

Vita Czepek

University of Warsaw

e-mail: v.czepek@wpia.uw.edu.pl

ORCID: 0000-0002-9372-1784

Elżbieta Karska

Cardinal Stefan Wyszyński University, Warsaw

e-mail: e.karska@uksw.edu.pl

ORCID: 0000-0002-5263-9127

THE SCOPE AND IMPORTANCE OF COOPERATION BETWEEN UNESCO AND THE ICC FOR THE PROTECTION OF CULTURAL PROPERTY

Abstract

Intentional destruction and theft of cultural property during armed conflicts are now prohibited by international law. In line with international regulations, deliberate attacks against cultural property, both during international and non-international armed conflicts, may constitute serious violations of the norms of humanitarian law and their perpetrators should be tried and penalized. At the international level, the United Nations Educational, Scientific and Cultural Organization (UNESCO) is the most appropriate body to take action to protect cultural property during armed conflicts. The International Criminal Court (ICC), on the other hand, has the jurisdiction to prosecute and penalize perpetrators of crimes against cultural property, classified as war crimes. The aim of this paper is, therefore, to answer the question of the extent to which the cooperation between the ICC and UNESCO may affect the protection of cultural property during armed conflicts. In order to answer this question, analysis was performed of the scope of

the protection of cultural property by the ICC and UNESCO, as well as of the legal basis for cooperation between these institutions.

KEYWORDS

International Criminal Court, UNESCO, protection of cultural property, international crimes

SŁOWA KLUCZOWE

Międzynarodowy Trybunał Karny, UNESCO, ochrona dóbr kultury, zbrodnie międzynarodowe

1. INTRODUCTION

Armed conflicts have always been an inherent part of human history, constituting the most common and most dangerous threat to cultural property. Ideas about protecting cultural property were already present in medieval Europe but the first attempts to formulate them as the provisions of international law were made only in the 19th century. The reason for their low effectiveness was their incomplete nature and their application being limited only to international conflicts. Unfortunately, despite the development of the protection of cultural property in the second half of the 20th century and at the early 21st century, such destruction continued to accompany armed conflicts in the territory of the former Yugoslavia, Iraq, Syria, Mali, Afghanistan, and Ukraine¹. Many of the cultural assets destroyed during some of these armed conflicts were inscribed on the UNESCO World Heritage List².

¹ H. Alamsyah, P. Nugraheni, M. Prabowo, E. Andriani, *The dark side of cultural heritage protection*, "Journal of Private and Commercial Law" 2022, Vol. 6, No. 1, pp. 21–40.

² On 11 October 2022 Ukraine made official the candidacy of the historic centre of Odesa for inscription on UNESCO's World Heritage List. This inscription was made on 25 January 2023. *Odesa inscribed on UNESCO's World Heritage List in the face of threats of destruction*, UNESCO, 25 January 2023, <https://www.unesco.org/en/articles/odesa-inscribed-unescos-world-heritage-list-face-threats-destruction> (accessed 25.01.2023). Receiving the application, Audrey Azoulay, the UNESCO's Director General, stressed that "this initiative marks confidence in UNESCO's protection mechanisms". *At UNESCO, President Zelensky officially announces Odesa's candidacy to receive World Heritage status*, UNESCO, 11 October 2022, <https://www.unesco.org/en/articles/unesco-president-zelensky-officially-announces-odesas-candidacy-receive-world-heritage-status?hub=66116> (accessed 20.12.2022). As indicated by the Organization: "The inscription of the

The international protection of cultural heritage, which has evolved significantly in recent decades, is now deeply linked to the human rights protection system. The opinion can be found that the protection of cultural heritage is an element of protection of human dignity or “an important element of the promotion and protection of all human rights”³.

Undoubtedly, the establishment of the ICC, and in particular the recognition by the international community of the deliberate destruction of cultural property as a war crime, is of significant importance for the effectiveness of the protection of cultural property. The authors of the ICC Statute were guided, *inter alia*, by the assumption that “all peoples are united by common bonds, their cultures pieced together in a shared heritage”. In order not to shatter “this delicate mosaic”, it was assumed that persons guilty of, *inter alia*, crimes against cultural property should bear criminal responsibility⁴.

UNESCO is a global leader in the field of cultural heritage protection at the level of international law. This organization particularly benefits from its specialist knowledge and many years of experience in this field. It seems, therefore, that the cooperation of these two institutions should significantly increase the effectiveness of the protection of cultural property during armed conflicts.

historic centre of Odesa on the World Heritage List would recognize the exceptional universal value of this site and the duty of humanity as a whole to protect it. In legal terms, it would establish an extended protection zone under the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage [1037 UNTS 151]. Indeed, under the Convention, ratified by both Ukraine and Russia, signatories undertake to assist in the protection of listed sites. They are furthermore obliged to refrain from taking any deliberate measures which might directly or indirectly damage World Heritage sites. Inscription on the List of World Heritage in Danger would moreover open access to emergency international assistance mechanisms, both technical and financial, to strengthen the protection of the property and help its rehabilitation”. *Ibidem*. There are 8 – including the historic centre of Odesa – properties inscribed on the UNESCO’s World Heritage List in Ukraine. *World Heritage Convention: States Parties: Ukraine*, UNESCO, <https://whc.unesco.org/en/statesparties/ua/> (accessed 25.01.2023). Organization emphasized that “as of 17 October [2022], UNESCO has verified damage to 204 sites since 24 February [2022] – 87 religious sites, 13 museums, 38 historic buildings, 38 buildings dedicated to cultural activities, 18 monuments, 10 libraries”. *Damaged cultural sites in Ukraine verified by UNESCO*, UNESCO, 18 October 2022, <https://www.unesco.org/en/articles/damaged-cultural-sites-ukraine-verified-unesco?hub=66116> (accessed 20.12.2022). Audrey Azoulay, the UNESCO’s Director General, emphasized that “Odesa, a free city, a world city, a legendary port that has left its mark on cinema, literature and the arts, is thus placed under the reinforced protection of the international community. While the war continues, this inscription embodies our collective determination to ensure that this city, which has always surmounted global upheavals, is preserved from further destruction”. *Odesa inscribed on UNESCO’s World Heritage List...*

³ See K. Wierczyńska, A. Jakubowski, *Zbrodnie przeciwko dziedzictwu kulturowemu przed Międzynarodowym Trybunałem Karnym – analiza krytyczna*, “Studia Prawnicze” 2016, Vol. 1(205), pp. 39–62.

⁴ Preamble to the Rome Statute of the International Criminal Court, 17 July 1998 (2187 UNTS 3).

The aim of this paper is, therefore, to answer the question of the extent to which the cooperation between the ICC and UNESCO may affect the protection of cultural property during armed conflicts. In order to answer this question, it is necessary to analyse the scope of protection of cultural property by the ICC and UNESCO and the legal basis for cooperation between these institutions.

The above goal was achieved mainly using two research methods: legal-dogmatic method and comparative method. The first of them discusses the provisions of international agreements in the field of protection of cultural property during armed conflicts, while the second one was used to compare the scope of ICC and UNESCO competences in the field of protection of cultural property within the scope specified above.

2. THE SCOPE OF PROTECTION OF CULTURAL PROPERTY BY ICC

The ICC is not the first court to deal with crimes against cultural property. The first such proceedings took place before the International Military Tribunal (Nürnberg Tribunal). Its jurisdiction in the area of war crimes concerning the destruction of cultural property is based on Art. 6(b) of the Charter of the Nürnberg Tribunal of 1945, which states that: "Such violations shall include, but not be limited to (...) plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity"⁵. The Tribunal, in accordance with its Statute (Charter), recognized crimes against cultural property as war crimes. In this context, it also referred to crimes against humanity. It emphasized that the persecution of the Jewish population, which in principle was classified in this way, manifested itself in a special way also in the destruction of synagogues⁶.

Nearly 50 years later two *ad hoc* tribunals were established, namely the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Interna-

⁵ Charter of the International Military Tribunal is an attachment and forms an integral part of the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis of 1945 (82 UNTS 279). Art. 6(b) of the Charter was used to sentence *inter alia* Alfred Rosenberg – tried for theft of property and destruction of cultural property and heritage of conquered countries. S. Strykowska, *Problematyka ochrony dziedzictwa kulturowego w działalności międzynarodowych trybunałów karnych*, "Przegląd Prawniczy Uniwersytetu im Adama Mickiewicza" 2016, Vol. 6, p. 213. On the Nuremberg Tribunal see also K. Karski, *Realizacja idei utworzenia międzynarodowego sądownictwa karnego*, "Państwo i Prawo" 1993, No. 7, pp. 68–70.

⁶ Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946, Nuremberg 1947, p. 302. See more in S. Strykowska, *op. cit.*, pp. 222–223.

tional Criminal Tribunal for Rwanda (ICTR). The Statute of the latter does not envisage criminal liability of an individual for crimes against cultural property⁷. However, in case of ICTY, the attempts to penalize the perpetrators of the destruction of cultural assets which occurred during the Yugoslavian conflict were based on Art. 2(d) of its Statute, which stipulated that: “The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (...) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”, and Art. 3(d) of the Statute of ICTY stating that: “The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to: (...) 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”⁸. In the light of the provisions of the statute, these actions should be classified as a war crime⁹.

The jurisprudence of the ICTY, in particular the judgments in the Jokic and Strugar cases, are recognized as milestones in the history of the protection of cultural heritage¹⁰ during armed conflict¹¹. First of all, it confirmed the customary nature of states’ obligations to protect the world heritage of humanity during armed conflicts¹² and the state’s duty to judge and punish the perpetrators of the destruction of protected objects. Destruction of cultural heritage objects has been considered as a war crime (*actus reus*), provided that these objects were not used for military purposes. Moreover, when assessing the intention to commit the crime (*mens rea*), the Tribunal indicated that it may be both direct and indirect intention, while excluding negligence. It was also emphasized that in cases where the perpetrator intends to discriminate against a specific group, such a crime could be viewed in terms of persecution as a crime against humanity. When analyzing the crime of genocide, the Yugoslav tribunal stressed that “the physical destruction of a group is the most obvious method, but one may also conceive

⁷ Statute of the ICTR of 1994 (S/RES/955, as amended), <https://unictr.irmct.org/en/documents> (accessed 20.12.2022).

⁸ Statute of the ICTY of 1993 (S/RES/808, as amended), <https://www.icty.org/en/documents/statute-tribunal> (accessed 20.12.2022).

⁹ See more in S. Strykowska, *op. cit.*, p. 214. On the correlation between genocide and the destruction of the cultural heritage of nations see e.g. K. Karski, *The crime of genocide committed against the Poles by the USSR before and during World War II: An international legal study*, “Case Western Reserve Journal of International Law” 2013, Vol. 45, No. 3, pp. 713, 728, 730.

¹⁰ K. Wierczyńska, A. Jakubowski, *op. cit.*, p. 55; M.S. Ellis, *The ICC’s role in combating the destruction of cultural heritage*, “Case Western Reserve Journal of International Law” 2017, Vol. 49, pp. 41–52.

¹¹ Applies both to international armed conflicts and to conflicts of different nature.

¹² Applies both to international armed conflicts and to conflicts of different nature.

of destroying a group through purposeful eradication of its culture and identity resulting in the eventual extinction of the group as an entity distinct from the remainder of the community”¹³.

The International Criminal Court (ICC) is the first permanent court with jurisdiction over crimes against cultural property. In the light of the provisions of its Statute, such crimes, as in the case of the ICTY Statute, were classified as war crimes. Pursuant to Art. 8(2)(b)(ix) and Art. 8(2)(e)(iv), which apply to international and non-international conflicts as appropriate, these acts concern deliberately targeting buildings intended for religious, educational, artistic, scientific or charitable purposes, historical monuments, hospitals and sites where the wounded and sick are gathered, provided they are not military targets. The Court has jurisdiction over war crimes, in particular those committed under a plan or policy, or when such crimes are committed on a large scale. This approach to the criteria for the protection of cultural heritage sites is a reflection of the provisions of Art. 27 of the Hague Regulations of 1907. The final version of the ICC Statute contains a much narrower scope of protection of cultural property than was considered by the Preparatory Committee in 1996. The list originally included such objects as: “clearly recognized historic monuments, works of art, or places of worship; constituting the cultural and spiritual heritage of peoples; specially protected under the aegis of international organizations; resulting in extensive destruction from the attack; and not used by an adverse party as part of its military effort and not within the immediate proximity of its military objectives”¹⁴.

The Elements of Crimes, which are a helpful tool for the ICC in the interpretation and application of the provisions of the Statute, indicate that in order to be able to classify the acts listed in Art. 8(2)(b)(ix) and Art. 8(2)(e)(iv) as war crimes it should be ascertained whether the perpetrator directed an attack and was aware of factual circumstances that established the existence of an armed conflict. It is irrelevant here if the consequence of committing such an act concerned the destruction of one or a few buildings¹⁵.

In 2021, the ICC Prosecutor, Fatou Bensouda, published internal document entitled “Policy on Cultural Heritage: Cultural heritage is the repository of the human experience throughout the ages. To protect it, is to pay homage to the basic fabric of civilisation and civilizational practice” (hereinafter Policy on Cultural Heritage). It states that Art. 8(2)(b)(ix) and Art. 8(2)(e)(iv) prohibit intentionally

¹³ Prosecutor v. Radislav Krstić, ICTY Case No. IT-98-33-T, Judgement of 2 August 2001, para 574. See more in Ch. Altafin, *Economic, social and cultural rights of civilians in contexts of armed conflict and occupation: An international law perspective*, Florence 2015, p. 128.

¹⁴ See S. Mathias, *Prosecuting crimes against culture: The contributions of the Al-Mahdi and Ntaganda cases to the ICC approach to cultural property protections*, “Emory International Law Review Recent Developments” 2021, pp. 63–68.

¹⁵ The Elements of Crimes of the ICC, 3-10 September 2002, United Nations Publication, Sales No. E.03.V.2 and corrigendum, pp. 15, 25, <https://www.icc-cpi.int/Publications/Elements-of-Crimes.pdf> (accessed 20.12.2022).

directing attacks during an armed conflict at determined types of buildings and monuments which fit the definition of “cultural property”. Considering that the concept of cultural property covers only tangible aspects of human culture, these provisions reflect only part of the protection that can be afforded to cultural heritage by the list of crimes set out in the Statute, in accordance with the assumptions of the Policy on Cultural Heritage. Therefore, “the Office broadly construes the term “cultural heritage” to extend beyond cultural property and to incorporate both products and processes”¹⁶.

The analysis of the achievements of the above-mentioned tribunals shows that crimes against cultural property are very common, but rarely tried before international courts. The ICC is no exception. During the two decades of the Court’s operation, it has managed to draw its attention to crimes against cultural property only on a few occasions. These were the cases of Bosco Ntaganda, Former Deputy Chief of the Staff and commander of operations of the Patriotic Forces for the Liberation of Congo¹⁷, Al Hassan Ag Abdoul Aziz, alleged member of Ansar Eddine and de facto chief of Islamic police¹⁸, and Ahmad al-Faqi al-Mahdi, alleged member of Ansar Eddine, a movement associated with Al Qaeda in the

¹⁶ In particular, the Office understands cultural heritage “as including monuments, religious or secular (such as architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings, and other combinations of features of cultural value); buildings or groups of buildings which are of cultural value, either because of their architecture, homogeneity or place in the landscape, or because of their content, in the case of museums, archives or libraries; sites (manmade works) and movable objects (such as works of art, sculpture, collections, manuscripts, books, records or other movable property of cultural value); underwater cultural heritage, including shipwrecks and underwater archaeological sites; intangible cultural heritage (such as the practices, representations, expressions, knowledge and skills that communities, groups, and, in some cases, individuals, recognise as part of their cultural heritage, together with the instruments, objects, artefacts, and cultural spaces associated therewith); and natural heritage (natural sites of cultural value, including certain natural or cultivated landscapes and physical, biological, or geological formations)”. Policy on Cultural Heritage: “Cultural heritage is the repository of the human experience throughout the ages. To protect it, is to pay homage to the basic fabric of civilisation and civilizational practice”, ICC, June 2021, para 16, pp. 7–8. This document was published by ICC Prosecutor, Fatou Bensouda, on 14.06.2021, i.e. on the last day of her term of the office. It could be regarded as a sort of a testament which was supposed to demonstrate the importance to her of these issues. Her successor, Karim Khan, announced the revision of policy papers adopted by his predecessor, thus the official position of the Office of ICC Prosecutor in this respect has not been finalised yet. See also ICC Prosecutor, Fatou Bensouda, publishes Policy on Cultural Heritage: “Cultural heritage is the repository of the human experience throughout the ages. To protect it, is to pay homage to the basic fabric of civilisation and civilizational practice”, ICC Press Release, ICC-OTP-20210614-PR1595, 14 June 2021, <https://www.icc-cpi.int/news/icc-prosecutor-fatou-bensouda-publishes-policy-cultural-heritage-cultural-heritage-repository> (accessed 20.12.2022).

¹⁷ Ntaganda Case: The Prosecutor v. Bosco Ntaganda: ICC-01/04-02/06, <https://www.icc-cpi.int/drc/ntaganda> (accessed 20.12.2022).

¹⁸ Al Hassan Case: The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud: ICC-01/12-01/18, <https://www.icc-cpi.int/mali/al-hassan> (accessed 20.12.2022). The verdict in this

Islamic Maghreb¹⁹. The case of alMahdi is extremely important as it is the only case so far in which the charges were formulated on the basis of a violation of only one provision of the ICC Statute. He was found guilty as a co-perpetrator of the war crime consisting in intentionally directing attacks against religious and historic buildings in Timbuktu in June and July 2012 and sentenced to nine years' imprisonment²⁰. Ahmad al-Faqi al-Mahdi was involved in the destruction of nine mausoleums and the doors of the Timbuktu mosque. These properties, with the exception of one, were on the UNESCO World Heritage List.

3. THE SCOPE OF PROTECTION OF CULTURAL PROPERTY BY UNESCO

UNESCO started operating on 4 November 1946. Its main purpose is “to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms”²¹.

In the light of international law, in particular international humanitarian law, cultural property is protected during an armed conflict on the basis of several legal instruments. UNESCO played an important role in the adoption of most of them.

The first one, mentioned earlier, is the Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land. Art. 27 of the Regulations lists protected facilities with the proviso that the obligation of such protection may be performed by the state “as far as possible”. Finally, Art. 56 of the Regulations provides for criminal liability for any seizure, destruction or wilful desecration of historical monuments, works of art and science²². Although the Convention did not create a uniform system for the protection of cultural property, it was certainly a significant step towards creating such a system.

case hasn't been issued yet. The list of accusations includes, among others, intentionally directing attacks against buildings dedicated to religion and historic monuments.

¹⁹ Al Mahdi Case: The Prosecutor v. Ahmad Al Faqi Al Mahdi: ICC-01/12-01/15, <https://www.icc-cpi.int/mali/al-mahdi> (accessed 20.12.2022).

²⁰ *Ibidem*. See more in A. Herman, *Timbuktu, international criminal law and cultural heritage protection*, “Art Antiquity and Law” 2018, Vol. 23, issue 1, pp. 61–68.

²¹ Art. I of the Constitution of the United Nations Educational, Scientific, and Cultural Organization, 16 November 1945, London (4 UNTS 275).

²² Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907, <https://ihl-databases.icrc.org/ihl/INTRO/195> (accessed 20.12.2022).

The need to ensure the full protection of cultural property was recognised by the Assembly of the League of Nations but World War II interrupted the work of experts on the relevant draft document²³. It was not until 14 May 1954 that the Convention for the Protection of Cultural Property in the Event of Armed Conflict (hereinafter the Hague Convention of 1954) was signed, followed by the Second Protocol to the Hague Convention of 1954 in 1999. The Convention was adopted at the General Conference of the UNESCO, which should undoubtedly be regarded as a significant achievement of this specialised organization²⁴.

The Hague Convention of 1954 imposes on States Parties a number of obligations in the field of protection of cultural property, including a duty of care and respect for it. It also obliges states to take appropriate steps to prosecute, try and punish perpetrators of crimes against cultural property²⁵. It should be stressed that the legal regime of the Hague Convention of 1954 was supplemented and reinforced by the provisions of Protocols Additional to Geneva Conventions of 12 August 1949 related to the protection of the victims of armed conflicts²⁶.

From UNESCO's perspective, Art. 23(1) of the Hague Convention of 1954 should be highlighted, under which the States Parties "may call upon the United Nations Educational, Scientific and Cultural Organization for technical assistance in organizing the protection of their cultural property, or in connexion with any other problem arising out of the application of the Convention or the Regulations for its execution"²⁷.

Specific attention should be also drawn to the Second Protocol to the Hague Convention of 1954. In its Art. 15 – which was an innovation – definitions of five international crimes related to the protection of cultural property were formulated. Moreover, pursuant to Art. 16 of the Protocol, for acts such as targeting cultural property under enhanced protection, using such cultural property to sup-

²³ For more information on the actions of international community for establishing of legally binding instruments for protection of cultural property during armed conflicts before the World War II, see K. Prażmowska, *Sprawa Al Mahdiego przed Międzynarodowym Trybunałem Karnym: Przelomowy wyrok czy stracona szansa*, "Studia Prawnicze KUL" 2019, No. 2(78), p. 302.

²⁴ H. Schreiber, *Konwencja o ochronie dóbr kulturalnych w razie konfliktu zbrojnego wraz z Regulaminem wykonawczym do tej Konwencji oraz Protokół o ochronie dóbr kulturalnych w razie konfliktu zbrojnego, podpisane w Hadze dnia 14 maja 1954 r.* (Dz. U. z 1957 r. Nr 46, poz. 212, załącznik): *Wprowadzenie – zarys historii idei ochrony dóbr kultury w konfliktach zbrojnych*, (in:) E. Zalasńska (ed.), *Konwencje UNESCO w dziedzinie kultury. Komentarz*, Warszawa 2014, pp. 19–31.

²⁵ Art. 28 of Convention for the Protection of Cultural Property in the Event of Armed Conflict, 7 August 1954 (249 UNTS 240). See more in K. Prażmowska, *op. cit.*, pp. 302–303.

²⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 (1125 UNTS 3); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977 (1125 UNTS 609).

²⁷ Art. 23 of Convention for the Protection of Cultural Property in the Event of Armed Conflict.

port military operations, causing extensive damage, the States Parties are obliged to exercise universal jurisdiction in respect of the perpetrators of these crimes²⁸.

Another instrument important for the protection of cultural property is the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property adopted during the General Conference of the United Nations Educational, Scientific and Cultural Organization in Paris in 1970 (hereinafter UNESCO Convention of 1970)²⁹. Certainly, the achievements of the Convention include the creation of foundations for international cooperation and controlling the flow of cultural property³⁰. This document sets the standard of protection, and thus has an impact on domestic law and the adoption of specific solutions in the individual legal systems of states that are the parties to the Convention³¹.

As in the case of the Hague Convention of 1954, the 1970 UNESCO Convention emphasizes the role of UNESCO in the protection of cultural property. In the case of the latter, the discussed scope of competences is much wider. Pursuant to Art. 17(5) of the Convention, UNESCO may, *inter alia*, call for the cooperation of any competent non-governmental organization or "at the request of at least two States Parties to the Convention which are engaged in a dispute over its implementation, UNESCO may extend its good offices to reach a settlement between them".

It is worth noting that the international community has not managed to develop a universal definition of cultural property. This means that each of the legal documents discussed above uses its own definition of protected assets.

UNESCO is also taking action during the ongoing Russian-Ukrainian war in Ukraine. It reports that: "Since the beginning of the war, UNESCO has been deploying emergency measures for Ukraine under its mandate for education, culture, science, information and communication. It has already raised more than \$18 million for this purpose, which has included the delivery of equipment to secure museums and outdoor artworks, the distribution with Google of 50,000 computers to Ukrainian teachers, and the provision of more than 600 sets of bullet-proof vests and helmets for the protection of journalists on the ground. In recent weeks, UNESCO has stepped up its support to Odesa in three ways: 1. Funding to repair the damage inflicted on the Odesa Museum of Fine Arts and the Odesa Museum of Modern Art (since the beginning of the war). UNE-

²⁸ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999 (2253 UNTS 172). See K. Prażmowska, *op. cit.*, p. 303.

²⁹ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970 (823 UNTS 231).

³⁰ See W. Stankiewicz, *Rola UNESCO w ochronie dóbr kultury i zasobów przyrodniczych*, "Przegląd Politologiczny" 2012, No. 1, pp.145–160.

³¹ K. Żalasińska, *Konwencja UNESCO z roku 1970*, "Cenne, Bezценne, Utracone" 2015, No. 1–2(82–83), p. 99.

SCO will also cover the cost of hiring additional staff to protect their collections. 2. Support for the digitization of at least 1,000 works of art in Odesa and of documentary collection at the Odesa State Archives by providing the necessary technical equipment. 3. The delivery of new equipment to the Odesa regional administration for the *in situ* protection of cultural properties: protective panels, sandbags, fire extinguishers, fireproof fabrics and gas masks to the Department of Culture, Religion and Protection of Architectural Heritage. They will enable the protection of monuments and sculptures in public spaces, which has been ongoing since the beginning of the war, to continue”³².

4. LEGAL GROUNDS OF COOPERATION BETWEEN THE ICC AND UNESCO

On the surface it may appear that both the ICC and UNESCO are dependent on the United Nations. In fact, this is not the case and their legal status is precisely defined in international law.

The ICC was established on the basis of the Rome Statute of the International Criminal Court that entered into force on 2 July 2002. On that day, a new institution of an exceptional nature began operating in the international arena. This consists, *inter alia*, in granting the Court, pursuant to Art. 4 para 1 of the ICC Statute, international legal personality and legal capacity to the extent necessary to perform its functions and objectives. The statement used in Art. 4 para 1 of the ICC Statute, regarding international legal personality, should be understood as granting the Court a legal personality in the sphere of international law. As Milik points out, despite the divergences of views on such reasoning existing in the doctrine of international law, the inclusion directly in the Statute of the provision granting the Court a legal personality (subjectivity) confirms the intentions of the founders of the Court, concerning the creation of an autonomous and independent International Criminal Court³³.

The independence of the ICC from other entities of international law is confirmed by the provisions of the Statute, which authorise it to conclude international agreements with third countries. Doubts could arise only in the case of the

³² *At UNESCO...*, *op. cit.* See also T. Korotkyi, Y. Savchenko, N. Hendel, *Vyklyky ta zahrozy dlia kulturnoi spadshchyny Ukrainy v umovakh ahresii rf proty Ukrainy* [Challenges and threats to Ukraine's cultural heritage in the context of Russia's armed aggression], "Ukrainian Journal of International Law" 2022, No. 4, pp. 54–65; O. Malyshev, *Protection of cultural heritage on the occupied territories of Ukraine*, "Law of Ukraine" 2020, No. 11, pp. 110–126.

³³ Not all representatives of the doctrine of international law share this position. Cf. P. Milik, *Międzynarodowa osobowość prawna i zdolność prawna Międzynarodowego Trybunału Karnego*, "Państwo i Prawo" 2003, No. 9, p. 74.

manner of regulating the relations between the Court and the United Nations, since such an agreement is approved by the Assembly of States Parties to the ICC Statute and then concluded by the President of the Court on its behalf³⁴.

The authors of the Statute, in the text concerning international cooperation and legal assistance, defined its scope and principles in a very detailed manner. Although their intention was to create a new, specific form of cooperation between the state and the International Criminal Court³⁵, the subjective scope of such cooperation is not limited only to the States Parties to the Statute. The Court may request legal aid from a State that is not party to the Statute on the basis of an *ad hoc* agreement, a contract with that State or on any other appropriate grounds³⁶. In addition, the Court may request an intergovernmental organisation to provide information, documents or request other forms of cooperation and assistance that may be agreed with that organisation and which are consistent with its competences and mandate³⁷. For example, the Agreement on cooperation and assistance was concluded on these grounds between the International Criminal Court and the European Union in 2006³⁸.

The Court can exercise its jurisdiction when information about (a) suspected crime(s) is presented to the ICC Prosecutor by the state party or by the UN Security Council. The Prosecutor may also initiate preliminary proceedings related to such a crime. Pursuant to Art. 15 of the Statute, the Prosecutor may, *proprio motu*, make a preliminary examination of the case on the basis of information on crimes within the jurisdiction of the Court. In order to verify the credibility of the received information, the Prosecutor may request additional information from states, UN bodies, intergovernmental or non-governmental organizations and other credible sources which he deems appropriate.

In the 2021 Policy on Cultural Heritage, the ICC Prosecutor stressed that “cooperation is a fundamental component of the Rome Statute system” and “no actor is able effectively to fight impunity alone”³⁹. Clearly, the ICC benefits from this type of cooperation as “often prior to the Court’s engagement in a situation,

³⁴ *Ibidem*.

³⁵ E. Zielińska, *Wstęp*, (in:) E. Zielińska (ed.) *Międzynarodowy Trybunał Karny. USA i UE: Dwa różne podejścia*, Warszawa 2004, p. 10. See also K. Karski, K. Myszon-Kostrzewa, *Polityka zagraniczna administracji George’a W. Busha w świetle raportu Zgromadzenia Parlamentarnego Rady Europy “Stany Zjednoczone Ameryki a prawo międzynarodowe” z 2007 r. Spojrzenie z perspektywy 2012 r.*, (in:) R.M. Czarny, K. Spryszak (eds.), *Państwo i prawo wobec współczesnych wyzwań. Księga jubileuszowa Profesora Jerzego Jaskierni*. Vol. 5. *Integracja europejska i stosunki międzynarodowe*, Toruń 2012, pp. 841–844; K. Zombory, *The protection of cultural heritage in international law*, (in:) A. Raisz (ed.), *International law from a Central European perspective*, Miskolc-Budapest 2022, pp. 246–247.

³⁶ Art. 87(5) of the Rome Statute of the ICC.

³⁷ Art. 87(6) of the Rome Statute of the ICC.

³⁸ Agreement between the International Criminal Court and the European Union on cooperation and assistance, 10 April 2006, Luxembourg (OJ L 115, 28.4.2006, pp. 50–56).

³⁹ Policy on Cultural Heritage, *op. cit.*, p. 41.

early responders such as UN bodies, peacekeeping and humanitarian personnel, non-governmental organisations and the media, deploy into areas where international crimes, including those against or affecting cultural heritage, have been committed⁴⁰.

Furthermore, UNESCO is one of the specialised UN agencies established pursuant to Art. 57 of the UN Charter. In accordance with its provisions, specialised agencies should meet three criteria, namely: 1. be established on the basis of agreements concluded between governments, 2. have broad competences in the economic, social, cultural, educational, health and related areas, defined in their basic acts, and 3. be related to the UN in accordance with the provisions of Art. 63 of the UN Charter. The last requirement concerns the conclusion of the agreement between the Economic and Social Council and the organizations mentioned in Art. 57 setting out the conditions under which this institution is to be associated with the UN⁴¹.

The treaty on cooperation between UNESCO and UN (hereinafter the Treaty) was adopted at the first session of the General Conference of UNESCO. The Treaty came into force on 14 December 1946 following its approval by the UN General Assembly. Pursuant to Art. X of UNESCO's Constitution the agreement between UN and UNESCO creates the grounds for effective cooperation between these two organisations in pursuing their common goals. At the same time, it recognises the autonomy of UNESCO in the area of competences defined in the founding act of that organisation⁴².

The primary areas of activity, the principles and means used to implement them, and the method of internal organisation of UNESCO were defined in the Constitution of the UNESCO. Pursuant to the provisions of Art. I, UNESCO will, *inter alia*, "maintain, increase and diffuse knowledge by assuring the conservation and protection of the world's inheritance of books, works of art and monuments of history and science, and recommending to the nations concerned the necessary international conventions"⁴³. In order for UNESCO to perform its tasks effectively, its statute provides for the possibility of cooperation with other specialised intergovernmental organisations and institutions whose interests and activities are related to its goals. To this end, the Executive Council empowers the Director General to establish effective day-to-day cooperation with such organi-

⁴⁰ *Ibidem*.

⁴¹ Pursuant to Art. 63(2) and Art. 64 of the Charter of the United Nations (1 UNTS XVI), the Economic and Social Council may coordinate its activities with the specialized agencies through consultation with and recommendations to such agencies and should be receiving regular reports from this type of agencies.

⁴² *Układ między Organizacją Narodów Zjednoczonych a Organizacją Narodów Zjednoczonych do spraw Oświaty, Nauki i Kultury*, (in:) S. Hubert (ed.), *Zbiór statutów i regulaminów organizacji międzynarodowych*. Vol. II. *Organizacje wyspecjalizowane ONZ*, Warszawa 1966.

⁴³ Art. I(2)(c) of the UNESCO Constitution.

zations and institutions and to establish joint committees as may be necessary to ensure effective cooperation⁴⁴.

An example of such cooperation concerns the preparation of the international agreement with the ICC, namely the Draft Framework Agreement Between UNESCO and the International Criminal Court, Acting in Relation to the Trust Fund for Victims of 10 September 2021. Currently, “the Court and UNESCO are also in the process of concluding a Court-wide co-operation agreement”⁴⁵. First of all, it will focus on “drawing upon UNESCO’s mandate for the protection, conservation, and promotion of cultural heritage affected by conflicts and intentional destruction and the Court’s mandate under the Rome Statute, to co-operate to work towards ending impunity for the commission of crimes against cultural property, including any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property, and thus contributing to their prevention, within their respective mandates”⁴⁶. Secondly, the agreement will aim at “establishing close relations between the ICC and UNESCO in order to enhance cooperation and encourage the exchange of knowledge, experience and expertise”⁴⁷. Thirdly, provisions of the Agreement will allow the ICC and UNESCO to co-operate closely and consult each other on matters of mutual interest⁴⁸.

It should be stressed that both the Statute of the ICC and the UNESCO Constitution do not establish an obligation to undertake the cooperation in question but provide organisations with such an option. Therefore, initiating this type of cooperation will always depend on the willingness of the ICC and UNESCO to do so.

5. IMPORTANCE OF COOPERATION BETWEEN THE ICC AND UNESCO FOR THE PROTECTION OF CULTURAL PROPERTY

The dynamic development of international treaty and customary norms, the law-making activity of international organisations, and the international jurisprudence of international courts in the field of protection of cultural property confirms the determination of the international community to combat the impunity of persons responsible for serious breaches of international obligations in this area⁴⁹. Undoubtedly, the ICC is at present the only permanent institution with the power to prosecute the perpetrators of crimes against cultural property. However,

⁴⁴ Art. XI of the UNESCO Constitution.

⁴⁵ Policy on Cultural Heritage, *op. cit.*, p. 43.

⁴⁶ *Ibidem*.

⁴⁷ *Ibidem*.

⁴⁸ *Ibidem*.

⁴⁹ K. Wierczyńska, A. Jakubowski, *op.cit.*, s. 46.

despite the Court's powers being broadly guaranteed in the statute within the discussed scope, practice shows that its effectiveness would be greatly reduced without cooperation with UNESCO.

As mentioned before, the ICC has twice already managed to bring perpetrators to justice in the area of protection of cultural property, in the cases of Al Mahdi and Katanga (the judgment in the third case, that of Al Hassan Ag Abdoul Aziz, has not yet been reached). UNESCO played the most important role in the case of the first of these cases.

It is essential to stress that it was the alert by UNESCO about the destruction of Mali's cultural heritage that contributed to the initiation of the proceedings before the ICC. In addition, during the proceedings regarding the destruction of Timbuktu's monuments inscribed on the UNESCO World Heritage List, UNESCO provided the ICC with the necessary expert knowledge. "UNESCO cooperated with the ICC between January 2013 and October 2015"⁵⁰. During several working sessions UNESCO provided the ICC with critical photographic and cartographic documentation pertaining to the destruction of cultural heritage in Timbuktu. In June 2013, UNESCO organised an international mission to assess damage to cultural heritage in Timbuktu, in which representatives of the ICC participated.

On 17 August 2017, the Chamber issued the Order on Reparations in the case of Al Mahdi, concluding that he was liable for 2.7 million EUR in reparations to the community of Timbuktu⁵¹. This decision of the Court is particularly important as the ICC has never before awarded redress to victims of crimes against cultural heritage. It is also notable that the Court aimed to address all types of harm suffered by the victims through its awards of individual, collective, and symbolic reparations. Moreover, UNESCO itself did not submit any application for reparation and stated that "local communities (...) have been the principal victims"⁵². Despite this, the ICC awarded symbolic compensation of 1 Euro to the Government of Mali and to UNESCO for harm to the Mali people and the international community⁵³.

⁵⁰ UNESCO Amicus Curiae Observations submitted pursuant to Rule 103 of the Rules of Procedure and Evidence, 2 December 2016, ICC-01/12-01/15-194, para 13, <https://www.legal-tools.org/doc/1de7b7/pdf> (accessed 20.12.2022).

⁵¹ Al Mahdi Case: ICC Trial Chamber VIII issues reparations order, ICC Press Release, 17 August 2017, ICC-CPI-20170817-PR1329, <https://www.icc-cpi.int/pages/item.aspx?name=pr1329> (accessed 20.12.2022).

⁵² Reparations Order, Case of the Prosecutor v. Ahmad Al Faqi Al Mahdi, No. ICC-01/12-01/15, para 52. See more in M. Lostal, *Implementing reparations in the Al Mahdi case: A story of monumental challenges in Timbuktu*, "Journal of International Criminal Justice" 2021, Vol. 19, issue 4, pp. 831–853. See also M. Lostal, *International cultural heritage law in armed conflict: Case studies of Syria, Libya, Mali, the invasion of Iraq, and the Buddhas of Bamiyan*, Cambridge 2017.

⁵³ Mali and UNESCO to receive a "symbolic euro" in token reparation for the heritage of Timbuktu, ICC Press Release: 29 March 2021, <https://en.unesco.org/news/mali-and-unesco-receive-symbolic-euro-token-reparation-heritage-timbuktu> (accessed 20.12.2022).

The ICC requested that the Trust Fund for Victims (hereinafter “TFV”) implement the reparation order and complement the reparation measures through assistance programmes. On 30 June 2020, the TFV therefore decided to grant an amount of 427,069 EUR to UNESCO for the implementation of the project “Collective Reparation Programme in the form of Rehabilitation and Maintenance of Protected Buildings, Timbuktu, Situation in Mali, Al Mahdi Case”⁵⁴. In order to undertake steps to strengthen the protection of cultural heritage in Timbuktu and to compensate the victims of the crimes against cultural heritage, the Director General of the UNESCO submitted to its Executive Board a draft Framework Agreement between UNESCO and the International Criminal Court, acting in relation to the Trust Fund for Victims, in accordance with Art. XI(1) of the Constitution of UNESCO. An agreement is to be concluded in order to implement the project “Rehabilitation and valorization of protected buildings in Timbuktu”.

In addition, at this stage of the proceedings, i.e. in the reparations stage, UNESCO appeared before ICC as *amicus curiae*. UNESCO expressed its willingness to submit comments in the proceedings pursuant to Rule 103(1) of the Rules of Procedure and Evidence, according to which “at any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate”⁵⁵. On 31 October 2016 the Chamber approved UNESCO’s request to present observations as *amicus curiae*. UNESCO made “observations on reparations related issues, in particular on the importance of international cultural heritage generally and the harm caused to the international community by the crime Mr Al Mahdi was convicted of”⁵⁶.

Cooperation between the ICC and UNESCO did not end with the conviction of Al Mahdi. On the contrary, the case of the destruction of Timbuktu’s monuments contributed to its reinforcement. This was reflected by signing a letter of intent by the UNESCO Director General and the ICC Prosecutor on 6 November 2017, formalising the cooperation of these two institutions in the field of cultural protection during armed conflicts. As noted by Bokova, strengthening cooperation for the protection of cultural property during armed conflicts is a humani-

⁵⁴ Draft Framework Agreement between UNESCO and the International Criminal Court, acting in relation to the Trust Fund for Victims, submitted to the Executive Board on 10 September 2021, UNESCO Doc. 212 EX/41, <https://unesdoc.unesco.org/ark:/48223/pf00000378781> (accessed 20.12.2022).

⁵⁵ Rule 103 (“Amicus curiae and other forms of submission”) of the Rules of Procedure and Evidence of the ICC, <https://www.icc-cpi.int/sites/default/files/Publications/Rules-of-Procedure-and-Evidence.pdf> (accessed 20.12.2022).

⁵⁶ Decision on Application by the United Nations Educational, Scientific and Cultural Organization (‘UNESCO’) to Submit Amicus Curiae Observations from 31 October 2016, No. ICC-01/12-01/15, para 3, https://www.icc-cpi.int/CourtRecords/CR2016_24735.PDF (accessed 20.12.2022).

tarian and security imperative⁵⁷. Given that cooperation in the Mahdi case also took place at a non-operational level, for example through participation in the new ICC Prosecutor's Office political initiative on cultural heritage, both sides expressed their hope of concluding a comprehensive cooperation agreement in the near future.

6. CONCLUSION

Intentional destruction and theft of cultural property during armed conflicts are now prohibited by international law. In the light of international regulations, deliberate attacks against cultural heritage, both during international and non-international armed conflicts, may constitute serious violations of the norms of humanitarian law, and their perpetrators should be tried and punished.

On a global scale, UNESCO is the entity most empowered to undertake actions for the protection of cultural property, both in international and non-international armed conflicts. It is not, however, a judicial authority and therefore its role is not to achieve justice. Since 2002, the ICC has been such a body, and the scope of its jurisdiction covers crimes against cultural property, classified as war crimes. Undoubtedly, states should be the most effective players in prosecuting and punishing perpetrators of such crimes. The ICC, on the other hand, works on a complementary basis in relation to the shortcomings of the domestic criminal jurisdiction. The effectiveness of the Court is also limited due to the fact that only a small number of states are parties to the ICC's statute. However, despite frequent criticism of the functioning of the ICC, the importance of its activity in the field of proceedings regarding intentional attacks on protected facilities over the last decade cannot be overstated. The research reported in this paper shows that the Court would not have achieved such results without the cooperation with UNESCO.

Both the ICC Statute and the UNESCO Constitution provide for the possibility of cooperation between these institutions and other international organisations. Moreover, the ICC Rules of Procedure and Evidence give international organisations the right to join the proceedings at any stage as a friend of the court (*amicus curiae*). UNESCO has successfully exercised this right in the case of Al Mahdi. For these reasons, it can be concluded that UNESCO's contribution was instrumental in defining the charges against Al Mahdi. The uniqueness of this

⁵⁷ International Criminal Court and UNESCO Strengthen Cooperation on the Protection of Cultural Heritage, UNESCO Press Release, 6 November 2017, <https://en.unesco.org/news/international-criminal-court-and-unesco-strengthen-cooperation-protection-cultural-heritage> (accessed 20.12.2022).

case lies not only in the extensive cooperation between the ICC and UNESCO, but also in the fact that it is the only case so far in which the charges were formulated on the basis of a violation of only one provision of the ICC Statute.

The activities of the ICC and UNESCO in the case of Al Mahdi contributed to signing a letter of intent formalising and strengthening cooperation between these institutions in the field of protection of culture during armed conflicts.

The former ICC Prosecutor Fatou Bensouda and former UNESCO Director General Irina Bokova provided a strong impetus for cooperation between the ICC and UNESCO. Their terms of office expired in 2021 and 2017, respectively. They have left the fulfilment of this task to their successors.

Formally, the ICC and UNESCO are not currently negotiating a cooperation agreement. In fact, the talks have been suspended for the time being and we await the positions of both sides to crystallize. It should be noted that Bensouda's successor, Karim Khan, announced a revision of her policy position papers. We cannot, therefore, consider that the official position of the Office of the Prosecutor of the ICC on this issue has yet been fully developed.

It should be noted that UNESCO remains interested in pursuing criminal law consequences of violations of the law within the scope of its interests. This is the case not only in relation to the issue of the protection of cultural property, but also – for example – in trials of crimes against journalists and those involving freedom of expression⁵⁸.

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⁵⁸ UNESCO's work with prosecutors to tackle crimes against journalists taken forward with international partners, UNESCO, 20 October 2022, <https://www.unesco.org/en/articles/unescos-work-prosecutors-tackle-crimes-against-journalists-taken-forward-international-partners> (accessed 20.12.2022).

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