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Citation

Powderly, J. C., & Strecker, A. (2023). Afterword: heritage destruction and the War on Ukraine. In *Heritage destruction, human rights and international law* (pp. 423-454). Leiden: Brill/Nijhoff.
doi:10.1163/9789004434011_018

Version: Publisher's Version

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Note: To cite this publication please use the final published version (if applicable).

Afterword

Heritage Destruction and the War on Ukraine

Joseph Powderly and Amy Strecker

1 Introduction

A common motivation of scholars, regardless of their discipline, is to conduct research that has the ambition and potential to contribute to contemporary, ongoing debates. There is an understandable desire that research outputs are relevant, up-to-date, and take the opportunity to reflect on the most important questions and issues occupying the discipline at that particular moment in time and to situate them in the context of current events. At a certain point, however, as a project nears completion, there is the inevitable reality that a line must be drawn, and a resultant acceptance that there is a possibility that events may develop dramatically during the period between submission of a piece of scholarship and its eventual publication. Certain developments in scholarship can be foreseen and factored in, but global events, events that may fundamentally engage and perhaps dramatically influence our respective disciplines, are inherently unpredictable.

The full-scale invasion of Ukraine by Russian forces in February 2022 commenced and evolved as this manuscript was being finalized for publication. Russia's pretensions in the region were clearly foreshadowed by the illegal and illegitimate annexation of Crimea in 2014, and the subsequent proxy control of a whole swath of the Ukrainian Donbas region.¹ However, that the escalation in war rhetoric and the amassing of Russian forces along the Russia-Ukraine and Belarus-Ukraine border would result in a full-scale invasion only became a predictable reality in the closing weeks of 2021. Over one-year on from the outbreak of this phase of the conflict, its relevance to the subject-matter of this volume is shamefully evident. However, it was neither practical, nor fair to our already heroically patient contributors to expect them to revise their contributions in light of these globally significant events. Instead, in this Afterword, we offer some reflections on heritage destruction in the context of

1 For an analysis of how Russia's position with respect to Crimea and Eastern Ukraine more generally has evolved since the collapse of the Soviet Union see, T Hopf, "Crimea is Ours": A Discursive History' (2016) 30 International Relations 227. For reflections on the illegality of the Crimean annexation see, TD Grant, "Annexation of Crimea" (2015) 109 AJIL 68.

the Russia-Ukraine conflict, a context in which heritage destruction is all too readily apparent.

The centrality of heritage destruction to the Ukrainian conflict has certain unique characteristics. In the lead-up to the invasion, the language of heritage protection and safeguarding was appropriated and used in the construction of the pretext for the use of force; as a tool to attempt to legitimize Russian actions with respect to the permissible use of force under the United Nations Charter, as expressed in the notion of *jus ad bellum*. In this regard, and as will be further discussed, allegations of heritage destruction, in particular the destruction of intangible heritage, have been packaged as acts of genocide which must be prevented by whatever means necessary in accordance with Russia's interpretation of its obligations under Article I of the 1948 Convention for the Prevention and Punishment of the Crime of Genocide. Allegations of threats to, and the intentional destruction of, Russian heritage and identity have been instrumentalized to construct an entirely fallacious narrative of Russian victimhood.

Moving from heritage destruction in the context of *jus ad bellum*, to heritage destruction in the context of *jus in bello* or in the context of the laws of armed conflict, it is evident that the wanton and intentional destruction of both tangible and intangible heritage is a notable and distressing feature of this conflict. The daily indiscriminate bombardment of Ukrainian towns and cities by Russian artillery and airpower is resulting in widespread damage to Ukrainian religious, cultural, and scientific sites.² As is so often the case, the targeting of immovable heritage is accompanied by the looting of cultural objects from museums and private collections located in territories under Russian control, particularly in the east and south of the country.³ The destruction, damage, and looting of movable and immovable heritage has a profound and interconnected impact on the practice, preservation and transmission of intangible cultural heritage; an impact that cannot be easily reversed.

In what follows, we explore and elaborate on how allegations of heritage destruction have been instrumentalized by Russia as part of its pretext for the use of force; how and the extent to which, at the time of writing (March 2023),

2 Since the outbreak of the current phase of the conflict, UNESCO has been keeping a record of sites damaged and destroyed sites. See: <https://www.unesco.org/en/ukraine-war/damages-and-victims>, last accessed 31 March 2023.

3 As is to be expected, the International Council of Museums has been actively engaged in the preparation of a Red List of Cultural Objects at Risk for Ukraine. See: <https://icom.museum/en/news/icom-is-preparing-an-emergency-icom-red-list-of-cultural-heritage-at-risk-for-ukraine/>, last accessed 31 March 2023.

tangible and intangible heritage is being targeted for attack; and finally we will reflect on the degree to which international law can play a role in delivering accountability for the heritage destruction being documented on a daily basis.

2 Heritage Destruction and the Pretext for War

Russia's latest acts of aggression against and invasion of Ukraine⁴ have brought into focus the fragility of the framework of international law upon which the post-World War II global order is constructed. That Russia should act in such flagrant violation of international rules governing the use of force, and in so doing manifestly violate the Charter of the United Nations, is shocking. Shocking, not because it is unconscionable that a permanent five ("P-5") member of the United Nations would behave in this way – recent history on the use of force has comprehensively eradicated any such naiveté⁵ – but because it illustrates that recourse to force in pursuit of annexation and territorial gain is far from being a relic of the past.⁶ To this end, in their Editorial in the *American Journal of International Law* published in October 2022, Ingrid Wuerth and Monica Hakimi make clear that, "[b]y invading Ukraine, Russian President Vladimir Putin has made plain that he now rejects the foundational principle of the post-World War II order – namely, that international boundaries may not be changed with force alone".⁷

2.1 *Denial of Ukrainian Culture and Identity*

While this is fundamentally a war of conquest and attempted reassertion of colonial domination, the various manic and misguided arguments that have been put forward by Vladimir Putin and his factotums by way of justification for the invasion illustrate the ideological nationalism that sits at the heart of this conflict. The conquest of Ukrainian territory is accompanied by, and is inextricably connected with, the attempted explicit eradication of Ukrainian

4 It is worth recalling that the current international armed conflict between Russia and Ukraine commenced in 2014 with Russia's illegal occupation of Crimea. See Grant (n 1).

5 See for example, A-M Slaughter, 'The Use of Force in Iraq: Illegal and Illegitimate' (2004) 98 *Proceedings of the ASIL Annual Meeting* 262; M Weller, *Iraq and the Use of Force in International Law* (OUP 2010).

6 For a digest of diplomatic responses to the invasion see, K E Eichensehr (ed), 'State Diplomatic and Consular Relations: Invasion of Ukraine Draws Widespread – but not Universal – Condemnation' (2022) 116 *AJIL* 605.

7 I Wuerth and M Hakimi, 'Russia, Ukraine, and the Future World Order' (2022) 116 *AJIL* 687, 688.

identity. That the destruction of individual and collective Ukrainian identities and their concomitant expressions of tangible and intangible cultural heritage are being intentionally targeted by Russian forces can be neither avoided nor denied. The denial of Ukrainian identity, the rejection of the very notion of a Ukrainian people and a Ukrainian sovereign state feature prominently in Putin's war rhetoric. For Putin, modern Ukraine exists only as a result of profound historical injustices inflicted on the Russian people as a result of failed political leadership and the West's exploitation of its vulnerability in the aftermath of the collapse of the Soviet Union.⁸ Rather than an independent sovereign state, in the eyes of the Kremlin, Ukraine is, and has always been, Russian territory, wrenched from the motherland and reduced to the status of a vassal for Western interests whose primary objective is to threaten and undermine the security and prosperity of the Russian State.⁹ Ukraine's dismemberment from Russia was a "tragedy"; in Putin's words, "Russia was robbed".¹⁰

In the days leading up to the most recent invasion, Putin variously ranted that "Ukraine actually never had [a] stable tradition of real statehood", and that "its electoral and other political procedures just serve as a cover, a screen for the redistribution of power and property between various oligarchic clans".¹¹ Such conspiracy theories are far from being a recent phenomenon and have been parroted in various forms for years by those who circulate within Putin's sycophantic sphere. For instance, former President, Prime Minister, and current Deputy-Chair of the Russian Security Council, Dmitry Medvedev has not only denied the existence of the Ukrainian State for many years,¹² but has expressed his hatred of those claiming Ukrainian identity: "I hate them. They are bastards and degenerates. They want us, Russia, to die. And while I'm still alive, I will do everything to make them disappear".¹³ In denying the very

8 See generally, 'Article by Vladimir Putin "On the Historical Unity of Russians and Ukrainians"' (12 July 2021), available at: <http://en.kremlin.ru/events/president/news/66181>, last accessed 15 November 2022 (Putin "Historical Unity").

9 Ibid.

10 Putin "Historical Unity" (n 8).

11 'Address by the President of the Russian Federation' (21 February 2022), available at: <http://en.kremlin.ru/events/president/news/67828>, last accessed 15 November 2022 (Putin 21 February 2021 Address).

12 A Dolgov, 'Russian Prime Minister: Ukraine Has "No Industry, or State"' (*The Times of Moscow*, 5 April 2016) available at: <https://www.themoscowtimes.com/2016/04/05/russian-prime-minister-ukraine-has-no-industry-or-state-a52385>, last accessed 15 November 2022.

13 S Walker, "I Hate Them": Dmitry Medvedev's Journey from Liberal to Anti-Western Hawk' (*The Guardian*, 1 August 2022) available at: <https://www.theguardian.com/world/2022/aug/01/dmitry-medvedev-journey-liberal-anti-west-hawk-russia>, last accessed

notion of a Ukrainian State and attendant Ukrainian identity, the language is inherently colonial and civilizational in that it subsumes Ukraine within the notion of Russian “unity” and casts the very idea of a distinct Ukrainian identity and culture as malignant Westernism.¹⁴

In his 2021 essay, “On the Historical Unity of Russians and Ukrainians”, Putin presents his entirely self-serving account of Ukrainian-Russian relations and concludes that “the true sovereignty of Ukraine is possible only in partnership with Russia”.¹⁵ Those who reject this characterization and advocate for the literal and conceptual separation of Ukraine from Russia are conveniently branded as anti-Russian neo-Nazis. In a similar vein, Dmitry Medvedev has made his vitriolic denial of Ukrainian identity a core feature of his Telegram persona. In April 2022, he posted that, “Ukrainian-ness, which is fueled by anti-Russian poison and is consumed by the lie concerning its own identity – this is all one big fake. This phenomenon has never existed in history. And it does not exist now”.¹⁶

While Ukrainian culture and identity is framed by the Kremlin as a direct threat to the unity of all Russians, it is presented as a direct existential threat to those peoples in the Ukrainian Donbas oblasts of Donetsk and Luhansk who identify as Russian, and who through Russian proxy and separatist forces have been waging a war of secession since 2014. Actions taken by the Ukrainian government in defence of its territorial integrity and in an effort to re-establish control over those parts of the Donetsk and Luhansk oblasts under separatist control are labelled as genocidal.¹⁷

15 November 2022. The article points out that it is not clear that in referring to “they” Medvedev had, or only had, Ukrainians in mind.

14 See *An Independent Legal Analysis of the Russian Federation’s Breaches of the Genocide Convention in Ukraine and the Duty to Prevent*, New Lines Institute for Strategy and Policy & the Raoul Wallenberg Centre for Human Rights, (May 2022), available at: <https://newlinesinstitute.org/an-independent-legal-analysis-of-the-russian-federations-breaches-of-the-genocide-convention-in-ukraine-and-the-duty-to-prevent/>, last accessed 15 November 2022.

15 Putin “Historical Unity” (n 8).

16 Dmitry Medvedev, Telegram, 5 April 2022, available at: https://t.me/medvedev_telegram/34, last accessed 15 November 2022, translated through Google Translate.

17 On 15 February 2022, in the context of a press-conference with German Chancellor, Olaf Scholz, Putin remarked, “What is happening in Donbas today is, in fact, genocide”. ‘News Conference Following Russian-German Talks’, 15 February 2022, available at: <http://en.kremlin.ru/events/president/news/67774>, last accessed 15 November 2022.

2.2 *Russia's Curation of a Genocide Narrative as a Pretext for the Use of Force and Ukraine's Institution of Proceedings before the International Court of Justice*

The accusation that Ukraine is engaging in acts of genocide against those in the Donetsk and Luhansk oblasts who identify as Russian is central to the Russian Federation's arguments justifying its acts of aggression and the subsequent invasion of Ukrainian territory. The genocide narrative underpinned Putin's recognition of the independence of the Donetsk and Luhansk People's Republics from Ukraine in the days leading up to the launching of his so-called 'Special Military Operation'.¹⁸ In his address on the eve of the invasion, Putin stated that, "[t]he purpose of this operation is to protect people who, for eight years now, have been facing humiliation and genocide perpetrated by the Kiev regime. To this end, we will seek to demilitarize and denazify Ukraine, as well as bring to trial those who perpetrated numerous bloody crimes against civilians, including against citizens of the Russian Federation".¹⁹

Russia's accusation that Ukraine is actively engaged in genocide appears to be predicated less on physical and biological destruction of the sort contemplated by Article II of the 1948 Genocide Convention (although this is nonetheless alleged), and more on suggestions of what would be classified as cultural genocide – a notion expressly excluded from Article II by the drafters of the Convention.²⁰ Frequent references have been made by Putin and others to the destruction of the intangible cultural heritage of those identifying as Russian in the Donbas region. Especially prominent are references to the alleged eradication of the Russian language:

The policy to root out the Russian language and culture and promote assimilation carries on. The Verkhovna Rada has generated a steady flow

18 See 'Address by the President of the Russian Federation', 24 February 2022, available at: <http://en.kremlin.ru/events/president/news/67843> [last accessed 15 November 2022] – "We had to stop that atrocity, that genocide of the millions of people who live there and who pinned their hopes on Russia, on all of us. It is their aspirations, and feelings of pain of these people that were the main motivating force behind our decision to recognize the independence of the Donbass people's republics".

19 Ibid.

20 For account of how cultural genocide was rejected by drafters see, EC Luck, "Cultural Genocide and the Protection of Cultural Heritage" (2018) 2 *J Paul Getty Trust Occasional Papers in Cultural Heritage Policy*, available at: <https://www.getty.edu/publications/occasional-papers-2/>, last accessed 15 November 2022. For an in-depth account of the concept of cultural genocide in international law more broadly, see E Novic, *The Concept of Cultural Genocide: An International Law Perspective* (OUP 2016).

of discriminatory bills, and the law on the so-called indigenous people has already come into force. People who identify as Russians and want to preserve their identity, language and culture are getting the signal that they are not wanted in Ukraine ... Under the laws on education and the Ukrainian language, as a state language, the Russian language has no place in schools or public places, even in ordinary shops.²¹

Separatist forces in the Donbas are lionized for their confrontation with 'neo-Nazis', and the fact that they "are fighting for their elementary right to live on their own land, to speak their own language, and to preserve their culture and traditions".²²

Under Article 1 of the 1948 Convention, States Parties "confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish".²³ From the text of this provision there is nothing to suggest that the obligation to prevent (or indeed punish) genocide contemplates or authorizes recourse to the use of force outside of the framework of the United Nations Charter. The notion of direct military intervention for the purposes of the protection of civilian populations is of course central to the controversial doctrine of the Responsibility to Protect ("R2P"). As is well-known, R2P has been invoked and relied upon on various occasions by coalitions of NATO States as a legitimate justification for recourse to the use of force, without the express authorization of the United Nations Security Council.²⁴

The use of force for apparently humanitarian purposes (in particular for the prevention of atrocity crimes, including genocide), but that nonetheless circumvents the United Nations Charter, has drawn the ire of Russia, and Putin in particular, since its use as a means of justifying NATO intervention in Kosovo in 1999.²⁵ Indeed, the entire Kosovo context, from NATO intervention

21 Putin 21 February 2021 Address (n 11).

22 Ibid.

23 Article 1, 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

24 The notion of R2P was coined by Gareth Evans and was firmly conceptualized in the 2001 *Report of the International Commission on Intervention and State Sovereignty*. The Kosovo example, while strictly couched as "humanitarian intervention" at the time, is clearly associated and one of the driving forces behind the notion. See TG Weiss, 'The Turbulent 1990s: R2P Precedents and Prospects' in AJ Bellamy and T Dunne (eds), *The Oxford Handbook of the Responsibility to Protect* (OUP 2016) 56.

25 On the NATO campaign in Kosovo, see VP Nanda, 'Legal Implications of NATO's Armed Intervention in Kosovo', in M Schmitt (ed), *International Law Across the Spectrum of Conflict: Essays in Honour of Professor L.C. Green on the Occasion of His Eightieth Birthday* (Naval War College 2000) 313.

to recognition of Kosovo as an independent sovereign State, has shaped Putin's foreign policy agenda.²⁶ The 'Kosovo precedent' is frequently invoked as a means of crying 'hypocrisy' when Russia's recognition of secessionist territories such as Abkhazia and South Ossetia in the Georgian context, and Crimea and the Donbas territories in the Ukrainian context, are criticized by NATO States.²⁷

The 74 day NATO bombing campaign in Kosovo in 1999 was presented as a necessary action to protect the civilian Kosovo-Albanian people from ongoing Serbian ethnic cleansing (and potential genocide) given the failure of the United Nations Security Council to agree to intervention in accordance with Article 42 of the United Nations Charter.²⁸ This narrative has never been accepted by the Kremlin, who view NATO's actions in Kosovo as a manifest rejection of the global legal order enshrined in the United Nations Charter. It is interesting therefore, that the arguments forwarded by Putin in support of the invasion "self-consciously mirror the justifications given by NATO leaders for bombing Yugoslavia more than two decades ago".²⁹ As Jade McGlynn has argued, in Putin's eyes, "NATO fabricated a fake genocide in Kosovo to legitimize its intervention; now he was just doing the same".³⁰

Ukraine has been emphatic in its rejection of the genocide pretext argument. While it has consistently rejected it at the political and diplomatic level,³¹ in the days following the Russian invasion, Ukraine instituted proceedings before the International Court of Justice ('ICJ'), wherein it argues that Russia's invocation of the obligation to prevent and punish genocide under Article I of the 1948 Convention as a justification for the use of force is fallacious, in bad faith, and contrary to the object and purpose of the Convention:

27. The duty to prevent and punish genocide enshrined in Article I of the Convention necessarily implies that this duty must be performed

26 J McGlynn, 'Why Putin Keeps Talking About Kosovo' *Foreign Policy* (3 March 2022), available at: <https://foreignpolicy.com/2022/03/03/putin-ukraine-russia-nato-kosovo/>, last accessed 15 November 2022.

27 DB Pineles, 'How the 'Kosovo Precedent' Shaped Putin's Plan to Invade Ukraine' *Balkan Insight* (9 March 2022), available at: <https://balkaninsight.com/2022/03/09/how-the-kosovo-precedent-shaped-putins-plan-to-invade-ukraine/>, last accessed 15 November 2022.

28 See Nanda (n 25) 313.

29 McGlynn (n 26).

30 Ibid.

31 See for example, 'Statement of the Ministry of Foreign Affairs of Ukraine on Russia's False and Offensive Allegations of Genocide as a Pretext for It's Unlawful Military Aggression', 26 February 2022, available at: <https://ne-np.facebook.com/UkrConsEdmonton/photos/%EF%B8%8Fstatement-of-the-ministry-of-foreign-affairs-of-ukraine-on-russias-false-and-of/7143790602360857/>, last accessed 15 November 2022.

in good faith and not abused, and that one Contracting Party may not subject another Contracting Party to unlawful action, including armed attack, especially when it is based on a wholly unsubstantiated claim of preventing and punishing genocide.

28. Russia's actions erode the core obligation of Article I of the Convention, undermine its object and purpose, and diminish the solemn nature of the Contracting Parties' pledge to prevent and punish genocide.
29. The Russian Federation's declaration and implementation of measures in the form of a "special military operation," as well as acts of recognition, based on a false claim of genocide is incompatible with the Genocide Convention and violates Ukraine's rights.³²

In addition to rejecting Russia's genocide pretext, Ukraine directly accuses Russia of planning acts of genocide in Ukraine:

24 ... Russia has turned the Genocide Convention on its head – making a false claim of genocide as a basis for actions on its part that constitute grave violations of the human rights of millions of people across Ukraine. Russia's lie is all the more offensive, and ironic, because it appears that it is Russia planning acts of genocide in Ukraine. Russia is intentionally killing and inflicting serious injury on members of the Ukrainian nationality – the *actus reus* of genocide under Article II of the Convention. These acts must be viewed together with President Putin's vile rhetoric denying the very existence of Ukrainian people, which is suggestive of Russia's intentional killings bearing genocidal intent.

32 *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)*, Application Instituting Proceedings (26 February 2022), paras 27–29. See also, *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)*, Request for the Indication of Provisional Measures Submitted by Ukraine (26 February 2022), para 3: "Russia thus expressly bases its 'special military operation' – in fact a full-scale, brutal invasion of Ukraine – on an absurd lie: the nonsensical and utterly unsupported claim that genocide has been committed in the Luhansk and Donetsk oblasts of Ukraine. Both Russia and Ukraine are parties to the Genocide Convention, which defines genocide as a crime under international law and obliges them to undertake to prevent and punish genocide. Russia claims that acts of genocide have been committed and that it has a basis to take military action in Ukraine to prevent and punish genocide. Ukraine emphatically denies that acts of genocide have been committed and maintains that Russia has no lawful basis to take any action in and against Ukraine to prevent and punish genocide".

The relief sought by Ukraine is unique in that it requests the Court to confirm that Russia's allegations of genocide are unfounded; in essence it is an application, for, amongst other things, a finding of a non-breach of the Convention.³³ Having filed the application instituting proceedings, it submitted a request for the indication of provisional measures including that Russia immediately suspend all military operations.³⁴ In ordering the granting of the Request, in its majority decision the Court emphasized that, "in discharging its duty to prevent genocide 'every State may only act within the limits permitted by international law'".³⁵

Whether Ukraine will ultimately be successful on the merits is yet to be seen – there remains some doubt as to whether the jurisdictional basis of the application will withstand the Preliminary Objections phase of the proceedings.³⁶ In the months following the institution of proceedings, some 24 States have sought to intervene pursuant to Article 63 of the Statute of the ICJ.³⁷ These interventions are submitted in support of Ukraine's claim and are a show of international solidarity for the principle that all States have an interest in ensuring that the obligation to prevent Genocide under Article I is not abused by States as a means of justifying acts of aggression.³⁸ Predictably, in

33 *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)*, *ibid.*, para 30.

34 *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)*, Request for the Indication of Provisional Measures Submitted by Ukraine (27 February 2022).

35 *Ibid.*, para 57.

36 For early reflections on the case see, I Marchuk and A Wanigasuriya, 'Beyond the False Claim of Genocide: Preliminary Reflections on Ukraine's Prospects in Its Pursuit of Justice at the ICJ' *Journal of Genocide Research – Advance Articles*, available at: <https://doi.org/10.1080/14623528.2022.2143528> last accessed 31 March 2023.

37 A full list of intervening States can be found here: <https://www.icj-cij.org/en/case/182/intervention>, last accessed 15 November 2022.

38 See for example, *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)*, Declaration of Intervention by Ireland Pursuant to Article 63 of the Statute of the International Court of Justice (19 September 2022), para 19: "Accordingly where action taken in purported prevention of a genocide follows upon allegations of genocide, those allegations and any subsequent action cannot in any circumstances be regarded as reasonable and indeed subvert the object and purposes of the Convention itself. In Ireland's view, therefore, any action taken on the basis of such allegations, in purported performance of Article I of the Convention, can only be regarded as a serious breach of the obligation to interpret and apply that provision in good faith". On the modalities and effectiveness of third party interventions see, B McGarry, 'Mass Intervention? The Joint Statement of 41 States on Ukraine v Russia' *EJIL:Talk!* (30 May 2022), available at:

response to the request for the indication of provisional measures,³⁹ Russia stated that the Court lacks jurisdiction to address the dispute, as Ukraine, in their view, is merely attempting to use Article 1 of the Genocide Convention as a means to have the Court address the legality of Russia's use of force, a question which is outside of the scope of the Convention.⁴⁰ They deny that they are relying on the prevention of genocide as justification for the use of force, and argue instead that they are acting in self-defence as per Article 51 of the United Nations Charter.⁴¹

The proceedings undertaken by Ukraine, while creative,⁴² nonetheless express support for the upholding of the principle of good faith in the fulfillment of international legal obligations. The case further expresses Ukraine's commitment to the peaceful settlement of disputes and affirms its faith (whether ill-founded or not) in the capacity of the ICJ to contribute to the maintenance of international peace and security. Perhaps most significantly, in instituting proceedings, Ukraine is seeking confirmation that Russia's genocide narrative – which, as discussed, places particular significance on allegations of

<https://www.ejiltalk.org/mass-intervention-the-joint-statement-of-41-states-on-ukraine-v-russia/>, last accessed 15 November 2022.

39 Russia only responded to the Request via letter to the Court and declined to attend the oral hearings on the matter, stating that “[i]n light of the apparent absurdity of the lawsuit, we decided not to attend the hearing” – see https://twitter.com/mfa_russia/status/1501510227589541891?s=20&t=6ejr2GTAH_srrF72kB6YQg, last accessed 15 November 2022. On the implications of the non-appearance see, F Megret, ‘Russia’s Non-Appearance Before the ICJ Against Ukraine: Of Not So Vanishing Vanishing Acts and their Vanishingly Thin Justification’ *EJIL.Talk!* (12 March 2022), available at: <https://www.ejiltalk.org/russia-non-appearance-before-the-icj-against-ukraine-of-not-so-vanishing-vanishing-acts-and-their-vanishingly-thin-justification/>, last accessed 15 November 2022.

40 *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)*, Document (with annexes) from the Russian Federation Setting Out Its Position Regarding the Alleged ‘Lack of Jurisdiction’ of the Court in the Case (7 March 2022), para 4.

41 *Ibid.*, para 15.

42 This is not the first time that Ukraine has invoked the jurisdiction of the ICJ in the context of the conflict with Russia. For example, in 2017 Ukraine instituted proceedings alleging that Russia’s annexation of Crimea and support for the separatist cause in the Donbas placed them in violation of their obligations under the 1999 International Convention for the Suppression of the Financing of Terrorism and the 1965 International Convention on the Elimination of All Forms of Racial Discrimination. The case is ongoing. See *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All of Forms of Racial Discrimination (Ukraine v Russian Federation)*, Application Instituting Proceedings (16 January 2017), available at: <https://www.icj-cij.org/en/case/166/institution-proceedings>, last accessed 15 November 2022.

heritage destruction – is completely unfounded and little more than a crude false flag upon which to base the illegal use of force.

Russia's carefully constructed and consistently delivered genocide narrative is, in reality, little more than a form of crude international legal gas-lighting wherein it casts itself as the victim of heritage destruction (amongst other things). However, as the conflict progresses it is all too evident that it is Ukrainian heritage that is being subjected to wanton and deliberate targeting by Russian forces. A relevant question in this regard is whether the consistent denial of a distinct Ukrainian identity and the demonization of the Ukrainian government as neo-Nazi could be considered to constitute direct and public incitement to genocide as prohibited under Article III of the 1948 Convention, and Article 25(3)(e) of the Rome Statute of the International Criminal Court ("ICC"). For this purpose, it would have to be established that those responsible for the issuance of inciting statements made them with the intent to destroy the group (nationals of Ukraine) in whole or in part.⁴³ Incitement is an inchoate act and, as such, it would not have to be established that a genocide in fact resulted from the inciting language, but simply that the inciter intended to bring about the destruction of the group in whole or in part. This is a highly complex question which can only be coherently addressed by an appropriate adjudicator. Nonetheless, there is certainly a *prima facie* case to suggest that the argument that the language used by Putin and his functionaries may constitute incitement to genocide is not outlandish or fantastical.⁴⁴ Arguments in this regard are reinforced when due account is given to the extent to which heritage is being targeted in the conflict. As the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the ICJ have confirmed, heritage destruction is a relevant indicator when attempting to establish the *mens rea* for genocide, namely, the intention to destroy the group in whole or in part.⁴⁵ As expressed in the *Krstić* case at the ICTY, "where there is physical or

43 For the purposes of the State responsibility under the 1948 Convention (rather than individual criminal responsibility under the Rome Statute), it would have to be established that the incitement was attributable to Russia.

44 *An Independent Legal Analysis of the Russian Federation's Breaches of the Genocide Convention in Ukraine and the Duty to Prevent*, New Lines Institute for Strategy and Policy & the Raoul Wallenberg Centre for Human Rights, (May 2022), available at: <https://newlinesinstitute.org/an-independent-legal-analysis-of-the-russian-federations-breaches-of-the-genocide-convention-in-ukraine-and-the-duty-to-prevent/> [last accessed 15 November 2022]. Cf. WA Schabas, 'Genocide and Ukraine: Do Words Mean What We Choose Them to Mean?' (2022) 20 JICJ 843.

45 See *Prosecutor v Krstić* (Appeal Judgment) IT-98-33-A (19 April 2003), para 25; *Prosecutor v Tolimir* (Trial Judgment) IT-05-88/2-T (12 December 2012), para 746; *Application of*

biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group”.⁴⁶

In addition to the question of incitement to genocide, there is mounting evidence that Russian authorities are engaged in the widespread separation, detention, and forcible transfer of Ukrainian children to Russian territory.⁴⁷ US Secretary of State, Anthony Blinken has stated that sources “indicate that Russian authorities have interrogated, detained, and forcibly deported between 900,000 and 1.6 million Ukrainian citizens, including 260,000 children, from their homes to Russia – often to isolated regions in the Far East”.⁴⁸ With respect to the forceable transfer of children, he stated further that “[r]eports also indicate Russian authorities are deliberately separating Ukrainian children from their parents and abducting others from orphanages before putting them up for adoption inside Russia”.⁴⁹ International humanitarian law and international criminal law are unequivocal on the question of the prohibition of the forceable transfer of populations and of the special protection to be afforded to children in armed conflict.⁵⁰ For example, Article 49(1) of the Geneva

the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia), Judgment (26 February 2007), para 344.

46 *Prosecutor v Krstić* (Trial Judgment) IT-98-33-T (2 August 2001), para 580.

47 See Amnesty International, “Like a Prison Convoy”: Russia’s Unlawful Transfer and Abuse of Civilians in Ukraine During “Filtration” (10 November 2022), available at: <https://www.amnesty.org/en/documents/eur50/6136/2022/en/>, last accessed 15 November 2022; Human Rights Watch, ‘Forcible Transfer of Ukrainians to Russia: Punitive, Abusive Screening of Fleeing Civilians’ (1 September 2022), available at: <https://www.hrw.org/news/2022/09/01/forcible-transfer-ukrainians-russia>, last accessed 15 November 2022; Agence France-Presse, ‘Kyiv Accuses Moscow of Mass Abduction of Ukrainian Children’ (*The Guardian*, 23 August 2022), available at: <https://www.theguardian.com/world/2022/aug/23/kyiv-accuses-moscow-of-mass-abduction-of-ukrainian-children>, last accessed 15 November 2022; E Bubola, ‘Using Adoptions, Russia Turns Ukrainian Children Into Spoils of War’ (*The New York Times*, 22 October 2022), available at: <https://www.nytimes.com/2022/10/22/world/europe/ukraine-children-russia-adoptions.html>, last accessed 15 November 2022.

48 US Department of State, ‘Press Statement: Russia’s “Filtration” Operations, Forced Disappearances and Mass Deportations of Ukrainian Citizens’ (13 July 2022), available at: <https://www.state.gov/russias-filtration-operations-forced-disappearances-and-mass-deportations-of-ukrainian-citizens/>, last accessed 15 November 2022.

49 Ibid.

50 For succinct account of the legal framework, see A Bisset, ‘Ukraine Symposium – Russia’s Forcible Transfer of Children’ *Articles of War* (5 October 2022), available at: <https://lieber.westpoint.edu/russias-forcible-transfer-children/>, last accessed 15 November 2022.

Convention IV of 1949 states that “[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive”.⁵¹ Violation of this provision constitutes a grave breach of the Geneva Conventions and entails individual criminal responsibility. Its status as a war crime is reflected in Article 8(2)(b)(viii) of the Rome Statute,⁵² and it can also be classified as a crime against humanity pursuant to Article 7(1)(d).⁵³ Indeed, it is the war crime of unlawful deportation and transfer of children that forms the basis of the March 2023 ICC arrest warrant against Putin, a subject returned to in Section 3.1.

In addition, and perhaps more significant for our present purposes, “[f]orcibly transferring children of the group to another group”, is enumerated as an act of genocide under Article 11(e) of the 1948 Convention when done with the intention to destroy the group in whole or in part.⁵⁴ The inclusion of Article 11(e) in the 1948 Convention (and Article 6 of the Rome Statute) is the only element of the notion of cultural genocide, as conceived by Rafael Lemkin, to make its way into the final text of the Convention.⁵⁵ When consideration is given to the fact that the abduction and forced adoption of potentially hundreds of thousands of Ukrainian children is occurring in the context of a conflict predicated on the denial of Ukrainian statehood and the individual and collective identity of all Ukrainians, to suggest the existence of an intent to destroy the group in whole or in part is far from outlandish. Recognition of forcible transfer of children as an act of genocide reflects the fact that an effective way of destroying the heritage and identity of a group is to deny it to future generations through policies and practices of assimilation and homogenization.

As outlined in Section 3, the ICC has jurisdiction with respect to Ukraine and has opened a formal investigation. However, it is too early to say whether

51 Article 49(1), Convention (IV) Relative to the Protection of Civilian Persons in Time of War 1949.

52 Article 8(2)(b)(viii), Rome Statute: “For the purpose of this Statute, ‘war crimes’ means: ... The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory”.

53 Article 7(1)(d), Rome Statute: “For the purpose of this statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: ... Deportation or forcible transfer of population”.

54 Article 1(e), 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

55 See generally, Novic (n 20).

or not genocide will be a feature of any subsequent prosecutions, or indeed that the ICC will be the only criminal justice mechanism pursuing accountability. What is clear is that the ICC does not have jurisdiction to prosecute Putin or other senior members of the regime for the crime of aggression pursuant to Article 8bis of the Rome Statute since Russia is not a State Party. Various proposals have been made by several well-meaning academics for the establishment of a dedicated *ad hoc* Tribunal or hybrid court for Ukraine which would be imbued with jurisdiction to try the crime of aggression.⁵⁶ Ukraine itself is pushing for the establishment of such an institution.⁵⁷ Whether international consensus will fall in line with this remains to be seen and is doubtful considering the precedent it would set. In the absence of such a dedicated mechanism, it is unlikely that Russia's denial of Ukrainian identity in the context of its construction of the pretext for the use of force will be subject to meaningful international adjudication.

3 Heritage Destruction and the Conduct of the War

3.1 *Accountability for Heritage Destruction: Legal Framework and Limitations Inherent in International Criminal Mechanisms*

As noted by Francesco Franioni in Chapter 1 of this volume, the prohibition of the intentional targeting of cultural property in armed conflict stands as a norm of customary international law.⁵⁸ Its status as such is confirmed by

⁵⁶ See for example, 'Statement: Calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression Against Ukraine', available at: <https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration.pdf> [last accessed 15 November 2022]; S Wolfson, 'Interview – "It's a Slam Dunk": Philippe Sands on the Case Against Putin for the Crime of Aggression' (*The Guardian*, 31 March 2022), available at: <https://www.theguardian.com/law/2022/mar/30/vladimir-putin-ukraine-crime-aggression-philippe-sands>, last accessed 15 November 2022; KJ Heller, 'Options for Prosecuting Russian Aggression Against Ukraine: A Critical Analysis' *Journal of Genocide Research – Advance Article*, available at: DOI: 10.1080/14623528.2022.2095094.

⁵⁷ See, 'We Must Create a Special Tribunal on the Crime of Aggression Against Ukraine – Address by President Volodymyr Zelenskyy to the Participants of the Public Debate "War and Law" in Paris' *President of Ukraine* (5 October 2022), available at: <https://www.president.gov.ua/en/news/mayemo-stvoriti-specialnij-tribunal-shodo-zlochynu-agresiyi-78285>, last accessed 15 November 2022.

⁵⁸ See 'Rule 40. Respect for Cultural Property' *ICRC Customary International Humanitarian Law Database*, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter12_rule40, last accessed 15 November 2022. For more on the evolution of

its expression in numerous international legal instruments, from the Hague Conventions and Annexed Regulations of 1899 and 1907⁵⁹ and the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (and its two Protocols),⁶⁰ through to the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda⁶¹ and the Rome Statute of the International Criminal Court.⁶² The only circumstance in which the destruction or seizure of cultural property is permitted in armed conflict is where “military necessity imperatively requires” such destruction.⁶³ However, the notion of military necessity is so nebulous and liable to competing interpretations that its invocation is often highly contestable.⁶⁴ In addition to relevant international humanitarian law and international criminal law instruments addressing moveable and immovable tangible heritage, it is important to remain conscious of the UNESCO standard-setting conventions

customary international law in the field of international cultural heritage law more generally, see Francioni in this volume.

- 59 See for example, Article 56 of the Hague Regulations of 1907 (Convention IV Respecting the Laws and Customs of War on Land and its Annex) which states, “[t]he property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings”.
- 60 See for example, Article 4(1) of the 1954 Convention which states: “The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility, directed against such property”.
- 61 See, Article 3(d) of the ICTY Statute which states: “The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to: ... (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science”.
- 62 See, Article 8(2)(b)(ix) which prohibits “[i]ntentionally directing attacks 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”. An equivalent provision applicable in the context of non-international armed conflicts is provided for in Article 8(2)(e)(iv).
- 63 Article 4(2) of the 1954 Convention.
- 64 See B Drazewska, ‘Destruction of Ukrainian Cultural Heritage Vis-à-Vis Military Necessity and Lasting Peace’ *BIICL Blog* (21 March 2022), available at: <https://www.biicl.org/blog/35/destruction-of-ukrainian-cultural-heritage-vis-a-vis-military-necessity-and-lasting-peace?cookieSet=1&ts=1669296937>, last accessed 15 November 2022. See also B Drawewska, *Military Necessity in International Cultural Heritage Law* (Brill 2021).

that are not specifically connected with the law of armed conflict context as such, namely, the 1972 World Heritage Convention, the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the 2003 Convention on the Safeguarding of the Intangible Heritage and the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions.⁶⁵ With the rapid evolution of international cultural heritage law and international criminal law over the course of the past 25 years, it is firmly established that the intentional destruction of cultural heritage entails individual criminal responsibility as a war crime, a crime against humanity, and as evidence of the intention to destroy a group in whole or in part for the purposes of the crime of genocide.⁶⁶ It also constitutes an internationally wrongful act entailing State responsibility.⁶⁷

In recent years, the wanton, intentional, and performative destruction of cultural heritage by ISIS and their affiliates in Syria and Iraq placed heritage destruction on the global agenda. In 2017, the United Nations Security Council linked the intentional destruction of cultural heritage with threats to international peace and security, stating:

[T]he unlawful destruction of cultural heritage, and the looting and smuggling of cultural property in the event of armed conflicts ... and the attempt to deny historical roots and cultural diversity ... can fuel and exacerbate conflict and hamper post-conflict national reconciliation, thereby undermining the security, stability, governance, social, economic and cultural development of affected States.⁶⁸

The Resolution further affirmed that “directing unlawful attacks against sites and buildings dedicated to religion, education, art, science or charitable purposes, or historic monuments may constitute, under certain circumstances

65 Ukraine is a State Party to all four Conventions, but Russia, while a State Party to the 1970 and 1972 Conventions, is not a party to the 2003 Convention or the 2005 Convention.

66 See S Brammertz *et al.*, ‘Attacks Against Cultural Heritage as a Weapon of War: Prosecutions at the ICTY’ (2016) 14 JICJ 1143.

67 See P Vigni, ‘Cultural Heritage and State Responsibility’ in F Francioni and AF Ardoljak, *The Oxford Handbook of International Cultural Heritage Law* (OUP 2020) 605. See also, A Jakubowski, ‘State Responsibility and the International Protection of Cultural Heritage in Armed Conflicts’ (2015) 2 *Santander Art and Culture Law Review* 147.

68 United Nations Security Council Resolution 2347 (2017), S/RES/2347 (2017) (24 March 2017).

and pursuant to international law a war crime and that perpetrators of such attacks must be brought to justice”.⁶⁹

As explored in several chapters in the first part of this volume dealing with heritage destruction in conflict (in particular, the contributions by Andrzej Jakubowski, Ana Vrdoljak, and Janet Blake), international criminal law continues to play an important role in not only providing a modest degree of accountability for heritage destruction, but also as a means of elucidating the individual, societal, and global harms that accrue from heritage destruction. Much has been written about the contribution of the ICC in this regard, particularly through its landmark conviction in 2016 in the *Al Mahdi* case.⁷⁰ In June 2021, seeking to build on the legacy of the *Al Mahdi* case, the ICC Office of the Prosecutor (“OTP”) published its ‘Policy on Cultural Heritage’, wherein it noted that “cultural heritage constitutes a unique and important testimony of the culture and identities of peoples, and that the degradation and destruction of cultural heritage – whether tangible or intangible – constitutes a loss to the affected communities, as well as to the international community as a whole”.⁷¹ In highlighting the significance and multifaceted character of crimes of heritage destruction, the OTP states its commitment to addressing “alleged crimes against or affecting cultural heritage in all stages of its work: preliminary examination, investigation, prosecution, and – when so invited – reparations”. Furthermore, the Policy pledged that “[w]herever evidence permits, the Office will seek to include charges for crimes directed at cultural heritage and will also seek to pursue and highlight evidence in situations affecting cultural heritage”.⁷²

While neither Ukraine nor Russia are State Parties to the ICC, in February 2014, Ukraine declared its acceptance of the ICC’s jurisdiction pursuant to Article 12(3) of the Rome Statute, a provision which allows non-States Parties to accept the Court’s jurisdiction on an *ad hoc* basis within specified temporal boundaries. Ukraine’s Declaration was revised in 2015 to extend its temporal scope to encompass crimes committed from 21 November 2013 onwards.⁷³ In April 2014, the OTP opened a Preliminary Examination into the situation in

69 Ibid., para 4.

70 See also the chapter by Lynn Meskell in this volume for a contextual account of the case.

71 ‘Policy on Cultural Heritage’ *ICC Office of the Prosecutor* (June 2021), available at: <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.icc-cpi.int/sites/default/files/itemsDocuments/20210614-otp-policy-cultural-heritage-eng.pdf>, last accessed 15 November 2022, para 4.

72 Ibid., para 5.

73 The text of both Declarations can be found here: <https://www.icc-cpi.int/ukraine>, last accessed 15 November 2022.

Ukraine. This step entails an enquiry into whether the prerequisites for the opening of a formal investigation are present, in particular, whether there are reasonable grounds to believe that crimes within the jurisdiction of the Court have been committed. On 28 February 2022, some eight years after the opening of the preliminary examination – and, crucially, four days after the launch of the Russian invasion – ICC Chief Prosecutor Karim Khan KC opened a formal investigation, following the submission of referral requests by 39 States Parties.⁷⁴ As a consequence, the ICC OTP has jurisdiction to investigate crimes against cultural heritage which fall within the scope of Articles 6 (genocide), 7 (crimes against humanity) and 8 (war crimes) of the Rome Statute, committed on the territory of Ukraine since 21 November 2013.⁷⁵

While the ICC's jurisdictional basis to act is clear, the degree to which it will in fact have the capacity to pursue the prosecution of crimes involving heritage destruction is questionable. Following the opening of a formal investigation, the OTP quickly established a presence in Ukraine, and in addition to conducting its own investigations, is assisting domestic Ukrainian accountability efforts, and the investigative efforts of other entities such as Eurojust.⁷⁶ Positive as this is, it is important to keep in mind that Ukraine is but one situation among 17 active investigations vying for the attention and resources of the OTP. Admittedly, many States Parties have been forthcoming in providing additional resources to the Court in the context of the 'Ukrainian moment';

74 See 'Statement of the ICC Prosecutor, Karim AA Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation' (2 March 2022) available at: <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states> [last accessed 15 November 2022]. Had States Parties not referred the situation, the OTP would have had to open the investigation *proprio motu*, an exercise of prosecutorial discretion requiring the agreement of the Pre-Trial Chamber (see Article 15(3) of the Rome Statute).

75 It is worth noting that in its Preliminary Examination Report of 2020, the OTP determined that there were reasonable grounds to believe that war crimes under Article 8(2)(b)(ix) or 8(2)(e)(iv) (attacks on protected buildings) had been committed. See The Office of the Prosecutor, 'Report on Preliminary Examination Activities 2020' (14 December 2020), para 280, available at: <https://www.icc-cpi.int/sites/default/files/itemsDocuments/2020-PE/2020-pe-report-eng.pdf>, last accessed 15 November 2022.

76 See 'Press Release: ICC Participates in Joint Investigation Team Supported by Eurojust on Alleged Core International Crimes in Ukraine' *Eurojust* (25 April 2022), available at: <https://www.eurojust.europa.eu/news/icc-participates-joint-investigation-team-supported-eurojust-alleged-core-international-crimes>, last accessed 15 November 2022. See also, US Department of State, 'The European Union, the United States, and the United Kingdom establish the Atrocity Crimes Advisory Group (ACA) for Ukraine' (25 May 2022), available at www.state.gov/creation-of-atrocity-crimes-advisory-group-for-ukraine, last accessed 15 November 2022.

however, it is nonetheless important to temper expectations.⁷⁷ The reality is that the cases that will result from the ICC's investigations in Ukraine, are likely to be few in number, will focus on high-level perpetrators, and will take several years to prosecute.

This prosecutorial direction is borne out by the dramatic announcement in March 2023 of the issuance of an arrest warrant against Putin and his Commissioner for Children's Rights, Maria Lvova-Belova, for "the unlawful deportation and transfer of Ukrainian children from occupied areas of Ukraine to the Russian Federation, contrary to Article 8(2)(a)(vii) and Article 8(2)(b) (viii) of the Rome Statute." This is the first time that a sitting Head of State of a P5 nation has been charged with an international crime by an international court or tribunal. Its significance should not be downplayed. However, notwithstanding the relative uncertainty of the status of Head of State immunity in this context, it is optimistic in the extreme to expect Putin to ever appear in the dock in The Hague. The warrant, no doubt the first of many bearing Putin's name, nonetheless brands Putin forever more as, at a minimum, a suspected war criminal. Such branding inflicts reputational damage and while the final judgment of the ICC may remain hypothetical, the judgment of history will have to reckon with the charges laid against him. That the OTP has chosen to classify the transfer of children as a war crime, rather than as an act of genocide reflects an element of caution. However, it is not beyond the realms of possibility that just such a genocide charge may materialize in the future.⁷⁸

In addition to the ICC, it is essential that alternative justice mechanisms and capacity building measures are contemplated, not only for the purposes of seeking accountability for the crime of aggression, which as previously noted is not within the jurisdiction of the ICC in this context, but also for the prosecution of war crimes, crimes against humanity, and genocide. In this respect,

77 On how States Parties to the ICC have responded financially to the needs to the Court in the context of the "Ukraine Moment", see S Vasiliev, 'Watershed Moment or Same Old? Ukraine and the Future of International Criminal Justice' (2022) *Journal of International Criminal Justice* available at: <https://academic.oup.com/jicj/advance-article/doi/10.1093/jicj/mqac044/6827886>, last accessed 15 November 2022.

78 See 'Statement by Prosecutor Karim AA Khan KC on the Issuance of Arrest Warrants Against President Vladimir Putin and Ms Maria Lovova-Belova' (17 March 2023), available at: <https://www.icc-cpi.int/news/statement-prosecutor-karim-khan-kc-issuance-arrest-warrants-against-president-vladimir-putin>, last accessed 31 March 2023. See also, Press Release 'Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova' (17 March 2023), available at: <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>, last accessed 31 March 2023.

there are numerous proposals currently circulating amongst the international criminal law commentariat for the establishment of a dedicated international tribunal, or hybrid tribunal embedded in the Ukrainian criminal justice system, that would have the capacity to address in a meaningful way the myriad international crimes, including crimes against cultural heritage, being committed in the conflict.⁷⁹ Ukraine should have a critical voice in whatever approach is adopted and should retain ownership and agency to determine how to address the crimes committed on their territory. To this end, the Office of the Prosecutor General has been very actively engaged in the collection of evidence,⁸⁰ and has already initiated prosecutions against Russian detainees for war crimes.⁸¹

3.2 *The Scale of Destruction: The Response of UNESCO and the Governing Bodies of Relevant UNESCO Conventions*

While it is too early to predict what justice mechanism(s) will be agreed upon by Ukraine and supporting States, it was all too predictable from the outset that the intentional destruction of cultural heritage would feature prominently in this conflict. Perhaps conscious of this, in the hours following the launching of the so-called ‘Special Military Operation’, UNESCO issued a press release calling “for respect for international humanitarian law, notably the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed conflict and its two (1954 and 1999) Protocols, to ensure the prevention of damage to cultural heritage in all its forms”.⁸² Four days later, on 28 February, the Ukrainian Foreign Ministry reported that Russian shelling in the Kyiv region had resulted in damage to the Ivankiv Museum and the destruction of 25 art

79 For one such proposal, see M Scharf, Y Dutton and M Sterio, ‘High War Crimes Court for Ukraine for Atrocity Crime in Ukraine’ *OpinioJuris* (29 July 2022), available at: <https://opiniojuris.org/2022/07/29/high-war-crimes-court-of-ukraine-for-atrocity-crimes-in-ukraine/>, last accessed 31 March 2023.

80 See the website of the Prosecutor General for further information: <https://warcrimes.gov.ua/en/>, last accessed 31 March 2023.

81 See for example, ‘Ukraine Probing Almost 26,000 Suspected War Crimes Cases’ (*Reuters*, 7 August 2022), available at: <https://www.reuters.com/world/europe/ukraine-probing-almost-26000-suspected-war-crimes-cases-prosecutor-2022-08-07/>, last accessed 15 November 2022; M Gessen, ‘The Prosecution of Russian War Crimes in Ukraine’ (*The New Yorker*, 1 August 2022), available at: <https://www.newyorker.com/magazine/2022/08/08/the-prosecution-of-russian-war-crimes-in-ukraine>, last accessed 15 November 2022.

82 ‘UNESCO’s Statement on the Recent Developments in Ukraine’ (24 February 2022), available at: <https://www.unesco.org/en/articles/unescos-statement-recent-developments-ukraine>, last accessed 24 February 2022.

works by celebrated Ukrainian folk-artist, Mariia Prymachenko.⁸³ The following day, on 1 March, Kyiv's Holocaust memorial at Babyn Yar was damaged in a Russian missile attack. While the purported target of the attack was a nearby TV tower, on the face of it, the damage to the site is at a minimum contrary to the principles of distinction and precaution in attacks.⁸⁴ The Babyn Yar site commemorates the murder of some 100,000 members of the Ukrainian Jewish population by Nazi forces during WORLD WAR II. In response to the attack, Ukrainian President Volodymyr Zelensky condemned it as "beyond humanity" and commented that "[s]uch a missile strike shows that for many people in Russia, our Kyiv is completely foreign. They know nothing about our capital. About our history ... But they have an order to erase our history. Erase our country. Erase us all".⁸⁵ As the conflict has progressed, the attacks on the Ivankiv Museum and at Babyn Yar have proven to be emblematic of a pattern of destruction that has seen heritage sites targeted throughout Ukraine.

Since the launch of the invasion, various international, national, and civil society heritage bodies have played an essential role in documenting and cataloguing instances of heritage destruction, as well as engaging in critical efforts aimed at safeguarding heritage at risk. UNESCO has naturally been at the forefront of such efforts. In addition to documenting instances of heritage destruction, it has been actively engaged in the construction of a database of damaged heritage sites from captured satellite imagery. The purpose of the database is not merely to document heritage destruction, but crucially to allow experts to compare before-and-after photos as a means of assessing the extent of the damage inflicted and to plan for restoration, reconstruction

83 See https://twitter.com/MFA_Ukraine/status/1498218345832882177, last accessed 15 November 2022. See also, M Stevens and G Bowley, 'Treasured Paintings Burned in Russian Invasion, Ukrainian Officials Say' (*The New York Times*, 28 February 2022), available at: <https://www.nytimes.com/2022/02/28/arts/design/maria-primachenko-paintings-destroyed-ukraine.html>, last accessed 15 November 2022.

84 D Cassidy, 'Russian Missile Strike Hits Holocaust Memorial Site in Kyiv' (*The Art Newspaper*, 2 March 2022), available at: <https://www.theartnewspaper.com/2022/03/02/russian-missile-strike-babyn-yar-holocaust-memorial-centre-kyiv>, last accessed 15 November 2022. For a detailed investigation into the attack based on open-source information see, 'Russian Strike on the Kyiv TV Tower' *Forensic Architecture* (10 June 2022), available at: <https://forensic-architecture.org/investigation/russian-strike-on-kyiv-tv-tower>, last accessed 15 November 2022. See also, L Kinstler, 'Who Will Remember the Horrors of Ukraine?' (*New York Times*, 13 June 2022), available at: <https://www.nytimes.com/interactive/2022/06/13/opinion/ukraine-russia-babyn-yar.html>, last accessed 15 November 2022.

85 'Babyn Yar: Anger as Kyiv's Holocaust Memorial is Damaged' (*BBC News*, 3 March 2022), available at: <https://www.bbc.com/news/world-europe-60588885>, last accessed 15 November 2022.

or recovery.⁸⁶ At the time of writing (March 2023), UNESCO had verified damage to “248 sites since 24 February [2022] – 107 religious sites, 21 museums, 89 buildings of historical and/or artistic interest, 19 monuments, [and] 12 libraries”.⁸⁷ The majority of sites are located in the Kyiv, Kharkiv, Donetsk, and Luhansk regions. Thus far, Ukraine’s seven World Heritage sites have not been damaged.⁸⁸ Understandably, UNESCO’s verified list of damaged sites is conservative compared to the unverified list compiled by the Ministry of Culture and Information Policy of Ukraine, who at the time writing list some “553 damaged and destroyed objects of the cultural heritage and cultural institutions of Ukraine”.⁸⁹ Similarly, the Ukrainian Cultural Foundation suggest that “[a]c- cording to preliminary estimates, over 550 monuments and cultural sites were partially damaged or completely destroyed as a result of a full-scale Russian military invasion of Ukraine”.⁹⁰

UNESCO has responded with a series of measures and initiatives beyond documentation of damaged sites. In the aftermath of the United Nations General Assembly’s condemnation of Russia’s acts of aggression, as expressed in Resolution A/ES-11/1 of 2 March 2022, UNESCO highlighted Russian attacks on Ukrainian heritage sites and stated that it was working “in close coordina- tion with the Ukrainian authorities ... to mark as quickly as possible key historic monuments and sites across Ukraine with the distinctive emblem of the 1954 Hague Convention, an internationally recognized signal for the protection of cultural heritage in the event of armed conflict”.⁹¹ Assisting with the appending

86 ‘UN Monitors Cultural Destruction in Ukraine with Satellites’ *DW* (27 October 2022), avail- able at: <https://www.dw.com/en/un-monitors-cultural-destruction-in-ukraine-with-sat- ellites/a-63569499>, last accessed 15 November 2022.

87 See ‘Damaged Cultural Sites in Ukraine Verified by UNESCO’, available at: <https://www .unesco.org/en/articles/damaged-cultural-sites-ukraine-verified-unesco?hub=66116>, last accessed 31 March 2023.

88 These consist of six cultural sites and one natural site: Ancient City of Tauric Chersonese and its Chora; Saint-Sophia Cathedral and Related Monastic Buildings, L’viv – the Ensemble of the Historic Centre, Residence of Bukovinian and Dalmatian Metropolitans, Struve Geodetic Arc, Wooden *Tserkvas* of the Carpathian Region in Poland and Ukraine, and the Ancient and Primeval Beech Forests of the Carpathians and Other Regions of Europe. See ‘UNESCO World Heritage Convention: Ukraine’, available at: <https://whc.une sco.org/en/statesparties/ua/>, last accessed 15 November 2022.

89 Ministry of Culture and Information Policy of Ukraine, ‘Destroyed Cultural Heritage of Ukraine’, available at: <https://culturecrimes.mkp.gov.ua/?p=3773>, last accessed 31 March 2023.

90 Ukrainian Cultural Foundation, ‘Map of Cultural Losses’, available at: <https://uacult ure.org/culture-loss-en/>, last accessed 31 March 2023.

91 UNESCO, ‘Press Release. Ukraine: UNESCO Statement Following the Adoption of the UN General Assembly Resolution’ (3 March 2022), available at: <https://www.unesco.org /en/articles/ukraine-unesco-statement-following-adoption-un-general-assembly-resolut ion?hub=701>, last accessed 15 November 2022.

of the Blue Shield emblem is but one measure amongst many. At a Special Session of the UNESCO Executive Board in March 2022, the Board invited “the governing bodies of all relevant UNESCO conventions and intergovernmental programmes, facilitated by the Director-General and the Secretariat, to assess and develop measures taking into account the situation in Ukraine, within its internationally recognized borders across UNESCO’s fields of competence”.⁹²

In accordance with the Executive Board’s invitation, the governing bodies of several of the UNESCO Conventions have taken steps aimed at activating and implementing various obligations and mechanisms for support and assistance built into their respective mandates. For example, following an Extraordinary Meeting on 18 March 2022, the Committee for the Protection of Cultural Property in the Event of Armed Conflict, in addition to condemning Russia’s invasion and reminding them of their obligations under Article 4 of the 1954 Convention and Articles 1–5 of the First Protocol, emphasized that “damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all humanity, since each people makes its contribution to the culture of the world”.⁹³ The Declaration goes on to invite “all Member States, UNESCO and relevant cultural heritage expert organizations to provide Ukraine, upon their request and based on their identified needs, any support or advice it may be able to give in protecting and safeguarding, including risk preparedness measures, of cultural heritage of Ukraine”.⁹⁴ In the same session, the Committee addressed an application from Ukraine for assistance under the emergency Fund for the Protection of Cultural Property in the Event of Armed Conflict provided for under the 1999 Second Protocol. In granting the modest sum of \$50,000, the Committee outlined the measures and initiatives

92 UNESCO, ‘Decisions Adopted By the Executive Board at its 7th Special Session’ 7X/EX/Decisions (30 March 2022), para 21. At para 17 the Board demanded, “the immediate end of the offensive against Ukraine so as to guarantee protection from further damage and harm to Ukrainian natural, built and movable cultural heritage in all of its forms, in compliance with the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970) and international humanitarian law, *inter alia* the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention), as well as resolution 2347 (2017) of the United Nations Security Council, and all other relevant instrument”.

93 ‘Declaration on the Protection of Cultural Heritage in Ukraine’, 2nd Extraordinary Meeting of the Committee for the Protection of Cultural Property in the Event of Armed Conflict, C54/22/2.EXT.COM/3 (18 March 2022), available at: <https://unesdoc.unesco.org/ark:/48223/pf0000380949>, last accessed 15 November 2022.

94 Ibid.

being undertaken by UNESCO in cooperation with the Ukrainian Government, which include:

- In accordance with Article 17 of the 1954 Hague Convention, marking cultural properties with the distinctive emblem of the Convention;
- Reinforcement of *in situ* protection of cultural property, in particular immovable cultural property, through securing doors and windows, taking precautions against structural collapse etc.;
- Removal of movable cultural property from high-risk areas and their temporary storage in refuges, to be identified by the Government of Ukraine;
- Detailed recording of damages and collection of evidence of potential breaches of the 1954 Hague Convention and its two (1954 and 1999) Protocols;
- Granting of enhanced protection, on an emergency basis, as well as special protection to select a number of cultural properties to reinforce their immunity.⁹⁵

While the activities of the Committee for the Protection of Cultural Property in the Event of Armed Conflict are commendable, the same unfortunately cannot be said of the World Heritage Committee (the governing body of the 1972 World Heritage Convention). The work of the Committee has ground to a halt in response to the fact that the Russian Delegate, Ambassador Alexander Kuznetsov, held the Chair of the Committee and was to be Chair of the 45th Session of the Committee, scheduled to take place in Kazan, Russia in June 2022. In April 2022, 46 members of the Committee wrote an open letter stating categorically that they would “not travel to Kazan or to a 45th session of the World Heritage Committee hosted in any other country if chaired by Russia”.⁹⁶ Following the submission of the open letter, the 45th session was postponed, effectively rendering the Committee inoperative. Pressure was increased on UNESCO and the membership of the Committee to find a way around the impasse when, in October 2022, Ukraine nominated the historic centre of

95 ‘Emergency International Assistance to Ukraine’, 2nd Extraordinary Meeting of the Committee for the Protection of Cultural Property in the Event of Armed Conflict, C54/22/2.EXT.COM/4 (18 March 2022), para 5.

96 UK Foreign and Commonwealth Office, ‘An Open Letter from 46 Countries Party to the UNESCO World Heritage Convention on the Location and Chair of the 45th World Heritage Committee’ (8 April 2022), available at: <https://www.gov.uk/government/publications/open-letter-to-the-unesco-world-heritage-committee-7-april-2022>, last accessed 15 November 2022.

Odessa for inscription on the World Heritage List, an initiative which, according to UNESCO Director-General, Audrey Azoulay, “marks confidence in UNESCO’s protection mechanisms”.⁹⁷ The stalemate appears to have been lifted in November 2022 with the resignation of Ambassador Kuznetsov.⁹⁸ The Chair of the Committee will now be assumed by the Saudi Arabian delegate and it is presumed that the work of the Committee will resume and the 45th session organized accordingly.⁹⁹

In addition to damage and destruction done to sites, there is evidence of widespread looting of cultural objects from public and private collections located in Russian occupied territories. For example, in May 2022, the Mariupol City Council alleged on Telegram that Russian forces had sacked three separate museums in the city, stating “[t]he occupiers ‘liberated’ Mariupol from its historical and cultural heritage ... [t]hey stole and moved more than 2,000 unique exhibits from museums in Mariupol and Donetsk”.¹⁰⁰ Similarly, in October 2022, the Associated Press reported the looting of over 1,700 objects from the Melitopol Museum of Local History, including 198 Scythian gold artefacts.¹⁰¹ There is also significant evidence to suggest that cultural objects have been looted and trafficked from other occupied territories including from the Kherson Art Museum.¹⁰² Russia’s unilateral declaration of annexation of whole swathes of Eastern Ukraine (including Kherson) are being used to

97 ‘At UNESCO, President Zelensky Officially Announces Odesa’s Candidacy to Receive World Heritage Status’, *World Heritage Convention: News* (11 October 2022), available at: <https://whc.unesco.org/en/news/2481>, last accessed 15 November 2022.

98 A Sansom, ‘Russia’s Ambassador to UNESCO Has Resigned, Clearing the Path for the World Heritage Committee to Resume Work’ (*Artnet News*, 25 November 2022), available at: <https://news.artnet.com/art-world/russia-unesco-ambassador-resigns-2216944>, last accessed 27 November 2022.

99 Ibid.

100 Quoted in T Solomon, ‘Russian Forces Looted More Than 2,000 Artworks from Mariupol’s Museums, City Council Says’ (*Art News*, 2 May 2022), available at: <https://www.artnews.com/art-news/news/mariupol-museums-russian-looted-artworks-city-council-1234627187/>, last accessed 15 November 2022.

101 H Arhirova, ‘“War Crime”: Industrial-Scale Destruction of Ukraine Culture’ (*Associated Press*, 9 October 2022), available at: <https://apnews.com/article/russia-ukraine-kyiv-travel-museums-7431f2190d917f44f76dff39b4d5df54>, last accessed 15 November 2022. See also, J York, ‘“Cultural Cleansing”: New Russian Attacks On Ukraine Spur Cultural Preservation Efforts’ (*France 24*, 14 October 2022), available at: <https://www.france24.com/en/europe/20221014-cultural-cleansing-new-russian-attacks-on-ukraine-spur-cultural-preservation-efforts>, last accessed 15 November 2022.

102 S Kishkovsky, ‘Ukrainian Forces Win Back Kherson Region – But Russia Has Reportedly Looted Its Art Collection’ (*The Art Newspaper*, 11 November 2022), available at: <https://www.theartnewspaper.com/2022/11/11/ukraine-wins-back-kherson-russian-looting-art-collection>, last accessed 15 November 2022.

suggest that museum collections in these illegally annexed territories are now Russian ‘property’.¹⁰³ Museum and library directors and their staff throughout Ukraine have been desperately taking measures to attempt to safeguard their collections.¹⁰⁴ Amongst the initiatives taken is a widespread, coordinated effort to digitize Ukrainian heritage under the umbrella of *Saving Ukrainian Cultural Heritage Online*.¹⁰⁵ As is to be expected, the International Council of Museums (“ICOM”), has also been very actively engaged with Ukrainian partners and has offered expertise and support. A concrete contribution in this regard is the publication in November 2022 of the *Emergency Red List of Cultural Objects at Risk – Ukraine*, which was completed in collaboration with 11 Ukrainian museums.¹⁰⁶ As the anecdotal evidence of widespread looting of cultural objects continues to grow, the true scale will only be ascertainable once all of Ukrainian territory is liberated from Russian occupation.

The impact of the conflict on intangible Ukrainian heritage is likely to be immense. With significant refugee flows out of Ukraine and internal displacement occurring on a vast scale, people are being wrenched from their communities with the attendant consequences this has on their access to, and ability to participate in, diverse forms of cultural life. As discussed by Janet Blake in Chapter 6 of this volume, the interconnectedness of tangible and intangible heritage means that we must not discuss the two in isolation, but rather emphasize that attacks on moveable and immovable heritage have a profound impact on individual and group identity and give rise to complex harms. In her report on the “Intentional Destruction of Cultural Heritage as a Violation of Human Rights”, former UN Special Rapporteur in the Field of Cultural Rights, Karima Bennouna, recalled that heritage destruction undermines several human rights, including the right to freedom from discrimination; the right to freedom of thought, conscience and religion; and the right to take part in cultural life, which includes “the right to maintain and develop the cultural

103 See S Kishkovsky, ‘Russia to Take Over Ukrainian Museum Collections as Formal Annexation Plans Announced’ (*The Art Newspaper*, 29 September 2022), available at: <https://www.theartnewspaper.com/2022/09/29/russia-to-take-over-ukrainian-museum-collections-as-for-mal-annexation-plans-announced>, last accessed 15 November 2022.

104 L Harding and H Sherwood, ‘Ukrainians in Race to Save Cultural Heritage’ (*The Guardian*, 9 March 2022), available at: https://www.theguardian.com/world/2022/mar/09/ukrainians-in-race-to-save-a-nations-cultural-heritage?utm_term=Autofeed&CMP=edit_221&utm_medium=Social&utm_source=Twitter#Echobox=1646811971, last accessed 15 November 2022.

105 For more on this initiative see, <https://www.sucho.org/>, last accessed 15 November 2022.

106 The Red List is available here: <https://icom.museum/en/news/launch-icom-red-list-ukraine/>, last accessed 26 November 2022.

practices of one's choice, and to access cultural heritage including one's own history".¹⁰⁷ In the same report, she noted that "sites may be destroyed as part of a policy of removing from public space, symbols of past events, and of preventing the expression of narratives deviating from [...] discourses regarding such events."¹⁰⁸ The attempted cultural cleansing by Russia in Ukrainian territory is certainly illustrative of such a policy.

In the context of the ongoing targeting of the Ukrainian cultural landscape, elements of the intangible cultural heritage – that Ukrainians carry with them – assume an even greater resonance. As a State Party to the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage, Ukraine has sought to utilize the Convention's safeguarding mandate. To this end, in March 2021 it nominated the "Culture of Ukrainian Borscht Cooking" for inscription on the Representative List of the Intangible Cultural Heritage of Humanity. In April 2022, Ukraine requested the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage to treat the nomination as "a case of extreme urgency" in accordance with Article 17(3) of the 2003 Convention.¹⁰⁹ The request is the first time that Article 17(3)'s "extreme urgency" criteria have been invoked.¹¹⁰ In making its case for the treatment of the nomination with extreme urgency, Ukraine argued that:

In these difficult times for Ukraine, we increasingly understand the importance of safeguarding our culture and traditions. In such circumstances, we need more than ever to preserve our traditions and unique recipes. Ukrainian borscht is a marker of the national identity. This dish demonstrates its culinary sustainability and historical, geographical and even

¹⁰⁷ 'Report of the Special Rapporteur in the Field of Cultural rights on the Intentional Destruction of Cultural Heritage as a Violation of Human Rights' A/71/317 (9 August 2016) at 34, available at: <https://www.ohchr.org/en/documents/thematic-reports/a71317-report-intentional-destruction-cultural-heritage-violation-human>, last accessed 15 November 2022.

¹⁰⁸ *Ibid.*, 35.

¹⁰⁹ 'Request by Ukraine to Examine the Nomination "Culture of Ukrainian Borscht Cooking" for the Urgent Safeguarding List as a Case of Extreme Urgency', Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, LHE/22/5.EXT.COM/5 (1 July 2022), para 1.

¹¹⁰ Convention for the Safeguarding of Intangible Cultural Heritage, Article 17(3) – List of Intangible Cultural Heritage in Need of Urgent Safeguarding: "3. In cases of extreme urgency – the objective criteria of which shall be approved by the General Assembly upon the proposal of the Committee – the Committee may inscribe an item of the heritage concerned on the List mentioned in paragraph 1, in consultation with the State Party concerned".

geopolitical durability. The culture of borscht cooking has become a kind of ethno-cultural phenomenon and plays an important role in shaping the modern consciousness of Ukrainians. It is no exaggeration to say that the entire population of Ukraine today is a bearer of tradition. The culture of Ukrainian borscht cooking is not only an element of the intangible cultural heritage of Ukraine, but a way of living. Therefore, Ukrainian borscht and the culture of its cooking contribute to strong social and dialogical interaction among all social levels of Ukrainian society.

I would like to draw special attention to the fact that the element is generally national, not regional, which in the context of a full-scale war only complicates its safeguarding. Every day civilians die in all regions of Ukraine. Some were left without access to food. Every family cooks Ukrainian recipes which are based on regional peculiarities, and today there are threats that the transmission of the culture of cooking and traditions of Ukrainian borscht cannot be passed from one generation to another due to the death of entire families.¹¹¹

The Intergovernmental Committee agreed to the request and stated that:

The displacement of people and bearers threatens the element, as people are unable not only to cook or grow local vegetables for borscht, but also to come together to practice the element, which undermines the social and cultural well-being of communities. As such, the transmission of the element is also threatened. The armed conflict destroys the environment (fauna and flora), which in turn, seriously threatens the diverse nature of the element. The armed conflict leads to the loss of everyday contexts associated with practicing the element, and has significantly affected the holding of cultural events, in particular festivals dedicated to traditional food, including borscht. All of these factors justify the need for urgent safeguarding of the element as a case of extreme urgency.¹¹²

111 'Request by Ukraine to Examine the Nomination "Culture of Ukrainian Borscht Cooking" for the Urgent Safeguarding List as a Case of Extreme Urgency', Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, Meeting of the Bureau, LHE/22/17.COM 3.NUR/3 (6 May 2022), Annex 2.

112 'Request by Ukraine to Examine the Nomination "Culture of Ukrainian Borscht Cooking" for the Urgent Safeguarding List as a Case of Extreme Urgency', Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, Fifth Extraordinary Session Online, LHE/22/5.EXT.COM/5 (1 July 2022).

The inscription of Ukrainian borscht on the Urgent Safeguarding List was heralded by Ukraine's Minister for Culture, Oleksandr Tkachenko, as representing victory in the 'borscht war': "[b]e sure that in both the war for borscht and in this war we will win".¹¹³ Tkachenko is referring here to the fact that for several years there has been a public campaign to have borscht cooking recognized as an element of the Ukrainian, rather than the Russian, culinary tradition. While its inscription on the Urgent Safeguarding List is undoubtedly justified, it is nonetheless clear that the request for its inscription was, as is often the case with intangible cultural heritage inscriptions, at least partially politically motivated and is clearly an element of the ongoing struggle for the maintenance of a distinct Ukrainian identity in the face of Russian denialism.

The foregoing is but a snapshot of where things stand as of March 2023. Clearly, throughout Ukraine, heritage in all of its diverse manifestations is being exposed to damage and destruction in one form or another. While this all too painfully apparent, the multiplicity of documentation efforts being undertaken by various actors at least means that we have a real-time understanding of where and how this destruction is taking place. The efforts of UNESCO and the governing-bodies of its Conventions to not only add their voices to the global condemnation of Russia's acts, but to activate available mechanisms aimed at the safeguarding of cultural heritage, are commendable and the least that can be expected. The call for international prosecutions for crimes committed in the conflict is deafening, even if the most effective mechanism to pursue such prosecutions is yet to be decided. Amidst the cry for justice, crimes involving heritage destruction cannot be ignored in the context of a conflict that has the denial of national and cultural identity at its core. Whether and how international, rather than national, criminal justice delivers in this regard remains to be seen.

4 Concluding Reflections

In July 2022, the Permanent Mission of Albania to the United Nations, in cooperation with the Permanent Missions of Poland and Ukraine, organized a United Nations Security Council Arria-Formula Meeting dedicated to the topic of "[t]he destruction of cultural heritage as a consequence of the

¹¹³ Quoted in A Kassam, 'Ukrainian Borscht Recognised by UNESCO with Entry on to Safeguarding List' (*The Guardian*, 1 July 2022), available at: <https://www.theguardian.com/world/2022/jul/01/ukrainian-borscht-recognised-by-unesco-with-entry-onto-safeguarding-list>, last accessed 15 November 2022.

Russian aggression against Ukraine”.¹¹⁴ In opening the meeting, the Albanian Ambassador, Ferit Hoxha, remarked that “the consequences of this war that is impacting everything go far beyond physical damage; they include the very historical and cultural identity of Ukraine, the diversity and splendor of a country’s rich cultural history. The right to exist of Ukraine as a country, as a nation, is under attack”.¹¹⁵ These sentiments were echoed by all States who participated in the meeting, with the obvious exception of Russia.

Recognition and condemnation of the fact that denial of Ukrainian identity and attacks on cultural heritage are central to this conflict are essential in establishing a clear historical record of how and why this war has been waged. As this Afterword has explored, the denial of Ukrainian nationhood and identity, coupled with the construction of a false genocide narrative, formed the pillars upon which Russia sought to justify its use of force against and full-scale invasion of Ukraine. Not only has heritage destruction formed part of the pretext for the war, but as was discussed in Section 3, it has also been a prominent feature of the conduct of hostilities. Wanton and indiscriminate bombardment of Ukrainian towns and cities is bringing damage and destruction to moveable and immovable heritage on a daily basis, cultural objects located in territories under Russian control are being looted and trafficked, and Ukrainians in their thousands are being uprooted from their homes and communities and forced to seek refuge across Europe, while others, including children in their thousands, are being forcibly transferred to Russia. The consequences and long-lasting impacts of Russia’s invasion of Ukraine will be felt by future generations.

While Russia’s actions constitute a rejection of the foundations of the post-WORLD WAR II global order, Ukraine and supporting States have sought to use international law as a means of pursuing justice, and as a means of safeguarding, to the extent possible, its tangible and intangible heritage. UNESCO

114 See Permanent Mission of the Republic of Albania to the United Nations, ‘Concept Note – United Nations Security Council Arria-Formula Meeting – “The Destruction of Cultural Heritage as a Consequence of the Russian Aggression Against Ukraine”’, available at: https://s3-eu-west-1.amazonaws.com/upload.teamup.com/908040/WmNHodSdTaaBhTQJN2FG_2022_05_27_concept_paper_on_Arria_cultural_heritage_Final.pdf [last accessed 15 November 2022]. A recording of the meeting held on 15 July is available here: <https://media.un.org/en/asset/k1e/k1egkow771>, last accessed 15 November 2022.

115 ‘Remarks by Ambassador Ferit Hoxha at the Security Council Arria Formula Meeting on the Destruction of Cultural Heritage’ (15 July 2022), available at: <http://ambasadat.gov.al/united-nations/remarks-by-ambassador-ferit-hoxha-at-the-security-council-arria-formula-meeting-on-the-destruction-of-cultural-heritage-in-ukraine/>, last accessed 15 November 2022.

and the governing-bodies of its Conventions are playing an important role in documentation, preservation and safeguarding of cultural heritage. No doubt, as the conflict progresses and eventually ends, attention will turn to restitution, recovery, and reconstruction of looted, damaged and destroyed sites and cities. Avenues for individual criminal accountability for acts of heritage destruction certainly exist domestically, and potentially before the ICC, or a yet to be established dedicated tribunal for Ukraine. States and international organizations have expressed their outrage and disgust at Russia's denial of Ukrainian identity and its blatant destruction of Ukrainian cultural heritage. The question remains whether that outrage will, in the final reckoning, translate into accountability.