DESTRUCTION OF CULTURAL PROPERTY AND FRAGMENTATION OF INTERNATIONAL LAW: BEYOND THE *LEX SPECIALIS* PRINCIPLE

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Abstract

The article aims to discuss the possible relationship between the lex generalis and the lex specialis in the specific context of armed conflict and the protection of cultural heritage. More broadly, through a specific issue, the objective is to demonstrate what fragmentation of international law could signify in this context. Through an analysis of the Al Mahdi case before the ICC, the researcher seeks to highlight how the fragmentation could be an opportunity to take into account the complex realities international law is expected to address.

I. Introduction

Sometime ago, the International Criminal Court (ICC) sentenced Ahmad Al Faqi Al Mahdi to nine years in jail for the destruction of cultural property in Timbuktu (the first international criminal law case on the subject matter). [1] Those demolitions occurred during the occupation of Timbuktu by Ansar Dine and Al-Qaeda in the Islamic Maghreb. Head of the Hesbah, a morality brigade, Al Mahdi was partly responsible for imposing the religious conceptions of the two armed groups upon the local population. [2] He led the destruction of mausoleums and mosques, which were considered incompatible with the restrictive religious visions of these groups.[3] Ultimately, pleading

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[1] Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15, Judgment and sentence, 109 (Sep. 27, 2016) [hereinafter Al Mahdi judgment].

[2] *Id.* at 31.

[3] *Id*. at 36.

guilty of the crimes, Al Mahdi allowed the ICC to close the case rather quickly.

Beyond regular considerations of fighting impunity though, this case goes deeper into shedding the light on the relationship between international humanitarian law (IHL), human rights law and other legal regimes in the event of armed conflict. The judgment and the reparations order in the *Al Mahdi* case may lead to new understandings of the interpretive principle of *lex specialis* formerly used by the International Court of Justice (ICJ or the Court) in the famous advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*.[4] This principle, even though widely relayed as an international law orthodoxy, has been challenged by many jurisdictions;[5] especially, by the International Criminal Tribunal for the former Yugoslavia (ICTY).

The researcher argues that the *Al Mahdi* case is a jurisprudential milestone in a broader understanding of the *lex specialis* principle. If the case is symbolically significant to fight impunity around the destruction of cultural heritage, it also offers valuable insights to the field of legal interpretation. For this purpose, the article will highlight fresh avenues regarding the relationship between the *lex generalis* and the *lex specialis* in the specific context of armed conflict.

II. The ICJ Position and its Limits

It is now generally accepted that human rights are applicable both in times of war and peace. The ICJ itself agreed many times to this

[4] Legality of the Threat or Use of Nuclear Weapons Case, Advisory Opinion, 1996 I.C.J. Rep 226, 240, 25 (Jul 8) [hereinafter Nuclear Weapons Case].

[5] For a more detailed analysis of the jurisprudence (especially from the regional human rights courts), concerning the relationship between humanitarian law and human rights law *see* Alejandro Lorite Escorihuela, *Humanitarian Law and Human Rights Law: The Politics of Distinction*, 19 MICH. ST. INT'L. L. REV. 299, (2011); Alexander Orakhelashvili, *The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?,* 19 EUR. J. INT'L. L. 161 (2008).

affirmation.[6] However, in its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*, the ICJ commented the relationship between IHL and human rights law in the event of armed conflict while noting that IHL must be considered as the *lex specialis* and human rights law as the *lex generalis*, and that the former has a degree of precedence over latter.[7] According to the latter, human rights provisions can be applied only in the light of IHL provisions.[8] To illustrate its view, the ICJ used the example of the right to life protected under the International Covenant on Civil and Political Rights.[9] If the right to not arbitrarily be deprived of life applies during armed conflict, the Court affirmed - an arbitrary privation of life must be determined under IHL.[10] The International law commission (ILC) has also confirmed the ICJ position by stating that human rights law applies in accordance with IHL.[11]

This interpretation of the *lex specialis* principle might be too restrictive. It suggests that IHL offers more precise provisions and a better understanding than human rights law, just because it applies solely during armed conflict. Besides, it is problematic to draw a general principle on the relationship between those two bodies of law looking at the example of the Court. IHL is profuse about who and how it is lawful to kill but for other issues like torture, it is less detailed. For example, in the *Furundžija* case before ICTY, the trial chamber noted that IHL 'while outlawing torture in armed conflict, does not provide a definition of the prohibition'.[12] Judges then considered the 1984

[6] Nuclear Weapons Case, *supra* note 4; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Case, Advisory Opinion, 2004, I.C.J. Rep 136, 178, 106 (Jul 9); Case concerning Armed Activities on the Territory of the Congo (Congo v. Uganda), Judgment, 2005, I.C.J. Rep 168, 242-243, 216.
[7] Nuclear Weapons Case*, supra* note 4.
[8] *Id*.
[9] International Covenant on Civil and Political Rights art 6, Dec 19, 1966, 999 U.N.T.S. 171; *Nuclear Weapons Case, supra* note 4, at 25.
[10] Nuclear Weapons Case, *supra* note 4.
[11] REPORT OF THE INTERNATIONAL LAW COMMISSION, UNGA, 57th Sess, Supp No 10, UN Doc A/60/10. (2005).
[12] Prosecutor v. Furundžija, IT-95-17/1-T, Judgment, 159 (Dec 10, 1998).

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in order to interpret and understand this specific IHL prohibition.[13] It appeared, if IHL offered more details about the specific context of war, some objects relating to protection or prohibition, such as torture, are better grasped by bodies of law outside IHL.

Therefore, the *lex specialis principle* could lead us to a restrictive understanding of IHL. The paper thus focuses on cultural heritage law and human rights law in the event of armed conflict to emphasize the potential shortcomings of the position of the ICJ.

III. Cultural Heritage and the Fragmentation of International Law

Fragmentation of international law is often alluded to post-modern anxieties;[14] and it has been as perplexing in the case of protection of cultural heritage as it would be for any other purpose. It first found the reference in the Hague Regulations (1907).[15] Today's IHL contains

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[13] *Id.* at 159 & 162.

[14] Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties,* 15 LEIDEN J. INT'L. L. 553, 553 (2002). Koskenniemi had presented the phenomenon of fragmentation as below:
'One of the features of late international modernity has been what sociologists have called 'functional differentiation', the increasing specialization of parts of society and the related autonomization of those parts. […] It is a well-known paradox of globalization that while it has led to increasing uniformization of social life around the world, it has also lead to its increasing fragmentation - that is, to the emergence of specialized and relatively autonomous spheres of social action and structure'.
MARTTI KOSKENNIEMI, FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW (REPORT OF THE STUDY GROUP OF THE INTERNATIONAL LAW COMMISSION) 7, UNGA, 58th Sess, UN Doc A/CN.4/L.682 (2006).

[15] Hague Regulations Respecting the Laws and Customs of War on Land, Annexed to the Hague Convention on the Laws and Customs of War on Land arts. 27 & 56, Oct 18, 1907 [hereinafter Hague Regulations]. We can also go back to the Lieber Code of 1863 for a national codification. United States of America, Presidency, Instructions

several provisions that protect cultural property in the occurrence of an armed conflict,[16] including the Hague Convention (1954) and its two protocols exclusively dealing with the matter.[17] Violations of this IHL protection also fall under the ambit of international criminal law as witnessed in the ICTY Statute and the ICC Rome Statute.[18] It should be also noted that broadly, a robust international regime on cultural heritage had to wait until the creation of United Nations Educational, Scientific and Cultural Organization (UNESCO) in 1945 that gave birth to the distinct body of international law on cultural heritage.

Treaties about cultural heritage adopted under the aegis of UNESCO,[19] constitute a relatively autonomous and more sophisticated regime. It addresses the complexity and the polymorphism in the cultural heritage better than any other regime, including IHL. Protecting tangible

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for the Government of Armies of the United States in the Field arts. 34-36, Gen. Order No. 100 (1863).

[16] *Id.* arts. 27 & 56; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art 53, Jun 8, 1977, 1125 U.N.T.S. 3[hereinafter API]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art 16, Jun 8, 1977, 1125 U.N.T.S. 609[hereinafter APII].

[17] Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215 [hereinafter Hague Convention, 1954]; Protocol for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215; Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Apr 26, 1999, 2253 U.N.T.S. 172.

[18] S.C. Res. 827 (Statute of the International Criminal Tribunal for the Former Yugoslavia), art 3-d (May 25, 1993) [ICTY Statute]; Rome Statute of the International Criminal Court arts 8-2-b-ix & 8-2-c-iv, July 17, 1998, 2187 U.N.T.S. 3. [hereinafter Rome Statute].

[19] Hague Convention, 1954, *supra* note 17; Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov 14, 1970, 823 U.N.T.S. 231; Convention for the Protection of the World Cultural and Natural Heritage, Nov 16, 1972, 1037 U.N.T.S. 151; Convention for the Safeguarding of the Intangible Cultural Heritage, Oct 17, 2003, 2368 U.N.T.S. 3 [Convention Intangible Cultural Heritage]; Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Oct 20, 2005, 2440 U.N.T.S.

heritage for decades, the regime opened itself to intangible 'heritage' at the turn of the twenty first century. Moreover, these developments have competed with the traditional nationalistic and universalistic approaches previously embodied in several UNESCO instruments.[20] The nationalistic approach considers the nation state as the heritage holder while the universalistic approach considers the international community (or humankind) as the collective holders of the heritage. Interestingly, recent treaties such as the Convention for the Safeguarding of the Intangible Cultural Heritage (2003), moved towards a more relativist or local approach recognising 'communities, groups and individuals' as heritage holders.[21]

Furthermore, the protection of cultural heritage, in times of peace or war, is strongly linked with human rights, especially cultural rights. From a human rights perspective, cultural heritage can be seen as the source to realize cultural rights such as the right to take part in cultural life or seek cultural development; not to exclude the associated political and civil rights as well, such as the freedom of religion or rights of the minorities. [22] The findings of the two United Nations Special Rapporteurs in the field of cultural rights since 2009,[23] have actively proposed the protection and destruction of cultural heritage as an important human rights issue.[24]

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[20] John Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L. L. 831, 831-832 (1983).

[21] Convention for Intangible Cultural Heritage, *supra* note 19, art. 2.

[22] CHRISTIANE JOHANNOT-GRADIS, LE PATRIMOINE CULTUREL MATERIAL ET IMMATERIEL : QUELLE PROTECTION EN CAS DE CONFLIT ARME 135-142 (Schulthess, 2013).

[23] Farida Shaheed (2011-2015) and Karima Bennoune until today.

[24] For example, *see* REP. OF HUMAN RIGHTS COUNCIL, REPORT OF THE INDEPENDENT EXPERT IN THE FIELD OF CULTURAL RIGHTS, UNGA, 17th Sess, UN Doc A/HRC/17/38 (2011) & HUMAN RIGHTS COUNCIL, REPORT OF THE SPECIAL RAPPORTEUR IN THE FIELD OF CULTURAL RIGHTS, UNGA, 31st Sess, UN Doc A/HRC/31/59 (2016).

In the next section the article discusses *Al Mahdi* case from the vantage point of the intersection between IHL, human rights and cultural heritage law.

Human Rights and Cultural Heritage Law in *Al Mahdi* Case

Although the ICC had to determine if Ahmad Al Mahdi violated the Rome Statute, a criminal law instrument, this article argues that IHL remains the *lex specialis* in such matters. The Rome Statute can be seen as a criminalization of IHL violations. On one hand, the Rome Statute criminalizes attacks against cultural property during armed conflict,[25] on the other, IHL provides for the protection of cultural property in the specific context of war. However, in line with certain jurisprudential developments regarding the destruction of cultural property, and due to the specific nature of the international criminal law, IHL was not seen as sufficient because of the ICJ restrictive conception that gives to much precedence to the *lex specialis.*

IV. From a Crime Against Property Towards a Crime Against Persons

Conflicts have shown that destruction of cultural heritage is mostly an attack against groups, communities or individuals and that international law has been lacking in addressing the ground realities.

For instance, the draft of the Genocide Convention (1948) '[d]rawing on Lemkin's definition of genocide' [26] also mentioned 'cultural genocide' alongside physical and biological genocide.[27] A *de-facto*

[25] Rome Statute, *supra* note 18, arts. 8-2-b-ix & 8-2-c-iv.
[26] Ann Marie Thake, *The Intentional Destruction of Cultural Heritage as a Genocidal Act and a Crime Against Humanity*, 10 ESIL CONF. PAPER SERIES 1, 6 (2017).
[27] HIRAD ABTANI & PHILLIPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES: VOL I 125 (Martinus Nijhoff, 2008).

reference to genocide implied a crime against person(s). [28]Despite that, the final version excludes cultural genocide, which prevents, today, the recognition of the destruction of cultural heritage in war as a crime against persons. However, the ICTY jurisprudence has ventured into creative ways in reducing the gap between the law and the reality of conflicts. In the *Blaskic* case, the tribunal concluded that destructions of cultural property committed with discriminatory motives could amount to a crime against humanity of persecution.[29] Developing this further, in the *Krstic* case, judges concluded that the 'discriminatory destruction of cultural heritage may constitute evidence of genocidal intent'.[30]

Despite ICC's attribution of Al Mahdi's acts as crimes against property, [31] the researcher submits that this case should also be seen as the one recognizing the destruction of cultural heritage as a crime against persons. Therefore, the *lex generalis* at hand (or the human rights and cultural heritage law) found a critical place in the judgment. The ICC position appears more proximate to the victim than that of ICTY as it refers to the victim's participation in the justice process and reparations on the basis of criminal law as well as human rights.

V. Individuals Behind Property

A significant part of the judgment and Reparations Order in the *Al Mahdi* case creates a symbiotic relationship between the individuals and cultural property. The Trial Chamber, for example, often pointed at the importance of the destroyed buildings for the local population,

[28] *Id*. In the draft, the cultural genocide included especially: '(d) systematic destruction of books printed in the national language or of religious works or prohibition of new publications; or (e) systematic destruction of historical or religious monuments or their diversion to alien uses, destruction or dispersion of documents and objects of historical, artistic, or religious value and of objects used in religious worship'.
[29] Prosecutor v. Tihomir Blaskic, IT-95-14-T, Judgement, 227 (Mar 3, 2000).
[30] Prosecutor v. Radislav Krstic, IT-98-33-T, Judgement, 580 (02 August 2001).
[31] Al Mahdi judgment, *supra* note 1, at 77.

especially, in the cultural and religious life of Timbuktu inhabitants.[32] Judges also noted: 'Timbuktu's mausoleums and mosques constitute a common heritage for the community'.[33] Therefore, even without explicitly referring to human rights, ICC's approach seemed on the lines of the ones offered by the UN Special Rapporteurs (cited above). It also took into account the importance of the property to assess the gravity of the crime.[34] This led to a view that destructions do 'not only affect the direct victims of the crimes, namely the faithful and inhabitants of Timbuktu, but also people throughout Mali and the international community'.[35] Hence – and as a direct reference to the three different approaches that structure the international cultural heritage law –, not just the local community, ICC also acknowledged the importance of cultural property for the Malian population[36] and the international community, citing several times the inclusion of nine buildings on the World Heritage list.[37]

The use of human rights and cultural heritage law in the Reparations Order was connected to the participation of the Special Rapporteur Karima Bennoune, appointed by ICC and UNESCO as *amicus curiae*. She profusely quoted relevant reports[38] and ICC referred to her brief several times in the Reparations Order.[39] The brief was categorical in urging ICC 'to adopt a human rights perspective in assessing the importance of cultural heritage and the harm caused by its destruction'.[40] As a result, the destruction of cultural heritage as a

[32] *Id.* at 34, 46, 78 and 79.
[33] *Id.* at 34.
[34] *Id.* at 79.
[35] *Id.* at 80.
[36] The Court noted that Timbuktu and those properties were 'at the heart of Mali's cultural heritage'. *Id.* at 78.
[37] *Id.* at 39, 46 & 80.
[38] Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15-214-AnxI-Red3, Brief by Ms. Karima Bennoune, UN Special Rapporteur in the field of cultural rights, at 4 (Apr 27, 2017) [hereinafter Brief of the Special Rapporteur].
[39] Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15, Reparations order (Aug 17, 2017) [hereinafter Reparations order].
[40] Brief of the Special Rapporteur, *supra* note 38, at 4.

'violation of cultural rights'[41] was eventually acknowledged by the Court. By giving collective reparations to Timbuktian, Malian and international communities[42], the ICC also confirmed the identifications of the holders of the Timbuktu heritage made during the judgment. However, a hierarchy between those heritage holders has been made here. Indeed, as in the latest international cultural heritage law developments, the emphasis has been put on a local approach of cultural heritage. Judges thus observed that the Timbuktu population 'suffered disproportionately more harm as a result of the attack on the Protected Buildings'.[43]

VI. Cultural Property as an Autonomous IHL Category?

The term 'cultural property' was introduced by the Hague Convention of 1954.[44] Defined as 'movable or immovable property of great importance to the cultural heritage of every people',[45] the term remains inexhaustive in its import.[46] It is also included in the first and second protocol of the Geneva Conventions,[47] hence, almost qualifying as a component of the customary international humanitarian law.[48]

But the larger question is about the determination of the importance of cultural property 'to the cultural heritage of every people'. It is very likely that the term 'people' was initially referring to national peoples of every state party. However, this work argues that international law has evolved to weave a connection between the heritage and its holders. Consequently, the internal logic and objectives of human rights and

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[41] *Id.* at 7.
[42] Reparation order, *supra* note 39, at ¶ 90, 106 & 107.
[43] *Id.* at 52.
[44] Hague Convention, 1954, *supra* note 17, art. 1.
[45] *Id.*.
[46] The enumerative list is the following: 'buildings dedicated to religion, education, art, science or charitable purposes, historic monuments'. Rome Statute, *supra* note 18.
[47] API, *supra* note 16, art. 53, 16; APII, *supra* note 16, art. 16.
[48] JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (CUP, 2005).

cultural heritage law seem to appear as equally important tools in deciphering the cultural value beyond IHL's regular formalism. By declaring all: the local, national and international people, as heritage holders in the destroyed property, ICC endorsed the undertone adopted by UNESCO while referring to the universal 'every people' category.

In both- the brief of the Special Rapporteur and the Reparations Order, cultural heritage is identified as 'the resources enabling cultural identification and development processes of individuals and groups'.[49]Associated with these resources are human rights such as the right to take part in cultural life, development and religious freedom. Consequently, establishing individual or collective rights that a property could enable is a proper way to determine its cultural value. Here, one would see that compelling understanding of the category of cultural property in IHL should be complex without making references to other bodies of law which offer more details on the specific object of cultural heritage.

There exists a legal basis for this approach as well. For instance, Article 31 of the Vienna Convention on the Law of Treaties (1969) envisages the use of '[a]ny relevant rules of international law applicable in the relations between the parties' as a method of interpretation method, thus making the space for going beyond a restrictive reading of the IHL provisions.[50]

VII. Enlarging the Scope of IHL

Reparation, in its essence symbolises the recognition of the violation of individual or collective rights. But in a *strictu sensu* reading of IHL, individuals are considered 'not as rights holders but, rather, as

[49] Reparations order, *supra* note 39, at 15; Brief of the Special Rapporteur, *supra* note 38, at 4.
[50] Vienna Convention on the Law of Treaties art 31, May 29, 1969, 1155 U.N.T.S. 331.

incidental beneficiaries of an interstate [or inter armed groups] system of rights and obligations'.[51]

But a passage from the Reparations Order requires to be mentioned at this juncture:

> The international community has recognised in various legal instruments the importance of the human right to cultural life and its physical embodiments. These instruments condemn the destruction of cultural heritage, including in situations of conflict.[52]

This is an affirmation by ICC which affirms that IHL also protect cultural rights though a specific category of civilian objects. Therefore, in cases like Al Mahdi, there seems to be a need for an interaction between the international cultural heritage law and human rights as interpretative lenses of IHL.

VIII. The Old Bridge of Mostar and ICT

The case *Prlic et al.* before the ICTY serves as a contemporary example of a more restrictive position regarding the destruction of cultural property. This case was partly about the infamous destruction of the old ottoman bridge of Mostar. The Trial Chamber had initially concluded that the destruction was wanton and not justified by military necessities.[53] Even though the old bridge was a military objective when the destruction occurred, judges argued that the attack was disproportionate considering the impact of the destruction of a highly symbolic and representative property known as the Balkan Muslims' cultural heritage.[54]

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[51] Lawrence Hill-Cawthorne, *Rights under International Humanitarian Law*, 28 EUR. J. INT'L L. 1187, 1188 (2017).
[52] Reparations order, *supra* note 39, at 14.
[53] Prosecutor v. Jadranko Prlic et al., IT-04-74-T, Judgment (volume 3 of 6), 1587 (May 29, 2013).
[54] *Id.* at 1584.

The Appeal Chamber eventually overthrew the decision, considering that destruction complies with military necessities.[55] In this regard, the dissenting opinion of Judge Fausto Pocar is interesting. He regretted the conclusions of the majority mainly for 'its failure to account for the fact that the Old Bridge of Mostar constitutes cultural property'.[56] However, he noted that the Trial Chamber correctly fulfilled its role by acknowledging:

> [the] undeniable cultural, historical and symbolic value of the Old Bridge of Mostar… the exceptional character of this monument - built by architect Bairudin and almost 500 years old – as well as its historical and symbolic nature the importance of the bridge both for the inhabitants of the town of Mostar and the Balkan region.[57]

But the majority in the Appeal Chamber stuck to a 'pure' IHL analysis which resulted in a lack of consideration for persons who had cultural linkages with the bridge. For Judge Pocar, the Appeal Chamber made a mistake by intertwining the principle of military necessity with that of a military objective.[58] For them, since the old bridge was a military objective, it sufficed to justify its destruction as a military necessity.[59]

The researcher agrees with the observations of the Trial Chamber in this case. It did not make direct references to human rights as the ICC did in the *Al Mahdi* case, but it did interpret the notion of proportionality in the light of the impact and harm the destruction had inflicted upon the local population. Military necessities did not require such a massive perturbation in the local population culture, and consequently, into the cultural rights of its members.

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[55] Prosecutor v. Jadranko Prlic et al, IT-04-74-A, Judgment (volume I), 411 (Nov 29, 2017) 411 [hereinafter Prlic et al*.,* Judgment in appeal].
[56] Prosecutor v. Jadranko Prlic and al, IT-04-74-A, Judgment (volume III), Dissenting opinions of Judge Fausto Pocar, 7 (Nov 29, 2017).
[57] Quoted in *Id*.
[58] *Id*.
[59] Prlic et al., Judgment in appeal, *supra* note 55.

IX. Conclusion

Al Mahdi case is important for the recognition of the destruction of cultural property as a crime against persons. Without contradicting the fact that IHL is the *lex specialis* during armed conflict, the particular question of cultural property has shown that sometimes, IHL has to make a way for the *lex generalis* (human rights and cultural heritage law). The ICJ stated in its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons* that human rights provisions could apply in war only in the light of IHL. But the *Al Mahdi* case also shows how the *lex generalis* may inform or even interpret the *lex specialis*.. Interestingly, this dialecticism could lead to further convergences among international law regimes in the era of fragmentation.

The next question to strike us is one about the significance of war for human rights: Is it only a state that changes the way to apply it, or the 'war itself is a problem for human rights, if not a violation of human rights'?[60] In *Congo v. Burundi, Rwanda and Uganda* (2003), the African Commission on Human and Peoples' Rights traversed into this domain. It stated that the violations of *jus ad bellum* and *jus in bello* by the defendant States were also human rights violations. More precisely, while they violated the *jus ad bellum*, Burundi, Rwanda and Uganda also violated the 'right of the peoples of the Democratic Republic of Congo to self-determination'.[61] The Commission toed the same path for the military occupation and concluded that *jus in bello* violations was also constitutive of human rights violations.[62] It took the task of

[60] Alejandro Lorite Escorihuela, *supra* note 5, at 399.

[61] Democratic Republic of Congo v. Burundi, Rwanda, Uganda, Communication 227/1999, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], 68.

[62] It observed: 'The Complainant State alleges grave and massive violations of human and peoples' rights committed by the armed forces of the Respondent States in its eastern provinces. It details series of massacres, rapes, mutilations, mass transfers of populations and looting of the peoples' possessions, as some of those violations. As noted earlier on, the series of violations alleged to have been committed by the armed

evaluating the compatibility of war with human rights instead of exploring the functional relationship between IHL and human rights. Lorite Escorihuela notes that in the Commission's view, war or occupation (even if regulated by IHL), remains 'an illegal situation in which the human rights of individuals and peoples are being denied as such, without the need for the occupier to do anything else beyond occupying'.[63]However, recognizing that war, by essence, is first and foremost a violation of human rights, should be the assumption preceding any reflection on the functional relationship between human rights and IHL.

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forces of the Respondent States fall within the province of humanitarian law, and therefore rightly covered by the Four Geneva Conventions and the Protocols additional to them. And the Commission having found the alleged occupation of parts of the provinces of the Complainant State by the Respondents to be in violation of the Charter cannot turn a blind eye to the series of human rights violations attendants upon such occupation'. *Id.* at 69.

[63] Alejandro Lorite Escorihuela, *supra* note 5, at 402.