements for the protection of cultural heritage would be reached by granting specific “urban powers” to the General Commissioner, under the Regulations for the Execution of 1954 Hague Convention. The Commissioner is chosen from an international list of people, by joint agreement between the Party to which he will be accredited. By virtue of its several functions, above all its missions *in loco*, the Commissioner could verify the real conditions of the urban cultural heritage and periodically report to the Committee, thereby also sensibilizing the belligerents on the importance of the protection of said urban cultural heritage.

With reference to the 1977 Additional Protocols to the 1949 Geneva Conventions, an extensive and evolutionary interpretation of the relevant provisions based on the “urban approach” would be desirable. A good option might be taking into consideration the urban dimension in the new ICRC Commentary to the II Protocol scheduled to be published by 2024, as well as adopting a new resolution of the next International Conference of the Red Cross and the Red Crescent on urban warfare, including urban cultural heritage. The preambular part of this new resolution could take note of all the major matters related to urban warfare, while an operative paragraph could provide specific obligation for States, in particular by requiring them to appoint safe zones and for the adoption and implementation of national legislation.

While revising the international regulations previously mentioned, it is fundamental to consider the role of ANSAs, which significantly challenge the State-centric international law paradigm. ANSAs are not under effective State control and lack the legal capacity to become

parties to relevant international treaties, thereby falling outside the remit of international law. Engaging with ANSAs is one of the major priorities, considering that a growing number of important heritage sites are under their control, both inside and outside of cities. Moreover, the intentional destruction of cultural property has become one of the primary tactics of ISIS and affiliated groups.

The International Committee of the Red Cross (ICRC) together with other non-governmental organizations – such as Geneva Call – are trying to fit ANSAs under the international humanitarian law framework. The key tool of engagement that Geneva Call is known as the Deed of Commitment, which encourages ANSAs to abide by specific humanitarian norms and to be held accountable for complying with these norms.

This emerging trend should be further strengthened and developed, in particular by raising awareness among ANSAs on the importance to respect urban cultural heritage. ANSAs could be interested in being trained on issues that would contribute to reinforce their images and acquire more legitimacy and consensus. The members of some of these groups have also declared that – notwithstanding existing rules – they do consider the need to protect cultural heritage items while developing their military action. Some ANSAs have bound themselves to the respect of cultural heritage through declarations, internal codes of conduct and manifestos.⁵⁵

Lastly, it is fundamental to promote the respect of all the other relevant international Conventions also in times of war, starting from the UNESCO Convention on the Protection of

⁵⁵ Alessandro Checchi & Vanessa Vuille, 'The role of the ICC and of non-State actors concerning the protection of cultural heritage' (2017) *Völkerrechtsblog* DOI <10.17176/20170510-063550> <<https://voelkerrechtsblog.org/de/the-role-of-the-icc-and-of-non-state-actors-concerning-the-protection-of-cultural-heritage/>> accessed 13 May 2021

World Cultural and Natural Heritage (1972)⁵⁶, which aims at identifying, safeguarding and preserving the world's most valuable cultural and natural heritage through international collaboration. Among other Conventions, it is worthwhile mentioning the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (2003)⁵⁷, the Convention on the Protection of the Underwater Cultural Heritage (2001)⁵⁸, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. The latter acquires particular importance in times of armed conflict, where illicit trafficking of cultural property can be widespread.

NATIONAL REGULATIONS: THE CASE OF SYRIA, IRAQ, YEMEN, AND LIBYA

Although Syria, Iraq, Yemen, and Libya have ratified the 1954 Hague Convention and its first Protocol, none of these countries, with the exception of Libya in 2001, has ratified the 1999 Second Protocol. According to the International Register of Cultural Property Under Special Protection none of these States has established a regime of special protection of cultural property.⁵⁹ The relevant international Conventions, even when ratified, have not always been

⁵⁶ Convention on the Protection of World Cultural and Natural Heritage, adopted by the UNESCO General Conference at its 17th session, Paris, 16 November 1972.

⁵⁷ Convention for the Safeguarding of the Intangible Cultural Heritage, adopted by the UNESCO General Conference at its 32nd session, Paris, 29 September 2003.

⁵⁸ Convention on the Protection of the Underwater Cultural Heritage, adopted by the UNESCO General Conference at its 31st session, Paris, 3 November 2001.

⁵⁹ The Committee for the Protection of Cultural Property in the Event of Armed Conflict called upon Syria and Iraq to ratify the Second Protocol to the Hague Convention at their earliest convenience and submit their requests to the Committee for granting enhanced protection to cultural property on an emergency basis. In the same month, the Director-General of UNESCO expressed distress after the attacks that destroyed urban cultural heritage in Sana'a and called on all parties to respect their obligations under international treaties.

incorporated into domestic legislation. This represents a significant lack, considering that domestic laws are fundamental, applying also when the minimum threshold of “prolonged and intense fighting” – needed to apply IHL - is not reached.

When the relevant domestic laws were adopted, the main threats were represented by the looting of archaeological sites, vandalization or illicit excavation.⁶⁰ Any mention to armed conflicts, urban warfare and urban cultural heritage is therefore missing.

However, Syrian law⁶¹ features some well-structured sections that seem even clearer than the international legislation. For instance, while the Hague Convention prohibits military use of the undefined “immediate surroundings” of a cultural site, the Syrian Antiquities Law explicitly prohibits to build hazardous industries and military facilities within 500 meters of registered immovable archaeological and historical properties. “The Syrian Antiquities Law is complemented by the Hague Convention, and, in some ways, they shore up some of the weaknesses of each other”.⁶² As the armed conflict broke out in 2011, the Syrian Directorate General of Antiquities and Museums (DGAM) also established 13 security measures⁶³ for the protection of cultural heritage. Among them a national campaign to raise awareness on the value of cultural heritage, the securing of the archeological artifacts present in the museums, and the

⁶⁰ Youssef Kanjou, ‘The Syrian cultural heritage tragedy: cause, effect, and approaches to future protection’ (2014) 8 Journal of Disaster Mitigation for Historical Cities <https://core.ac.uk/download/pdf/60544917.pdf> accessed 1 March 2021

⁶¹ Legislative Decree N. 222, Antiquities Law of 1963, as amended in 1999.

⁶² Emma Cunliffe, Nibal Muhensen & Marina Lostal ‘The Destruction of Cultural Property in the Syrian Conflict: Legal Implications and Obligations’ (2016) 23 International Journal of Cultural Property DOI <10.1017/S0940739116000011> [https://research.ku.dk/search/result/?pure=en/publications/the-destruction-of-cultural-property-in-the-syrian-conflict\(deb7a22f-d67e-4e36-a685-f5cd5328d7a8\).html](https://research.ku.dk/search/result/?pure=en/publications/the-destruction-of-cultural-property-in-the-syrian-conflict(deb7a22f-d67e-4e36-a685-f5cd5328d7a8).html) accessed 21 April 2021

⁶³ Annual Report 2013 of DGAM.

establishment of a digital mapping of the affected cultural heritage in Syria. Moreover, in 2014, legal experts, officers from the DGAM, and other Syrian bodies started to collaborate with UNESCO in order to shed light on the expected benefits of the application of the Second Protocol of the Hague Convention in the Syrian case.⁶⁴

Similarly, even though Iraqi domestic law⁶⁵ provides long-term imprisonment for anyone who commits intentional or negligent acts against cultural heritage, while punishing with death penalty anyone who knowingly takes an article of antiquity out of Iraq, it contains no reference to armed conflict and urban cultural heritage.

Yemeni domestic law⁶⁶ regulates the country's protection of the archaeological heritage, criminalizing any form of damage against any archeological object. Decree n.129/1997, which established the General Organization for the Protection of Historic Cities, deserves to be highlighted. The organization is tasked to adopt special policies for the survey, delimitation and documentation of archeological buildings, sites of historical, religious, scientific and handicraft interest and of other resources for restoration and protection.

Libyan domestic law⁶⁷ provides penalties against those who violate cultural property, in particular for the smuggling of cultural heritage. Although its legislation seems to lack effective provisions aimed at preventing crimes against cultural property, Libya has ratified the 1999

⁶⁴ Emma Cunliffe, Paul Fox & Peter Stone, 'The protection of Cultural Property in the Event of Armed Conflict: Unnecessary Distraction or Mission-Relevant Priority?' (2018) 2(4) OPEN 1 <<https://www.act.nato.int/images/stories/media/doclibrary/open201804-cultural-property.pdf>> accessed 10 May 2021

⁶⁵ Antiquities Law No. 59 of 1936 and two Amendments No. 120 of 1974 and No. 164 of 1975. The most recent one is the Law No. 55 of 2002 The Antiquities and Heritage Law".

⁶⁶ Law of Antiquities N. 21/1994 with a modification of certain articles on the basis of law n. 7/1997.

⁶⁷ Law Concerning Antiquities, Museums, Historical Cities and Historic Buildings No. 3/1994.

Second Protocol, thereby complementing national laws with international provision.

A revision of the domestic law of the States above-mentioned could hardly take place, due to the instability and the internal problems caused by war. Nevertheless, a reassessment of the national regulation, together with the international ones, would be advisable, especially by States currently affected by armed conflicts.

PART 3. INTERNATIONAL CRIMINAL LAW AND THE PROTECTION OF URBAN CULTURAL HERITAGE

The attacks on the Old Town of Dubrovnik, the National Library in Sarajevo, and the Mostar Bridge, resulting in incomparable historic and cultural loss, have already highlighted in the 1990s the importance to protect urban cultural heritage and to bring to justice anyone who attempts to its integrity and preservation.

The Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) did not make explicit reference to “cultural property,” but rather listed the types of institutions upon which an attack would be punishable⁶⁸. Art. 3 (d) of the ICTY Statute lists, among the violations of the laws or customs of war, “the seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science”.

The ICTY has been particularly assertive on the issue of cultural heritage, charging individuals who destroyed cultural property, including the urban one, in eleven important cases.

⁶⁸ Mark. S. Ellis, ‘The ICC’s Role in Combatting the Destruction of Cultural Heritage’ (2017) 49 Case Western Reserve Journal of International Law <<https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=2499&context=jil>> accessed 23 May 2021

Recently, in 2005, the ICTY Trial Chamber sentenced retired General Pavle Strugar of the Yugoslav Peoples' Army to eight years in prison, charged for the destruction in 1991 of several historical and cultural sites located in the Old Town of Dubrovnik.

The International Criminal Court is unequivocal in declaring its intention to prosecute cultural property crimes⁶⁹. The very first paragraph of the ICC Statute declares: "All peoples are united by common bonds, their cultures pieced together in a shared heritage".

Crimes against cultural heritage fall within the ICC's jurisdictional remit, whether they are committed in the context of international or internal armed conflicts. Art. 8(2)(b)(ix) and art. 8(2)(e)(iv), are identical for both kind of conflicts, describing as war crimes "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"⁷⁰.

The definition, however, does not refer to cultural property in its comprehensive meaning, thereby missing the opportunity to establish a holistic cultural-value approach. It features a limited list of protected sites, which include historic monuments and buildings, without any reference, for instance, to moveable property. Only the provisions prohibiting pillaging – art. 8(2)(b)(xvi) and 8(2)(e)(v) of the Statute⁷¹ – could be used and interpreted to charge acts against moveable property.

⁶⁹ Cf Ellis (n 25).

⁷⁰ Roger O'Keefe, 'Cultural Heritage and International Criminal Law' (2013) Cordonier Segger & Jodoin (eds) Sustainable Development, International Criminal Justice, and Treaty Implementation, Cambridge Press 120,150 <<https://ssrn.com/abstract=3496737> or <http://dx.doi.org/10.2139/ssrn.3496737>> accessed 23 May 2021

⁷¹ These articles criminalized as war crime the "Pillaging a town or place, even when taken by assault".

Moreover, according to both art. 8(2)(b)(ix) and art. 8(2)(e)(iv), attacks against cultural property does not amount to war crimes if – and as long as – such property is a military objective. Although the concept of military objective is more precise than the looser notion of military necessity or military efforts,⁷² it leaves room for exempting the penal responsibility of perpetrators in several cases.

The ICC Statute does not explicitly consider urban cultural heritage, which can be used by ICC judges also for condemning attacks against urban cultural sites. Indeed, the destruction of urban cultural heritage is at the very heart of the case of *Prosecutor v. Ahmad Al Faqi Al Mahdi* (September 18, 2015), which is the first instance where the ICC considered – as its primary subject of ruling – the war crime of destroying cultural heritage.

After classifying the conflict in Mali as a non-international armed conflict, the ICC sentenced Ahmad Al Faqi Al Mahdi to nine years of imprisonment for intentionally directing attacks against historic monuments and/or buildings dedicated to religion, including nine mausoleums and one mosque, in Timbuktu, qualified as a World Heritage site in 1988. Located at the gateway to the Sahara Desert, Timbuktu is known as the “City of 333 Saints” and is one of Africa’s most historically charged cities.

The ICC Prosecutor has eloquently described the impact of the loss of Timbuktu’s urban cultural heritage: “To destroy Timbuktu’s mausoleums is therefore to erase an element of

⁷² Art. 52(2) of the 1977 Additional Protocol I provides that “in so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”. Therefore, the definition provided by the Protocol is strictly confined and circumscribed. Contrary to the broader concept of “military efforts” it leaves no space for interpretation.

collective identity built through the ages. It is to eradicate a civilization's landmark. It is the destruction of the roots of an entire people, which irremediably affects its social attitudes, practices and structures"⁷³.

Also, the Trial Chamber significantly takes into consideration the human dimension of cultural heritage, affirming that the targeted buildings were not only religious buildings but also had a symbolic and emotional value for the inhabitants of Timbuktu. According to paragraph 80 of the judgment, their destruction does not only affect the direct victims of the crimes, namely the faithful and inhabitants of Timbuktu, but also people throughout Mali and the international community.

Even though The Rome Statute provides no explicit mention to urban cultural heritage, this significantly testifies that the ICC does take into account that heritage and its human value. Moreover, crimes against cultural heritage, including urban cultural heritage, could amount to crimes against humanity, or other acts amounting to crimes against humanity may have adverse consequences for cultural heritage.⁷⁴ Crimes against cultural heritage could also frequently occur in connection with genocide, thereby could be examined in connection with art. 5 of the Rome Statute.

This does not mean that destruction of cultural property, including urban cultural heritage, in places such as Syria, Iraq or Yemen, will certainly be brought before the ICC.

⁷³ Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the opening of the confirmation of charges hearing in the case against Mr Ahmad Al-Faqi Al Mahdi, 1 March 2016. <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-01-03-16>

⁷⁴ To amount to crime against humanity, according to art. 7 of the Rome Statute, crime against cultural heritage should be committed as part of a widespread or systematic attack directed against any civilian population.

According to the principle of complementarity, a State Party may refer to the Prosecutor of the Court a situation where national courts cannot or do not want to act. Moreover, the ICC can prosecute an individual, if the crime has been committed in the territory of a State Party, or if the perpetrator is a national of a State Party to the ICC (art. 12-13 Rome Statute).

Therefore, there seems to be a stumbling block to the international prosecution of perpetrators of attacks against cultural heritage in Syria, Iraq, Yemen, which are not parties to the Rome Statute. The ICC does not have jurisdiction over the crimes committed in those countries, unless the Security Council refers the situation to the ICC, such as Resolution 1970 (2011) regarding Libya.

With the aim of reinforcing the implementation of the relevant international criminal law, a comprehensive approach should be developed, in particular by fostering the cooperation between the ICC and all the relevant stakeholders, such as Interpol, Europol, Eurojust, United Nations bodies, peacekeeping and humanitarian personnel and non-governmental organizations.

In 2018 Irina Bokova, Director-General of UNESCO, and Fatou Bensouda, Prosecutor of the ICC, signed a Letter of Intent formalizing and enhancing their collaboration. By carrying out more frequent meetings and joint initiatives, with a special focus on urban cultural heritage, the ICC and UNESCO could help guarantee the respect of international criminal law in this field.

The need for collaboration is also well recognized in the Draft Policy for Cultural Heritage, published last March by the Office of the ICC prosecutor and still under negotiation.⁷⁵

⁷⁵ The Draft Policy for Cultural Heritage is consultable here. <https://www.icc-cpi.int/itemsDocuments/2021-03-22-otp-draft-policy-cultural-heritage-eng.pdf>. The Office of the

The document, drafted according to the ICC Strategic Plan 2019-2021, and through a consultative process with a group of external experts, especially UNESCO, aims at raising greater awareness on the importance of the issue, seeking to close the impunity gap and maximizing impact through collaboration with a wide network of partners and relevant actors.

Despite the Draft Policy for Cultural Heritage does not take into explicit consideration urban cultural heritage, it witnesses the growing importance attached by the ICC to crimes against cultural heritage, implicitly including the urban dimension.

However, at present, another important and appropriate tool for pursuing war crimes against cultural property is the II Protocol to the 1954 Hague Convention.⁷⁶ Article 15 of the Protocol discusses violations against the Protocol itself, qualifying among the offences: making cultural property under enhanced protection the object of attack (art. 15 a); using cultural property under enhanced protection or its immediate surroundings in support of military action (art. 15 b); extensive destruction or appropriation of cultural property protected under the Convention and this Protocol (art. 15 c).⁷⁷ Urban cultural property is not specifically highlighted by the accountability mechanism of the 1999 Protocol, even though it is obviously included in the broader meaning of “cultural property”.

Prosecutor collected comments from the States on the draft Policy and will start an internal review and revision process.

⁷⁶ Michaela Frulli, ‘The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency’ (2011) 22(1) The European Journal of International Law 203, 217 <<https://www.semanticscholar.org/paper/The-Criminalization-of-Offences-against-Cultural-in-Frulli/93fcb94c8c8044cbe659688de8e42285a95b973a>> accessed 3 May 2021

⁷⁷ Art. 15 qualifies as a violation of the Protocol also: making cultural property protected under the Convention and this Protocol the object of attack (art.15 d); theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention (art 15 e).

The proposal of introducing an obligation for the belligerents to place under enhanced protection the most important movable and immovable urban cultural property (as put forward in paragraph 3) would guarantee that any attack against such property would represent a grave violation of the Protocol under both art. 15 (a) and 15 (b). Therefore, the Party in whose territory the alleged offender is found to be present could, if it does not extradite that person, submit the case to its competent authorities, for the purpose of prosecution (the “*aut dedere aut judicare*” mechanism is provided by art. 17 of the Protocol)⁷⁸.

National implementation of the Protocols is crucial: accountability can only be guaranteed by establishing also an effective legal framework for the prosecution and punishment of the perpetrators. States Parties are under an obligation to criminalize the violations listed by the Protocol in their domestic law, by adopting and implementing legislative, administrative or disciplinary measures. When defining the forms of individual criminal responsibility, States must also comply with general principles of international law, for instance, the rules extending individual criminal responsibility to persons other than those who directly commit the act.⁷⁹

Appropriate provisions in the national criminal laws are crucial also because they can favor the activation of the ICC – according to the principle of complementarity – when the State is unable or unwilling to exert its jurisdiction.

⁷⁸ Extradition could not be refused on the basis of the possible political nature of the offence, while it can be rejected where a requested party has grounds for believing that extradition has been made for the purpose of prosecution or punishing a person on the grounds of race, religion, nationality, ethnic origin or political opinion.

⁷⁹ Individuals, whether members of armed forces or civilians, may be held criminally responsible, not only for committing serious violations of the Second Protocol, but also for ordering such violations to be committed.

Nevertheless, the way State Parties implement and enforce the treaty obligations lies, ultimately, with the State themselves. As of today, there are no concrete examples of the implementation of the criminal aspects of the 1999 Second Protocol at the national level. That is why it is crucial not only to promote a wider ratification of the 1999 Protocol, but also to encourage States to adopt and implement national legislation allowing domestic judges to prosecute the most serious crimes against cultural heritage. Meanwhile, the urban dimension ought to be increasingly taken into specific consideration.

It also fundamental to have the two different ways of approaching the criminalization of acts against cultural property, the one by the ICC and by the II Protocol, and the relevant domestic law, converge. These two different approaches have progressed in parallel until now. It seems critical to establish a link between them, especially given that their core element is precisely the urban dimension of the issue.

PART 4. THE ROLE OF RELEVANT INTERNATIONAL AND REGIONAL ORGANIZATIONS FOR THE PROTECTION OF URBAN CULTURAL HERITAGE

As highlighted in the first paragraph, urban warfare is likely to become “the most frequent type of conflict”⁸⁰. Despite the existing international and national regulations, cultural heritage is increasingly under threat in urban warfare, and is thereby deserving of more specific protection.

International and regional organizations could play a major role in this regard. The initiative #Unite4Heritage, launched by UNESCO, was designed to have Governments mobilize in favor

⁸⁰ Michelle Tan, ‘Army Chief: Soldiers Must Be Ready To Fight in Megacities’, (2016) <https://www.defensenews.com/digital-show-dailies/ausa/2016/10/05/army-chief-soldiers-must-be-ready-to-fight-in-megacities/> accessed 24 May 2021

of the protection of cultural heritage, particularly in the Middle East. Under this initiative, UNESCO also adopted a strategy that calls for the integration of the cultural element into UN peacekeeping activities and operations.⁸¹

Meanwhile, the Security Council adopted in 2018 the first-ever resolution on cultural heritage (res. 2347)⁸², recognizing that its protection is key in order to maintain international peace and security. The resolution marks a historical turning point, ensuring the inclusion of cultural heritage in humanitarian actions, global security policies and peacebuilding.⁸³

In addition, the European Union contributes to these efforts, by providing financial support to civil society and international organizations in this field, and by promoting training courses, meetings, and networks on the issue. The importance of cultural heritage is recognized in the Treaty on the Functioning of the European Union (Article 167 of the Treaty on the Functioning of European Union⁸⁴) and in several EU resolution and documents. It is worthwhile to recall that the 2012 EU Parliament's Resolution on the destruction of cultural sites perpetrated by ISIL/Da'esh called for international cooperation to implement international conventions and resolutions on cultural heritage during armed conflict. The destruction of

⁸¹ Giulia Gallinella, 'I Caschi blu della cultura. Il ruolo italiano nel peacekeeping culturale.' (2017) <<https://www.iai.it/sites/default/files/iai1715.pdf>> accessed 24 May 2021. Italy has signed an agreement with UNESCO establishing the first operational group dedicated to these tasks, the so-called Blue Helmets of Culture (BHC), composed of sixty units including Carabinieri and experts who provide technical supervision and training, in order to assist national authorities and other local actors in implementing emergency readiness and response measures.

⁸² UN Security Council resolution 2347 (2017), S/RES/2347.

⁸³ The Resolution encourages the creation of 'safe heavens' to protect cultural heritage from conflicts. Moreover, it limits the possible transfer of cultural heritage to other Member States' 'own territories', in response to countries that rejected the potential transfer of their heritage to other States.

⁸⁴ According to art. 167 of TFEU, the EU shall bring the common cultural heritage to the fore by encouraging cooperation between EU countries while respecting their national and regional diversity.

cultural heritage sites in Syria and Iraq prompted the EU to take steps to further address the situation, by adopting in 2016 a joint communication of the Commission and European External Action Service⁸⁵ and, in 2017, the SEAE-UNESCO Project “Protecting Cultural Heritage and Diversity in Complex Emergencies for Stability and Peace” with the purpose to implement relevant activities for the stabilization and safeguarding of the cultural heritage in Iraq, Libya, Syria and Yemen⁸⁶.

The protection of cultural heritage is also part of the EU’s Common Security and Defense Policy (CSDP) missions. In 2018, during the negotiation of Civilian CSDP Compact, cultural heritage was officially endorsed as one of the new “lines of operation” for these missions with the EU Advisory Mission in Iraq (EUAM Iraq) representing the first mission to be mandated with this task.

NATO also plays an important role. The Preamble of its founding treaty states “the parties to this Treaty are determined to safeguard the freedom, common heritage and civilization of their peoples”. To ensure that the Alliance meets its intents and obligations in its operations and missions, cultural property has been incorporated as an essential part of NATO military environment and plays a specific role in NATO’s tactical, operational and strategic considerations. In Kosovo, Afghanistan and Libya, NATO forces undertook and promoted several initiatives, including the protection of cultural sites such as monasteries or by building

⁸⁵ The joint recommendation “Towards an EU strategy for international cultural relations” is focused on the role of cultural heritage both for the economic development of third countries and for combating the financing of terrorism through the trafficking of artefacts.

⁸⁶ The Project is an EU External Action funded under the Instrument contributing to Stability and Peace (IcSP), with the implementation of the Project’s activities led by UNESCO.

temporary facilities to store archaeological finds⁸⁷.

With a view to advance the protection of cultural heritage in urban warfare, developing synergies and joint initiatives between all the international and regional Organizations, including United Nations, European Union, NATO OSCE, Council of Europe, the Arab League and the African Union, would be the next key step. For instance, the establishment of a permanent forum of cooperation between all the relevant international and regional organizations would be a pioneering and effective practice. The forum would allow for the exchange of views and good practices, in order to mainstream the protection of cultural heritage, particularly urban cultural heritage, in all the Organizations' activities, following a comprehensive and coordinated approach.

CONCLUSION

Over the past 80 years urban warfare has destroyed important urban cultural heritage, thereby killing part of our collective identity as world citizens. Stories and arts that have resisted and existed for millennia are disappearing or being targeted, slowly leaving us with only their memories. Future generations, for instance, will grow up without having seen relevant cultural sites, such as Palmyra. The only way to deal with cities' destruction is prevention, protection and reconstruction. However, the rebuilding of a city, in particular of its cultural heritage, is a crucial process. Many cities have been substantially reshaped during the post-war period and replaced

⁸⁷ In Afghanistan, NATO forces participated in initiatives and projects on an *ad hoc* basis, such as offering cultural heritage courses, building temporary facilities to store archaeological finds, rebuilding the National Museum of Afghanistan and protecting cultural heritage in Ghazni. During Operation Unified Protector in Libya, NATO used the data provided by several sources, such as UNESCO and academia, in order to integrate cultural property protection in the planning of NATO airstrikes.

with modern buildings and constructions.

According to Spencer, “cities are living organisms and should be treated as such”. They are more than simple locations on a map, representing places where generations and civilizations chose to be. When reinventing them after war, the involvement of the local communities is fundamental, as this will ensure that all members of society are accounted for in the city’s new design, which should be strongly based on local identity and sentiment. Reconstruction plans should take into consideration the nature and extent of destruction, preserving and respecting the pre-war memories, values and traditions, but should also try to leave behind the scars of the war. Bringing people together needs to be the real objective.

DISCLOSURE NOTE

The opinions featured in this paper are expressed on a personal basis, and are in no way attributable to the Italian Ministry of Foreign Affairs and International Cooperation.

Also, while this work was carried out jointly, the authorship of the following sections is to be attributed to Hani El Debuch:

Introduction. The Trend of Urbanization in War;

The definition of Urban Warfare;

National Regulations: The Case of Syria, Iraq, Yemen, And Libya;

The following sections are to be attributed to Gianluigi Mastandrea Bonaviri:

International And National Regulations regarding Cultural Property: A need For Reassessment?;

International Criminal Law And The Protection Of Urban Cultural Heritage;

The role Of Relevant International And Regional Organizations For The Protection Of Urban Cultural Heritage;

Conclusions are the result of a common journey.