



LIBERTAS CHAMBERS

clerks@libertaschambers.com | www.libertaschambers.com

Prosecuting Cultural Heritage Crimes in Ukraine: A Survey of the Relevant Principles and Provisions

By Fahrid Chishty

With world leaders set to meet in London later this spring, all eyes are on the ICC. As the Investigation into the Situation in Ukraine develops, theorists and practitioners of international law have speculated as to the scope of potential charges against Russian officials. Prevailing discourse has focussed its analysis on a range of traditional atrocity crimes - genocide, war crimes and crimes against humanity - but where do crimes against cultural heritage fit within this matrix? And to what extent can such conduct, if evidentially made out, be prosecuted at the Hague? In this article, Fahrid Chishty deconstructs these critical yet understudied questions.

Fahrid has significant experience in the law relating to crimes against art and antiquities, having advised clients on countering transnational trafficking operations and cultural destruction redress. He has previously shared his expertise in relation to the Armenia-Azerbaijan litigation at the ICJ and the 'blood antiquities' crisis facing Afghanistan and Pakistan in 2023.

On 24 February 2022, the Kremlin declared its 'special military operation' in Ukraine. Its objective was purportedly to 'demilitarise and de-nazify' President Zelensky's regime. At the time of writing, the war endures, with no signs of a ceasefire on the horizon. The implications of the conflict for trade, energy and agriculture – on the continent and beyond – have been profound. Yet negligible attention has been paid to the destruction or misappropriation of Ukraine's cultural heritage in the theatre of operations. With the International Criminal Court (ICC) poised to deliver its preliminary findings vis-à-vis its Investigation into the Situation in Ukraine, the world expects the evidential picture to support the indictment of the Russian chain of command – notwithstanding the fact that key issues relating to immunities and jurisdiction remain unresolved. While criminal charges brought against Moscow's leadership may be framed in terms of alleged atrocities committed against civilians – principally, mass killing,

torture, abduction, arbitrary detention and sexual violence – calls are mounting in some quarters for the Prosecutor’s description of the charges to also enumerate alleged crimes against Ukraine’s cultural heritage.

Factual matrix

According to UNESCO, 218 cultural sites have been partially or totally destroyed in Ukraine since February: 95 religious buildings, 78 historical buildings, 18 monuments, 17 museums and 10 libraries. Ukrainian officials state that these were intentional, strategic strikes and amount to cultural genocide. Moreover, Russian troops stand accused of having pillaged swathes of cultural artefacts from museums and private residences nationally. According to one allegation, Russian soldiers forcibly removed Ukraine’s prized collection of Scythian jewellery – a series of golden ornaments dating from the bronze-age Steppes – from the Melitopol Museum of Local History. A diadem dating from the rule of Attila the Hun (d. 453 AD) was also allegedly looted.

Ukraine’s position is plain: Russia is intent on extinguishing Kiev’s independent cultural identity and expunging its peoples’ historical footprint. The Minister of Culture has called these actions war crimes. On 20 October 2022 a European Parliament Resolution described Russian actions as ‘an attempt to eradicate the identity and culture of a sovereign nation, also through strategic and targeted acts of destruction on cultural heritage sites, constituting a war crime under the 1954 Convention to which both countries are signatories.’ In this context, if the ICC Investigation evidence is inculpatory, can we expect the Russian leadership to face trial for war crimes committed specifically in relation to Ukraine’s cultural heritage?

Legal framework

The destruction of cultural heritage during times of war is sadly not a new phenomenon. At various junctures in history, international law has penalised the use of violence against buildings, objects or artefacts having cultural or historical importance. The Nuremberg Trials heard evidence relating to Nazi leaders’ confiscation, desecration and destruction of cultural heritage. The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 first established a duty on States Parties to respect and safeguard cultural property in times of military hostilities. This article focuses specifically on three war crimes contrary to the Rome Statute 1998.

First, Article 8(2)(b)(ix) criminalises the intentional direction of attacks on ‘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.’ This provision is, prima

facie, engaged; Russia is alleged to have intentionally directed attacks against monuments, museums and houses of worship inter alia. Whether it truly bites will turn on the probative value of the evidence.

What of venues that are not expressly listed in the provision? Sporting venues, community centres, cemeteries and parks are potential species of cultural heritage that are not adumbrated in Article 8(2)(b)(ix). The second provision, Article 8(2)(b)(ii), provides a solution. A *lex generalis* provision, Article 8(2)(b)(ii) classifies the intentional direction of attacks against 'civilian objects' as also a war crime. A civilian object is defined as object which is not a 'military objective', meaning that it does not by its nature, location, purpose, or use, make an effective contribution to military action, and its destruction, capture or neutralisation does not offer a definite military advantage in the circumstances. Accordingly, potential cultural heritage sites that are not susceptible to Article 8(2)(b)(ix) may fall within the ambit of Article 8(2)(b)(ii) where it can be proven that there was no effective contribution to military action and its destruction did not offer a definite military advantage.

Lastly, Article 8(2)(b)(xvi) criminalises pillaging, defined as the appropriation of certain property without consent for private or personal use.

Russian responses

On the basis of the above, the Rome Statute plainly provides a basis for bringing charges against Russian officials in relation to crimes against cultural heritage. However, it will be for a Trial Chamber to determine on the evidence whether the offences are made out. As such, it is important to examine potential Russian responses to the charges at trial.

First, Russia may plead that Article 8(2)(b)(ix) has no relevance on the basis that Russian officials did not intentionally direct attacks against protected objects. That is to say, Ukrainian cultural heritage sites sustained damage as a result of bilateral military strikes and not unilateral Russian action. Accordingly, the damage inflicted was, on this interpretation, incidental and collateral. While tragic, it may be put that this is not a war crime within the meaning of the provision.

Alternatively, the Russia may plead the 'military objectives' defence. This would entail accepting that attacks were intentionally directed at Ukrainian cultural heritage sites, but that those attacks were justified on the basis that the sites in question made an effective contribution to military action and their destruction offered a definite military advantage in the circumstances. According to this position, cultural heritage sites were mobilised for war and therefore dispossessed of their status as protected objects at the material time. That is to

say, churches, mosques and museums were militarised and repurposed as pseudo-garrisons from which Ukrainian armed forces and insurgents operated.

Lastly, in relation to pillaging, Russia may challenge the nature of the alleged appropriation carried out. While the evidence may paint a picture of Russian troops forcibly removing art and antiquities from Ukraine's museums, the defence may plead that these were necessary safeguarding and protection measures. The relocation of cultural assets in wartime may be a military necessity. As such, it may be asserted that the alleged pillaging was justified and does not constitute a war crime contrary to Article 8(2)(b)(xvi).

These lines of defence are, ultimately, speculative and if pleaded, may not be insurmountable. Whether or not the charges will result in the conviction of Russian officials will, of course, be fact-sensitive and dependent on the evidence. However, the very fact that the charges may contain counts relating to war crimes against cultural heritage is a step in the right direction. Litigating the allegations may not only go towards securing justice vis-à-vis the destruction of heritage of humankind in Ukraine – it will also invite critical judicial guidance on important yet understudied issues intersecting international criminal law and cultural protection.