

DOES THE DESTRUCTION OF CULTURAL HERITAGE IN UKRAINE FALL WITHIN THE SCOPE OF THE ROME STATUTE?

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Abstract

This article explores the issue of cultural heritage destruction in the context of the Russian aggression against Ukraine starting in 2014, with a particular focus on the events after 24 February 2022, from the viewpoint of international law. After portraying a brief history and current state of cultural heritage protection in the event of an international armed conflict, the analysis of the provisions of the Rome Statute of the International Criminal Court on what is called 'crimes against or affecting cultural heritage' by the Office of the Prosecutor of the International Criminal Court follows. The conclusion on partial coverage of the destruction of cultural heritage in Ukraine by the Rome Statute and a particular challenge regarding the destruction of the intangible cultural heritage is reached.

Key words: Ukraine, Rome Statute, International Criminal Court, cultural heritage, international armed conflict.

ЧИ НИЩЕННЯ КУЛЬТУРНОЇ СПАДЩИНИ В УКРАЇНІ ОХОПЛЮЄТЬСЯ НОРМАМИ РИМСЬКОГО СТАТУТУ?

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Анотація

Стаття присвячена розгляду питання нищення культурної спадщини в контексті російської агресії проти України починаючи з 2014 року, з особливою увагою до подій після 24-го лютого 2022-го року, з позиції міжнародного права. Після змалювання історичної перспективи та сучасного регулювання захисту культурної спадщини у випадку міжнародного збройного конфлікту, подано аналіз положень Римського Статуту Міжнародного кримінального суду щодо «злочинів проти культурної спадщини або таких, що впливають на неї», як їх називає Офіс Прокурора Міжнародного кримінального суду. Досягнуто висновку про часткове охоплення питання нищення культурної спадщини в Україні нормами Римського Статуту, а також про особливий виклик щодо знищення нематеріальної культурної спадщини.

Ключові слова: Україна, Римський Статут, Міжнародний кримінальний суд, культурна спадщина, міжнародний збройний конфлікт.

On 25th February 2022, the second day of Russia's full-scale invasion of Ukraine, came the news of a missile hitting the Ivankiv Historical and Local History Museum, Kyiv region — a place hosting works of Ukrainian artists, including Maria Prymachenko. The museum staff was able to save some works by removing them from the exhibition a day before, while other works were destroyed forever.¹ More recently, Ukraine and the international community were shocked by the — luckily minor - damage inflicted on the Saint-Sophia Cathedral — a cathedral from the 12th century, forming a part of the UNESCO heritage site 'Kyiv: Saint-Sophia Cathedral and Related Monastic Buildings, Kyiv-Pechersk Lavra' and being one of the most crucial symbols and centuries-long witnesses of Ukraine's history.² Some of the further striking accounts of Russia's attacks against Ukraine's cultural heritage include hitting the Hryhorii Skovoroda Literary Memorial Museum in Skovorodynivka, Kharkiv region, dedicated to one of the most prominent Ukrainian philosophers,³ and stealing thousands of artefacts from several museums in Kherson.⁴ In total, according to the most recent data from the Ministry of Culture and Strategic Communication of Ukraine, as of May 2025, 1,482 cultural heritage sites and 2,302 cultural infrastructure facilities were damaged as a result of Russia's war of aggression.⁵ The full number is even higher, as these numbers do not include data from the territories under temporary occupation, from which it is hard to receive accurate information.

While the destruction of cultural heritage on this scale might be unprecedented in European history after World War II, the general nexus between cultural heritage and war is far from being a novel issue in human history. It was, however, not until the 19th century that it became restrained by the provisions of international law. For instance, during the Thirty Years' War, the Bibliotheca Palatina in Heidelberg, one of

¹ Smovzh, P. (2022, May 05). Yak ryatuvaly Ivankivskiy muzei z kartynamy Marii Prymachenko [How the Ivankiv Museum with the paintings of Maria Prymachenko was being rescued]. *Ukrinform*. Retrieved from <https://www.ukrinform.ua/rubric-ato/3494824-ak-ratuvali-ivankivskij-muzej-z-kartinami-marii-primacenko.html> [In Ukrainian].

² UNESCO (2025, June 11). Kyiv: UNESCO is deeply concerned about threats to World Heritage in Ukraine's capital. Retrieved from <https://shorturl.at/uPCli>.

³ Suspilne (2022, May 7). Muzei Skovorody na Kharkivshchyni znyshchenyi vnaslidok rosiiskoho obstrilu [The Skovoroda Museum in Kharkiv region was destroyed as a result of Russian shelling]. Retrieved from <https://shorturl.at/7S0Eo> [In Ukrainian].

⁴ Rubryka (2025, May 11). Pid chas okupatsii Khersona rosiyany vyvezly 23 tysyachi artefaktiv z kraieznavchoho muzeiu [During the occupation of Kherson, the Russians removed 23 thousand artifacts from the local history museum]. Retrieved from <https://shorturl.at/I2hDn> [In Ukrainian].

⁵ Ministry of Culture and Strategic Communication of Ukraine (2025, June 03). Due to Russian aggression, 1,482 cultural heritage sites and 2,302 cultural infrastructure facilities were damaged in Ukraine. Retrieved from <https://shorturl.at/vSvrh>.

the most important libraries of the German Renaissance, was seized by Maximilian of Bavaria and given to the Pope in a symbolic and political gesture. Most of it still forms a part of the Bibliotheca Apostolica Vaticana. The Peace of Westphalia did not require the restoration of plundered property, but some of the writings, documents and other movable objects were returned. It is only after the Napoleonic wars, marked by the looting of cultural objects across Europe and Egypt in an attempt to re-create Paris as the 'new Rome', that the Congress of Vienna reached a conclusion as to the need for restitution of cultural objects, even though only half of the works were eventually returned.⁶ Turning back to the Bibliotheca Palatina, this decision at the Congress of Vienna helped to return to Heidelberg some of the manuscripts.⁷ The major 'breakthrough' happened during the US Civil War with the issuing of the Instructions for the Government of Armies of the United States in the Field General Order No. 100 (1863), known as the Lieber Code, which recognised the need for a "special status for charitable institutions, collections, and works of art".⁸ This development in the US inspired the discussions as to the similar provisions in Europe, resulting in the Hague Conventions of 1899 and 1907. Thus, Article 27 of the 1907 Hague Convention Regulations provides for protection of the "buildings dedicated to religion, art, science, or charitable purposes [and] historic monuments, provided they are not being used at the time for military purposes". The provisions of these Conventions, as well as principles of customary international law, formed the basis of the convictions by the Nuremberg International Military Tribunal after World War II. In particular, Alfred Rosenberg was convicted of war crimes and crimes against humanity, including the plunder of public and private property comprising the artworks and cultural objects.⁹

The more recent sources include the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention) with First Additional Protocol (1954) and Second Additional Protocol (1999), the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage, the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), and the 2003

⁶ Gerstenblith P. (2023). Development of the Law of Armed Conflict as Applied to Cultural Heritage. In González Zarandona, J.A., Cunliffe, E., & Saldin, M. (Eds.), *The Routledge Handbook of Heritage Destruction* (1st ed., pp. 76–88). Routledge. <https://doi.org/10.4324/9781003131069-6>, 77 — 78.

⁷ Bibliotheca Palatina (2012). *Bibliotheca Palatina — The Story of a World-Famous Library*. Retrieved from https://digi.ub.uni-heidelberg.de/en/bpd/bibliotheca_palatina/geschichte.html.

⁸ Gerstenblith P. (2023). Development of the Law of Armed Conflict as Applied to Cultural Heritage, 78 — 79.

⁹ Ibid., 79 — 80.

Convention for the Safeguarding of the Intangible Cultural Heritage. Looking at the names of these treaties and their provisions, one may note the differences in wording as to the protected aspect of cultural heritage. For instance, the “cultural property” according to the 1954 Hague Convention covers “movable and immovable property of great cultural importance to the cultural heritage of every people”, certain protected buildings, such as museums, large libraries and depositories of archives, as well as centres containing monuments.¹⁰ The Additional Protocol I is subordinate to the 1954 Hague Convention, and protects “historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of the peoples”.¹¹ One may further notice that the sources addressing protection of some aspects of cultural heritage in the situation of an armed conflict deal solely with movable and immovable cultural property, excluding the intangible cultural heritage, and also use the threshold “of every people” (the 1954 Hague Convention) or “of the peoples” (Additional Protocol I). The intangible cultural heritage, comprising “practices, representations, expressions, knowledge, skills — as well as the instruments, objects, artefacts and cultural spaces associated therewith” was not governed by a legally binding treaty until the 2003 UNESCO Convention.¹² The said Convention is, however, silent as to any special norms on safeguarding intangible cultural heritage in a situation of armed conflict. There is also a general observation that intangible cultural heritage “has the least protection of any heritage under any legal system”.¹³

This overview of historical development and attention to terminological differences is immediately relevant for understanding the provisions of the Rome Statute of the International Criminal Court (ICC). The only article explicitly dealing with a certain aspect of cultural heritage in a situation of an international armed conflict is Article 8 (2) (b) (ix), outlawing the act of “[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments [...], provided they are not military objectives”.¹⁴ In its first case focused on the destruction of cultural heritage — *Al Mahdi* — the ICC has clarified that the ‘attack’ for the purposes of this article includes not only acts aimed at objects

¹⁰ Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, 14 May 1954, <https://shorturl.at/XTK6y>, Article 1 [1954 Hague Convention].

¹¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977>, Article 53.

¹² Convention for the Safeguarding of the Intangible Cultural Heritage, 17 October 2003, <https://shorturl.at/Dy85h>, Article 2, Preamble.

¹³ Smith C. (2023). Heritage Destruction In Conflict. In González Zarandona, J.A., Cunliffe, E., & Saldin, M. (Eds.), *The Routledge Handbook of Heritage Destruction* (1st ed., pp. 37–54). Routledge. <https://doi.org/10.4324/9781003131069-3>, 41.

¹⁴ Rome Statute of the International Criminal Court, 17 July 1998, <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>.

under the control of the adverse party, but also against those under the control of a party to the conflict.¹⁵ In the Ukrainian context, this would mean that protected objects located on Ukraine's territory under temporary Russian control would be covered by the scope of this article. Moreover, this article would also encompass cases when an attack was intentionally directed against a protected building or monument, but no actual damage followed.¹⁶

In terms of limitations of this article, notably, it is based on the 1907 Hague Convention rather than on the 1954 Hague Convention. On the one hand, one may agree with the Office of the Prosecutor (OTP) that the use of more general language is more inclusive than that of the 1954 Hague Convention or First Additional Protocol to the Geneva Conventions, which refer to the cultural property of a certain threshold.¹⁷ On the other hand, the significant limitation of such a wording lies in the fact that it only covers certain buildings and historic monuments, that is, immovable property rather than 'cultural property' under the meaning of the 1954 Hague Convention, which covers various categories of both immovable and movable property.¹⁸ The protection of intangible cultural heritage also falls beyond the scope of this article. Another limitation is the requirement that these protected objects are not military objectives, leaving room for interpretation of the factual circumstances, as might be illustrated by the example of the wanton destruction of the Old Bridge in Mostar. In particular, the Appellate Chamber of the International Tribunal for former Yugoslavia (ICTY) overturned the decision of a Chamber and reached a conclusion that this bridge constituted a military objective; therefore, no conviction followed. Judge Pocar dissented from this decision by stating that in this case, the military necessity and military objective tests should have been applied more stringently.¹⁹

Despite these limitations, there is a theoretical possibility for international criminal responsibility for the war crime of destruction of the protected categories of buildings and monuments in Ukraine under this article. The realisation of this possibility, the one concerning this particular crime or any other crime potentially within the scope of the Rome Statute, however, is also subordinate to the rules on admissibility of cases before the ICC, including complementarity and gravity. The

¹⁵ The Office of the Prosecutor (2021). *Policy on Cultural Heritage*. International Criminal Court. <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20210614-otp-policy-cultural-heritage-eng.pdf>, para.45; See The Prosecutor v. Ahmad Al Faqi Al Mahdi. (2016). ICC-01/12-01/15. International Criminal Court.

¹⁶ The Office of the Prosecutor (2021). *Policy on Cultural Heritage*, para. 46.

¹⁷ Ibid, para. 44.

¹⁸ 1954 Hague Convention, Article 1.

¹⁹ The Office of the Prosecutor (2021). *Policy on Cultural Heritage*, para. 57; See Dissenting Opinions of Judge Fausto Pocar. In Prosecutor v. Jadranko Prlic (2017). IT-04-74-A. ICTY. <https://www.legal-tools.org/doc/9379b6/pdf/>.

former means that Ukraine has a primary role in prosecuting attacks on the protected objects on its territory, while the ICC acts only in situations where Ukraine is either unable or unwilling to prosecute a case.²⁰ The latter means assessing whether the case is “sufficiently grave to justify further action by the ICC”.²¹ In the context of the cultural property, the objects listed as UNESCO World Heritage sites are likely to certainly pass this test. However, it is worth noting that crimes against other protected objects not having such a status might also be grave enough to justify the ICC’s involvement. In particular, in the *Al Mahdi* case all sites but one were inscribed on the UNESCO World Heritage List.²² In the same vein, relying on the practice of the ICTY, such as the conviction of Pavle Strugar for the shelling of Dubrovnik, the OTP noted that while attacks against UNESCO World Heritage sites bear particular gravity, it was not required by the ICTY that the attacks be targeting cultural property of ‘great importance’ to be deemed unlawful.²³

In an attempt to overcome the limitations of the original wording of the Rome Statute as to the protection of cultural heritage, the OTP published the Policy of Cultural Heritage (2021), where the ‘cultural heritage’ is broadly construed to cover not only immovable and movable property, but also processes, that is both tangible and intangible cultural heritage.²⁴ Importantly, ‘cultural heritage’ is understood as denoting “a community’s sense of identity and belonging”, while in temporal perspective it is realised that practices and attributes “are inherited from past generations, maintained in the present, and bestowed upon future generations for the benefit and continuity”.²⁵ Thus, the OTP uses the wording “crimes against or affecting cultural heritage” to accommodate protection of the cultural heritage as comprehensively as possible within various provisions of the Rome Statute beyond Article 8 (2) (b) (ix), pursuing the aim of giving “full effect to the provisions enunciated within the Statute”.²⁶ Accordingly, in the opinion of the OTP, the crimes against or affecting cultural heritage are present in each of the categories of international crimes, including genocide, crimes against humanity, war crimes, and the crime of aggression. Because of the jurisdictional difficulties of the prosecution of Russia’s

²⁰ Rome Statute of the International Criminal Court, Article 17.

²¹ Wierczyńska, K., & Jakubowski, A. (2017). Individual Responsibility for Deliberate Destruction of Cultural Heritage: Contextualizing the ICC Judgment in the *Al-Mahdi* Case. *Chinese Journal of International Law*, 16(4), 695–721. <https://doi.org/10.1093/chinesejil/jmx029>, para. 17.

²² ICC (2016, September 27). ICC Trial Chamber VIII declares Mr Al Mahdi guilty of the war crime of attacking historic and religious buildings in Timbuktu and sentences him to nine years’ imprisonment. <https://www.icc-cpi.int/news/icc-trial-chamber-viii-declares-mr-al-mahdi-guilty-war-crime-attacking-historic-and-religious>.

²³ The Office of the Prosecutor (2021). *Policy on Cultural Heritage*, para. 43.

²⁴ *Ibid.*, para. 14 — 17.

²⁵ *Ibid.*, para. 15.

²⁶ *Ibid.*, para. 37.

aggression against Ukraine in the ICC, this paper is focused on three other categories of international crimes excluding the crime of aggression.

Continuing with the category of war crimes (Article 8), to which belong the abovementioned protection of certain buildings and monuments, covered by Article 8 (2) (b) (ix) as *lex specialis*, the other highly relevant provisions are *lex generalis* norms on protection of civilian objects: Article 8 (2) (b) (ii) “intentionally directing attacks against civilian objects” and Article 8 (2) (b) (iv) “intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects”. These provisions would cover any other tangible heritage which does not constitute a specially protected building or monument. However, with respect to these articles, the special understanding of the term ‘attack’ is no longer present, so that it covers only civilian objects not under the control of the same party, excluding thus the objects in the occupied territories.²⁷

Other group of provisions on war crimes, which are highly relevant for tangible cultural heritage, includes the crimes entailing destruction or appropriation of property not for private or personal use: Article 8 (2) (a) (iv) “Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”, which would also cover all property on occupied territory, such as the situations when museum exhibits or archives are unlawfully relocated to Russian Federation to be kept there according to the state policy; and Article 8 (2) (b) (xiii) “Destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war”.²⁸ In addition, the situations of appropriation of cultural property for personal gain would be covered by Article 8 (2) (b) (xvi), prohibiting pillaging.²⁹

Another major category of crimes under the Rome Statute — crimes against humanity (Article 7) — is applicable in situations where general conditions for invoking these crimes are satisfied, namely when the attack is directed against the civilian population rather than objects when it is undertaken pursuant to a state policy, and when it has a widespread or systematic nature.³⁰ Out of the crimes mentioned by the OTP, it is suggested to highlight the following crimes briefly characterised below. Article 7 (1) (d) “Deportation or forcible transfer of population”, which would also encompass cases where members of the community have to flee to practice their culture freely, allegedly such as when Ukrainians have been relocating from Crimea since the occupation in 2014, accompanied by the restrictions as to the ability to practice culture freely. Article 7 (1) (h) “Persecution” that is deprivation

²⁷ Cf. The Office of the Prosecutor (2021). *Policy on Cultural Heritage*, para. 50; Additional Protocol I, Article 49.

²⁸ See The Office of the Prosecutor (2021). *Policy on Cultural Heritage*, para. 52 — 57.

²⁹ Ibid., para. 58 — 59.

³⁰ Ibid., para. 62 — 66.

of fundamental rights, including in the first place the right to self-determination, entailing also cultural development and the right to freedom of religion or belief, affected by the attacks on the religious sites.³¹ Article 7 (1) (f) “Torture”, in particular, including its element of mental suffering inflicted by the destruction of cultural heritage.³² Article 7 (1) (b) “Extermination”, in the context of which crimes affecting cultural heritage, “can lower a group’s morale, change power dynamics, and weaken resistance, thereby facilitating mass killing”.³³

When it comes to genocide — the crime which has a special symbolic meaning for Ukrainians in the context of the current Russian aggression against Ukraine and in the historical perspective, including various instances of prohibition and pressure on the Ukrainian language and culture throughout centuries — even if Rome Statute does not include ‘cultural genocide’, the crimes against or affecting cultural heritage may evidence the specific intent of the perpetrator and the manifest pattern needed for proving the commission of this crime. This approach has been applied by the ICTY in the case of *Krstić*, where the tribunal recognised that the destruction of a group may also be undertaken “through purposeful eradication of its culture and identity resulting in the eventual extinction of the group as an entity distinct from the remainder of the community” and took into account the deliberate destruction of mosques and houses as evidence of intent to destroy the group.³⁴ Furthermore, in the *Bosnian Genocide*, ICJ endorsed this observation from *Krstić*, stating 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 intent to physically destroy the group”.³⁵

Apart from contributing to the demonstration of intent, certain acts affecting cultural heritage may themselves constitute the acts of genocide. For instance, Article 6 (b) “Causing serious bodily or mental harm to members of the group”, in particular, the element of mental harm.³⁶ Furthermore, Article 6 (c) “Inflicting conditions of life calculated to bring about the group’s physical destruction”, as acts targeting or affecting cultural heritage may be a means of imposing such conditions of life.³⁷

³¹ Ibid., para. 75.

³² The Office of the Prosecutor (2021). *Policy on Cultural Heritage*, para. 71.

³³ Ibid., para. 67.

³⁴ Ibid., para. 78; Wierczyńska & Jakubowski (2017). Individual Responsibility for Deliberate Destruction of Cultural Heritage, para. 12; Prosecutor v. Radislav Krstić (2001). IT-98-33-T. ICTY. <https://www.refworld.org/jurisprudence/caselaw/icty/2001/en/40159>, para. 574, 580.

³⁵ The Office of the Prosecutor (2021). *Policy on Cultural Heritage*, para. 79; Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro). (2007). ICJ Rep. 43. ICJ. <https://www.icj-cij.org/sites/default/files/case-related/91/091-20070226-JUD-01-00-EN.pdf>, para. 344.

³⁶ The Office of the Prosecutor (2021). *Policy on Cultural Heritage*, para. 82.

³⁷ Ibid., para. 84.

Moreover, and perhaps most importantly in the Ukrainian context, given the number of children taken from Ukraine to the Russian Federation, Article 6 (e) “Forcibly transferring children of the group to another group”, the crime which has a profound impact on numerous manifestations of the intangible cultural heritage and for the continuation of a group’s cultural heritage as such.

In conclusion, the destruction of cultural heritage in Ukraine due to the Russian aggression is partially covered by the Rome Statute of the International Criminal Court. The most definitive backing by the criminal sanction is granted to the immovable cultural property: certain buildings, related to culture and historic monuments, against which it is prohibited to intentionally direct attacks, provided that these are not military objectives. Intangible cultural heritage, in contrast, remains the least protected category of cultural heritage. Relying on the Policy on Cultural Heritage by the Office of the Prosecutor, it was explained how various crimes against or affecting cultural heritage are found across the provisions of the Rome Statute and are potentially relevant in the Ukrainian context, such as general protection of civilian objects from an armed attack, prohibition of appropriation of property not for private or personal use as well as those for personal gain, prohibition of deportation or forcible transfer of population, prohibition of persecution and torture, including mental suffering, inflicting conditions of life calculated to bring about the group’s physical destruction or prohibition of forcible transfer of children to another group. Importantly, apart from amounting to crimes, certain acts affecting cultural heritage might also evidence the presence of genocidal intent.

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