

*Arturo Dueñas Díaz*

*Internationalist and translator by the Pontifical University of Comillas. Master's Degree in Interdisciplinary European Studies, College of Europe*

*Email: arturodue97@gmail.com*

## *Athena versus Mars: the protection of ukrainian cultural heritage in the war against Russia*

### **Abstract**

The Ukrainian war has awakened old fears in Europe. This war has its origins in ethno-cultural issues that go back centuries. To understand the origin of the conflict between Russians and Ukrainians, it is necessary to go back to the Russian empire, which is reflected today in aspects such as language and religion. In such a conflict, cultural property becomes a potential victim and subject to manipulation, plunder, damage and destruction. Since the beginning of the war, hundreds of cultural properties in Ukraine have been damaged or destroyed despite international regulations protecting heritage in the event of armed conflict, much of which has been ratified by both Kiev and Moscow. This paper will begin by analyzing Ukrainian versus Russian national identity from its origins to the present day, continue by examining the mechanisms of protection of cultural property applicable to this case, as well as the damage suffered to this day by Ukrainian heritage, and try to determine whether such acts are contrary to international law and how they can be judged.

### **Keywords**

Ukraine, Cultural heritage, Destruction, Armed conflict, UNESCO.

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## I. Introduction

On February 24, 2022, the Russian army crossed the border and marched on Ukraine. Since the beginning of the Russian invasion, the Ukrainian government has worked together with UNESCO and other cultural organisations to protect the country's cultural property by fixing the emblem prescribed by the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, surrounding historical monuments with sandbags and trying to evacuate cultural property from museums.

It is interesting to analyse the protection of Ukraine's wartime cultural heritage for several reasons. First, cultural property is also a victim of conflict and is subject to theft, damage or destruction. In addition, their protection is often compromised by being subordinated to the military needs of the warring parties. Secondly, the Russian-Ukrainian conflict has very strong cultural motivations, which puts cultural assets even more in the spotlight as their destruction is an effective means of undermining morale and humiliating the adversary.

This paper will seek to answer the following research questions: Which cultural assets are most threatened in war? Has Russia committed war crimes by its actions against cultural property in Ukraine? And if the answer is yes, how can they be judged? Naturally, the answer to these questions will be detailed in the conclusions.

The work is divided into three distinct parts. The first part will consist of an analysis of what is meant by heritage and of the range of international standards aimed at protecting cultural property. The second part will analyse precisely the Ukrainian national consciousness *vis-à-vis* the Russian one from its origins to the present day. Exploring the identity and interests of both sides will reveal the ideals and objectives of the actors and allow us to demonstrate that identity is an element that is present in the construction of the foreign policy of states, as well as the effectiveness and importance that its study can have in international relations. The third part will provide the reader with an overview of the current situation of cultural heritage in Ukraine now that the country is in the midst of war. Finally, the fourth part will look at how to bring to justice the crimes committed against heritage in this conflict.

### 1.1. What is cultural heritage?

Influenced by the ravages suffered by historical and cultural heritage during World War II, the Convention for the Protection of Cultural Property in the Event of Armed Conflict adopted in The Hague in 1954 first delineated in article 1 what was meant by cultural property: “movable or immovable property of great importance to the cultural heritage of every people”, be they monuments, works of art, manuscripts, etc. and “buildings whose main and effective purpose is to preserve or exhibit the movable cultural property”, such as museums, libraries, archives or even shelters

intended for their protection. Sites that concentrate a considerable number of cultural properties of the two previous classes will be considered as monumental centres (Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954)<sup>10,31</sup>},»issued»:{{«date-parts»:{{«1954»,5,14}}}},»schema»:»https://github.com/citation-style-language/schema/raw/master/csl-citation.json»} .

Besides, the Convention Concerning the Protection of the World Cultural and Natural Heritage, adopted within the framework of the UNESCO General Conference at its 17<sup>th</sup> session held in Paris from October 17 to November 21, 1972, in its article 1 defines cultural heritage as:

“Monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science; groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science; and sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view” (Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1972).

The latter definition is key, not only for its precision and clarity, but also for highlighting the universal value of heritage. This idea of cultural diversity as an invaluable asset for the whole of humanity is taken up by UNESCO in one of its declarations of November 15, 1972, article 7 of which recognises “the right of all countries and peoples to preserve their culture as part of the common heritage of mankind” (*Declaración sobre los Principios Rectores del Empleo de las Transmisiones por Satélite para la Libre Circulación de la Información, la Difusión de la Educación y la Intensificación de los Intercambios Culturales*, 1972).

Indeed, heritage can be understood as an inheritance that a human group receives from previous generations, which it can pass on to future generations, and which the members of the group carry with them to express their identity and collective memory. It is because of this potential of heritage as a basis from which to project oneself into the future that, after decolonisation, third world countries pushed for the recognition within the United Nations of the so-called third generation rights or human rights of solidarity, among which the right of peoples to their natural wealth and resources is of particular interest to us. The latter would crystallise in articles 13 to 15 of the 1976 Universal Declaration of the Rights of Peoples, concerning the right to preserve their own culture and conserve their heritage (Urueña Álvarez, 2004).

Given its role as a bridge between the past and the present, the deliberate destruction of cultural property has been frequently used as a weapon of war throughout history up to the present day, as recognised by the Cultural Heritage Policy of the Office of the

Prosecutor of the International Criminal Court: “Deliberate attacks on cultural heritage are a centuries-old practice that remains a feature of modern conflicts”. Indeed, the destruction of heritage assets is part of strategies to eliminate the adversary’s cultural and ideological references in order to undermine its morale and weaken the historical justifications for its claims. The loss of heritage is a severe blow to the identity of a nation, which sees an important part of its past erased with the stroke of a pen. Without testimonies of its tradition that allow it to project itself into the present and the future, a culture is exposed to the manipulation of its history, its cultural cleansing and its dilution in favour of another imposed or assimilated culture. From a security perspective, identity crises also foster instability and conflict by increasing the likelihood of violent struggles within societies to forge a new identity and of feelings of resentment between different human groups (Cortés Jiménez, 2019).

### *1.2. Mechanisms for the protection of cultural heritage in armed conflict*

Once the object of study has been defined, we can go on to consider the set of legal bases that ensure its protection. First of all, cultural heritage is protected by human rights themselves, more specifically article 27 of the Universal Declaration of Human Rights which ensures the right of everyone to “freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits”, an idea that is also enshrined in article 15 of the 1966 International Covenant on Economic, Social and Cultural Rights, to which both Russia and Ukraine are parties (Universal Declaration of Human Rights, 1948), this idea is also reflected in article 15 of the 1966 International Covenant on Economic, Social and Cultural Rights, to which both Russia and Ukraine are parties (Drazewska y Hausler, s. f.).

In the field of *ius in bello*, article 147 of the Fourth Geneva Convention of 1949 considers “destruction and appropriation of property not justified by military necessity and carried out on a large scale in an unlawful and wantonly” as grave breaches (Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949). Similarly, its 1977 Additional Protocol I on the Protection of Victims of International Armed Conflicts, which is binding on Russia and Ukraine, stipulates in article 53 that “historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples” must not be attacked, be the object of reprisals, or be used in support of the military effort (Protocolo I adicional, 1977).

The 1954 Hague Convention mentioned above is a key document as the first treaty of universal scope devoted exclusively to the protection of cultural heritage (Urueña Álvarez, 2004). This Convention, which was sponsored by UNESCO and to which both Russia and Ukraine are parties, requires in its Article 4 that states parties respect cultural property located on the territory of other states, refrain from any act of theft, pillage, misappropriation or vandalism against it and avoid retaliatory measures against cultural property. Likewise, States Parties to the Convention must both avoid “exposing such property to destruction or damage in the event of armed conflict”

(Convention for the Protection of Cultural Property, 1954), and take advantage of the protection enjoyed by the property by using it in support of the military effort.

The 1954 Convention offers cultural property two types of protection: a general one, under Article 6, for anything that can be considered cultural property under Article 1, whereby it is the task of the State Party to determine which property is of sufficient importance to enjoy the protection of the Convention; and a special protection, for cultural property of great importance which is not used for military purposes, which is remote from important military objectives and which is inscribed on the International Register of Cultural Property under Special Protection, in addition to shelters of specific property, and transports which are specially used for the purpose of transporting cultural property (article 8). In order to mark the properties to be protected, the Convention establishes an emblem of obligatory use in the case of cultural property subject to special protection, and optional use for those with general protection (Balcells Magrans, 2022).

Subsequently, in view of the brutal acts committed during the Kosovo war, it became clear that a new treaty was needed that would take up the development of humanitarian law since 1954 and deepen the protection of heritage (de Rueda Roigé, 1998). Thus, at the Diplomatic Conference held in The Hague in 1999, the Second Protocol was signed, Chapter III of which established a new category of enhanced protection for cultural property of particular importance for humanity which benefits from appropriate national protection measures and which is not used for military purposes (Second Protocol, 1999).

### *1.2.1. Military requirements*

Despite the general prohibition of subjecting cultural property to attack, international law also provides for certain exceptions under which it is lawful. Thus, the 1954 Convention introduces for the first time the idea of military necessity taking precedence over the protection of cultural property (de Rueda Roigé, 1998). Regarding cultural property enjoying general protection, article 4.2 of the Convention provides that it shall lose its protection if military necessity prevents compliance. The conditions for waiving the immunity of specially protected cultural property are stricter and according to Article 11 can only be done on a temporary basis if the adversary attacks cultural property or uses the property or its immediate vicinity for military purposes, and prior efforts should be made to require the adversary, whenever possible, to cease such violation within a reasonable time. The decision to waive immunity can only be taken by, at least, one Head of Division and must be communicated to the opposing party, if circumstances permit it, well in advance and in writing to the Commissioner-General for Cultural Property, explaining the reasons for taking such action (Convention for the Protection of Cultural Property, 1954). It goes without saying that, under the principle of proportionality, a waiver of military necessity does not justify a disproportionate attack (Drazewska y Hausler, s. f.).

The Second Protocol, pursuant to article 4 of the 1954 Convention, in its article 6, further elaborates on the concept of military necessity by accepting it in case the cultural property in question has been rendered a military objective by its function, or if the capture, neutralisation or destruction of the cultural property would provide a military advantage not otherwise achievable. Therefore, military necessity cannot be invoked if the attack does not involve such a military advantage or if the damage caused to the cultural property is excessive in relation to the military advantage anticipated, as prescribed by article 7 of the same Protocol (Second Protocol, 1999), or if it has other purposes such as spreading terror among the population, which is prohibited by article 51 (2) of the 1977 Additional Protocol I.

### *1.2.2. Looting of cultural property*

Finally, the 1954 Convention had certain gaps, such as the restitution of cultural property in post-conflict situations and how to deal with illicit situations resulting from a possible lack of vigilance and conservation, such as illicit trafficking in property, archaeological plundering, or the restoration or modification of cultural property with ideological intent. These gaps have been filled by subsequent protocols and conventions such as the Protocol for the Protection of Cultural Property in the Event of Armed Conflict, adopted at the same time as the 1954 Convention of the same name (Miranda Gonçalves, 2020). This Protocol, which has been signed and ratified by both Russia and Ukraine, in its Chapter I requires its States Parties to prevent the export of cultural property located in territory occupied during the armed conflict, to seize cultural property imported into their territory, to return it and to compensate the competent authorities of the territory of the State from which it was exported after the end of hostilities (Protocol for Protection, 1954). In the same vein, the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property was adopted within the framework of UNESCO in 1970 and approved by Russia and Ukraine in 1988 (Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970). The 1999 Second Protocol also addresses this issue in Article 9 by prohibiting, in occupied territory, the export of cultural property by the occupying power, as well as archaeological excavations and restorations, except when indispensable for the safeguarding of the property. They should also, if necessary, enlist the cooperation of the competent national authorities of the occupied territory, if and when circumstances permit (Segundo Protocolo, 1999).

## **2. The case of Ukraine**

The causes of the present conflict are numerous and varied in nature: geopolitical, strategic, economic and, of course, cultural and identity-based. The American political scientist Alexander Wendt already argued that identity and interests were the main

factors guiding the actions of states, and that identity and interests were determined not so much by material forces as by ideas. As a consequence of interacting with other actors, their awareness of themselves *vis-à-vis* others, their own characteristics and history, international actors construct images of themselves in order to differentiate themselves from other actors. These images constitute what we know as identity and condition its relationship with the other states with which it interacts, as well as the interests that lie behind this relationship (Wendt, 1994).

Three days before the invasion, on February 21, 2022, Vladimir Putin made a speech to justify Russia's intervention in the neighbouring country. Among the reasons given were NATO's expansion right up to Russia's doorstep, but especially the legitimacy of Ukraine's identity and its right to statehood (Putin, 2022).

This is not the first time Putin has made similar statements. For example, in 2008, on a visit to the US, he told US President George W. Bush that "Ukraine is not a country" and in his speech to the Duma in 2014, after the annexation of Crimea, he claimed that Russians and Ukrainians were one nation (Behrends, 2014). Such statements reflect Putin's belief in the unity of the peoples descended from Kievan Rus on the basis of their Slavic and Orthodox Christian identity (Dlugy, 2022). However, it omits the influence of other cultures that have contributed to making Ukraine, Belarus and Russia distinct nations.

The idea shared by the Russian elite of the existence of one great Russian nation divided into three Russias corresponding to a Greater Russia, a Lesser Russia (Ukraine) and a White Russia (Belarus) dates back to the time when the Grand Principality of Moscow brought the various Eastern Slavic groups under its control and has been promoted through the Russian imperial education system of the 19<sup>th</sup> century to the present day (Mankoff, 2022).

According to this approach, Ukrainian and Belarusian national identities would be a product of manipulation from the outside, and thus artificial. In the case of Ukraine, although its inhabitants had been culturally and linguistically different from Russians for centuries, Ukrainian nationalism did not emerge until the 19<sup>th</sup> century after the partition of Ukraine between Russia and Austria, which came to control the Ukrainian regions of Galicia, Bukovina and Transcarpathia. Saint Petersburg tried to suppress Ukrainian nationalist sentiment by banning the publication of works and teaching in the Ukrainian language, judging it to be a minor dialect and a contrived creation of Austria-Hungary to weaken the greater Russian identity (Behrends, 2014), which Putin evokes in his accusations of NATO and the EU manipulating Ukrainian national identity as part of their geostrategic rivalry with the Kremlin.

Ukraine sought independence after the collapse of the Russian and Austro-Hungarian empires in the aftermath of World War I and during World War II, when the Organisation of Ukrainian Nationalists led by Stepan Bandera attempted to create an independent Ukrainian state with the cooperation of Nazi Germany. Nevertheless, Stalin carried out an intense russification campaign in Ukraine that would be continued by his successors until Gorbachev's glasnost, when nationalist movements advocating

independence from the USSR regained their importance. Yeltsin supported Ukrainian independence in the belief that it would not be permanent and that an independent Ukraine would always remain linked to Russia (Behrends, 2014).

On the contrary, since its independence, Ukraine has taken steps towards consolidating its national identity, including in the majority Russian-speaking regions in the east and south of the country. Of particular note are the efforts made in this regard during Petro Poroshenko's presidency during which, in 2019, a law was passed making Ukrainian the official language of the state and increasing its use in the media and administration. As a result of this nation-building process, today two thirds of Ukrainian citizens consider Ukrainian to be their mother tongue and a large part of the eastern part of the country is bilingual in Ukrainian and Russian (Behrends, 2014).

Ukraine's cultural disconnection from Russia has even been reflected in the religious sphere. Until 2014, the largest of all Ukrainian Orthodox churches was the Ukrainian Orthodox Church of the Moscow Patriarchate (UOC-MP) (Behrends, 2014), which had been created during the last days of the USSR as an autonomous Church dependent on the Moscow Patriarchate despite the existence of the Ukrainian Autocephalous Orthodox Church (UAOC) and the Ukrainian Orthodox Church of the Kyiv Patriarchate (UOC-KP), which had been created in 1992 as independent from the Moscow Church shortly after Ukraine's declaration of independence. However, both the UAOC and the UOC-KP lacked recognition in the orthodox church hierarchy and were branded schismatic. The situation changed on December 15, 2018 with the Unification Council held in Saint Sophia Cathedral in Kiev, which unified the UAOC, the UOC-KP and some parishes of the UOC-MP into the new Orthodox Church of Ukraine (UOC) which was also granted autocephaly and recognition by the Ecumenical Patriarchate of Constantinople, much to the frustration of the Moscow Patriarchate (Orzechowski y Wejman, 2021). This separation between the Ukrainian and Russian Orthodox churches adds a dimension of religious warfare to an already complex conflict. Since its inception, the UOC has taken steps to move closer to the Western Catholic churches and away from the traditions of the Russian Orthodox Church. On December 24, 2022, the Primate of the UOC and the Greek Catholic Church in Ukraine signed an agreement to harmonise their liturgical calendars and the dates of their religious holidays, which meant that, for example, Christmas would henceforth be celebrated in the Slavic country on December 25 and not on January 7 as per Orthodox tradition. At the present juncture, even the UOC-MP has distanced itself from Russia despite the harmony of its primate with the current Patriarch of Moscow. In May 2022, the UOC-MP issued a communiqué rejecting the Russian invasion and amending its statutes, underlining its autonomy from the Russian Orthodox Church, although it did not miss the opportunity to blame the UOC and its ideology for the invasion (Bianchi y Botti, 2023). According to sources, the UOC would today be the largest church in Ukraine with 54 % of the Ukrainian population being members. In contrast, while the UOC-MP had always been the majority church among the Ukrainian population, today only 4 % of Ukrainians would identify with this religious denomination (Лев, 2022), probably because of accusations that it is a focus of Russian influence if not collaboration with the invader.

The relative success of Kiev's ukrainianisation policy has set alarm bells ringing in Moscow and the invasion unleashed in February last year can be interpreted as a last desperate attempt to bring Ukraine back into the Russian fold. However, it seems that this war has had the opposite effect of bringing Ukrainian citizens closer together and reinforcing the separation between Russian and Ukrainian identities.

### 3. Heritage damage in the Ukrainian war

The ethnic and cultural element is key in this war between two groups that are perceived as two distinct cultures and ethnic groups. Given the close relationship between cultural heritage and identity, cultural property runs the risk of being used in a propagandistic manner to strengthen the positions of groups and of becoming military targets to deny the cultural identity of the other. This is not the first time that Ukraine's cultural heritage has been threatened by war. Already during the occupation of the country by German troops during World War II, Ukraine suffered severe cultural losses due to looting and destruction (Pasikowska-Schnass, 2022). In the current war, if one thing is clear from the photographs and videos that reach us, it is that there are no neutral zones and that even civilian places such as homes, hospitals, nuclear power plants, schools, places of worship, museums and archaeological sites are not free from military targeting and artillery fire (Bazhenova, 2022). Since the beginning of the war, the vast majority of Ukrainian territory has been shelled with ballistic and cruise missiles aimed at intimidating and demoralising the population. In February 2022 alone, the Russian military is estimated to launch more than 1100 missiles, around fifty per day (Koval y Gaidai, 2022). Such actions should come as no surprise given that Russia has already demonstrated its disregard for international norms in Syria by targeting some of its attacks on hospitals and important heritage sites (Daniels, 2022).

At present, Ukraine has eight UNESCO World Heritage Sites: the residence of the Metropolitans of Bukovina and Dalmatia in Chernivtsí, the wooden tserkvas of the Carpathian region, the Geodesic arch of Struve, the Chagarian beech forests of the Carpathians, the ancient city of the Tatar Chersonese and its *chôra* in occupied Crimea, Saint Sophia Cathedral, the monastic ensemble and the Kievo-Petchersk laura in Kiev, the ensemble of the historic centre in Lviv, and the historic centre of Odessa. The latter three have been added by UNESCO to its List of World Heritage in Danger because of the serious danger of war damage. The inclusion of the Ukrainian properties on the list is part of efforts both to prevent them from being attacked by Russia and to alert the international community and enlist its urgent support for their preservation. Inscription on the list enables Ukraine to benefit from resources from the World Heritage Fund and to collaborate with the World Heritage Committee in taking corrective measures to ensure the conservation of the properties (*Centro del Patrimonio Mundial*, 2008: 17). Measures Ukraine has benefited from since the beginning of the invasion include a \$ 30 million emergency plan, part of which is earmarked for monument protection equipment, and support for the conservation and digitisation of artistic and documentary heritage (UNESCO, 2023).

Ukraine also has seventeen World Heritage candidate sites on its Tentative List (UNESCO, s. f.), among which the Derzhprom complex located in Kharkov's Freedom Square, the archaeological site of the Stone Tombs and the historical centre of Chernobyl have been affected by the intense fighting (Pasikowska-Schnass, 2022). As part of UNESCO's efforts to conserve Ukrainian heritage, UNESCO is working hand in hand with the Ukrainian authorities and ICOMOS to develop a rehabilitation plan for the historic centre of Chernobyl (UNESCO, 2024).

According to UNESCO, from the beginning of the war on February 24 to October 18 this year, a total of 295 cultural sites have been damaged or destroyed (according to the Ukrainian Ministry of Culture this figure is 533), including 124 religious sites, 110 historic buildings, 28 museums, nineteen monuments, thirteen libraries and one archive. The overwhelming majority of damaged cultural property is located in areas of heavy fighting such as Donetsk, Kharkov and Lugansk, and in Kiev (UNESCO y Larcán, 2023).

The region with the most damaged or destroyed cultural sites is Donetsk with 85 damaged or destroyed cultural sites, according to UNESCO, especially the city of Mariupol. The former Greek colony on the Sea of Azov is now under the control of the Donetsk People's Republic (Kishkovsky y Seymour, 2022). It is estimated that around 20 000 of its inhabitants have perished in the Russian offensive (Koval y Gaidai, 2022) and that 90 % of its historic buildings have been destroyed (Verheyen y Chialastri, 2022). On March 16, 2022, one of the most dramatic episodes of the war took place in that city after Russian aircraft dropped two 500 kg bombs on the Donetsk Regional Academic Theatre of Dramatic Art, despite the fact that it was marked in Russian with the word children written large on the ground. In this case the Russians did not destroy it because it was a cultural building, but, worse, because they knew that about a thousand women and children were sheltering there, of whom about 600 perished (Baitsym, 2022).

Kharkov, with 55 sites in particular, is the second Ukrainian region with the most damaged or destroyed cultural heritage. In February 2022 alone, Russian attacks destroyed 80 % of Izium and 1937 buildings, including 1671 residential buildings, in the city of Kharkov (Koval y Gaidai, 2022), Ukraine's second largest city and a member of the UNESCO Creative Cities Network. Some of the buildings of heritage interest in the city centre have suffered the most damage, such as the opera house; the Derzhprom complex on Freedom Square, which is on Ukraine's Tentative List for future World Heritage status; and the Slovo Building, important in the Ukrainian national consciousness for having been built in the 1920s to house the most prominent Ukrainian writers, a good number of whom would be shot on orders from the USSR (Kishkovsky y Seymour, 2022). On March 9, the city's Art Museum was also bombed and badly damaged. The museum has a collection of around 25 000 works, including works by Italian, French, Indian, Chinese, Russian and Flemish artists, and although they were fortunately not destroyed in the attack, their conservation, especially that of the paintings, has been severely compromised as their temperature and humidity can no longer be controlled (Baitsym, 2022).

Other Ukrainian cities that have also been severely damaged include Trostianets, Irpin, Bucha, Borodianka and Hostomel, while others such as Lisichansk, Severodonetsk, Rubizhne and Chernobyl have been virtually wiped off the map (Koval y Gaidai, 2022). In the latter, whose historic centre is on the Ukrainian UNESCO World Heritage Tentative List, Russian forces destroyed an estimated 70 % of the buildings in February 2022 (Koval & Gaidai, 2022).

Russian attacks seem to target especially those cultural assets that represent those parts of Ukrainian history and politics that are not compatible with the predominant Russian version of history or that support the idea of a Ukrainian nation, especially monuments, museums, libraries and archives. Russian forces have attacked monuments commemorating victims who perished during the Holodomor, the great famine accompanied by political repression caused by the Stalinist regime in Ukraine between 1932 and 1934 and considered by more than thirty countries as genocide against Ukraine, which Russia still denies today. We know that during the Russian occupation of Mariupol in October 2022 Russian troops ordered the dismantling of a memorial to the victims of the Holodomor (Koval y Gaidai, 2022) and that in July 2023 in Sumy Oblast they bombed a school housing a Holodomor research centre (Sapuppo, 2023). Similarly, several monuments to Taras Shevchenko, the Ukrainian national poet who was forced into exile because of Russian repression, have also been destroyed or damaged. On the other hand, monuments dedicated to personalities viewed favourably by Russia, such as the Cossack hetman Bogdan Khmelnytsky who signed the treaty incorporating the Cossack territories into the Russian Tsarate, are not in danger (Mick, 2023).

Among the museums that have suffered damage, is the Ivankiv Historical and Cultural Museum in Ivankiv, northwest of Kiev, which was burned down in February 2022, just four days after the beginning of the Russian invasion. As a result of the fire, 25 works by the internationally renowned Ukrainian artist Maria Prymachenko (Daniels, 2022) were lost. This artist, whose work received praise from the likes of Pablo Picasso and Marc Chagall, is a key figure in Ukrainian art as she sought an alternative to the prevailing discourse in the USSR that considered Russian art as the pinnacle of creative intelligence while disdaining Ukrainian art and relegating it to inferior categories such as folk and national (Baitsym, 2022). In Kharkov Oblast, on May 7, 2022, a Russian airstrike destroyed the Hryhorii Skovoroda National Literary Memorial Museum, dedicated to the 18<sup>th</sup> century philosopher and poet after whom it is named, considered a national symbol in Ukraine. The mansion in which he lived and wrote his works in the twilight of his life has also been destroyed, although fortunately its contents had been made safe earlier (Kishkovsky y Seymour, 2022).

Ukraine's literary heritage has also been affected given its role as a repository of Ukrainian culture. It is estimated that dozens of libraries across the country have been destroyed and more than 150 have been severely damaged, such as the Rare Book Library of the Vasily Karazin National University in Kharkov whose collection of 60 000 historical books and manuscripts was bombed (Sapuppo, 2023). In the Russian-occupied areas, the authorities promote the repression of

everything related to Ukrainian culture and history in the educational, political and cultural spheres. Thus, books are confiscated from public libraries and schools to be destroyed and replaced by books on Russian and Soviet language, culture and history (United Nations, 2023). There is also a risk that the Russian occupying forces will destroy archives and documents that contradict their historical narrative, especially documents from the Soviet period (Schäffer y Kirchmair, 2022). There is also evidence that artists and writers have been detained, tortured or even killed in the Donetsk and Luhansk regions because of their pro-Ukrainian views, such as the children's writer Volodymir Vakulenko (Shcherba, 2023).

In the case of places of worship, many have been damaged and destroyed during this war, reflecting the tension between the different Orthodox churches. For example, the Holy Dormition Orthodox monastery in Sviatohirsk Lavra built in the 16<sup>th</sup> century and located in Donetsk Oblast. This monastery, which is considered one of the three holiest places in Ukraine by Orthodox Christians, was under the jurisdiction of the Ukrainian Orthodox Church of the Moscow Patriarchate. Given its proximity to the front, in March, Russian artillery destroyed the Saint George's skete and heavily damaged the church of All Saints belonging to this monastic complex (Kishkovsky y Seymour, 2022). Other religious cultural properties damaged or destroyed by the war include: the Dormition Cathedral in Kharkov, an Orthodox church built in the 18<sup>th</sup> and 19<sup>th</sup> century, whose stained glass windows and icons were damaged on March 2, 2022 after Russian troops launched a bombardment against the cathedral which at the time was being used as a shelter by the civilian population; the Trinity Monastery in Chernobyl, a monastic ensemble of 11<sup>th</sup> and 17<sup>th</sup> century buildings which has apparently been severely damaged (Hammer, 2022); and the Transfiguration Cathedral in the port city of Odessa, a UNESCO World Heritage Site, which was partially destroyed by a Russian missile strike on July 23 this year (Sapuppo, 2023). It is interesting to note that all of the above religious sites were under the UOC-MP. By destroying these sites Russia destroys a heritage that it perceives as part of its own Russian Orthodox culture. In principle, it does not make much sense for the Russian military to seek to destroy cultural property that it considers its own and can claim. In fact, once the territory was conquered and the conflict was over, it would be expected that these churches would be placed under the direct control of the Russian Orthodox Church (Mick, 2023). However, it is important to bear in mind the direction the war is taking for Russia. The Kremlin realises that taking all of Ukraine and halting its nation-building is now unlikely, hence its strategy now is to slow down the Ukrainian counter-offensive and hold on to as much of the ground it has conquered so far as possible. In order to consolidate its positions, Russia would employ indiscriminate bombing tactics that would make no distinction with cultural property or attempt to avoid damaging it, which is contrary to the 1954 Hague Convention. Likewise, being aware of how unlikely it is at this stage that these churches will end up in the hands of the Russian Orthodox Church, it would not pose a moral dilemma to destroy them and would even be a means of damaging and demoralising the enemy. Apart from Orthodox churches, Russia has also bombed other religious sites, including the mosque of Sultan Suleiman the Magnificent and his wife Roxelana in Mariupol,

which was bombed on March 12, 2022, when it was used as a shelter by eighty people, including 34 children (Baitsym, 2022).

In many cases, Russian military tactics of bombing non-military areas from a long distance to drive people out of cities make it difficult to distinguish whether a cultural property is deliberately targeted or whether it is collateral damage from these attacks (Peter, 2022). Under the 1954 Convention, a key criterion in determining whether an attack on cultural property can be considered a crime is whether the property in question, its transport or shelter was marked with the appropriate emblem under articles 16 and 17 of the Convention and whether the accused offender therefore knew, or had reasonable grounds to know, of its protection (Campfens, Jakubowski, Hausler y Selter, 2023). According to a February 2023 report by a group of UN Special Rapporteurs, due to the magnitude and disproportionality of the attacks on densely populated areas, it can be inferred that much of the cultural property that has been damaged or destroyed and that was clearly marked has been deliberately destroyed (United Nations, 2023). They were also not used for military purposes and therefore do not qualify for the military needs exception (Koval y Gaidai, 2022). The fact that the list of damaged or destroyed Ukrainian cultural property is constantly growing has even led the Ukrainian Parliament and Zelensky himself to call for the expulsion of the Russian Federation from UNESCO for the damage caused to Ukrainian cultural heritage and for ignoring the rules of international humanitarian law (Adams, 2022). However, it is not yet possible to make a comprehensive assessment of all the damage because of the difficulty of visiting the areas mainly affected by the occupation, the shelling, the danger of mines, and the fragmentary and contradictory information coming from the besieged or occupied areas.

Ukrainian cultural heritage is not only exposed to destruction but also to looting. Since the Russian annexation of Crimea in 2014, illegal archaeological excavations have been carried out on Greek, Scythian and Tatar sites in Crimea, the finds of which have been illegally transported to Russia or sold on the black market (Daniels, 2022). Such is the case of the archaeological site of the ancient Greek colony of Chersonesus, outside Sevastopol, which happened to be placed under direct supervision of Moscow (Isachenkov, 2015). Already in 2014, UNESCO expressed its concern about “reports of the large-scale transfer of valuable cultural objects from Crimean museums to the Russian capital” (UNESCO, 2014). Similarly, paragraph 278 of the 2020 Report on Preliminary Examination Activities of the International Criminal Court indicated that:

“The Office found a reasonable basis to believe that, from 26 February 2014 onwards, in the period leading up to, and/or in the context of the occupation of the territory of Crimea, the following crimes were committed: [...] seizing the enemy’s property that is not imperatively demanded by the necessities of war, with regard to private and cultural property, pursuant to article 8(2)(b)(xiii) of the Statute” (Report on Preliminary Examination Activities 2020, 2020: par. 278).

Illegal export of historical and artistic artefacts to Russia or occupied Crimea is common in areas under its occupation. For example, there is clear evidence that most of the collections of the museums in Mariupol, Kherson and Melitopol have been looted (Shcherba, 2023), including the valuable collections of Scythian gold artefacts they housed (Koval y Gaidai, 2022). In other cases, the exact affiliation of the groups that seized works and whether they did so to hide and safeguard them or to destroy or steal them is unknown (Kinsella, 2023). This has led UNESCO on March 18, 2022 to urge Russia to respect international humanitarian and human rights law, including the 1954 Hague Convention; to ratify the Second Protocol to the Convention to Prevent and Stop all Forms of Theft, Misappropriation and Vandalism of Cultural Property; and to refrain from seizing movable cultural property in Ukraine (Second Extraordinary Meeting, 2022).

### *3.1. How to prosecute crimes against heritage in the Ukrainian war?*

Attacks on property may amount to war crimes and therefore entail international responsibility. The 1954 Convention and the 1999 Second Protocol, apart from establishing a framework for action to oblige the disputants to respect cultural heritage, also established criminal sanctions for acts against heritage. The 1954 Convention committed its Contracting Parties to adopt in their national legal systems criminal sanctions to punish those persons who have violated, or ordered a violation of the 1954 Convention (Convention for the Protection of Cultural Property, 1954). Article 15.2 of the 1999 Second Protocol also reiterated the obligation of the parties to incorporate into their national legislation the crimes against property established in the Protocol in order to punish them in accordance with general principles of law and international law. Furthermore, it recognised the individual criminal responsibility of persons guilty of crimes against cultural property even if they had not directly committed them. However, this Second Protocol went further than the 1954 Convention by including in its Article 17 the principle of universal justice by providing that the parties must prosecute or extradite any alleged offender of the Protocol who is present in their national territory, even if the alleged offender is not one of their nationals and the alleged offence was committed in the territory of a third State (Additional Protocol II, 1977). This principle of universal justice opens the door for any country to prosecute or extradite alleged perpetrators of serious crimes against property on its territory regardless of their nationality or where the offence was committed, which may be of particular interest to European states and other Ukrainian allies (Escobar Hernández, 2022).

Although Russia, unlike Ukraine, has not ratified the Second Protocol, its actions must also be judged under its precepts since, thanks to the widespread acceptance of its provisions, they have acquired a customary value in international law. The latter is particularly significant in relation to aspects such as the idea of military necessity in Article 6, which is applicable to the acts of both sides in the conflict and on which the Protocol is not considered to add anything new to the 1954 Convention but merely elaborates on its content (de Rueda Roigé, 1998).

When acts against cultural heritage are committed, the question of how to judge such actions logically arises. The Rome Statute of the ICC of 1998 recognised in its clauses 8.2.b.ix and 8.2.e.iv the jurisdiction of the Court to try individuals for their acts against buildings “dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives”. According to article 8.2.e.iv of the Rome Statute, acts against cultural property may also be considered war crimes: “The destruction and appropriation of property, not justified by military necessity, carried out on a large scale, unlawfully and arbitrarily” (Rome Statute, 1998).

However, Russia has never ratified the Rome Statute and even withdrew its signature from it after the ICC prosecutor’s office in 2016 in its annual report described the Russian annexation of Crimea as an occupation, so that, according to articles 11, 12 and 24 of the Statute itself, the ICC lacks jurisdiction over crimes committed in Russia by Russian citizens (Rome Statute, 1998). Although Ukraine is also not a party to the Rome Statute, Kiev accepted the jurisdiction of the court by submitting two declarations under Article 12(3) of the Statute. In the former, the ICC’s jurisdiction is limited to alleged crimes committed between November 21, 2013 and February 22, 2014, during the Euromaidan protests, while in the latter it extends to acts committed on Ukrainian territory since February 20, 2014, following Russia’s occupation of Crimea, without any time limit, thus covering crimes committed during the current war. Thanks to these declarations, the ICC is competent to prosecute anyone, including Russian citizens, who commit on Ukrainian soil those crimes that fall under its jurisdiction, i.e. war crimes, crimes against humanity, and genocide. In fact, in March 2022, a total of 39 countries, including Spain, submitted a request to the ICC Office of the Prosecutor to investigate possible war crimes and crimes against humanity in Ukraine (Escobar Hernández, 2022).

Investigating the acts committed in Ukraine and whether they constitute a crime is not easy given the circumstances in which it has to be carried out: a high-intensity armed conflict in which multinational military forces and non-state armed groups are fighting, the areas where the alleged crimes are being committed are outside Ukrainian authority and there have been massive population displacements both inside and outside the country, making it difficult to locate witnesses. These elements are compounded by Moscow’s refusal to cooperate with the ICC, which makes it difficult to obtain evidence, especially in Russian-occupied territories. To obtain information relevant to the investigation, the ICC relies on the cooperation of Ukraine, States Parties, European institutions, and international organisations such as the OSCE, UNESCO and ICOM.

Despite the symbolic power of international criminal law, the ICC has no policing or enforcement powers, so it relies on international cooperation to enforce its warrants to arrest suspects and have them transferred to The Hague for trial (Sagoo y Dias, 2023). On March 17, 2023, the Court issued two arrest warrants for Russian President Vladimir Putin and Presidential Commissioner for Children’s Rights in Russia Maria Lvova-Beleva for the alleged war crimes of deportation and forcible transfer of minors

from Ukraine to Russia under article 8 of the Rome Statute (Sagoo y Dias, 2023). Since Russia is not currently a party to the Rome Statute, it is under no obligation to cooperate with the ICC or to comply with any arrest warrants against suspects on Russian territory, let alone against the current president Vladimir Putin. It is not easy for the ICC to try those responsible for crimes committed in Ukraine, as the Court requires the physical presence of the suspects. Since Russia cannot be expected at this stage to hand over Putin and other Russian leaders to stand trial for possible war crimes, the only way the ICC could do so would be if they were arrested abroad and taken into the custody of the Court (Torrico, 2022). Paradoxically, the current international sanctions imposed against Russian leaders, which include travel bans, could even further complicate their arrest, given that while they are in place, those subject to such sanctions cannot be expected to travel abroad much in the immediate future (Marchuk y Wanigasuriya, 2022). Moreover, although states that are parties to the Rome Statute are obligated to comply with ICC arrest warrants if the accused are found on their national territory, some states parties could refuse to comply by invoking the immunity *ratione personae* enjoyed by heads of state, according to international custom. They can also invoke article 98.1 of the Rome Statute, which establishes that, in order to try a national of a third state that is not a party to the Rome Statute, the ICC will require the cooperation and waiver of the state to waive the immunity of its accused national.

About this, is particularly relevant the Al Bashir case, in which, although the ICC had issued an arrest warrant for Sudan's former dictator Omar Hassan Ahmad Al Bashir while he was still in office, charging him with crimes against humanity and war crimes, several countries refused to execute it on the grounds of the African leader's alleged immunity. This case is relevant since, like Russia, Sudan had also not ratified the Rome Statute at the time the ICC issued the arrest warrant for its head of state.

The jurisprudence of the ICC in the Al Bashir case reaffirmed the inappropriateness of invoking immunity to avoid the enforcement of its order on the basis of customary international law and the referral of the case to the ICC Prosecutor by the UN Security Council, which according to article 13.b of the Rome Statute allows the Court to exercise its jurisdiction. Although in the case at hand the cooperation of the Security Council cannot be expected as Russia is a permanent member of the Council, it is still possible to rely on international custom to deal with the thorny issue of immunity (Ugarte Boluarte y Diestra Huerta, 2022).

Regarding the possibility for States Parties to the Statute to refrain from arresting Heads of non-States Parties on the basis of their immunity, the ICC ruled that when a State Party executes an ICC arrest and/or surrender warrant, it is not exercising its national criminal jurisdiction but would be acting on behalf of the ICC. Thus, States Parties would not be in breach of their customary obligations towards third States, while abstaining would violate their ICC obligations (Liu, 2023).

The ICC decision went further by stating that, while it does recognise the immunity of heads of state before their national courts, it does not contemplate its existence before the ICC or any other international court. According to the Court, article 27(2)

of the Statute, which denies that the immunity that heads of state may enjoy exempts them from international criminal responsibility and prevents the ICC from exercising its jurisdiction, reflects international custom: “There is neither State practice nor *opinio juris* that would support the existence of Head of State immunity under customary international law vis-à-vis an international court. To the contrary, such immunity has never been recognised in international law as a bar to the jurisdiction of an international court” (Judgment, 2019).

However, even though states parties are obligated to abide by the Court’s arrest warrants and that immunity from international courts is not recognised, the ICC will continue to depend on Russia’s cooperation if it wishes to bring Putin and his associates to justice one day. Again, the Al Bashir case is useful and offers not particularly encouraging prospects. Although he was overthrown in 2019, the ICC has not yet been able to arrest Al Bashir, let alone try him despite the charges against him because, even today, Sudanese national jurisdiction recognises his immunity as head of state (Rédaction Africanews, 2023).

### *3.2. A possible genocide?*

The gravity of the events has prompted some experts to warn that Russia may be carrying out genocide on Ukrainian soil (Schäffer y Kirchmair, 2022). Article 6 of the Rome Statute and Article 2 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide limit genocide to “acts [...] with intent to destroy, in whole or in part, a national, ethnical, racial or religious group” as seriously prejudicing the physical or mental integrity of the members of the group or subjecting them to conditions of life calculated to bring about their physical destruction. Although attacking cultural property cannot be equated to genocide, the International Criminal Court’s own Cultural Heritage Policy in paragraph 78 recognises that acts intended to damage or destroy a group’s cultural property can provide important evidence of genocidal intent as these acts have a psychological impact on the people who suffer them.

In cases such as *Bosnia and Herzegovina v. Serbia and Montenegro* and the *Krstić* trial, the International Court of Justice and the International Tribunal for the former Yugoslavia have ruled respectively that, while the destruction of cultural property shows a clear intent to destroy the cultural, religious or social presence of a group, it is often accompanied by the physical and biological destruction of members of the group and is contrary to international standards. The destruction of a group’s historical, artistic and cultural heritage alone does not fall within the category of genocide under the Rome Statute and the Convention on the Prevention and Punishment of the Crime of Genocide as it does not necessarily entail the imposition of conditions of life entailing the physical destruction of the group. In any case, although not sufficient to be considered genocide, the International Criminal Court found in the *Al Mahdi* case

that the destruction of property caused such psychological pain to the group that it merits individual and collective reparations.

#### 4. Conclusion

The current conflict between Russia and Ukraine is the biggest challenge to peace and security in Europe since the end of the Cold War. The promotion of the Ukrainian language by Kiev and the religious independence of the Kiev patriarchate from the Moscow patriarchate have raised hackles in Russia, which is said to have unleashed its invasion last February with the intention of returning Ukraine to the Russian world. Ukraine cannot be compared to other countries that in the past also belonged to the Russian empire or the Soviet Union, such as Finland, since Finland, unlike Ukraine, would not be part of the ancestral Russian nation, according to Putin and his collaborators. Moscow's determination and military effort to keep all the Russias united suggests that, with respect to Ukraine, the Kremlin's Finnish-style neutrality is not enough, that the issue goes beyond Ukraine's distant, hypothetical NATO membership and that it will not accept anything that does not imply political, economic and identity-based domination over the neighbouring country. The Ukrainian war would therefore be a paradigmatic example of the triumph of Wendt's constructivist theory, according to which identity and the social perception of reality would take precedence over material issues in understanding the behaviour of states in the international system.

The destruction and damage of Ukrainian cultural heritage is not only an attack on the heritage of humanity, but also aims to weaken the Ukrainian identity as symbols of its essence and its social and cultural values. In light of the facts, we can conclude that Russia's actions could qualify as war crimes under the definition of article 8.2.iv of the 1998 Rome Statute. No military necessity has been identified to justify the attack on the above-mentioned cultural property, so Moscow would have violated the prohibition of attacking cultural property contained in the 1954 Convention, article 53 of the 1977 Protocol I Additional to the Geneva Conventions of 1949 relating to the Protection of Victims of International Armed Conflicts, and even Article 27 of the Universal Declaration of Human Rights and Article 15 of the 1966 International Covenant on Economic, Social and Cultural Rights, all signed and ratified by both Russia and Ukraine.

Moscow also allegedly violated its commitments in relation to the prohibition of subjecting cultural property to theft, pillage or misappropriation under article 4 of the 1954 Convention by transferring artistic and historical objects to Russia from occupied Ukraine. Thus, if Russia still wishes to honour its international commitments, and more specifically Chapter I of the 1954 Protocol for the Protection of Cultural Property in the Event of Armed Conflict, it should seize all cultural property on its territory originating from Crimea and Ukraine, return it and compensate the Ukrainian authorities after the end of the war.

Sadly, given the way the situation is going and the mood of Putin's government, it is hard to believe that such a thing will happen. As has also been explained above, it is currently not easy to prosecute war crimes committed by Russian leaders despite Ukraine's submission to the jurisdiction of the Court and the fact that the Court's Prosecutor has given the green light to the investigation due to the current impossibility of sitting Putin and his collaborators in The Hague. All of this is further evidence of the weakness of the international criminal justice system in bringing accountability to completion. To prevent impunity for the most serious crimes under international law, states, especially those that are parties to the Rome Statute, must therefore rise to the occasion and cooperate closely in everything the ICC requires.

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