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Convention for the Protection
of Cultural Property in
the Event of Armed Conflict



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THE PENAL PROTECTION OF CULTURAL PROPERTY

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**THE FIGHT AGAINST
IMPUNITY IN THE
FRAMEWORK OF
THE 1954 HAGUE
CONVENTION AND
ITS 1999 SECOND
PROTOCOL**

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“The destruction of culture is one element of a global strategy of hatred, and the fight against impunity and respect for the rule of law must be part and parcel in a broader vision for peace.”

Irina Bokova, Director-General of UNESCO

Aim of this manual

The 1999 Second Protocol (“the Second Protocol”) was adopted to supplement the provisions of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (“the 1954 Hague Convention”), thus providing greater protection to cultural property in times of peace, and in times of conflict.

The 1954 Hague Convention and its Second Protocol create, among others, an obligation for States Parties to sanction the destruction of cultural property. States party to the 1954 Hague Convention are required, within the framework of their ordinary criminal jurisdiction, to prosecute and punish persons who breach or order the breach of the Convention. Chapter 4 of the Second Protocol further develops the specific criminal sanction regime provided for Article 28 of the 1954 Hague Convention. Much work remains to be done by States Parties to ensure the obligations set out within the Second Protocol are sufficiently reflected in domestic legislation and consistently applied in practice.

This manual is aimed at all Parties with an interest in protecting cultural property in the domestic and international sphere, namely civil servants working in Ministry of Defence, Ministry of Justice, Ministry of Culture and all other relevant Ministries, as well as members of parliament, diplomats and member of armed forces of States Parties to the 1999 Second Protocol.

Within the framework of Resolution II, adopted by the Diplomatic Conference that gathered to adopt the 1954 Hague Convention, a special advisory role was foreseen for national advisory committees. Thus, National Committees for the implementation of International Humanitarian Law should also play an active role in proposing implementation strategies to the relevant national authorities in the field of the protection of cultural heritage.

The manual aims to ensure that policy makers and legislators comply with the implementation of the Second Protocol, thus enabling States Parties to effectively bring their laws and practice in line with the requirements they have consented to, and ultimately to ensure the Convention and its Protocols serve their purpose: the protection of cultural property.

The manual does not aim to provide definitive legal interpretations of the provisions of the instruments it describes, as this lies rather with the States Parties.

Content

What is the 1954 Hague Convention?	6
What is the First Protocol to the 1954 Convention?	6
What is the Second Protocol to the 1954 Convention?	7
The relationship between the 1954 Hague Convention and its Second Protocol	7
.....	
I. The relevance of the 1954 Hague Convention and its Second Protocol today	8
.....	
II. Implementation of the 1954 Hague Convention and the Second Protocol in differing legal traditions: civil or common law systems	9
.....	
III. Cultural Property Protection and Domestic Criminal Law: The Chapter IV of the Second Protocol	9
.....	
IV. Methods of incorporating international crimes into domestic law	18
.....	
V. International Criminal Tribunals and the destruction of cultural property	19

What is the 1954 Hague Convention?

Adopted in The Hague (Netherlands) in 1954, the Convention for the Protection of Cultural Property in the Event of Armed Conflict is the first international treaty devoted exclusively to the protection of cultural property in the event of armed conflict. Its States Parties have committed to adopt safeguarding measures to ensure that both movable and immovable cultural property are provided adequate protection, both in peacetime and in the event of armed conflict. The Convention constitutes the first culture convention ever adopted under the auspices of UNESCO and was adopted as a direct response to the destruction of cultural property during World War II.

What is the First Protocol to the 1954 Convention?

The Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) is the standard-setting instrument for the protection of movable cultural property in occupied territory. Adopted at the same time as the Convention, it prohibits the export of cultural property from occupied territory and requires the return of such property to the authorities of the territory from which it was removed at the end of hostilities. Parties are obliged to actively prevent the export of movable cultural property from any territory that they might occupy during an armed conflict. Additionally, they must undertake to seize and hold, until the end of hostilities, any cultural property that was imported into their territory.

What is the Second Protocol to the 1954 Convention?

The Second Protocol strengthens and elaborates on several provisions of the Convention concerning the safeguarding of, and the respect for, cultural property and conduct during hostilities. It clarifies concrete safeguarding measures to be taken, and creates an 'enhanced protection' regime for cultural property of the 'greatest importance for humanity', adding to the earlier categories of 'general protection' and 'special protection' under the 1954 Hague Convention. This new category must be protected by adequate domestic legal and administrative measures. It also directly defines the sanctions due in the event that serious violations are committed against cultural property, and the conditions under which individual criminal responsibility applies.

The relationship between the 1954 Hague Convention and its Second Protocol

The Second Protocol does not replace the 1954 Hague Convention; it supplements it. With regard to the penal protection of cultural property, Article 28 of the 1954 Hague Convention establishes that States Parties 'must undertake all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons', while the Second Protocol specifies the scope of these sanctions, without prejudice to the original Article.

I. The relevance of the 1954 Hague Convention and its Second Protocol today

Cultural property is particularly threatened by armed conflicts and, in some cases, by any resulting belligerent occupation. This may be the result of intentional targeting as a means of ‘cultural cleansing’, or as a result of collateral damage that could have been avoided by implementing safeguarding measures during peacetime. As cultural property reflects the life, history and identity of the community, its preservation helps to rebuild broken communities, re-establish individual and community identity, and link its past with its present and future following the cessation of hostilities. In addition, the cultural property of any people contributes to the cultural heritage of humankind. Thus, the loss of, or damage to, such property impoverishes humankind.

The ratification of the 1954 Convention and its Second Protocol by States sends a clear message to perpetrators that States understand and respect the importance of cultural property and will abide by the framework these standard-setting instruments create. The ratification of the 1954 Convention and its Protocols, and the national implementation of the penal regime it contains, establishes the prospect of being sanctioned for crimes against cultural property. Its effective implementation will eventually have a deterrent effect on potential criminals and perpetrators of war crimes and, when the provisions are applied, they will decrease impunity. Additionally, States Parties are obliged to disseminate the Convention, Protocols and corresponding regulations as widely as possible, particularly to the armed forces, in order to have them respected in the event of armed conflict.

The 1954 Hague Convention and its Second Protocol provide a legal framework aimed at protecting cultural property both in times of peace, and in the event of armed conflict.

II. Implementation of the 1954 Hague Convention and the Second Protocol in differing legal traditions: civil or common law systems

For the purpose of national implementation, it is the usual practice for common law jurisdictions to adopt separate legislation to incorporate the obligations deriving from each of the major treaties into their legislation. These are often stand-alone acts that include criminal offences. Civil law jurisdictions often insert all criminal offences flowing from these treaties into their criminal code or military code, and often in both.

III. Cultural Property Protection and Domestic Criminal Law: The Chapter IV of the Second Protocol

The key element in penal national implementation is the establishment of an effective legal framework for the prosecution and punishment of the perpetrators of acts committed against cultural property. This is a fundamental obligation imposed on States Parties. Chapter 4 of the Protocol imposes on States Parties two distinct sets of obligations. The first range of obligations are those attached to the five 'serious violations' of the Second Protocol defined in its Article 15. The second set of obligations are those attached to the two 'other violations' referred to in Article 21 of the Second Protocol.

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🔗 In practice, this requires the adoption of appropriate legislation into the domestic legal system during peacetime, including the special penal provisions to supplement the general body of laws (the penal code, military law and regulations governing the armed forces). To assist States in their adoption of appropriate legislation, this chapter provides an outline of the main issues in the adoption of criminal sanctions. Ultimately, the manner in which States Parties implement and enforce their treaty obligations lies with the State themselves.

.....

CRIMINALIZATION

Article 15 (1) of the Second Protocol defines five ‘serious criminal violations’:

- a. Making cultural property under enhanced protection the object of an attack;
- b. Using cultural property under enhanced protection or its immediate surroundings in support of military action;
- c. Extensive destruction or appropriation of cultural property protected under the Convention and this Protocol;
- d. Making cultural property protected under the Convention and this Protocol the object of an attack; and,
- e. Theft, pillage, or misappropriation of cultural property protected under the Convention, and acts of vandalism directed against cultural property protected under the Convention.

The ‘cultural property under enhanced protection’ is cultural property protected under the regime provided for in Chapter 3 of the Protocol (‘Enhanced Protection’)

Other violations laid down in Article 21 of the Second Protocol include any use of cultural property in violation of the Second Protocol, and any illicit export or other removal or transfer of ownership of cultural property from an occupied territory in violation of the Convention or the Second Protocol.

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🔗 In practice, ‘criminalization’ means that States Parties are under an obligation to criminalize these acts in their domestic legal framework by adopting penal legislation pursuant Article 15, or by enacting legislative, administrative or disciplinary measures pursuant Article 21.
.....

APPROPRIATE PENALTIES

The determination of the penalty is a matter decided by national legislators. It should, however, be judged in comparison with the usual practice for the determination of penalties for other domestically punishable crimes, and take

into account aggravating and mitigating factors. Additionally, it must be balanced with fair trial and treatment guarantees as outlined in Article 17 (2) of the Second Protocol, which extend to the sentencing stage of the proceedings, and as well as fair treatment during punishment.

International legal principles regarding the imposition of penalties for war crimes are at present embryonic; a fortiori, such principles as may be relevant to war crimes in respect of cultural property.

Imprisonment is the only appropriate penalty for war crimes, including those committed against cultural property. Fines and forfeiture alone are inappropriate, although they may be imposed in addition to a custodial sentence.

FORMS OF INDIVIDUAL CRIMINAL RESPONSIBILITY

Article 15(2) of the Second Protocol states that States Parties, when defining the forms of individual criminal responsibility, must comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act.

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

Responsibility for crimes may still arise even when they were committed as a result of superior orders. Principles of international law establish that every combatant has the duty to disobey a manifestly unlawful order. Obeying a superior order may not relieve the subordinate of criminal responsibility if he or she knew – or should have known, due to the nature of the act ordered – that the order was unlawful.

In situations of armed conflict, armed forces or groups are generally placed under a command that is responsible for the conduct of its subordinates. It is reasonable, then, in order to make the repression system effective, that the hierarchical superiors should be held individually responsible when they fail to take proper measures to prevent their subordinates from committing serious violations. This principle is known as the 'command or superior responsibility'.

.....
🔗 **In practice, forms of individual criminal responsibility encompass:**

- **Those who directly commit the act (commission can include omission, in cases where the accused has a legal duty to act);**
 - **Those who attempt to commit the act;**
 - **Those who participate in the act in its commission or attempted commission (notably by ordering or assisting).**
-

Responsibility as a principal for ordering the commission of an offence is to be distinguished from 'command or superior responsibility'. Other principles such as the 'joint criminal enterprise' regime are recognized by the case-law of international criminal tribunals.

JURISDICTION

A State exercises jurisdiction within its own territory. Such jurisdiction includes the power to make law (legislative jurisdiction), the power to interpret or apply law (adjudicative jurisdiction) and the power to take action to enforce law (enforcement jurisdiction).

While the assertion of adjudicative jurisdiction and enforcement jurisdiction are generally limited to national territory, Article 16 of the Second Protocol recognizes that in certain circumstances a State may adjudicate on events occurring outside its territory (extraterritorial jurisdiction).

Basis of Jurisdiction

According to Article 16 of the Second Protocol, each States Parties must take the necessary legislative measures to establish its jurisdiction over 'serious violations' of the Second Protocol, provided that those violations are:

- committed on the territory of the State (territorial principle);
- committed by persons of the nationality of the forum State (nationality principle); or
- in relation to specific serious violations, where the alleged offender is present in its territory (universal jurisdiction).

Universal Jurisdiction

Universal jurisdiction refers to the assertion of jurisdiction over offences regardless of the place where they were committed or the nationality of the perpetrator or victims. Under the Second Protocol, universal jurisdiction is applied to three specific offences, whose repression by all States is justified or required as a matter of international public policy.

These are:

- Making cultural property under enhanced protection the object of attack;
- Using cultural property under enhanced protection or its immediate surroundings in support of military action;
- Extensive destruction or appropriation of cultural property protected under the Convention and the Second Protocol.

Irrespective of the legal tradition, in implementing jurisdiction States must clearly provide for the criteria for the opening of criminal proceedings. States have adopted a range of methods to provide for universal jurisdiction within their national law.

A number of civil law States make provision for universal jurisdiction within their ordinary or military penal code. This code may define the jurisdictional and material scope of the offence in the specific offence; however, more often the provisions on universal jurisdiction are included in the general section of the code and refer to substantive offences defined elsewhere in the same instrument.

Universal jurisdiction may also be laid down in criminal procedural law or in a law on the organization of the tribunals. Some States have granted their tribunals universal jurisdiction with regard to certain offences by means of a special stand-alone law. In countries with a common-law system, it is common practice to provide for universal jurisdiction in primary legislation defining both the jurisdictional and material scope of the offence.


PROSECUTION AND JUDICIAL GUARANTEES

States Parties to the Second Protocol must ensure prompt and effective prosecutions of the violations of the Convention and its Second Protocol.

Article 17 (2) embodies certain fundamental procedural safeguards ('judicial guarantees') for alleged offenders. It stipulates that any person against whom proceedings are commenced in connection with the Convention or its Second Protocol shall be guaranteed fair treatment and a fair trial in accordance with domestic law and international law at all stages of the proceedings.

These guarantees apply to proceedings in respect of all 'serious violations' set forth in Article 15 of the Second Protocol, as well as to proceedings pursuant to legislative measures of a penal nature taken by States Parties in accordance with Article 21.

Many of these judicial guarantees will already be included in the domestic law of States Parties, and share much in common with the rights included in international human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR, Art. 14). States should ensure that the judicial guarantees reflected in instruments to which they are party are included in domestic legislation, in instruments such as their code of criminal procedure and rules of evidence, in stand-alone legislation and in their constitution.

.....
 In practice, the proceedings will follow the standard established criminal procedure of the tribunals in the State in question.
.....

For some serious violations, Article 17 of the Second Protocol requires States Parties to either try or extradite any alleged offender found in their territories. This is the *aut dedere aut judicare* principle. The serious violations concerned are:

- Making cultural property under enhanced protection the object of an attack;
- Using cultural property under enhanced protection or its immediate surroundings in support of military action;
- Extensive destruction or appropriation of cultural property protected under the Convention and this Protocol.

Practical issues related to prosecution

The prosecution and trial of offences allegedly committed abroad creates practical and logistical challenges in the gathering of evidence, respect for the defendant's rights, and protection of witnesses. Implementation of effective procedures for prosecutions and trials must address these challenges by means of suitable provisions to facilitate investigations as well as the gathering and evaluation of evidence. In this respect, arrangements for international judicial cooperation are essential. The 1999 Second Protocol addresses specifically the issue of extradition and mutual legal assistance

➔ Extradition

International law allows States to grant extradition for any crime they consider appropriate. The conditions of extradition and the related procedure are governed by the law of the requested State. In the framework of the Second Protocol, extradition is provided for in its Article 18, and concerns the offences committed against cultural property as set out in Article 15 (1) (a) to (c). As such, the amendment of a State's current penal and/or military code may be necessary to ensure that serious violations of cultural property are extraditable offences.

Countries that make extradition conditional on the existence of an extradition treaty are required to incorporate the above-mentioned violations into all future multilateral or bilateral extradition treaties. This can be done in three ways. Firstly, through an agreed list of offences in the treaty itself. In doing so, care must be given to ensure the harmonization of terminologies and definitions between national jurisdictions to ensure the full and effective implementation of the Second Protocol. Secondly, and more commonly, an extradition treaty may refer to a specific category of punishment as the criterion for extradition. For example, all crimes sanctioned with five years in imprisonment are extraditable offences. This requires the State to think carefully about the length of punishment for the penalties imposed for the destruction of cultural property. Lastly, in the absence of any extradition treaty, Article 18 (2) of the Second Protocol states that the requested Party may, at its discretion, consider the Second Protocol as the legal basis for extradition.

➔ Grounds for Refusal to the Extradition

Article 20 of the Second Protocol addresses the application of exceptions which may bar extradition or mutual legal assistance in certain circumstances. It prevents refusals for requests for extradition or mutual legal assistance on the basis of the offence in question being a political offence, or inspired by political motives, by barring the offences in question from being regarded as such.

Article 20 (2) explicitly states that extradition is not required where a requested party has grounds for believing that extradition or mutual legal assistance has been made for the purpose of prosecution or punishing a person on the grounds of race, religion, nationality, ethnic origin or political opinion, or that compliance would be prejudicial to that person position for the aforementioned reasons.

➔ Mutual Legal Assistance in Criminal Matters

The repression of serious violations of the Second Protocol ultimately requires the cooperation of different States and bodies, not only because the persons involved in the proceedings may be of different nationalities or in different countries, but also because the international community as a whole has a direct interest in seeing them effectively repressed. From this standpoint, Article 19 of the Second Protocol provides for various forms of assistance, including with investigations and criminal or extradition proceedings, as well as the provision of assistance in obtaining and taking evidence abroad in line with the enforcement of foreign judgments.

CHOICE OF A COMPETENT TRIBUNAL

The selection of the appropriate tribunal may be dependent on the status of the alleged offender. Dependent on whether an alleged offender is a member of the armed forces, it must be decided whether military proceedings or civilian proceedings are more appropriate. In assessing the choice of tribunal, it is necessary to take into account the capabilities the tribunal is imbued with. For example, it may be necessary to carry out investigations abroad, thus raising issues of proofs and the rights of defense. It is important to take into account the practical and logistical issues, and ensure that suitable procedures are in place to ensure the effective implementation of the treaty obligations, as well as ensuring the defendants right to an expedient trial and access to justice.

Irrespective of what tribunal is selected, Article 17 of the Second Protocol requires that a defendant shall be guaranteed fair treatment and a fair trial in accordance with both domestic and international law at all stages of the proceedings. Thus, the independence and impartiality of the regularly constituted tribunal charged with overseeing the proceedings is of the utmost importance, not only in respecting the rights of the defendant as established in international law, but also to ensure an effective prosecution system for the elimination of serious violations against cultural heritage.

STATUTES OF LIMITATIONS

The creation and implementation of an effective sanctions regime for the violation of cultural property is essential for ensuring that the purpose of the 1954 Convention and its Second Protocol is fulfilled. The Convention asserts that damage to cultural property belonging to any people damages the cultural heritage of all mankind. Therefore, the issue of statutory limitations for these violations must be raised. This is all the more important in view of the gravity of certain violations, characterized as war crimes, that run counter to the interests of the international community as a whole.

The application of a statutory limitation on legal action in the event of an offence (also known as time-barring or time limits) may relate to either the prosecution itself, or alternatively to the application of the sentence.

Time limits in the 1954 Convention and the Second Protocol

Both the Convention and the Second Protocol are silent on the provision of time-limits for prosecution and sentence. It is, however, important to underline that several standard-setting execution of instruments in the field of international humanitarian law enshrine the non-applicability of statutory limitations, notably the United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity and the Statute of the International Criminal Court.

IV. Methods of incorporating international crimes into domestic law

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🔗 **Criminalization of international law obligations often take the form of either a special stand-alone law separate from criminal codes, or an insertion into the existing criminal legislation, whether military or ordinary, or in some cases both. This choice will depend largely on the legal tradition of the State in question. There are a number of approaches a legislator can take when translating and implementing international standards of serious violations of cultural property into domestic legislation.**
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One possible approach, often utilized by States of a civil law tradition, is to introduce into their existing military and/or ordinary national criminal codes specific provisions related to the protection of cultural property in the event of armed conflict. However, it cannot be overstated that such an approach relies upon the premise that existing codes provide sufficient protection against, and punishment of all criminal acts directed against cultural property. The advantage of this approach is that it requires little amendment and therefore can be done expeditiously and efficiently. Special attention must be given to closing legal gaps to minimize impunity. Such issues may arise where domestic law does not reflect criminal behavior in armed conflict, or where domestic penalties do not reflect the gravity and context of international crimes.

A second approach consists of adopting at the national level legislation that makes specific reference to the international standard-setting instruments, namely the 1954 Hague Convention and its two (1954 and 1999) Protocols. This approach is straightforward and efficient. However, considering that this method does not permit any differentiation of the penalty in accordance with the gravity of the act, unless this is provided for by the law itself, the approach leaves a large space for judicial interpretation, which may in turn impact the principle of legality (*nullum crimen sine lege, nulla poena sine lege*).

A third approach consists of enacting a stand-alone act in the domestic legal order. The enactment of specific provisions that correspond directly with treaty obligations lays down clearly and predictably which types of conduct are criminal. It provides strong frameworks to ensure judicial interpretation in line with the States' international obligations. The potential disadvantage of such

an approach is that it requires extensive review of existing criminal and military legislation, as well as the development, drafting and passing of new substantive legislation, and ongoing amendment to reflect the developments of international law.

A final approach is the adoption of a mixed approach that involves combining criminalization by reference to general provisions together with the insertion of explicit and specific criminalization provisions. This approach is advantageous; it ensures that repression is carried out fully and with sufficient precision, taking into account different levels and severity of offences.

V. International Criminal Tribunals and the destruction of cultural property

As of today, there are no concrete examples of the implementation of the criminal aspects of the 1999 Second Protocol at the national level. However, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Court (ICC) provide illustrative examples of the fight against impunity at the international level.

Following the atrocities that occurred during and following the break-up of the Socialist Federal Republic of Yugoslavia, the United Nations Security Council established the ICTY on 25 May 1993, as an effective measure to deter widespread violations of international humanitarian law, to bring those responsible to justice, and to contribute to the restoration and maintenance of peace (Resolution 827 (1993)). In addition to the criminalisation of conduct that results in damage to, or destruction of, cultural property, the ICTY has also held that the destruction of cultural property is punishable as a violation of the laws and customs of war under Article 3 of the ICTY Statute.

In the same vein, the Rome Statute, which created the International Criminal Court, also defines the destruction of cultural property as a war crime (Articles 8(2)(b)(ix) and 8(2)(e)(iv)).

Several judgments of the ICTY underline the fight against impunity when it comes to the protection of cultural heritage. Among those judgments, Jokic and Strugar are particularly significant.

In the case *Prosecutor v Jokić*, Miodrag Jokić was found guilty of war crimes for an intentional attack on the World Heritage site of the Old Town of Dubrovnik. The Trial Chamber also considered the crime of destruction not being justified by military necessity, in view of the destruction caused by one day of heavy shelling upon the Old Town. In its judgment, the Trial Chamber paid considerable attention to the crime of destruction or wilful damage done to institutions dedicated to religion, charity, education, and the arts and sciences, as well as to historic monuments and works of art and science. The Trial Chamber found that this is a crime representing a violation of an especially protected value, a protected UNESCO site.

In the case *Prosecutor v. Pavle Strugar*, the Trial Chamber observed, in relation to the seriousness of the offence of damage to cultural property under Article 3(d) of the ICTY Statute, that such property is, by definition, of *'great importance to the cultural heritage of every people'*. The Trial Chamber thus found that the crime in question under Article 3(d) is proven when: (i) *the act has caused damage or destruction to property which constitutes the cultural or spiritual heritage of peoples;* (ii) *the damaged or destroyed property was not used for military purposes at the time when the acts of hostility directed against these objects took place; and (iii) the act was carried out with the intent to damage or destroy the property in question.* At paragraph 307, the Trial Chamber further pointed out that the Convention protects property *'of great importance to the cultural heritage of every people'* and the Additional Protocols to the Geneva Conventions refer to *'historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of people'*. Further, the Strugar Trial Judgment concluded that the protection accorded to cultural property is lost where such property is used for military purposes.

Recently, on 27 September 2016, a new step was successfully reached when the ICC rendered its judgment in the case *The Prosecutor v. Ahmad Al Faqi Al Mahdi*. Mr Al Mahdi was sentenced to imprisonment for nine years by the ICC for intentionally directing attacks against historic monuments and/or buildings dedicated to religion, including nine mausoleums and one mosque in Timbuktu (Mali), in 2012. The mausoleums of saints and mosques of Timbuktu are an integral part of the religious life of its inhabitants. Timbuktu's mausoleums and mosques constitute a common heritage for the community. These mausoleums are frequently visited by the residents and are places of prayer and, for some, places of

pilgrimage. According to the ICC, the destruction of these cultural properties not only affected the direct victims of the crimes, namely the faithful and inhabitants of Timbuktu, but also people throughout Mali and the international community.

On 2 December 2016, the UNESCO Secretariat submitted *amicus curiae* observations to the Trial Chamber of the ICC in charge of the reparation/compensation stage.¹

These examples of international criminal prosecution for the destruction of cultural heritage demonstrate that it is necessary and possible to judge individuals who are responsible for such destruction.

1 https://www.icc-cpi.int/CourtRecords/CR2016_25595.PDF

