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Indice

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Articolo scientifico sottoposto a referaggio ai sensi dell'art. 3 del Regolamento della Rivista

Attacking cultural property to destroy a community: heritage destruction as a crime against humanity and genocide

A cura di **Dott.ssa Francesca Sironi De Gregorio**[1]

ABSTRACT

Cultural heritage, if considered in a multilevel dimension, represents the essence of a population. Attacks against tangible cultural heritage can amount to persecution or ethnic cleansing if committed with a discriminatory intent. For their nature, such attacks are often accompanied by destruction of intangible cultural heritage targeting the language, the traditions and the uses of a people. They cause, alongside tremendous losses of something unique and irreplaceable, psychological damages to the communities linked to them. An episode of cultural cleansing like the removal of communities by eradicating their cultural presence on a land encompasses also deliberate attacks against cultural property. International criminal law qualifies the phenomena as crimes against humanity, giving them additionally relevance in the reconstruction of the *mens rea* of genocide. The article will focus on how to prosecute attacks against cultural heritage in international criminal law as a crime against humanity or as genocide, dealing specifically with the crime of persecution and the concept of cultural genocide under international criminal law. At the end, a brief assessment on the crimes committed in Syria against ethnic minorities under the aforementioned categories will be provided.

PAROLE CHIAVE

heritage destruction – cultural heritage – international criminal law – cultural genocide – crime of persecution

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Sommario: 1. Introduction – 2. Heritage Destruction as a Crime Against Humanity – 2.1. Introduction to the category of Crimes Against Humanity – 2.2. Intentional Destruction as Crime of Persecution – 3. The Concept of Cultural Genocide – 4. Heritage Destruction and the ICTY – 5. Further Developments – 6. Syria: Persecution against the Yazidis – 7. Conclusions.

1. Introduction

In summer 2015 the images of the destruction of the ancient ruins of Palmyra by Daesh, a radical jihadist organisation, became worldwide a symbol of the Syrian conflict.[2] The city of Palmyra was an important archaeological site on the trade route linking Eastern Mediterranean to Asia that reflected in its shapes the multiculturalism of Syria, merging Greco-Roman influences with Persian and indigenous elements.[3] Its sculptures, temples, roads and colonnades survived for over 2000 years countless wars and in 1980 the city was declared an UNESCO World Heritage site.[4]

Despite the assurances made by Daesh's commanders that the site would be preserved and not targeted, ISIS engaged in a campaign of destruction of cultural heritage centred on the ruins. First, the 82-years old archaeologist Khaled al-Assad, the guardian of Palmyra and most prominent figure in the area, was captured and questioned to reveal the location of the most precious treasures of the site. He refused, and his brutal execution was then shared on the internet. The bulldozing of the temples, the funerary in the Valley of Tombs, the Roman Triumphal Arch and the Old Theatre followed.

At an early stage, heritage destruction campaigns concentrated on attacks against "the idols that the infidels worship" but soon every expression of art and history became a target.[5] The relationship between Daesh and cultural heritage followed a double tendency. On one hand, the group engaged in ruthless campaigns of destruction mainly directed against archaeological and religious monuments with iconoclastic intentions. On the other, they attacked churches and mosques to eradicate the presence of ethnic and religious minorities.

Before dealing with these issues, it is necessary to define in general terms what falls under the legal definition of cultural heritage, a definition that became progressively broader.

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[2] It has been chosen to address the terrorist group as 'Daesh' in line with the most recent academia or as ISIL, the acronym used by the United Nations. The Arab term Daesh was firstly used by French President Hollande and United States Secretary of State Kerry and stands for *Al Dawla Al Islamiya fi al Iraq wa al Sham*, Arabic original for "The Islamic State in Iraq and the Levant" (ISIL).

[3] H. Turku, *The Destruction of Cultural Property as a Weapon of War*, Springer, Washington DC (2018), p. 1.

[4] For a comprehensive description of the site see: UNESCO, Site of Palmyra, available at: [http://whc.unesco.org/en/list/23].

[5] K. Shaheen, *Syria: Isis Releases Footage of Palmyra Ruins Intact and 'Will Not Destroy Them'*, *The Guardian*, May 27, 2015, available at: [https://www.theguardian.com/world/2015/may/27/isis-releases-footage-of-palmyra-ruins-intact].

According to John Harry Marryman, there are two different ways of thinking about cultural property.[6] The first one is a nationalistic idea of cultural property: it is conceived part of national cultural heritage what has a special interest for the culture of the nation itself. States therefore attribute on cultural objects a national character that has the aim to restrict their movement outside national boarders, regardless of their ownership or physical location.[7]

The second way of thinking about cultural property is a cosmopolitan idea that underlines the value of the object itself as part of a common heritage, independently from location or property rights.[8] It requires a special protection as it is part of the heritage of all mankind.

The very same idea of modern international law, and international criminal law specifically, is in a simplistic way to give power to the international community to fight against threats that put humankind in danger. The concept of humaneness shapes the idea that there are some fundamental interests that, for their nature, have a collective dimension and require a shared framework of protection. Cultural heritage falls under this idea of humankind.

The contours of the definition are vague, and the concept of culture must be seen as a living process where individuals and communities protect and preserve their specificities and purposes and, at the same time, as expression of economic, social and political life. The process is historical, dynamic and evolving and takes account of the individuality.[9]

For these reasons, in 1946 the United Nations Educational, Scientific and Cultural Organisation (UNESCO), a UN specialised agency, was created with the aim to contribute to the building of peace, the eradication of poverty, sustainable development and intercultural dialogue through education, the sciences, culture, communication and information.[10] Since its foundation, UNESCO has approved six international treaties and a multitude of soft law instruments following two different approaches: the traditional and the immaterial one.

The traditional approach refers to cultural objects, specifically objects of artistic, archaeological, historical or ethnological value. Under this approach, UNESCO adopted the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, the 1970 UNESCO Convention and the 2001 Convention on the Protection of the Underwater Cultural Heritage.

However, when we consider cultural heritage in contemporary international law, the traditional reference to "property" shifts to "heritage". As stated by Prott and O'Keefe, the term "cultural heritage" consists

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[6] J.H. Merryman, *Two Ways of Thinking about Cultural Property*, *American Journal of International Law*, Vol. 80, No. 4 (Oct. 1986), pp. 831-853.
[7] *Ibid*, p. 832.
[8] *Ibid.*
[9] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, E/C.12/GC/21, available at: [http://www.refworld.org/docid/4ed35bae2.html].
[10] UNESCO Constitution, Article 1, 16 November 1945.

in the manifestation of a particular view of life and the history and validity of that view.[11] Embracing such a broad definition means to recognize that not only objects but also ways of life and traditions are part of cultural heritage. This is clearly visible in recent developments of international multilateral conventions and soft law instruments. As an example, in its General Comment no. 21, the Committee on Economic, Social and Cultural Rights analyses in depth Article 15, paragraph 1(a), of the Covenant. In assessing the meaning of the right to take part in cultural life, the Committee defines the word *culture* as follows:

The Committee considers that culture, for the purpose of implementing article 15 (1) (a), encompasses, inter alia, ways of life, language, oral written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives. Culture shapes and mirrors the values of well-being and the economic, social and political life of individuals, groups of individuals and communities.

The protection of cultural heritage therefore is not limited to cultural goods but encompasses an immaterial dimension.[12] UNESCO in 2003 adopted the Convention on the Safeguard of Intangible Cultural Heritage with the purpose to ensure respect for the intangible cultural heritage of communities, groups and individuals, raise awareness at local, national and international level and provide international cooperation and assistance on the matter (Article 1).[13] The conceptualisation of "intangible cultural heritage" was discussed in depth during the negotiations and the current definition comprises the uses, representations, expressions, knowledge and techniques. The forms in which intangible cultural heritage manifests itself are mainly oral traditions, performing art, social practices, rituals, knowledge and practices concerning nature and the universe. Article 2 recognizes also the safeguard of instruments, goods, objects of art and cultural spaces inherent to intangible cultural heritage.[14]

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[11] L.V. Prott and P. J. O'Keefe, '*Cultural Heritage' or 'Cultural Property'*, *International Journal of Cultural Property*, (1992), pp 307-320.

[12] *Ibid.*

[13] *Convention on the Safeguard of Intangible Cultural Heritage*, Paris, 17 October 2003.

Article 1 - *Purposes of the Convention*

The purposes of this Convention are:

(a) to safeguard the intangible cultural heritage;

(b) to ensure respect for the intangible cultural heritage of the communities, groups and individuals concerned;

(c) to raise awareness at the local, national and international levels of the importance of the intangible cultural heritage, and of ensuring mutual appreciation thereof;

(d) to provide for international cooperation and assistance.

[14] *Article 2 – Definitions*

For the purposes of this Convention,

1. The "intangible cultural heritage" means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities

Legally speaking, a distinction is frequently made between cultural property and cultural heritage, the latter having a much broader meaning. As an example, Article 1 of the 1954 Hague Convention provides a definition of cultural property having regard to movable or immovable property of great importance, buildings whose main and effective purpose is to preserve or exhibit the movable cultural property and centres containing a large amount of cultural property.[15] On the other hand, many actions are focused on how to protect intangible cultural heritage through strengthening indigenous and local traditions. This multidimensional idea of cultural heritage has enabled the progressive recognition of attacks against cultural heritage as international crimes both against property and against people.

Two different approaches to attacks against cultural heritage can thus be derived and examined.

Firstly, monuments and sites are destroyed when representing enemies advantage points – this is particularly relevant with regard to minarets, castles or citadels, given their prominent positions. Such scenario is taken into consideration in the most important legal instrument pertaining to the protection of cultural property in armed conflict: the 1954 Hague Convention. The Convention prohibits all parties to use cultural property for military purposes and urges them to avoid targeting heritage sites unless imperative military necessity so requires. Furthermore, peace time obligations requires States to provide effective protection measures to cultural heritage so as to avoid the targeting and subsequent destruction in case of hostilities, by, among others, listing and inventory of works of arts and cultural sites.

Secondly, as stated above cultural heritage, if considered in a multilevel dimension, represents the essence of a population. Attacks against tangible cultural heritage can amount to persecution or ethnic cleansing if committed with a discriminatory intent. For their nature, such attacks are often accompanied by destruction of intangible cultural heritage as attacks against the language, traditions and uses of a people. They cause, alongside tremendous losses of something unique and irreplaceable, physiological damages to the communities linked to them. Episodes of cultural cleansing, like the removal of communities by eradicating their cultural presence on a land, encompasses also episodes of deliberate attacks against

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and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.

2. The "intangible cultural heritage", as defined in paragraph 1 above, is manifested inter alia in the following domains:

(a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;

(b) performing arts;

(c) social practices, rituals and festive events;

(d) knowledge and practices concerning nature and the universe;

(e) traditional craftsmanship.

3. "Safeguarding" means measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage.

4. "States Parties" means States which are bound by this Convention and among which this Convention is in force.

5. This Convention applies mutatis mutandis to the territories referred to in Article 33 which become Parties to this Convention in accordance with the conditions set out in that Article. To that extent the expression "States Parties" also refers to such territories.

[15] 1954 Hague Convention, Article 1.

cultural property. International criminal law qualifies the phenomena respectively as war crime and crime against humanity, giving them, additionally, a weight in the establishment of the *mens rea* of the crime of genocide.

The article will focus on how to prosecute attacks against cultural heritage in international criminal law as a crime against humanity or as genocide, dealing specifically with the crime of persecution and the concept of cultural genocide. At the end, a brief assessment of the crimes committed in Syria against ethnic minorities under the aforementioned categories will be provided.

2. Heritage Destruction as a Crime Against Humanity

2.1. Introduction to the Category of Crimes Against Humanity

The expression *crimes against humanity* originates from the Martens Clause embodied in the Hague Conventions of 1899 and 1907. The purpose of the clause was to cover from any possible omission the text of the Conventions.[16] Specifically, the clause reads as follows:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.

The first attempt to criminalise crimes against humanity can be traced back to 1915 when, in a joint declaration, France, Great Britain and Russia so described the actions undertaken by the Ottoman Empire against the Armenian population.[17] Four years later, the Inter-Allied Commission called for the prosecution of Turkish authorities responsible for the massacres but ultimately no prosecution, whether domestic or international, was made for crimes against humanity and war crimes.

Nonetheless, the first codification of the specificities of the category took place in the London Charter of the IMT. The widespread atrocities committed by the Axis forces went beyond what was codified in the Hague Regulations, therefor Article 6(c) of the Nuremberg Charter recognised the category of crimes against humanity, namely "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial

[16] N. Geras, *Crimes Against Humanity: Birth of a Concept*, Manchester, Manchester University Press, (2011), pp. 5-6.
[17] M.C. Bassiouni*, Crimes Against Humanity: Historical Evolution and Contemporary Application*, New York, Cambridge University Press (2011), p. 1.

or religious grounds" when such crimes were perpetrated "in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated".[18] The use of the new category was an expedient to make Nazis accountable for crimes committed against German nationals during the Holocaust.

The IMT Charter, however, linked crimes against humanity to other crimes prosecuted under the jurisdiction of the Tribunal. Both the International Military Tribunal for the Far East in Tokyo (Article 5(c)) and the Council Law No. 10 (Article II(c)) replicated the same definition. The notion of crime against humanity further developed under international law after World War II, mainly with the adoption by the international community of sectorial conventions.[19] In the absence of a specific and comprehensive international convention, the categorisation of crimes against humanity suffers from the presence of multiple and not coincident definitions.[20]

The resurgence of the category of crimes against humanity is directly connected with the new era of international criminal justice. In 1991, the International Law Commission drafted the Draft Code of Crimes against the Peace and Security of Mankind and its Commentary. The Draft Code provided in Article 21 the criminalisation under international law of systematic or mass violations of human rights.[21] A reformulation of the Draft Code occurred in 1996 when, after the adoption of the Statutes of the *ad hoc* Tribunals, Article 18 of the Draft Code encompassed a comprehensive definition of crimes against humanity, namely crimes committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group, recognising certain inhuman acts as crimes against humanity.[22]

In the Statutes of the *ad hoc* Tribunals, crimes against humanity, along with genocide and war crimes, are attributed to the jurisdiction of the Tribunals. The characterisation of the crimes differs in the two Statutes mainly with regard to the contextual element. Under the ICTY Statute the offences should be committed during an armed conflict, whether international or internal in character, and be directed against any civilian population.[23] The ICTR Statute describes crimes against humanity as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.[24] The threshold required for the contextual element under Article 7 of the ICC Statute

[18] A. F. Vrdoljak. *The Criminalisation of the Intentional Destruction of Cultural Heritage*, in T. Bergin, E. Orlando, *Forging a Socio-Legal Approach to Environmental Harm: Global Perspectives,* London, Routledge (2016).

[19] An example is the 1984 UN International Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

[20] C. Byron, *War Crimes and Crimes Against Humanity in the Rome Statute*, Manchester, Manchester University Press (2009), p. 189.

[21] Report of the International Law Commission on the Work of its Forty-third Session, UN Doc. A/46/10 (1991).

[22] Report of the International Law Commission on the Work of its Forty-eight Session, UN Doc. A/51/10 (1996).

[23] Article 5 of ICTY Statute.

[24] Article 3 of ICTR Statute.

is that the acts are "part of a widespread or systematic attack directed against any civilian population with knowledge of the attack".

2.2. Intentional Heritage Destruction as Crime of Persecution

Concerning the criminalisation of intentional cultural heritage destruction under the category of crimes against humanity, international criminal law makes clear that if the destruction or seizure is made with a discriminatory intent it can be qualified as the crime of persecution punishable under international criminal law. It has to be noted that the qualification of intentional destruction of cultural heritage as a crime against humanity characterises the acts as a crime against people and not as a crime against property anymore.[25]

The first use of the crime of persecution as a basis for the prosecution of intentional heritage destruction dates back to the Nuremberg Judgement.[26] The judgement deals with the persecution of Jews in connection to and in execution of the common plan perpetrated by the Nazi Party. Specifically, the Tribunal held that the seizure and destruction of cultural property by Nazis in the East amounted not only to war crimes but also to crimes against humanity. Likewise, pursuant Article 4(h) of its Statute, the ICTY prosecuted the intentional destruction of cultural heritage as a crime of persecution considering the discriminatory nature of the act of destruction of cultural property.

It has to be noted that when cultural property is intentionally destroyed with a discriminatory intent, it tends to have a cataclysmic effect on the cultural identity of the persecuted group.[27] Cultural identity defines a group and the unlawful destruction of buildings and monuments is recognised to have an impact on the targeted group.[28] Often, these attacks are not merely part of military operations but rather fall within a discriminatory policy against a particular group.[29]

Although recognized by the major international criminal tribunals, the crime of persecution was not defined until the adoption of the Rome Statute for the deep concerns of States that feared that any discriminatory practices could potentially constitute a crime against humanity for an international court.[30] To avoid that violations of international human rights law could amount to persecution, the definition of the Rome Statute provides that only extreme forms of discrimination could be prosecuted under

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[25] P. Gerstenblith, *The Destruction of Cultural Heritage: A crime Against Property or a Crime Against Culture?, John Marshall Review of Intellectual Property*, No. 15 (2016), p 10.

[26] *Trial of the Major War Criminals before the International Military Tribunal (Indictment)*, Vol. I, p. 66.

[27] R. O'Keefe, *Protection of Cultural Property under International Criminal Law, Melbourne Journal of International Law,* Vol. 11, No. 2 (2010), p. 373.

[28] M. Lostal, *International Cultural Heritage Law in Armed Conflict,* Cambridge University Press, Cambridge (2017), p, p. 35.

[29] A. M. Thake, *The Intentional Destruction of Heritage as a Genocidal Act and Crime Against Humanity*, Conference Paper No. 15/2017 presented at ESIL Conference in Naples. Vol. 10 n. 5 (2017), p. 22.

[30] D. Robinson, *Defining 'Crimes Against Humanity' at the Rome Conference, The American Journal of International Law*, vol. 93, no. 1 (1999), p. 53.

international criminal law. Article 7(1)(h) of the Rome Statute punishes acts of persecution "against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, *in connection* with any act referred to in this paragraph or any crime within the jurisdiction of the Court" (emphasis added). In paragraph 2, persecution is defined as the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group. The Rome Statute refers to the protection of a "group" or a "collectivity" and thus it is reasonable to interpret it as including not only minorities but also any distinct and identifiable group of people.[31]

Under the ICC Statute, the prosecution of crimes against humanity requires the contextual element of a widespread or systematic attack against any civilian population. Under the elements of crimes the *actus reus* of the crime of persecution is characterised by severely depriving, contrary to international law, one or more persons of their fundamental rights because of their membership to a particular targeted group. It is important underlining how modern international law recognises cultural rights as a fundamental human right.[32] In addition, there is another requisite condition: the persecution must have been committed in conjunction with any other crime within the jurisdiction of the ICC, thus the Court does not have the jurisdiction on persecution *per se*.[33] As a result, if committed during an armed conflict, whether international or non-international in character, destruction of cultural heritage can certainly amount to a crime against humanity when the destruction is part of a widespread and systematic attack and other crimes under the jurisdiction of the ICC took place in the course of the conflict. If committed during peacetime, the destruction of cultural heritage can constitute a crime against humanity punishable under the Statute only if committed in conjunction to other crimes within the jurisdiction of the Court and when the destruction was such that severely deprived victims of their cultural rights.[34]

The requisite *mens rea* for any crime against humanity is the intent to commit the charged offence, combined with the knowledge that the act falls within the widespread or systematic attacks against the civilian population. For the specific crime of persecution, the specific aggravated intent to discriminate the targeted group, described as aggravated criminal intent by Cassese, is required.[35]

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[31] Y. Gottlieb, *Criminalizing Destruction of Cultural Property: A Proposal for Defining New Crimes under the Rome Statute of the ICC*, Penn State International Law Review, Vol. 223, No. 4 (2005), 875.

[32] It is not the purpose of this article to analyse in depth the role of cultural rights in modern international law. For further readings on the matter see: General Assembly A/71/317 ,*Report of the Special Rapporteur in the Field of Cultural Rights*, adopted in New York by the Seventy-first Session of the General Assembly, (2016); F. Francioni, M. Scheining, *Cultural Human Rights*, Leiden, Nijhoff, (2008); H. Silverman, D. Fairchild Riggles (editors), *Cultural Heritage and Human Rights,* New York, Springer (2007); P.K. Stephenson Chow, *Cultural Rights in international law and discourse: contemporary challenges* Leiden, Brill-Nijhoff, (2018); A.F. Vrdoljak, *Human Rights and Cultural Heritage in International Law*, Oxford, Hart Publishing (2014).

[33] D. Robinson, op. cit., *supra* note 29, pp. 53-55.

[34] A. M. Thake, op. cit., *supra* note 28, p. 23.

[35] A. Cassese, *Crimes Against Humanity* in A Cassese *et al* (ed.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I, Oxford University Press, Oxford (2002), p. 364.

The reconstruction of the crime under customary international law presents some difficulties. In 2015, the International Law Commission started again its work on the Draft Code. The Special Rapporteur stated in his First Report that the most widely accepted formulation of the crime against humanity of persecution is the provision enshrined in Article 7(1)(h) of the Rome Statute. The Provisional Articles on Crimes against Humanity adopted by the ILC define persecution as follows: "persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with the crime of genocide or war crimes".[36]

The main issue to address is the element of the connection requirement.[37] The ILC considers the ICC Statute elements of crimes without regard to the consistency of provisions us previous and contemporary legal instruments. [38] As a matter of fact, apart from the Rome Statute and the Charter of the IMT, no other international provision contains the contextual element. Scholars have affirmed that the connection requirement in the ICC Statute should be considered as a jurisdictional threshold to restrict the jurisdiction of the Court in the light of the fear expressed by some delegations at the Rome Conference that wanted to "avoid a sweeping interpretation criminalising all discriminatory practices" or considered otherwise the notion to be "vague and potentially elastic".[39] The first elaboration of the ILC on the issue was the Draft Code of Offences against the Peace and Security of Mankind adopted in 1954, where the Commission dropped the link to other offences enshrined in the Nuremberg Charter. In the Commentary to the Code, the Commission Explained that the decision was to enlarge the scope of the paragraph to make the acts enucleated in the paragraph "independent of whether or not they are committed in connection with other offences defined in the draft Code".[40] The position was held in 1996 Draft Code that includes "persecution on political, racial, religious or ethnic grounds" as one of the crimes against humanity and without demanding any contextual requirement.[41] In this regard, the ICC Statute and the ILC Draft Articles of 2015 lag behind customary international law that developed crimes against humanity, including the crime of persecution, as independent.

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[36] ILC, *Report on the work of the sixty-ninth session of 2017*, Text of the draft articles on crimes against humanity adopted by the Commission on first reading, UN Doc. A/72/10, p. 10.

[37] Control Council Law No. 10, Punishment of persons guilty of war crimes, crimes against peace and against humanity, 20 December 1945, Article II(1)(c); ICTY Statute, Article 5(h); ICTR Statute, Article 3(h); ICC Statute, Article 7(1)(h).

[38] See: *Ibidem*; Statute of the Special Court for Sierra Leone, established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000), 14 August 2000, Article 2(h); Law on the Establishment of the Extraordinary Chambers of Cambodia, 27 October 2004, Article 5; Kosovo Law on Specialist Chambers and Specialist Prosecutor's Office, Law No.05/L-053, 3 August 2015, Article 13(h); Malabo Protocol adopted by the twentieth-third Ordinary Session of the Assembly, 27 June 2014, Article 28C(1)(h).

[39] See: H. von Hebel and D. Robinson, *Crimes within the Jurisdiction of the Court*, in R.S. Lee (ed.), *The International Criminal Court, The Making of the Rome Statute,* The Hague. Kluwer Law International, (1999), p. 101; K. Kittichaisaree, *International Criminal Law*, Oxford, Oxford University Press (2002), p. 121 cited in Amnesty International, *International Law Commission: The Problematic Formulation of Persecution under the Draft Convention on Crimes Against Humanity*, London (2018), p. 7. See also: M. Boot; C.K. Hall, *Art. 7* in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, para. 115.

[40] ILC, Draft Code of Offences against the Peace and Security of Mankind with commentaries (1954), p. 150.

[41] ILC, Draft Code of Crimes against the Peace and Security of Mankind of 1996, Article 18(e).

The ICTY in *Kupreškić et alt.* in the reconstruction of the crime of persecution specifically addresses the inconsistency between the ICC Statute and customary international law, stating the Statute of the ICC may be in accordance with the *opinio iuris* of many States but not consonant to customary international law, rejecting "the notion that persecution must be linked to other crimes".[42] The same argument was sustained by the ECCC in the *Nuon Chea and Khieu Samphan* case where the Chamber rejected the argument that a link must exist between the acts of persecution and any other underlying offence within the jurisdiction of the ECCC and affirmed that the Chamber is required to apply the existing definition of persecution under customary international law at the time of the perpetration of the offences, in 1975, definition that excluded any connection element.[43]

A brief overview of national legislations points out that the practice of several States in implementing the Rome Statute into their national systems consists in a waiver of the connection requirement.[44] Prominent scholars uphold the same view as Article 7 is less liberal than customary international law with regard to the connection requirement.[45] Therefore it can be concluded that the crime of persecution under customary international law does not require the additional link of having been committed in connection with any other international crime.

3. The Concept of Cultural Genocide

Since its introduction in the international law debate by Lemkin, the concept of cultural genocide has always been at the centre of a debate.[46] In his work *Axis Rule in Occupied Europe*, Raphael Lemkin attaches great importance to the cultural aspect of genocide. In Chapter IX genocide is defined as a coordinated plan of different actions aiming at the destruction of the essential foundations of the life of national or ethnical groups with the aim of annihilating the groups themselves.[47] Accordingly, there are eight techniques of implementation of genocide, each targeting a different aspect of the life of a group: political,

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[42] ICTY *Prosecutor v. Kupreškić et alt.,* Trial judgement 14 January 2000, para. 578-581.

[43] Extraordinary Chambers in the Courts of Cambodia, *Nuon Chea and Khieu Samphan, Case* 002/01, Trial Chamber judgement of 7 August 2014, para. 431-432.

[44] See: France, Code Pénal, Article 212-1(8); Germany, Code of Crimes against International Law, 2002, Section 7(10). See also, among others, the national legislations of Burkina Faso, Burundi, Republic of Congo, Canada, Czech Republic, Ecuador, Estonia, Finland, Georgia, Hungary, Republic of Korea, Lithuania, Montenegro, Panama, Portugal, Serbia and Spain.

[45] A. Cassese, *Crimes against Humanity*, in A. Cassese, P. Gaeta, J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court. A Commentary*, Oxford, Oxford University Press (2009), p. 376.

[46] The concept of genocide was firstly coined by Raphael Lemkin in 1944 after the atrocities committed by the Axis against the Jews people. Combining the Greek word *genos* (race) and *cide*, term related to the concept of killing. Genocide is defined in international law as the intent to destroy a racial, national, political or religious group. The first legal instrument dealing with genocide is the Convention on the Protection and Punishment of Genocide, adopted in December 1948. The Convention characterises genocide as an international crime and attaches obligations upon States Parties in terms of prevention, prosecution and extradition.

[47] R. Lemkin, A*xis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, New York, (1944), Chapter IX.

social, cultural, economic, biological, physical, religious or moral.[48] Recalling the evolution of the discriminatory Nazi policy, he points out how destruction of people often begins with the assault to culture, language, institutions and monuments, extending genocide beyond attacks to the physical or biological dimension.

In 1946, the General Assembly of the United Nations defined genocide as the denial of the right of existence of entire human groups that shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups and is contrary to moral law and to the spirit and aims of the United Nation.[49] Despite the emphasis on the cultural dimension in the resolution, neither the Genocide Convention nor other international legal instrument criminalised cultural genocide.[50]

The exclusion of cultural genocide and policies of ethnic cleansing from the scope of the 1948 Genocide Convention was debated during the negotiations and suffered from the need of compromise that led to distortions of the concept of cultural genocide.[51] The outcome of the negotiations turned out to be particularly disappointing as national delegations rejected the provisions concerning cultural genocide from the Convention.

Draft Article II provided:

In the Convention, the word 'genocide' means a criminal act directed against any one of the aforesaid groups of human beings, with the purpose of destroying it in whole or in part or of preventing its preservation or development. Such acts consist of: […]

III. [Cultural genocide] Destroying the specific characteristics of the group by:

(a) forcible transfer of children to another human group; or

(b) forced and systematic exile of individuals representing the culture of a group; or

(c) prohibition of the use of the national language even in private intercourse; or

(d) systematic destruction of books printed in the national language or of religious works or prohibition of new publications; or

(e) systematic destruction of historical or religious monuments or their diversion to alien uses, destruction or dispersion of documents and objects of historical, artistic, or religious value and of objects used in religious worship.

Draft Article 3 added that "genocide" also includes any deliberate act committed with the intent to destroy the language, religion, or culture of the group on grounds of the national or racial origin or the religious belief of its members. Such actions are, *inter alia*: prohibiting the use of the language of the group

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[48] S. Negri, *Cultural Genocide in International Law: Is the Time Ripe for a Change?, Transnational Dispute Managemen*t, Vol. 10, No. 5, (2013), p. 1.

[49] UNGA RES/01/96, *The Crime of Genocide*, adopted 11 December 1946.

[50] E. Novic, *The Concept of Cultural Genocide*, Oxford University Press, Oxford (2016), p. 18.

[51] *Ibid.*

in daily intercourse or in schools, the printing and circulation of publications in the language of the group, destroying or preventing the use of, among others, libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the groups. As Novic points out, it is not the same to talk about the destruction of a culture or the destruction of a group through an attack against its culture.[52] In his works Lemkin addresses both and the idea is reconstructed in the drafts articles aforementioned: cultural genocide is a technique of genocide while the final harm of genocide is the destruction of a group, which equated to the destruction of a culture.

The Genocide Convention was firstly drafted by three legal experts including Lemkin. Since the beginning of the drafting process the three had different opinions concerning the strong language used by Lemkin and the opportunity to include cultural genocide in the Convention, considered by Professor Donnadieu de Vabres and Professor Pella an undue extension of the notion of genocide.[53] Nevertheless, the arguments of Lemkin were compelling and he insisted that the groups protected by the Convention (national, religious, ethnic or racial) could not continue to exist if their moral, spiritual and cultural cohesion is not preserved.[54] During the negotiations, since early times, France and the United States supported the majority of experts maintaining that the definition of genocide should be limited to the physical and biological dimension, leaving the protection of minorities to other legal instruments.[55] Similarly, the Netherlands and Poland hold that it is a human right issue.[56] On the other side, Lebanon, Soviet Union, Venezuela and Pakistan became the main supporters. Venezuela made an emblematic statement in defence of cultural genocide, asserting that physical destruction is not the only form of the crime of genocide and the existing cultural bond among a group is the most vital factor that shapes the human group itself.[57] At the time of the final drafts, the negotiations for the Universal Declaration of Human Rights were at stake in front of the United Nations General Assembly Third Committee and the opposing delegations used the argument of the inclusion of similar provisions in the Declaration to delete the cultural genocide provision from the Convention.[58] The sole remaining idea of cultural genocide in the Convention is the *actus reus* of "forcibly transfer children of the group to another group". The final definition appears as a fragile equilibrium and the result of long-negotiated compromises in the post war political scene.[59] Ultimately, in UNGA Third Committee the provision concerning cultural genocide was dismissed as well, on the basis that it should have been discussed more appropriately in the Sub-Commission on Discrimination and Protection of Minorities.[60]

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[52] *Ibid*, p. 20.
[53] W.A. Schabas, *Genocide in International Law*, Cambridge University Press, Cambridge (2000), pp. 179-180.
[54] UN Document E/447, pp. 26-27.
[55] UN Document, A/401/Add.3.
[56] UN Document E/623/Add.3.
[57] UN Document E/AC.25/SR.5, p. 727.
[58] W.A. Schabas, op. cit., *supra* note 52, p. 187
[59] E. Novic, op.cit., *supra* note 49, p. 28
[60] W.A. Schabas, op. cit., *supra* note 52, p. 187

In 1966 the International Covenant on Civil and Political Rights was adopted and Article 27 recalls the concept of cultural genocide.[61] Specifically, it imposes negative obligations on States to allow minorities to exercise their cultural rights and a positive obligation to adopt all necessary legal tools to protect minorities and to ensure their effective participation in cultural life.[62] The Human Rights Committee in General Comment no. 24 specifies that some measures contemplated in the drafting of the Genocide Convention as cultural genocide, such as destruction of libraries and the suppression of minority language, definitely fall within the scope of application of Article 27.[63]

In conclusion, no legal instrument criminalising cultural genocide exists. However, as it will be analysed, acts that could be described as cultural genocide (namely destruction of cultural heritage of minorities, systematic destruction of books and library and attacks to language) have been used by international criminal tribunals to prove the genocidal intent of the perpetrator. They cannot therefor amount to genocidal acts (*actus reus*) but they may serve evidentially to confirm an intent, among other circumstances, to destroy the group as such.

4. Heritage destruction and the ICTY

Under Article 5 of its Statute, the International Criminal Tribunal for the former-Yugoslavia has jurisdiction on the crimes against humanity including, in Article 5(h), the crime of persecution on political, racial and religious grounds.[64] The fact that the destruction of cultural property can amount to persecution if characterised by a discriminatory intent powerfully expresses the intrinsic link between cultural heritage and a community. The high number of attacks against cultural heritage during the Balkan wars, in vast majority in the territories of Bosnia-Herzegovina and Kosovo, lead to the destruction of monuments, religious institutions and cultural sites that belonged to the Muslim population in the area. In the crime of persecution the victim is not only the single individual but the group in its entirety. In *Kupreškić and Others* the Tribunal defined persecution as the "gross or blatant denial, on discriminatory grounds, of a fundamental right, laid out in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5".[65] Starting from *Tadic*, the ICTY Chambers have elaborated a series of criteria to prove the responsibility for the crime of persecution: (i) an act or omission discriminated in fact on a prohibited ground in the sense that the victim is targeted because of his or her perceived

[61] *Ibid.*
[62] General Comment n. 23, UN Document CCPR/C/21/Rev.1/Add.5, para. 7.
[63] General Comment n. 23, UN Document CCPR/C/21/Rev.1/Add.6, para. 8.
[64] ICTY Statute, Article 5(h).
[65] ICTY, *Prosecutor v. Kupreškić et alt.,* Trial Judgement, 14 January 2000, para. 621 cited in S. Brammertz, K.C. Hughes, A. Kipp, W.B. Tomlianovich, *Attacks against Cultural Heritage as a Weapon of War*, *Journal of International Criminal Justice*, Vol. 14, No. 15 (2016), p. 1160.

membership in a group; (ii) the act or omission denied or infringed upon a fundamental right laid down in customary international law or treaty law; (iii) the act or omission constituted an act listed under Article 5 of the Statute, or was of equal gravity to the crimes listed in Article 5 ICTY Statute, whether considered in isolation or in conjunction with other acts; and (iv) the act or omission was carried out with the intention to discriminate on one of the prohibited grounds.[66] On the perspective of the Prosecution, prosecuting under the crime against humanity of persecution can be used as an umbrella to link together different acts committed with the same discriminatory intent and provide justice for operations of ethnic cleansing. In this framework, the role that cultural heritage has is easy to identify: acts of cultural persecution are an integral part of the eradication of a population from a territory.[67] Thus, the Office of the Prosecutor used the crime of persecution to provide, on one hand, justice for the widespread destruction of cultural property in Kosovo and Bosnia-Herzegovina and on the other to prove the existence of a common plan to destroy a population.[68] In *Brđanin* the Tribunal found that the evidences showed a consistent criminal strategy of ethnic cleansing in the Bosnian Krajina area implemented by the Bosnian Serbian forces and the Serbian Democratic Party (SDS).

The ICTY firstly addressed the crimes in the *Blaškić* judgment, qualifying the offence as crime of persecution. The Chamber held that in the case under examination the persecution was implemented through widespread, large-scale and systematic attacks upon towns and villages inhabited by Bosnian Muslims through the wilful destruction of "institutions dedicated to religion or education".[69] Quoting, *inter alia*, the Nuremberg Judgement and the International Law Commission draft commentary to the Draft Code of Crimes against Peace and Security of Mankind of 1991, it stated that "persecution encompasses not only bodily and mental harm and infringements upon individual freedom but also acts […] such as those targeting property so long as the victimised persons were specially selected on grounds linked to their belonging to a particular community", accepting the Prosecutor's argument that persecution could consist in the destruction of religious institutions when undertaken with a discriminatory intent and as part of a widespread and systematic attack. [70] In *Kordić and Čerkez* the ICTY further continued in the direction, affirming that the act:

[66] S. Brammertz, K.C. Hughes, A. Kipp, W.B. Tomlianovich, op. cit., *supra* note 64, p. 1160.
[67] E. Novic, op. cit., *supra* note 49, p. 155.
[68] S. Brammertz, K.C. Hughes, A. Kipp, W.B. Tomlianovich, op. cit., *supra* note 64, p. 1145.
[69] ICTY, *Prosecutor v. Blaškic*, Trial Judgement 3 March 2000, para. 11.
[70] *Ibid*, paras 227 and 233, cited in R. O'Keefe, *Cultural Heritage and International Criminal Law* in *Sustainable Development, International Criminal Justice and Treaty Implementation,* edited by S. Jodoin; M. Cordonier Segger, Cambridge, Cambridge University Press (2013), p. 140. The paragraph quotes a passage of the ICL Commentary on the Draft Convention on persecution. The same passage is also cited in *Tadic*, Trial Judgment (para. 703-704).

[..] when perpetrated with the requisite discriminatory intent, amounts to an attack on the very religious identity of a people. As such, it manifests a nearly pure expression of the notion of 'crimes against humanity', for all humanity is indeed injured by the destruction of the unique religious culture and its concomitant cultural objects.[71]

The approach of the OTP had the aim to integrate destruction of cultural heritage into the variety of crimes committed during ethnic cleansing campaigns. It introduced evidences to support the purpose of SDS and Bosnian Serbian forces to intentionally use cultural property as a weapon of war to support the ethnic cleansing campaigns and eradicating the legacy of a multi-cultural society.[72] With regard to the specific site destroyed, it has to be specifically targeted for its political, racial or religious character which means that the respective institutions must clearly be identified as belonging to the targeted group.[73]
Generally speaking, the crime of persecution was addressed at first by the ICTY in the *Tadić* Trial judgement. The Chamber found that the "elements of the crime of persecution are the occurrence of a persecutory act or omission and a discriminatory basis for that act or omission on one of the listed grounds, specifically race, religion or politics".[74] It also added that the persecution must be intended to cause and result in an infringement on an individual's enjoyment of a basic and fundamental right.[75] With the aim to give more legal certainty, in *Kupreškić*, the Tribunal defined in specific terms the crime of persecution as the gross denial, on discriminatory grounds, of a fundamental right.[76] The *Kupreškić* definition does not define the fundamental rights protected, leaving an open-way to case-by-case examination. The reason probably lies in the fear that the explicit mention of some fundamental rights would result in the explicit exclusion of others.[77] The "discriminatory intent" should be regarded as both mental element and part of the *actus reus,* as confirmed by the jurisprudence of the Tribunal stating that it is persecutory the act that "discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law".[78] The ICTY has also consistently held that an act can be regarded as discriminatory when the victim is targeted because of its membership to the discriminated group, adding that however it is not necessary that the victim is actually a member of the group.[79] It is sufficiently the perception of the perpetrator of the affiliation of the victim to the group itself.[80]

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[71] ICTY, *Prosecutor v. Kordić and Čerkez*, Trial Judgement 26 February 2001, para. 207.
[72] S. Brammertz, K.C. Hughes, A. Kipp, W.B. Tomlianovich, op. cit., *supra* note 64, p. 1164.
[73] C. Ehlert, *Prosecuting the Destruction of Cultural Property in International Criminal Law*, Leiden, Nijhof Publisher (2014), p. 164.
[74] ICTY, *Prosecutor v. Tadić*, Trial Judgement, 7 May 1997, para. 694.
[75] *Ibid*, para. 714.
[76] ICTY, *Prosecutor v. Kupreškić*, Trial Judgement, 14 January 2000, para. 621
[77] K. Roberts, *The Law of Persecution Before the ICTY*, *Leiden Journal of International Law*, No. 15 (2002), p. 625.
[78] ICTY, *Prosecutor v. Krnojelac*, Trial Judgement, 15 Mach 2002, para. 431 cited in K. Roberts, op. cit., *supra* note 79, p. 626.
[79] ICTY *Prosecutor v. Krnojelac*, Appeal Judgement 17 September 2003, para. 185 cited in M.C. Bassiouni, op. cit., *supra* note 16, p. 400.
[80] *Ibid.*

As summarised by the Trial Chamber in the *Sainović* judgement dealing with the destruction of religious and cultural sites in Kosovo, the Tribunal jurisprudence specifically recognises destruction of religious sites and cultural monuments as persecution when committed with discriminatory intent.[81] In *Sainović* the Tribunal makes a complete examination of the destruction of religious and cultural sites as persecution in paragraphs 204-210. After recalling that the acts are punishable under Article 3(d) of the Statute as war crime under international customary humanitarian law, the Tribunal specifies that no classification exists under Article 5.[82] Nevertheless, the Appellate Chamber in *Blaskić* and *Kordić* had recognised that, when all the elements required are fulfilled, depending on the extent and nature of the destruction, the perpetrator can be punished also under Article 5(h).[83] However, in the recalled judgement cultural and religious property was regarded as falling within the more general category of civilian property, thus in *Kordić* the Chamber underlined the importance of the religious identity of a people.[84] It is then specified that the OTP must prove a triple set of elements, namely the general requirements of crimes against humanity (see *Kunarac* Appeal judgement, para. 85), the specific requirements of persecution and the *actus reus* and *mens rea* of wanton destruction or damage of religious sites and cultural monuments.[85] Recalling *Blaškić*, the *actus reus* requires that: (a) the religious or cultural property must be destroyed or damaged extensively; (b) the religious or cultural property must not be used for a military purpose at the time of the act; and (c) the destruction or damage must be the result of an act directed against this property.[86] Concerning the first requirement, it is relevant to note that Article 5(h) does not explicitly mention destruction or damage. In order to reach the level of equal gravity in respect to the acts enumerated in Article 5, the jurisprudence examines the impact that the destroyed site had on the victims.[87] Furthermore, the notions of "damage" and "destruction" are clarified. The former refers to physical injuries or harm to an object that impairs its value of use while the latter implies demolition or reduction to a useless form. The mental element to prove is that the perpetrator acted with the intent to destroy or extensively damage the property in question or in reckless disregard of the likelihood of it.[88] What the Tribunal failed to define is the number of acts that the perpetrator has to commit in order to integrate the level of gravity of crimes against humanity. Analysing the convictions of the ICTY for destruction of cultural heritage as persecution, it can be concluded that in the vast majority of cases the accused were found guilty for a

[81] ICTY, *Prosecutor v. Sainović*, Trial Judgement, 26 February 2009 (Vol. 1), para. 205 cited in R. O'Keefe, op. cit., *supra* note 69, p. 141. O'Keefe refers to the *Milutinović* case. It has to be noted that the case changed the name in *Sainović* in 2009, following the acquittal of Milutinović itself.
[82] ICTY, *Prosecutor v. Sainović*, Trial Judgement, 26 February 2009 (Vol. 1), para. 204.
[83] ICTY, *Prosecutor v. Kordić and Čerkez*, Trial Judgement, 26 February 2001, para. 206-207.
[84] *Ibid*, para. 204-205. The Chamber considers that under the case law of the ICTY, destruction of religious sites and cultural monuments is prohibited and falls within the crime against humanity of persecution.
[85] *Ibid*, para. 206.
[86] ICTY, *Prosecutor v. Blaškic*, Trial Judgement, 3 March 2000, para. 144-149, recalled in *Ibid,* para. 206.
[87] *Ibid*, para. 207.
[88] *Ibid.*

number of acts, including *inter alia* destruction of numerous cultural buildings and religious sites.[89] Blaškić had ordered attacks in cities, towns and villages that resulted in severe and extensive destruction and plundering of Muslim institutions in various municipalities in Bosnia-Herzegovina; *Kordić*, *Čerkez* and *Stakić* were implicated in numerous attacks and *Brđanin* was held responsible for the destruction of more than 40 mosques and at al least 8 catholic churches in Krajina.[90] Nonetheless, in the *Dreonjić* case, the accused was held responsible of persecution under Article 5(h) for, *inter alia*, the destruction of a single mosque.[91] It has to be noted though, that he plead guilty for the count of persecution, so no general principle can be derived on such basis.

In conclusion, the vast jurisprudence of ICTY recognises as persecution a number of attacks against cultural heritage if committed with a discriminatory intent. Persecution, as interpreted by the Tribunal, should be intended as a crime able to fill some of the gaps that exist in the current legal framework in relation to those acts that explicitly target a group. In the more recent *Karadzić* judgment, the Trial Chamber addressed the severe damages to mosques and catholic churches as well as other cultural monuments and sacred sites committed by Serbian forces with "discriminatory intent against Bosnian Muslims and Bosnian Croats" adding that "these incidents of wanton destruction of private and public property, including cultural monuments and sacred sites, constitute acts persecution as a crime against humanity".[92] In the light of the vast body of case law on the matter, it can be concluded that the view of the Tribunal the qualification of destruction of cultural property as a crime against humanity of persecution, if committed with discriminatory intent, is firmly established.

Under a certain point of view, the ICTY jurisprudence on crime of persecution can be defined as surprisingly since it criminalises some the same acts that would have fallen into the category of cultural genocide as interpreted by Raphael Lemkin.[93] Novic states that the idea that cultural genocide could fall into the category of persecution has historical grounds.[94] In fact, in Nuremberg the crimes falling within the category of genocide were rather prosecuted as persecution. From a formal perspective there are notably differences between the two crimes: first of all, genocide is thoroughly regulated and codified in international legal instruments whereas the crime of persecution is only defined in broad terms and in an open-ended way.[95] Concerning the *actus reus* of genocide, Article 4 of the ICTY Statute, wording the Genocide Convention, enumerates the limited acts that may amount to genocide while with regard to persecution no definitive list of the rights protected and the acts criminalised exists, leaving the Tribunal

[89] C. Ehlert, op. cit., *supra* note 73, p. 166.
[90] *Ibid*, pp. 165-167.
[91] ICTY, *Prosecutor v. Deronjić*, Trial Judgement, 30 March 2004, para. 77.
[92] ICTY, *Prosecutor v. Karadzić*, Trial Judgement, 24 March 2016, para. 2555 and 2559.
[93] E. Novic, op. cit., *supra* note 49, p. 158.
[94] *Ibid*, p. 147.
[95] *Ibid*, p. 149.

to consider the offences on a case by case basis.[96] If the material element of the two offences can be regarded under a certain point of view alike, the mental element differs. Both categories require a special intent. The *dolus specialis* to prove persecution is "intent to discriminate" while genocidal intent is "intent to destroy", requiring a heavier burden of proof for the prosecution. In *Kupreškić*, the Chamber states that the "*mens rea* requirement for persecution is higher than for ordinary crimes against humanity, although lower that genocide" and considers in clear terms the offence of persecution as belonging to the same *genus* of genocide.[97] The intent to discriminate is the common denominator that in persecution can take "multifarious inhumane forms and manifest itself in a plurality of actions including murder" whereas in genocide it must be accompanied by the, even more specific, "intent to destroy in whole or in part the group to which the victims of the genocide belong".[98] Thus, genocide is regarded as the most extreme and inhuman form of persecution.[99] For these reasons, in the ICTY case law it can be observed that the OTP has systematically co-criminalised the same acts qualified as genocide under the count of persecution.

In *Krstić*, the ICTY explored for the first time the relation between attacks against cultural heritage and genocide. Radislav Krstič was the first person convicted for genocide by the ICTY for his actions as Commander of the Drina Corps in the territory of Bosnia-Herzegovina perpetrated in the Srebrenica enclave during the fall of 1995. The Trial Chamber explicitly rejected the idea of cultural genocide, not accepting that the destruction of religious sites and cultural institutions may amount to the *actus reus* of the offence.[100] In *Krstić*, the Tribunal specifies that two elements of the special intent are required for the offence of genocide: (a) the act or acts must target a national, ethnical, racial or religious group; (b) the act or acts must seek to destroy all or part of that group.[101] The ICTY took the chance to examine the issue of whether attacks against cultural heritage could amount to genocide addressing the way in which the destruction of a group may be implemented so as to qualify as genocide, posing the question of if the "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" may amount to genocide.[102] The Tribunal recalls the history of cultural genocide, from the work of Raphael Lemkin to the ICL Commentary on the Draft Code on Crimes Against Peace and Security of Mankind of 1996 pointing out that during the negotiations for the Genocide Convention the concept of *cultural destruction* of a group was expressly rejected. In 1996 the ILC noted that the definition of genocide encompasses the "material destruction of a group either by physical or biological means and not the destruction of the national, linguistic, religious, cultural or

[96] K. Roberts, op. cit., *supra* note 77, p. 629.
[97] ICTY, *Prosecutor v. Kupreškić,* Trial Judgement, 14 January 2000, para. 636.
[98] *Ibid.*
[99] *Ibid.*
[100] ICTY, *Prosecutor v. Krstić,* Trial Judgement, 2 August 2001, para. 575 ss.
[101] *Ibid*, para. 550.
[102] *Ibid*, para. 574.

identity of a particular group". It is also added that the national, religious, racial or ethnic element is not taken into consideration in the definition of destruction, which must be taken "only in its material sense, physical or biological sense".[103] Nonetheless, several declarations and decisions were made, interpreting as genocide cultural and other non-physical destruction forms. A relevant declaration was General Assembly Resolution 47/121 of December 1992 that, addressing the situation in Bosnia-Herzegovina, affirmed in a preambulatory clause that ethnic cleansing policies are a form of genocide.

Furthermore, the German Federal Constitutional Court in 2000 dealt with the issue in the trial for war crimes, crimes against humanity and genocide against Nikola Jorgić, the leader of a Serb paramilitary group in the Doboji region, prosecuted in Germany under universal jurisdiction.[104] The first Court to deal with the issue was the Higher State Court of Düsseldorf in 1997 and concluded that the intent to destroy the group could be conceived as an intent to destroy the group as a social unit, convicting Jorgić for genocide.[105] The Court recalled paragraph 220(a) of the German Criminal Code that requires the intention of the accused to destroy in whole or in part the group in order to integrate the offence of genocide. It found that Jorgić had the intention to destroy the group of Muslims, characterised by both religion and ethnicity, in North-Eastern Bosnia or at least in the Doboj region.[106] In regard to paragraph 220(a), the Courts states that the "biological-physical destruction of the group is not required" to constitute the offence as the intention to destroy a group means "destruction of the group as a social unity in its specificity, uniqueness and feeling of belonging".[107] The Courts adds that the intention to destroy the group is attested by, *inter alia*, looting and destruction of houses and mosques.[108] The holding was upheld by both the Federal Supreme Court of Germany and the German Federal Constitutional Court, respectively in 1999 and December 2000. The case was also heard by the European Court of Human Rights and decided in 2007. The Strasbourg Court was asked to evaluate the accuracy and foreseeability of the interpretation of the definition of genocide given by the German courts as the applicant lamented violation of Article 6 (right to a fair trial) and Article 7(1) (*nullum crimen sine lege* principle) of the ECHR. The Applicant contested the broad interpretation that the German Courts made in regard to the *means rea* of the offence of genocide.[109] Jorgić maintained that the ethnic cleansing

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[103] International Law Commission Draft Code, pp. 90-91, cited in ICTY, *Prosecutor v. Krstić*, Trial Judgement, 2 August 2001, para. 576. For an in-depth analysis of the ILC work, see M. C. Ortega, *ILC Adopts a Draft Code of Crimes Against Peace and Security of Mankind, Max Plank Yearbook of United Nations*, Vol. 1 (1997) pp. 283-326.

[104] Federal Constitutional Court, 2 BvR 1290/99, 12 December 2000. The decision in available at: [https://www.asser.nl/upload/documents/20120611T032446-Jorgic_Urteil_26-9-1997.pdf] (German version).

[105] E. Novic, op. cit., *supra* note 49, p. 53.

[106] Higher State Court of Düsseldorf, *State Attorney's Office v. Nikola Jorgić*, 26 September 1997, para. D (III) (1) p. 94. Judgement available at: [https://www.asser.nl/upload/documents/20120611T032446-Jorgic_Urteil_26-9-1997.pdf] (English Translation).

[107] *Ibid.*

[108] *Ibid.*

[109] European Court of Human Rights, *Jorgic v. Germany*, Judgement of 12 July 2007, para. 89.

campaign he took part in aimed only "at driving Muslims away from that region by force [..] expelling the group, not destroying its very existence".[110] Furthermore, he contested the interpretation of "intent to destroy", as inconsistent with the interpretation of Article II of the Genocide Convention given by the international community that conceives genocide as a physical or biological destruction process, claiming that it was not "foreseeable for him at the time of the commission of the acts that the German courts would have qualified the acts as genocide under German or public international law".[111] The Court upheld the interpretation rendered by the German courts, stating that the German authorities had systematically interpreted paragraph 220(a) provision in the light of the German Criminal Code as a whole.[112] In particular, German courts address the attention to two distinct acts enumerated in the provision, impositions of measures which are intended to prevent births within the group and forcible transfer of children of the group into another group to underline that such provisions do not necessitate the physical destruction of the group in order to amount to genocide. Hence, the Strasbourg's Judges found the interpretation not in contrast with the wording of the norm and reasonable.[113]

The position taken by the German courts, however, remained a minority view as in 1991 the ICTY Trail Chamber ruled in *Krstić* that the group destruction should be understood in biological or physical terms only.[114] Indeed, the ICTY was aware of the fundamental principle of *nullum crimen sine leg*e and concluded that "despite recent developments, customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group".[115] Therefore, the Tribunal underlines that often attacks against the cultural and sociological characteristics of a human group with the aim to annihilate it, cannot fall within the definition of genocide. However, episodes of attacks against cultural or religious property or symbols of the group can often integrate the genocidal intent and be considered as evidence of the intent to physically or biologically destroy a group.[116] This approach would be referred to as the *Krstić* approach, used also by the Appeals Chamber in 2004. The *Krstić* Appeal judgment was accompanied by a strong partial dissenting opinion by Judge Shahabuddeen on the matter under consideration.[117] He contends that the Trial Chamber should have, in paragraph 580, made a distinction between the nature of the act and the intent. In his opinion, the principle is that genocide is not a crime against an individual but a crime against a human group. Judge Shahabuddeen points out that what constitutes a group are often intangible characteristics "binding together a collection of people as a social unit".[118] He concludes that:

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[110] *Ibid*, para. 92.
[111] Ibid, para. 93-94.
[112] *Ibid*, para. 105.
[113] *Ibid.*
[114] ICTY *Prosecutor v. Krstić*, Trial judgement, 2 August 2001, para. 580.
[115] ICTY *Prosecutor v. Krstić*, Trial judgement, 2 August 2001, para. 580.
[116] *Ibid.*
[117] ICTY, *Prosecutor v. Kristić*, Appeal Judgement, 19 April 2004, *VII. Partial Dissenting Opinion of Judge Shahabuddeen.*
[118] *Ibid*, para. 50.

[..] If those characteristics are destroyed in pursuant of the intent with which a listed act of a physical or biological nature was done, it is not convincing to say that the destruction, though effectively obliterating the group, is not genocide because the obliteration was not physical or biological.[119]

In Judge Shahabuddeen's view, to summarise, a distinction should be made between the nature of the listed acts of genocide and the intent with which they are done and, whilst for the former a physical or biological dimension is required, so it is not for the latter. So, "certainly the intent has to be to destroy, but with respect for the listed acts, there is no reason why the destruction must always be physical or biological".[120]

A year after the *Krstic* Appeal Judgment, Trial Chamber I dealt again Srebrenica in *Blagojević*.[121] The responsibility of the accused for genocide was mainly correlated with the forcible transfer of population and acts of "opportunistic killings" rather than the mass-killing acts under investigation in *Krstić*.[122] Schabas noted that during the negotiation for the Genocide Convention, all States agreed on the inclusion of the act of "forcibly transferring children of the group to another group" whilst no consensus was reached on the act of "forcibly transfer of population". In this regard, he argues that if the Convention specifically contemplates the forcible transfer of children, probably it does not address the broader phenomenon of transferring a whole population.[123] The Chamber recalled the separate opinion of Judge Shahabuddeen, the German *Jorgić* case and the jurisprudence of the International Criminal Tribunal for Rwanda to point out that a broader notion of the term *destroy* could and should to be accepted. Challenging the *Krstić* holding, the Chamber stated that:

The forcible transfer of individuals could lead to the material destruction of the group, since the group ceases to exist as a group, or at least as the group it was. The Trial Chamber emphasises that its reasoning and conclusion are not an argument for the recognition of cultural genocide, but rather an attempt to clarify the meaning of physical or biological destruction.[124]

The Appeal Chambers dismissed the conviction on the basis that the acts attributed to Blagogević did not demonstrate the intent to destroy the group and that the reasoning of the Trial Chamber was not convincing. Noteworthy, the formulation of the reasoning of the Trial Chamber mirrored the *Krstić*

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119 *Ibid.*
120 Ibid, para. 51.
121 E Novic, op. cit., *supra* note 41, p. 55.
122 *Ibid.*
123 W. Schabas, *Ethnic Cleansing and Genocide: Similarities and Distinctions*, *European Yearbook of Minority Issues*, Vol 3, Issue 1, p. 123.
124 ICTY, *Prosecutor v. Blagogević*, Trial Judgement, 17 January 2005, para. 666.

approach as the intent to physically destroy the group can be derived through acts intended to undermine the socio-cultural structure of the group.[125]

The International Court of Justice also addressed the issue of cultural genocide with respect to the Srebrenica facts. In the judgement *Application of the Genocide Convention (Bosnia and Herzegovina v. Serbia and Montenegro),* taking into consideration the jurisprudence of ICTY*,* the ICJ recognised that there was "conclusive evidence of the deliberate destruction of the historical, cultural and religious heritage of the protected group during the period in question".[126] Nevertheless, the Court found that the destruction of historical, cultural and religious heritage cannot be considered to amount to the level of deliberate infliction of conditions of life to bring to the destruction of the targeted group and to integrate the offence of genocide.[127] It is yet specified that such acts can still be considered contrary to legal norms but, despite the significance of the eradication of all traces of cultural and religious presence of a group, they do not fall within the categories of the acts of genocide set out in Article II of the Convention.[128] Notwithstanding, the Court specifically endorses the *Krstić* approach and recalls that "where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group".[129] The same view was reaffirmed by the International Court of Justice in the 2015 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* judgement.[130] In the light of the majority of the decisions on the matter, it can be concluded that under international law episodes of "cultural genocide" do not amount to genocide even though attacks against cultural and religious property and symbols may be considered evidences to prove the intent to physically or biologically destroy a group. Hence, cultural genocide can be regarded as a *technique* to prove the crime of genocide. There are several voices whishing that the concept of "cultural genocide" could be formally introduced in international law as the destruction of cultural property, unfortunately, more and more often is an integral part of genocidal policies. As an

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[125] E Novic, op. cit., supra note 49, p. 55.

[126] International Court of Justice*, Application of the Genocide Convention (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement of 16 February 2007, para. 344.

[127] *Ibid.*

[128] *Ibid.*

[129] ICTY, *Prosecutor v. Krstić*, Trial Judgement, 2 August 2001, para. 580 cited in ICJ, *Application of the Genocide Convention (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement of 16 February 2007, para. 344.

[130] ICJ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgement of 3 February 2015, para. 136. This conception was heavily criticised by Judge Cançado Trinidade in his dissenting opinion on the *Croatia v. Serbia* Judgement as in his view dissociating physical/biological destruction from cultural destruction for the purpose of the determination of genocide is rather artificial. Though, it has to be considered that in his work as judge of the Inter-American Court of Human Rights Cançado Trinidade worked closely with the issue of the cultural aspects of genocide and the jurisprudence of the IACHR is considered to be progressive on the issue. For references, see E. Novic, op. cit., *supra* note 49, pp. 96-139; IACHR cases (Awas Tingni, Moiwana and Plan de Sanchez).

example, interestingly, during its trial Milošević itself affirmed that "the destruction of monuments of culture would be tantamount to genocide".[131]

The collective dimension of crimes against cultural heritage can therefore be satisfactory addressed as crime against humanity under the offence of persecution. The ICTY case law has largely addressed the cultural element of international crimes and opened the way for successful prosecutions of offences against cultural heritage, posing often at the centre the impact on the community. Conceptualising cultural heritage destruction under the crime of persecution has always, satisfactory, led to incriminations of offences that would follow under the category of "cultural genocide", avoiding impunity for such acts. That being said, it can also be affirmed that the recognition of cultural genocide seems out of sight in the near future, even though it has been successfully hold that the destruction of tangible cultural heritage can constitute a technique of genocide, given the probative value of the acts of destruction with regard to the analysis of the discriminatory intent.

5. Further developments

Without a precedent in the case law of the ICC it is not easy to understand the approach that the OTP or the Court will keep in relation to heritage destruction as persecution and on the elements of cultural genocide. Still, in their case law the ICTY and the International Court of Justice had agreed on the fact that the destruction of cultural and religious sites can constitute evidence of the intent to destroy a group for the purposes of genocide and it seems unlikely an inconsistent interpretation of the International Criminal Court, given the wording of Article 6 of the Rome Statute. An adoption of the interpretation of persecution in relation to cultural heritage consistent with the ICTY jurisprudence by the ICC, pending the *Al Hassan* case, is advocated. Addressing heritage destruction solely as a war crime has its shortcomings, given the limited scope of the offence as intrinsically linked to an armed conflict situation. Addressing the issue under the category of crimes against humanity could be a fundamental step to address impunity and provide justice for the episodes of heritage destruction committed also during peace time. Widespread and systematic attacks against cultural heritage are a sad reality in a number of countries that are not currently involved in armed conflicts. The most famous example might be the situation in Tibet, where the Dalai Lama itself had repeatedly used the term "cultural genocide" to describe the discriminatory policies imposed by the Chinese government. Alongside measures against Tibetan language and culture, monasteries were severely damaged or destructed. It should also be recalled the campaign of cultural cleansing that the Chinese Government has in place against the Uighur minority.[132]

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[131] ICTY, *Prosecutor v. Milosević*, Trial Chamber, Transcripts of 8 July 2003, p. 23839, available at: [http://www.milosevic-trial.org/trial/2003-07-08.htm].

[132] See, *inter alia*: [https://foreignpolicy.com/2018/09/19/china-has-chosen-cultural-genocide-in-xinjiang-for-now/] ; [https://www.hrw.org/report/2018/09/09/eradicating-ideological-viruses/chinas-campaign-repression-against-xinjiangs].

In Afghanistan, in March 2001 the Taliban forces violently destructed the massive rock sculptures of the Bamiyan Buddhas with the specific aim of destroying Afghan pre-Islamic culture. In the light of the *Al Mahdi* case, the destruction of the Buddhas can amount to war crimes under Article 8(2)(e)(iv) given the similarities of the case.[133] However, no military action was under way in that part of Afghanistan at the time and the purpose of the destruction was inspired by the will to eradicate what did not corresponded to Taliban views on culture and religion.[134] Therefore, the offence that best suits the actions of the Taliban is persecution given the specific discriminatory intent of the act.[135]

In relation to the attacks against cultural heritage committed by the Khmer Rouge regime in Cambodia, the Extraordinary Chambers in the Courts of Cambodia had recently addressed the facts as persecution in the Case 002/02. The judgement was delivered on 27 March 2019 and provides some relevant statements on cultural genocide. The charges against Nuon Chea and Kheiu Sampan concerned crimes against humanity and genocide related to the forced movement of Buddhist population during the Khmer Rouge regime. The judgement was long overdue given the prosecution's choice to address the cultural dimension of genocide.[136] The Prosecutors submitted that, contrary to some jurisprudence, the destruction of the group does not need to be physical or biological to amount to genocide.[137] They contended that a group can "be deprived of its existence through the destruction of its specific traits […] leading to the dissolution of its unity and/or collective identity in a fundamental and irremediable manner" citing the forcible transfer of children as relevant example, as it is criminalised under the Genocide Convention.[138] The Court, despite the allegation of the prosecution, concurred with the International Court of Justice and the ICTY. The reasoning finds its basis in the *travaux préparatoires* of the Genocide Convention and in the scope of the Convention itself to criminalise only such acts that aim to the physical or biological destruction of the group.[139] Judge You Ottara upheld a dissenting opinion on genocide, dealing specifically with cultural genocide and advocating in support of the recognition of the offence under international criminal law. He recognised the exclusion of the offence of cultural genocide from the Genocide Convention and subsequent international and hybrid criminal tribunal statutes. However, he upholds that additional motivations for genocide may exist, namely political, cultural or ideological.[140] In his view, non-physical or biological destruction can still amount to genocide,

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[133] Though, it has to be noted that the International Criminal Court does not have jurisdiction on the episode as the ratification of the Rome Statute by the Afghan authorities took place in 2003.
[134] F. Francioni, F. Lazzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, European Journal of International Law, Vol. 14, No. 4 (2003), p. 620.
[135] *Ibid,* p. 644.
[136] ECC, *Case 002/02*, Closing Order (Indictment), 15 September 2010.
[137]ECCC, *Case 002/02*, Trial judgement, 29 March 2019, para. 800; Ibid, para. 799. The relevant jurisprudence is ICTY *Prosecutor v. Krstić,* ICTY *Prosecutor v. Karadzić*, ICJ *Bosnia and Herzegovina v. Serbia and Montenegro*, ICJ *Croatia v. Serbia.*
[138] *Ibid.*
[139] *Ibid*, para. 800.
[140] ECCC, *Case 002/02*, Trial judgement, Judge You Ottara's Disssenting Opinion, 29 March 2019, para. 4470.

providing that the *actus reus* elements are proved.[141] Judge You Ottara concludes that, even if the intention of physically destroying a group is required by Article II of the Genocide Convention, the intention may be evidenced in a range of actions that do not necessarily entail physical or biological destruction.[142] He recalls that destruction of a group means obliteration of it and therefore it is consistent with the Convention to interpret in this broad sense the provision.[143]

The wording of the provisions in the ICTY Statute, Rome Statute and in the Law on the Establishment of the ECCC differs with regard to the crime of persecution and therefore it is not possible to find a common provision. Furthermore, in every conviction of an international tribunal condemning cultural heritage destruction, the acts were in connection with others falling under the crime of persecution or other crimes under the jurisdiction of the tribunal. Therefore, it cannot be concluded that acts of heritage destruction, if committed alone, could amount to the crime of persecution under international customary law. Still, the case law is consistent in affirming that, if such acts are committed alongside other crimes against humanity or war crimes, they can be prosecuted under the international crime of persecution. In conclusion, even though the punishment of those responsible for the attacks cannot restore cultural heritage damaged or destroyed, it can definitely have a fundamental role in addressing and reaffirming the values involved.

6. Syria: persecution against the Yazidis

Syria contains some of the most varied and important cultural heritage of the Mediterranean, representing the evolution and the coexistence of the different cultures that inhabited the Mediterranean in the past centuries. The news in recent years have been filled with episodes of heritage destruction occurred in Syria and Iraq during the course of the still undergoing conflict, mainly perpetrated by Daesh. The ancient ruins of Palmyra, the Crac des Chevaliers Castle, the Old Souk of Aleppo and the Old City of Apamea are only some of the atrocities committed against cultural heritage in the past years. UNESCO has consistently called upon all the actors involved to refrain from intentional destruction and illicit looting of cultural heritage form the territories of Syria and Northern Iraq but the results, after almost nine year of war, are devastating. The country hosts six World Heritage Sites and the vast majority of attention concerning the destruction of cultural property was referred to them.[144] However, it fundamental to underline that Syria also has a conspicuous national and local heritage that reflects the diversity of its

[141] *Ibid*, para. 4491.
[142] *Ibid*, para 4471-4490.
[143] *Ibid*, para. 4491.
[144] E. Cunliffe, N. Muhesen, M. Lostal, *The Destruction of Cultural Property in the Syrian Conflict: Legal Implications and Obligations, International Journal of Cultural Property*, Vol. 23 (2016), p. 3.

population.[145] The direct target of cultural heritage sites has multiple causes and forms. The majority of attention has been devoted to the Islamic iconoclasm but the reasons behind the episodes of heritage destruction are varied and different in nature.[146]

The richness of Syrian cultural heritage is, without doubts, inter-twisted with its diverse ethnic and demographic composition. Around 73% of the population is composed by Sunni Muslims, followed by a 12% of Alawi and a 10% of Christian. Important to note is also a large population of Kurds (around 10% of the population and the vast majority of them of Muslim religion) that inhabited the North-Eastern part of Syria and a small percentage of Yazidi, an ethnic group mostly spread in Iraq and Northern Syria that was severely affected during the conflict by Daesh. The ethnic and religious differences certainly played a role in how the conflict evolved and it can be mirrored in the profound reasons behind episodes of heritage destruction.

Focusing on heritage destruction when approaching a heinous and brutal conflict like the Syrian one (which war is not brutal?) seems, once again, to suggest that the physical damages rivals the human tragedy.[147] In reality, attacks against cultural, historical and religious heritage are often weaponised and serve as a mean of terror in operations steeped with ideology and carried out with discriminatory intent. Former UNESCO's Director General Irina Bokova called the phenomenon as a process of "cultural cleansing".[148] The term cultural cleansing refers to an intentional strategy that seeks to destroy cultural diversity through the deliberate targeting of individuals identified on the basis of their cultural, ethnic or religious background, combined with deliberate attacks on their places of worship, memory and learning.[149] Such attacks are both against physical, tangible and built expressions of culture such as monuments and buildings as well as against minorities and intangible heritage such as customs, traditions and beliefs. In Syria and Iraq the strategy implemented is exactly the same: destroy tangible and intangible cultural heritage to eradicate the presence of a group from a certain area.

As already recalled, in order to address destruction of cultural heritage as a crime against humanity the discriminatory intent of the perpetrator has to be proven. In addressing the perpetrated crimes, a focus on the religious minorities that inhabited the area, and in particular the Yazidis, will be provided.

Generally speaking, during the course of the conflict ISIL militants have been the protagonists of massacres, deportation, tortures, forcible transfers, summary executions, sexual violence and other inhuman acts against minorities, mainly Christians, Yazidis, Kurds, Shabak and Kakai.[150] Churches,

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145 *Ibid.*

146 E. Cunliffe, N. Muhesen, M. Lostal, op. cit., *supra* note 143, p. 3.

147 R. Burns, *Weaponising Monuments*, *International Review of the Red Cross*, Vol. 99, No. 3 (2017), p. 938.

148 Report of the UNESCO International Conference, *Heritage and Cultural Diversity at Risk in Iraq and Syria,* UNESCO Headquarters, 3 December 2014.

149 *Ibid.*

150 See, among others: HRC Reports, A/HRC/27/CRP.3, para. 24-31; A/HRC/28/69, para. 39; A/HRC/28/18, para. 16-28; A/HRC/30/48, para. 110-128; A/HRC/31/68, para. 109-112; A/HRC/33/55, para. 89. For a detailed examination see: Minority Rights Group International, *From Crisis to Catastrophe: The Situation of Minorities in Iraq* of 14 October 2014, available

mosques, mausoleums and other buildings, symbols of their culture and expression of their identity have been targeted, destroyed and set on fire.[151] The most targeted minority seems to be the Yazidis that, since the summer of 2014, have suffered from a genocidal campaign put in place by the jihadist group. On 27th March 2015 the High Commissioner for Human Rights directly referred the situation as genocide and highlighted for the first time the correlation between the destruction of religious and cultural heritage sites by ISIS and persecution of minority groups, Yazidis and Shias in the first place.[152] Daesh has pursued a strategically planned campaign of destruction of cultural heritage that has taken the form of smashing artefacts in museums, iconoclastic breaking and bulldozing of archaeological sites, dynamiting shrines, tombs and other sacred buildings for local communities, burning libraries and archives.[153] Many of the actions when committed against a minority targeted group had the aim to discriminate and even to destroy the group itself through the eradication of their cultural roots. A brief examination of the peculiarities of the Yazidis minority will be provided to identify their characteristics and ascertain their status under international law as protected group according to their religious belief.

The Yazidis and other Christian minorities have a long-standing ethnic and religious identity in modern Syria and Northern Iraq where they inhabited the land for centuries and practiced their religion since the early ages of Christianity.[154] With the diffusion of Islam they acquired the *dhamni*, a regulated and protected status as non-Muslims that upfront the payment of some taxes permitted them to be protected and to freely profess their religion. Yazidism incorporates many elements of Zoroastrianism, Judaism, Christianism and Islam and believes in God as a relatively remote figure. Their contacts with God take place through seven Holy Beings, called the "Angels", that represent emanations of the Divine.[155] The religion is still surrounded by mystery and enigmas, has its own philosophy and considers natural elements as sacred.[156]

Particularly relevant is their concern about purity, visible also in social practices and organisation: marrying outside one's social grouping, living away or having personal relationships outside the Yazidi

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at: [minorityrights.org/publications/from-crisis-to-catastrophe-the-situation-of-minorities-in-iraq-october-2014]; Minority Rights Group International, *No Way Home*: *Iraq's Minorities on the Verge of Disappearance*, 4 July 2016, available at: [minorityrights.org/publications/no-wayhome-iraqs-minorities-on-the-verge-of-disappearance/], pp. 13 ss.; 42 ss; See also: United States Holocaust Memorial Museum, *"Our Generation is Gone". The Islamic State's Targeting of Iraqi Minorities in Ninewa*, (2015) available at: [http://www.ushmm.org/m/pdfs/Iraq-Bearing-Witness-Report-111215.pdf], p. 13 ss.

[151] M. Mancini, *La Furia dell'ISIS contro le Minoranze etniche e religiose: il genocidio degli Yazidi, Diritti Umani e Diritto Internazionale*, Vol. 10, No. 3 (2016), p. 620.

[152] HRC, A/HRC/28/18, *Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so called Islamic State in Iraq and the Levant and associated groups of 27 March 2015*, para. 7, 24, 78.

[153] Minority Rights Group International, *No Way Home*: *Iraq's Minorities on the Verge of Disappearance*, 4 July 2016, available at: [minorityrights.org/publications/no-wayhome-iraqs-minorities-on-the-verge-of-disappearance/], p. 19.

[154] E. Osborne, M. Dowd, R. McBrearty, *Intending the Worst: The Case of ISIS's Specific Intent to Destroy the Christians of Iraq*, *Pepperdine Law Review,* Vol. 46, No. 3 (2019), p. 559.

[155] C. Allison, *The Yazidis*, Oxford Research Encyclopaedia, Oxford University Press (2019).

[156] S. De Vido, *Protecting Yazidi Cultural Heritage through Women: An international feminist law analysis, Journal of Cultural Heritage*, Vol. 33, p. 265.

community traditionally constituted grounds for ostracism.[157] In addition, to be considered part of the community a child needs to born from both Yazidi parents.[158] This is fundamental in addressing the practice of mass sexual violence perpetrated by ISIL: being intimate with an outsider is cause for stigma and results in the expulsion of the woman from the group and if the violence results in the birth of a child, such child could not be considered Yazid. In this regard, given the practice of international tribunal, such practices could be described as genocide.[159] In the light of their characteristics, without doubt they constitute a religious group under the scope of application of the Genocide Convention and in the light of the definition given by the International Criminal Tribunal for Rwanda in *Akayesu* of group "whose members share the same religion, denomination or mode of worship".[160]

Before the war, the Yazidi around the world amounted to approximately one million, around half of them in Northern Iraq and 15,000 in Syria, where they inhabited two main areas: Sheikhan, a collection of villages and towns to the northeast of Mosul, and Sinjar, a mountain to the northwest close to the border with Syria.[161] At the time of the writing, only some villages in Sheikhan remain uncompromised and the diaspora continues, with a strong concentration of Yazidis in Europe (in particular in Germany), Canada and the United States. The emigration is certainly having a negative impact on the preservation of the peculiarities of the population in the form of customs and traditions.[162]

To give an order to the discussion, firstly it will be analysed whether the crime of persecution is potentially applicable in the present scenario and later some considerations over genocide will be provided. With regard to persecution, as previously recalled, the destruction of cultural heritage is recognised as *actus reus* of the crime under consideration given the importance that culture bears as a fundamental right. Concerning the specific acts committed, important holy Yazidi mausoleums (Sheikh Babik, Sayeda Zeina, Sheikh Sin, Shaqsebat) and other less known temples dating back to XIV century had been attacked and bombed in 2015.[163] All these monuments were important pilgrimage sites and associated to major religious figures and Saints. Furthermore, the Mar Benham monastery, founded in the IV century, contained a plethora of Aramaic codes that together with the manuscripts of the Dominican monks of Mosul formed one of the most precious and ancient libraries in the Near East.[164] Luckily, all the manuscripts had been transferred for security and conservation issues just before the outbreak of the hostilities but the jihadist militias devastated the religious institutions destroying crosses, altars and

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157 *Ibid.*

158 S. Ashraph*, Acts of Annihilation. Understanding the Role of Gender in the Crime of Genocide*, *Cairo Review of Global Affairs*, Vol. 24 (2017), pp. 61–69.

159 See: ICTR, *Prosecutor v. Akayesu,* Judgement of 2 September 1998, para. 496; ICTR, *Prosecutor v. Nyiramasuhuko*, Amended Indictment of 1 March 2001, Count 2; ICTY, *Prosecutor v. Krstic*, Judgement of 2 August 2001, para. 509.

160 ICTR, *Prosecutor v. Akayesu,* Judgement of 2 September 1998, para. 103.

161 C. Allison, op. cit., *supra* note 154.

162 *Ibid.*

163 P. Brusasco, *Dentro la Devastazione*, Milano, La Nave di Teseo (2018), pp. 84-88.

164 Ibid, p. 89.

religious statute, defacing graves and vandalising the premises. Mar Benham was later transformed into a military base given its strategic location 30 kilometres from Mosul and eventually attacked on 9 March 2015: due to the bombardments, now one of the oldest monasteries of the Assyrian Church is razed to the ground.[165] Furthermore, local churches were destroyed and people required to convert or to die: men were brutally killed whereas women and children forcible transferred in other locations or imprisoned in detention facilities.[166]

The most relevant issues to address are the contextual and mental elements required, as well as the consequences of the acts themselves. As previously analysed, in the reconstruction of the crime of persecution the provision enshrined in the Rome Statue requires a contextual element, namely the existence of a link between the acts of persecution and any other underlying offence within the jurisdiction of the Court itself, while such an element is not required in international customary law. However, given the specificities of the situation in which the crime has been allegedly perpetrated, the connection between persecution and other international crimes seems nonetheless.

Regarding the mental element, the *dolus specilis* required is the intent to discriminate on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law. In a report of the Independent International Commission of Inquiry on the Syrian Arab Republic it is clearly highlighted how ISIS has sought to destroy the Yazidis through "cutting them off from beliefs and practices of their own religious community and erasing their identity as Yazidis".[167] In examining the basis of the crime of persecution, the ICTY elaborated a fourfold approach: (i) an act or omission discriminated in fact on a prohibited ground in the sense that the victim is targeted because of his or her perceived membership in a group; (ii) the act or omission denied or infringed upon a fundamental right laid down in customary international law or treaty law; (iii) the act or omission constituted an act listed under Article 5 of the Statute, or was of equal gravity to the crimes listed in Article 5 ICTY Statute, whether considered in isolation or in conjunction with other acts; and (iv) the act or omission was carried out with the intention to discriminate on one of the prohibited grounds.[168]

The right to religious freedom has to be considered a fundamental right and the vast destruction of worship sites amounts certainly to persecution. Minority Rights Group, a London based NGO, has documented that minorities are also contending with the psychological impact of witnessing the destruction of their places of worship and other built cultural heritage and that potentially this, together with their forcible displacement could easily impact on the survival of their religious and cultural

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165 *Ibid*, p. 91.

166 HRC, A/HRC/32/CRP.2 of 15 June 2016, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*: "They came to destroy": ISIS Crimes Against the Yazidis*.

167 *Ibid,* para. 202.

168 S. Brammertz, K.C. Hughes, A. Kipp, W.B. Tomlianovich, op. cit.*, supra* note 64*,* p. 1160.

traditions.[169] Moreover, heritage destruction can be relevant in persecuting genocide against the Yazidi minority in the light of the case law of the ICTY and the International Court of Justice. The so called *Krstić* approach recalls that "where there is physical or biological destruction, there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group".[170] The same view was reaffirmed by the International Court of Justice in the 2015 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* judgement.[171] Therefore, it could be affirmed that the attacks against cultural heritage of Yazidi amount to persecution and can serve as evidence to prove the genocidal intent to destroy, in whole or in part, the targeted group.

7. Conclusions

The case law of the ICTY has consistently recognised attacks against cultural heritage to constitute the *actus reus* of persecution, as stated in *Blaškić*, *Kupreškić et alt.* and *Kordić and Čerkez*. Given the importance that culture bears for a population, the Tribunal's jurisprudence specifically recognised destruction of religious sites and cultural monuments as persecution when committed with discriminatory intent. Thereby, the ICTY has fundamentally contributed to the definition of the elements of the crime of persecution when committed through attacks against cultural heritage. Previously, also the IMT and the District Court of Jerusalem in the case against Eichmann had found that destruction of cultural property can amount to persecution. Noteworthy, Al Hassan is charged before the ICC with the crime of persecution committed through, among other, the destruction of the Sufi Mausoleum in Timbuktu, Mali in 2004.

However, the wording of the provisions in the ICTY Statute, Rome Statute and other internationalised tribunals differs and therefore it is not possible to conclusively find a common provision. Furthermore, in every conviction of an international tribunal condemning cultural heritage destruction, the acts were committed among others falling under the crime of persecution or other crimes under the jurisdiction of the tribunal. Therefore, it cannot be concluded that acts of heritage destruction, if committed alone, can amount to the crime of persecution under international customary law. However, the case law is

[169] Access Minority Group reports here: [https://minorityrights.org/publications/].
[170] ICTY *Prosecutor v. Krstić*, Trial Judgement, 2 August 2001, para. 580.
[171] ICJ, *Application of the Genocide Convention (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement of 16 February 2007, para. 344.

consistent in affirming that, if such acts are committed alongside other crimes against humanity or war crimes, they can be prosecuted under the international crime of persecution.

In conclusion, even though the punishment of those responsible for the attacks cannot restore cultural heritage damaged or destroyed, it can definitely have a fundamental role in addressing and reaffirming the values involved. Notably, the vast majority of international obligations concerning cultural heritage protection refer to armed conflicts and belligerent occupation. Thus, the existing legal framework is characterised by a vacuum in this regard and the crime of persecution could be the ground upon which to provide accountability for episodes of heritage destruction occurred during peacetime.

With regard to genocide, international courts are consistent in affirming that episodes of heritage destruction can amount to evidence of genocidal intent as part of the required *mens rea*. In *Krstić*, the ICTY ruled that attacks against the cultural and sociological characteristics of a human group often have the aim to annihilate the group itself but cannot fall within the definition of genocide. However, episodes of attacks against cultural or religious property or symbols of the group can integrate the genocidal intent and be considered as evidence of the intent to physically or biologically destroy the group.[172] The so called *Krstić* approach was replicated by the International Court of Justice in the case *Bosnia-Herzegovina v. Serbia* and by the Extraordinary Chambers in the Courts of Cambodia in the recent *Case 002/02*.

Therefore, the current international practice does not warrant the conclusion that the crime of genocide encompasses the concept of cultural genocide. The history of codification of the crime of genocide underlines, as Novic states, a precise selective intent to consider the crime as the "crime of crimes" and therefore interpreting it restrictively.[173] The purposely exclusion of cultural harm from the definition of the crime of genocide however should be seen as the opportunity to concentrate the effort in the criminalisation of the conducts under different titles, such as the crime of persecution. Moreover, persecution requires a less difficult proof of the mental element (intent to discriminate instead of intent to destroy) and therefore can be more effective in the fight against impunity.

The category of cultural genocide could therefore be regarded as not only alien from the current international legal framework, but also without practical application given the opportunity to address the issue with different international legal instruments.

[172] ICTY, *Prosecutor v. Krstić*, Trial Judgement, 2 August 2001, para. 580.
[173] E. Novic, op. cit., *supra* note 49, p. 240.