PROTECTION OF CULTURAL PROPERTY UNDER INTERNATIONAL CRIMINAL LAW

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One means by which states seek to protect both immovable and movable cultural property is through international criminal law. A detailed corpus of war crimes exists to safeguard such property from destruction and plunder in armed conflict. Some acts of this sort, whether in armed conflict or peacetime, will similarly constitute crimes against humanity. So-called 'cultural genocide', however, is not an international crime. The following article elaborates on the relevant rules of customary international law and treaty.

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I INTRODUCTION

Writing on the natural and positive law of war in the eighteenth century, Emer de Vattel deplored the 'wilful destruction of public monuments, temples, tombs, statues, paintings, etc', which was 'absolutely condemned, even by the voluntary law of nations, as never being conducive to the rightful object of war'.[1] 'For whatever reason a country be ravaged', he wrote, 'those buildings must be spared which do honour to humanity and which do not contribute to the

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[1] Emer de Vattel, *Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains* (text of 1758) (Carnegie Institution, 1916), book III, 143–4 [173]. The translations from Vattel are the author's.

enemy's strength, such as temples, tombs, public buildings and all works of remarkable beauty'.[2] Deploying an expression traditionally used in relation to the crime of piracy *jure gentium*, Vattel declared it an 'act of a sworn enemy of the human race to deprive it lightly of such monuments of the arts and models of taste'.[3] Two and a half centuries later, several months after the premeditated demolition in March 2001 of the great statues of the Buddha at Bamiyan in Afghanistan by the country's then-Taliban government, the General Assembly of the states parties to the *World Heritage Convention*,[4] in the preamble to a resolution on the protection of the cultural heritage of Afghanistan,[5] '[c]ondemn[ed] the wilful destruction of the cultural heritage of Afghanistan by the Taliban forces, particularly the statues of Bamiyan, as [a] "crime against the common heritage of humanity"'.[6] Similarly, the United States Secretary of State, Colin Powell, decried the demolition of the Buddhas as 'a crime against humankind'.[7]

The rhetorical invocation of global outlawry is a typical reaction to the intentional destruction and damage of cultural property in peace or war and, it might be added, to its plunder. The feeling seems to be, as posited in the preamble to the *Convention for the Protection of Cultural Property in the Event of Armed Conflict*[8] that 'damage to cultural property belonging to any people

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2 Ibid 139 [168]. Vattel made clear, however, that if it were 'necessary to destroy buildings of this sort to pursue military operations or to erect siegeworks', a belligerent 'no doubt ha[d] the right to do so': 140 [168]. He noted, for example, that it 'is difficult to spare the most beautiful buildings when one is bombarding a town': ibid [169]. The same doctrine of necessity applied in defence. The governor of a besieged town, for example, was permitted to set fire to outlying districts in order to deny a siege party ground, and if he 'thereby destroy[ed] some work of art', it was simply 'an accident, an unfortunate consequence of the war': ibid [168].

3 Ibid 139 [168].

4 *Convention concerning the Protection of the World Cultural and Natural Heritage*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975) ('*World Heritage Convention*').

5 *Acts Constituting 'Crimes against the Common Heritage of Humanity'* (UNESCO Doc WHC-01/CONF.208/23, UNESCO, 22 November 2001) pt II ('*Resolution on the Protection of the Cultural Heritage of Afghanistan Adopted by the General Assembly of States Parties to the World Heritage Convention at Its Thirteenth Session (Paris, 30–31 October 2001)*').

6 A few days later, at its 31st session and the first after the destruction of the Buddhas, the General Conference of the United Nations Educational Scientific and Cultural Organization ('UNESCO') adopted a resolution entitled *Acts Constituting a Crime against the Common Heritage of Humanity*, although the text of the resolution makes no reference to crime: see *Records of the General Conference, 31st Session, Paris, 15 October to 3 November 2001, vol 1: Resolutions* (UNESCO Doc 31C/Resolutions, UNESCO, 15 October to 3 November 2001) resolution 26 ('*Acts Constituting a Crime against the Common Heritage of Humanity*').

7 Richard Boucher, *Daily Briefing* (12 March 2001) US Department of State <http://2001–2009.state.gov/r/pa/prs/dpb/2001/1191.htm>.

8 Opened for signature 14 May 1954, 249 UNTS 240 (entered into force 7 August 1956) ('*1954 Hague Convention*').

whatsoever means damage to the cultural heritage of all mankind' and that the most adequate response to such *lèse-humanité* is to punish those responsible by means of international law. Nor has this proved just impotent rage. On the contrary, states, aided by international criminal tribunals, have developed a body of international criminal law precisely to hold accountable those who destroy or damage and those who misappropriate cultural property. Such accountability is chiefly[9] provided for under the respective rubrics of war crimes and crimes against humanity. Although journalistic and speculative academic reference is not infrequently made to 'cultural genocide', the crime of genocide, as will be seen below, does not extend under positive international law to acts of hostility against and plunder of cultural property.

The present article offers a straightforward account of the relevant principles of international criminal law which serve to protect cultural property.

II THE RELEVANT CRIMES

A *War Crimes*

There is a range of both customary and treaty-based war crimes to which the destruction of cultural property in armed conflict may give rise. Before examining each in turn, however, it is important to emphasise that, while the

[9] It is worth noting in passing that art 8 of the UNESCO-sponsored *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, opened for signature 14 November 1970, 823 UNTS 231 (entered into force 24 April 1972) obliges a state party to impose penalties or administrative sanctions, first, on any person responsible for importing cultural property stolen from a museum, religious or secular public monument or similar institution in another state party and, secondly, on any person responsible for the exportation of cultural property from the state party's own territory without the appropriate export certificate. Article 14 of the *Convention on the Protection of the Archeological, Historical and Artistic Heritage of the American Nations*, 16 June 1976, OASTS No 47 ('*Convention of San Salvador*'), provides that '[t]hose responsible for crimes against the integrity of cultural property or for crimes resulting from the illegal exportation or importation thereof are subject to extradition treaties, when appropriate'. Article 2 of the *International Convention for the Suppression of Terrorist Bombings*, opened for signature 12 January 1998, 2149 UNTS 284 (entered into force 23 May 2001) provides for the offence of unlawfully and intentionally delivering, placing, discharging or detonating an explosive or other lethal device in, into or against a place of public use — defined in art 1(5) to include any cultural or historical place accessible or open to the public — with the intent to cause death or serious bodily injury, or to cause extensive destruction where such destruction results, or is likely to result, in major economic loss. In accordance with art 3, however, the *Convention* does not apply (with the exception, 'as appropriate', of arts 10 to 15, on extradition, mutual legal assistance and prevention) where the offence is committed within a single state, where the alleged offender and the victims are nationals of that state, where the alleged offender is found in the territory of that state and where no other state has a basis under arts 6(1) or 6(2) of the *Convention* to exercise jurisdiction. (This would mean that, if they occurred today, the 1993 Mafia car-bombings in Italy — which in Florence destroyed the Torre dei Pulci, killing a family, and seriously damaged, inter alia, the Uffizi Gallery, and which in Rome devastated the 12th century portico of the Church of San Giorgio al Velabro and damaged both the Basilica of St John Lateran and the Lateran Palace — would not fall within the *Convention*'s scope of application.) In addition, art 19(2) of the *Convention* excludes the activities of armed forces during armed conflicts. For its part, finally, the *European Convention on Offences relating to Cultural Property*, opened for signature 23 June 1985, ETS No 119 (not yet in force), is not in force and may never be, not having attracted a single state party to date.

existence of an armed conflict (be it of an international or non-international character) is a necessary legal criterion for the commission of a war crime, it is not a sufficient one. In order to qualify as a war crime, the destruction of cultural property, as well as occurring in time of armed conflict, must have some 'nexus' to that conflict, in the language of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia.[10] That is, it must be 'closely related'[11] to the armed conflict, by which is meant that the existence of the conflict must, at a minimum, play 'a substantial part in the perpetrator's ability to commit [the crime], his decision to commit it, the manner in which it was committed or the purpose for which it was committed'.[12] It is for this reason, for example, that the demolition of the Buddhas of Bamiyan did not constitute a war crime. While sporadic non-international armed conflict continued in the far north-east of Afghanistan at the time of their destruction, the Buddhas were not destroyed in the course of fighting,[13] the Bamiyan Valley and the rest of the country being free of hostilities and securely under the Taliban Government's

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[10] *Prosecutor v Akayesu (Judgment)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-96-4-A, 1 June 2001) [444]; *Prosecutor v Rutaganda (Judgment)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-96-3-A, 26 May 2003) [569]–[570] ('*Rutaganda*'); *Prosecutor v Stakić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-97-24-A, 22 March 2006) [342] ('*Stakić Appeal*').

[11] *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1, 2 October 1995) [70]; *Prosecutor v Kunarac (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-23 & IT-96-23/1-A, 12 June 2002) [55] ('*Kunarac Appeal*'); *Rutaganda* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-96-3-A, 26 May 2003) [569]–[570]; *Stakić Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-97-24-A, 22 March 2006) [342].

[12] *Kunarac Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-23 & IT-96-23/1-A, 12 June 2002) [58]. The Chamber further states:

> What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment — the armed conflict — in which it is committed. … [I]f it can be established … that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict.

This was quoted and endorsed in *Rutaganda* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-96-3-A, 26 May 2003) [569]–[570]. See also *Stakić Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-97-24-A, 22 March 2006) [343].

[13] Nor can there exist a legal state of belligerent occupation in non-international armed conflict.

control,[14] and their demolition, which was essentially an act of fundamentalist religious iconoclasm, was in no way facilitated or motivated by the conflict.

1 *Customary International Law*

(a) Background

The First World War witnessed many controversial acts of destruction of and grave damage to extremely significant cultural property in Belgium and France, including the international *causes célèbres* of the torching of the medieval university library in Leuven (Louvain) and the bombardment of the great gothic cathedral at Reims. In response, Sub-Commission III of the Commission on Responsibilities, established by the Preliminary Peace Conference of Paris in 1919, was mandated with investigating and making recommendations as to violations of the laws and customs of war committed by Germany and the Central Powers during the War. In its report,[15] the Commission presented, inter alia, a draft list of war crimes, which included the 'wanton destruction of religious, charitable, educational and historic buildings and monuments'. Political disagreement, however, thwarted trials before an inter-Allied criminal tribunal, and the Allied Powers sought instead the extradition from Germany of suspected war criminals for trial by national courts.[16] France entered 16 requests for persons suspected of offences of a cultural nature.[17] But extradition proved elusive as well.[18]

The loss of cultural property during the First World War soon paled in comparison with Nazi Germany's systematic devastation and plunder of the galleries, museums, libraries and historic buildings and sites of Poland and the Soviet Union, along with its Europe-wide seizure of private Jewish-owned collections, during the Second. In the event, art 6(b) of the *Charter of the*

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14 Note, however, that the absence of hostilities at the time in the Bamiyan Valley does not in itself mean that no war crime could, as a matter of law, have been committed there. An act 'geographically remote from the actual fighting' can still be a war crime, provided that the impugned act was 'in furtherance of or under the guise of the armed conflict': *Kunarac Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-23 & IT-96-23/1-A, 12 June 2002) [57]–[58]; *Stakić Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-97-24-A, 22 March 2006) [342]. For this reason, the January 1998 bombing by Tamil separatists of the Temple of the Tooth (Sri Dalada Maligawa or Temple of the Sacred Tooth Relic) in the World Heritage site of Kandy in Sri Lanka during that country's civil war could — if customary international law were held to be the same then as it is now — be considered a war crime.

15 Reproduced in United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (HMSO, 1948) 33–4.

16 See John Horne and Alan Kramer, *German Atrocities, 1914: A History of Denial* (Yale University Press, 2001) Appendix 4, 448–50.

17 See ibid 448.

18 As a result of an Allied-German compromise, trials of some suspected German war criminals took place in Leipzig, but to little avail, while some were tried in absentia in France and Belgium.

International Military Tribunal at Nuremberg[19] vested the Tribunal with jurisdiction over war crimes, including 'plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity'.[20] Those Nazis involved in organising the massive destruction and misappropriation of cultural property in and from the occupied territories were convicted, on these and many other counts, of war crimes.[21] Nor were lesser examples of crimes against cultural property ignored by the national war crimes tribunals established by the Allied powers after the war. The Permanent Military Tribunal set up under French jurisdiction at Metz found a German civilian — who had destroyed a monument in a French town commemorating the dead of the First World War and broken a statue of Joan of Arc — guilty of destroying public monuments, on the order of a German official, contrary to the laws and customs of war.[22]

Fifty years later, a hallmark of the savage wars that erupted in Croatia and Bosnia-Herzegovina during and after the dissolution of the former Socialist Federal Republic of Yugoslavia was the premeditated destruction of the cultural heritage of 'enemy' communities, in the form of attacks on the historic cities of Dalmatia and the laying waste of centuries-old mosques, mektebs, churches, monasteries, libraries, archives and the like in Bosnia-Herzegovina and the Croatian Krajina. In response, the ICTY was granted competence in art 3(d) of its Statute[23] over the war crime of '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', a provision which has

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19 *Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 82 UNTS 279 (signed and entered into force 8 August 1945) annex ('*Charter of the International Military Tribunal at Nuremberg*') ('*Nuremberg Charter*').

20 See also *Control Council Law No 10: Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity*, 20 December 1945, 3 *Official Gazette Control Council for Germany* 50 (1946), art II(1)(b) ('*Control Council Law No 10*').

21 See especially *International Military Tribunal (Nuremberg) Judgment and Sentences*, reproduced in 'Judicial Decisions', (1947) 41 *American Journal of International Law* 172, 237–8, 287, 330 ('*Nuremberg Judgment*'). Chief among the perpetrators was Alfred Rosenberg, head of the Einsatzstab Rosenberg, the special corps created by Hitler and mandated with the plunder of the public artworks and antiquities of Central and Eastern Europe, including the Soviet Union, and of private Jewish-owned collections across the continent. Others involved included Martin Bormann, Hermann Göring and Joachim von Ribbentrop.

22 See *Trial of Karl Lingenfelder*, French Permanent Military Tribunal, Metz (judgment delivered 11 March 1947), case extracted in UN War Crimes Commission, *Law Reports of Trials of War Criminals* (1949) vol 9, 67.

23 *Report of the Secretary-General Pursuant to Security Council Resolution 808 (1993)* UN Doc S/25704 (3 May 1993) annex ('*Statute of the International Tribunal*'), approved and adopted by SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/827 (25 May 1993), as amended ('*ICTY Statute*'). See also International Law Commission ('ILC'), *Report of the International Law Commission on the Work of Its Forty-Eighth Session — 6 May – 26 July 1996*, UN GAOR, 51st sess, Supp No 10, UN Doc A/51/10 ch II D ('*Draft Code of Crimes against the Peace and Security of Mankind*') art 20(e)(iv) ('*Draft Code of Crimes*').

formed[24] and continues to form[25] the jurisdictional basis of numerous prosecutions before the Tribunal.

The recent memory of the Yugoslav conflict and the example of the *ICTY Statute* inspired the drafters of the *Rome Statute of the International Criminal Court* to vest the Court in arts 8(2)(b)(ix) and 8(2)(e)(iv) with jurisdiction over the war crime of '[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes [and] historic monuments', whether committed in international or non-international armed conflict.[26] Identical provisions were included in *Regulation No 2000/15* promulgated in 2000 by the United Nations Transitional Administration in East Timor ('UNTAET'), which established and empowered special panels within the District Court in Dili for the prosecution of certain serious offences, including

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[24] See *Prosecutor v Strugar (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-01-42-T, 31 January 2005) ('*Strugar Trial*') and *Prosecutor v Jokić (Sentencing Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-01-42/1-S, 18 March 2004) ('*Jokić Sentencing Judgment*'), both in respect of the bombardment of the World Heritage site of the Old Town of Dubrovnik on 6 December 1991. (The case of Vladimir Kovačević, also indicted for his role in the attack, was transferred to the judicial authorities of the Republic of Serbia in late 2006.) See also, in relation to the destruction of Muslim and Roman Catholic cultural property across Bosnia-Herzegovina: *Prosecutor v Blaškić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 3 March 2000) ('*Blaškić Trial*'), one count (regarding the destruction of religious property in Busovača) being vacated in *Prosecutor v Blaškić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14-A, 29 July 2004) [533] ('*Blaškić Appeal*'); *Prosecutor v Kordić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14/2-T, 26 February 2001) ('*Kordić Trial*'), one count (in relation to the mosque at Stari Vitez) being overturned in *Prosecutor v Kordić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14/2-A, 17 December 2004) [471] ('*Kordić Appeal*'); *Prosecutor v Naletilić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-34-T, 31 March 2003) ('*Naletilić Trial*'); *Prosecutor v Brđanin (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-99-36-T, 1 September 2004) ('*Brđanin Trial*'); *Prosecutor v Plavšić (Sentencing Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-00-39&40/1-S, 27 February 2003) ('*Plavšić Sentencing Judgment*'). (The case of Paško Ljubičić, a commander of Bosnian Croat forces indicted for destruction of mosques, was transferred to the authorities of Bosnia-Herzegovina in mid-2006.) See also, in relation to destruction of and damage to Croat cultural property in Croatia: *Prosecutor v Martić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-95-11-T, 12 June 2007) ('*Martić Trial*'). In *Prosecutor v Hadžihasanović (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-01-47-T, 15 March 2006) ('*Hadžihasanović Trial*'), while the Trial Chamber found that foreign mujahedin had destroyed certain Serb cultural property in Bosnia-Herzegovina, it held that the first accused was not responsible for their actions.

[25] See *Prosecutor v Prlić (Second Amended Indictment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-04-74-T, 11 June 2008) ('*Prlić Second Amended Indictment*') [229], as regards the destruction of historic and other Muslim cultural property in Bosnia-Herzegovina, among it much of the historic town of Mostar, including the Old Bridge (Stari Most) from which it takes its name; *Prosecutor v Šešelj (Third Amended Indictment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-03-67-T, 7 December 2007) [34] ('*Šešelj Third Amended Indictment*'), for the destruction of mosques, Catholic churches and a religious archive in Bosnia-Herzegovina.

[26] *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) arts 8(2)(b)(ix) (international), 8(2)(e)(iv) (non-international) ('*Rome Statute*').

war crimes;[27] and in the *Iraqi Special Tribunal Statute* promulgated by the Coalition Provisional Authority in Iraq,[28] in which the US, a state not party to the *Rome Statute*, played the dominant role. For the US's own part, it is worth noting that the *Military Commissions Act*,[29] as amended,[30] as applicable to 'any conflict subject to the laws of war',[31] recognises the war crime of 'attacking protected property',[32] the latter including 'buildings dedicated to religion, education, art, science, or charitable purposes [and] historic monuments'.[33]

(b) Unlawful Attacks against Cultural Property

In terms of the specific offences recognised as customary war crimes, there is no doubt that customary international law embodies individual criminal responsibility for unlawfully directing attacks[34] against cultural property in the inclusive sense of the term,[35] whether in international or non-international armed conflict. This responsibility is distinct from that recognised for unlawfully

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27 See *Regulation No 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences*, UN Doc UNTAET/REG/2000/15 (6 June 2000) s 6.1(b)(ix) (international) and s 6.1(e)(iv) (non-international) ('*UNTAET Regulation 2000/15*').

28 *Coalition Provisional Authority: Statute of the Iraqi Special Tribunal* (2003) 43 ILM 231, art 13(b)(10) (international), art 13(d)(4) (non-international) ('*Iraqi Special Tribunal Statute*'). Although the Tribunal was replaced on 18 October 2005 by the Supreme Iraqi Criminal Tribunal (also known as the Iraqi High Tribunal), the latter was in substance a continuation of the former: see Iraq, 'Law of the Supreme Iraqi Criminal Tribunal', Law No (10) 2005, in *Official Gazette of the Republic of Iraq*, No 4006, 47th year, 18 October 2005 [International Center for Transitional Justice trans, 12 April 2006].

29 10 USC §§ 948a–950t.

30 See *Military Commissions Act of 2009* Pub L No 111-84 §§ 1801–7, 123 Stat 2574.

31 10 USC § 950p(c), cross-referable to § 948a(9).

32 10 USC § 950t(4).

33 10 USC § 950p(a)(3).

34 The customary definition of the word 'attacks' is that reflected in art 49(1) of *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) ('*Additional Protocol I*'), namely 'acts of violence against the adversary, whether in offence or defence'.

35 By this is meant all 'institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science', in the words of art 3(d) of the *ICTY Statute*; or, in the words of arts 8(2)(b)(ix) and 8(2)(e)(iv) of the *Rome Statute*, all 'buildings dedicated to religion, education, art, science or charitable purposes [and] historic monuments'. It was incorrectly suggested in *Strugar Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-01-42-T, 31 January 2005) [312] that the war crime recognised in art 3(d) of the *ICTY Statute* applies only in so far as the cultural property in question constitutes 'the cultural or spiritual heritage of peoples', within the meaning of *Additional Protocol I* arts 53(a) and 16. But this was not followed in *Hadžihasanović Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-01-47-T, 15 March 2006) [60], [61], [64] and *Kordić Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14/2-A, 17 December 2004) [89], [92]. Note that the term 'historic monuments' refers in this and similar contexts to immovable property, whether public or private, deserving of legal protection on its own historical, artistic or architectural terms, rather than on account of its contents or purpose: see Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict* (Cambridge University Press, 2006), 27–8, 102.

directing attacks against a civilian object,[36] a species of which cultural property prima facie constitutes,[37] even if the requisite material and mental elements of the two offences are, *mutatis mutandis*, the same.[38] In the *Strugar Trial*, the Trial Chamber of the ICTY found the accused guilty of the war crime 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', within the meaning of art 3(d) of the *ICTY Statute*, for his role in the bombardment of the Old Town of Dubrovnik on 6 December 1991. The Chamber stated that such conduct was a war crime regardless of whether the conflict was international or non-international,[39] a position also taken in a subsequent decision of the Appeals Chamber in *Hadžihasanović*.[40] The accused in *Jokić* pleaded guilty to the same offence in respect of the same attack. It will be recalled too that arts 8(2)(b)(ix) and 8(2)(e)(iv) of the *Rome Statute* give the Court jurisdiction over the war

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36 See, eg, *Prosecutor v Strugar (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-01-42-A, 17 July 2008) [277] ('*Strugar Appeal*'): 'The crime of destruction or wilful damage of cultural property under Article 3(d) of the Statute is *lex specialis* with respect to the offence of unlawful attacks on civilian objects.' The Appeals Chamber of the ICTY has held that individual criminal responsibility attaches under customary international law to attacks against civilian objects in both international and non-international armed conflict: *Prosecutor v Hadžihasanović (Appeals Chamber Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98*bis *Motions for Acquittal)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-01-47-AR73.3, 11 March 2005) [30] ('*Hadžihasanović Interlocutory Appeal*'). See also *Prosecutor v Strugar (Decision on Interlocutory Appeal)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-01-42-AR72, 22 November 2002) [10] ('*Strugar Interlocutory Appeal*'); *Kordić Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14/2-A, 17 December 2004) [59]. Civilian objects are defined negatively as those objects which are not military objectives. In turn, the customary definition of military objectives is reflected in art 52(2) of *Additional Protocol I*, viz 'objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage': see, eg, *Brđanin Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-99-36-T, 1 September 2004), [596] n 1509; *Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 and 26 (Eritrea/Ethiopia)* (*Partial Award*) (2005) 135 ILR 565, 608 ('*Western Front, Aerial Bombardment and Related Claims'*); Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2005), vol 1, 29 (r 8). The definition is reproduced in, inter alia, *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, opened for signature 26 March 1999, 2253 UNTS 212 (entered into force 9 March 2004) art 1(f) ('*Second Protocol*'). Note that the *Rome Statute* recognises the war crime of '[i]ntentionally directing attacks against civilian objects, that is, objects which are not military objectives', only when the attack takes place in international armed conflict: see *Rome Statute* art 8(2)(b)(ii).

37 *Kordić Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14/2-A, 17 December 2004) [89], [92]; Henckaerts and Doswald-Beck, above n 36, 32–4 (r 9). See especially 34, listing 'historic monuments, places of worship and cultural property' as prima facie civilian objects, provided they have not become military objectives.

38 In neither case is the relevant property to be made the object of attack unless and for as long as it is a military objective, and in both cases the impugned attack must have been intentional: see below n 66.

39 *Strugar Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-01-42-T, 31 January 2005) [230].

40 *Hadžihasanović Interlocutory Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-01-47-AR73.3, 11 March 2005) [44]–[48].

crime, in international and non-international armed conflicts respectively, of '[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes [and] historic monuments'; that these provisions are reproduced verbatim in *UNTAET Regulation 2000/15*[41] and in the *Iraqi Special Tribunal Statute*;[42] and that the *Military Commissions Act* recognises the war crime of 'attacking protected property',[43] a term defined to include 'buildings dedicated to religion, education, art, science, or charitable purposes [and] historic monuments'.[44]

As to the requisite material elements (actus reus) of the offence, customary international law presently accepts that attacks against cultural property are not unlawful if and for as long as such property is a military objective. This is reflected in arts 8(2)(b)(ix) and 8(2)(e)(iv) of the *Rome Statute* ('provided they are not military objectives'), as reproduced word for word in *UNTAET Regulation 2000/15*[45] and in the *Iraqi Special Tribunal Statute*.[46] Similarly, the *Military Commissions Act* grants jurisdiction over the war crime of attacking, inter alia, buildings dedicated to religion, education, art, science or charitable purposes and historic monuments 'only if and to the extent such property is not being used for military purposes or is not otherwise a military objective'.[47] A military objective is currently defined under customary international law as it is defined in art 52(2) of *Additional Protocol I*, namely as an object 'which by [its] nature, location, purpose or use make[s] an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage'.[48] The test is a modern refinement, in the specific context of attacks, of the classical rule whereby the destruction of enemy property (including cultural property) was justified if imperatively demanded by military necessity.[49]

It was stated by the Trial Chamber in the *Strugar Trial*, however, that the only circumstance in which an intentional act of hostility against cultural property

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41 *UNTAET Regulation 2000/15*, UNTAET/REG/2000/15, s 6.1(e)(ix).

42 *Iraqi Special Tribunal Statute* arts 13(b)(10) (international), 13(d)(4) (non-international).

43 10 USC § 950t(4).

44 10 USC § 950p(a)(3).

45 *UNTAET Regulation 2000/15*, UNTAET/REG/2000/15, ss 6.1(b)(ix), 6.1(e)(iv).

46 *Iraqi Special Tribunal Statute* arts 13(b)(10), 13(d)(4).

47 10 USC § 950p(a)(3).

48 See, eg, *Brđanin Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-99-36-T, 1 September 2004), [596] n 1509; *Western Front, Aerial Bombardment and Related Claims* (2005) 135 ILR 565, 608 [113]; Henckaerts and Doswald-Beck, above n 36, 29 (r 8). No definition of the term 'military objective' is included in the *Rome Statute*, *UNTAET Regulation 2000/15* or the *Iraqi Special Tribunal Statute*. For its part, 10 USC § 950p(a)(1) defines the term 'military objective' to mean, in addition to combatants,

> those objects during hostilities which, by their nature, location, purpose, or use, effectively contribute to the war-fighting or war-sustaining capability of an opposing force and whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of an attack.

In line with the US's oft-stated position, this definition goes beyond the concept of an effective contribution to 'military action' to include an effective contribution to the 'war-sustaining capability' of the opponent. But it is otherwise consonant with customary international law.

49 See *Kordić Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14/2-A, 17 December 2004) [54].

would not be criminal was when it was used for military purposes.[50] The view was reiterated by the Trial Chamber in *Hadžihasanović*,[51] which, moreover, expressly distinguished between the case law of the ICTY, which permitted attacks against cultural property when it was being used for military purposes, and the 'broader' protection afforded by the *1954 Hague Convention*, under which an act of hostility against cultural property was permissible only where military necessity imperatively required.[52] In short, according to these two Trial Chamber cases, attacks against cultural property gave rise to individual criminal responsibility under customary international law on grounds both more restrictive and more expansive than those posited above: the sole circumstance in which an attack against cultural property would not be a war crime was if, at the time of the attack, the property was being used for military purposes; and if it was being used for military purposes, an attack was, ipso facto, not a war crime.

The Appeals Chamber of the ICTY has not embraced the view of the Trial Chambers in the *Strugar Trial* and the *Hadžihasanović Trial*. In the *Strugar Appeal*, the Appeals Chamber characterised the Trial Chamber's conclusion on the facts as being that the attack on the Old Town of Dubrovnik was 'not justified by any military necessity'.[53] This implicit portrayal of use for military purposes as simply one instance giving potential rise to a situation of military necessity was also seen earlier in *Brđanin*, where the Appeals Chamber, '[t]urning to the question of whether [the cultural property] had not been used for military purposes', recalled 'that the Prosecution must establish that the

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50 *Strugar Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-01-42-T, 31 January 2005) [310], [312]. The Trial Chamber relied on what it called 'the established jurisprudence of the Tribunal', which consisted of a strikingly bald and brief assertion in *Blaškić Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 3 March 2000) [185], as faithfully restated without serious analysis in *Kordić Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14/2-A, 17 December 2004) [361]–[362]; *Naletilić Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-34-T, 31 March 2003) [603], [605]; *Brđanin Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-99-36-T, 1 September 2004) [598]. Nor is the Trial Chamber's own reasoning convincing. First, it elides art 27 of the *Regulations concerning the Laws and Customs of War on Land* ('*Hague Rules*'), annexed to the *Convention concerning the Laws and Customs of War on Land*, opened for signature 18 October 1907, 205 ConTS 277 (entered into force 26 January 1910), and its proviso as to military use, with arts 4(1) and 4(2) of the *1954 Hague Convention*, the latter referring more broadly to cases where imperative military necessity requires a waiver: see *Strugar Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-01-42-T, 31 January 2005) [309]. See also [229]. Secondly, and perhaps more to the point, it pays no attention to subsequent practice in the interpretation of art 27 of the *Hague Rules*, which seems to favour a construction whereby the provision prohibits only such bombardment of protected property as is not imperatively demanded by the necessities of war.

51 *Hadžihasanović Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-01-47-T, 15 March 2006) [58], [61], [64].

52 Ibid [61].

53 *Strugar Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-01-42-A, 17 July 2008) [279].

destruction in question was not justified by military necessity'.[54] Moreover, it continued:

> Determining whether destruction occurred pursuant to military necessity involves a determination of what constitutes a military objective. Article 52 of Additional Protocol I contains a widely acknowledged definition of military objectives as being limited to 'those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage'.[55]

In other words, its use for military purposes is not the only way in which cultural property can be a military objective and, when it is so used, it may be attacked only if its 'total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage'.[56]

Cultural property will not, in the overwhelming majority of cases, constitute a military objective, meaning that its intentional attack will generally constitute a war crime in both international and non-international armed conflict. But there are rare circumstances in which it may. Historic fortresses, barracks, arsenals and the like might be said to make, by their nature, an effective contribution to military action, although when decommissioned they are better characterised as historic monuments and when still in service are better seen as contributing to military action by their use. Historic bridges, railways stations, docks and other forms of civil infrastructure could conceivably, by their purpose (defined as 'the future intended use of an object'),[57] make an effective contribution to military action, even if today one might expect more modern transport links to bear most of the military burden. The location of cultural property — that is, its position on the battlefield in relation to the positions of the opposing parties — may also

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54 *Prosecutor v Brđanin (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-99-36-A, 3 April 2007) ('*Brđanin Appeal*') [337].

55 Ibid (citations omitted). See also *Brđanin Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-99-36-T, 1 September 2004) [596] (citations omitted):

> [Items of cultural property] may be attacked only when they become a military objective. Military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.

See also *Kordić Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14/2-A, 17 December 2004) [89]: 'the building or monument cannot be destroyed unless it has turned into a military object by offering the attacking side "a definite military advantage" at the time of the attack'; *Prosecutor v Milutinović (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-05-87-T, 26 February 2009) [208] ('*Milutinović Trial*') (in relation to the destruction of Kosovar Albanian cultural monuments and religious sites). With the acquittal of the accused Milutinović, the case is now listed as '*Šainović*'.

56 *Additional Protocol I* art 57.

57 *Western Front, Aerial Bombardment and Related Claims* (2005) 135 ILR 565, 611 [120], endorsing UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford University Press, 2004) 56 [5.4.4] ('*UK Manual*'), in turn endorsing Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross and Martinus Nijhoff, 1987) 636 [2022] ('*ICRC Commentary*') ('intended future use').

make an effective contribution to either's military action, for example by obstructing a line of sight or line of fire, although, in cases where a party has deliberately positioned itself so as to take advantage of this, the contribution to military action is better characterised as a function of the passive or de facto use of the property in question. In practice, then, of the four bases on which an object can be rendered a military objective, it is its use to make an effective contribution to military action which will be the principal one on the basis of which an attack against cultural property may not be a war crime. In all cases, however, whatever the effective contribution cultural property makes to military action, attacking it will be lawful only if its total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage. In 'extremely simple terms', any attack 'must be militarily necessary in order to reach a permissible operative goal',[58] meaning that there exists 'no feasible alternative method for dealing with the situation'.[59]

As for whether destruction or damage is a necessary element of the war crime of attacking cultural property, the position under the *ICTY Statute* differs from that under the *Rome Statute*. Article 3(d) of the former speaks of 'destruction or … damage' to cultural property, whereas arts 8(2)(b)(ix) and 8(2)(e)(iv) of the latter — reproduced verbatim in *UNTAET Regulation 2000/15* and in the *Iraqi Special Tribunal Statute* — refer to 'directing attacks against' such property.[60] Reason suggests that the ICC position is the better one, since the underlying rule of customary international humanitarian law prohibits directing attacks against cultural property.[61] For its part, when enumerating the elements of the war crime of 'attacking protected property', including cultural property, the *Military Commissions Act* includes no requirement of destruction or damage,[62] and this, in the final analysis, is the position under customary international law.

In terms of the requisite mental element (mens rea) of the offence, the attack in question must be committed with intent and knowledge,[63] the latter meaning

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58 Stefan Oeter, 'Methods and Means of Combat' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (Oxford University Press, 2nd ed, 2008) 119, 180. See also *UK Manual*, above n 57, 72, [5.26.3] n 120.

59 *UK Manual*, above n 57, 73, [5.26.8].

60 Nor do the respective Elements of Crimes require destruction or damage: International Criminal Court, *Elements of Crimes*, Doc No ICC-ASP/1/3 (part II-B) (adopted 9 September 2002) art 8(2)(b)(ix) and art 8(2)(e)(iv) ('*ICC Elements of Crimes*'). This accords with the International Committee of the Red Cross ('ICRC') commentary to the reference in art 53 of *Additional Protocol I* to acts of hostility 'directed against' cultural property: see Sandoz, Swinarski and Zimmermann (eds), above n 57, 647 [2070].

61 See, eg, O'Keefe, *The Protection of Cultural Property in Armed Conflict*, above n 35, 318–26.

62 10 USC § 950p(a)(3). See also the elements of the crime specified in US Department of Defense, *Manual for Military Commissions (2007 Edition)*, pt IV [6(4)(b)].

63 *Rome Statute* art 30(1). See also *UNTAET Regulation 2000/15*, UNTAET/REG/2000/15, s 18.1.

'awareness that a circumstance exists'.[64] That is, the accused must intentionally[65] (or, synonymously, wilfully)[66] direct an attack against the relevant object in the knowledge that it is cultural property[67] in the broad sense of the term. In *Strugar*, the Appeals Chamber of the ICTY explained the requirement of intent as meaning 'either deliberately or through recklessness'.[68] It is unclear, however, whether recklessness would suffice under customary international law, especially given that the *Rome Statute*'s definition of intent in relation to conduct is that the accused 'means to engage in the conduct'.[69] The accused's intent and knowledge can be inferred from relevant facts and

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64 *Rome Statute* art 30(3). See also *UNTAET Regulation 2000/15*, UNTAET/REG/2000/15, s 18.3. Although the Trial Chamber in *Blaškić Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 3 March 2000) [185] posited the requirement that the object targeted 'may be clearly identified' as cultural property, this was probably no more than a clumsy way of demanding knowledge on the part of the accused that the object was, in fact, cultural property. The Trial Chamber's choice of words has not been reproduced in later cases, and the *ICC Elements of Crimes* embodies no explicit requirement that the institutions and historic monuments referred to in arts 8(2)(b)(ix) and 8(2)(e)(iv) of the *Rome Statute* may be clearly identified as such.

65 *Rome Statute* arts 8(2)(b)(ix), 8(2)(e)(iv); *Blaškić Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 3 March 2000) [185]; *Kordić Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14/2-T, 26 February 2001) [361]; *Naletilić Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-34-T, 31 March 2003) [605]; *Brđanin Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-99-36-T, 1 September 2004) [599]; *Strugar Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-01-42-T, 31 January 2005) [311]–[312]; *Hadžihasanović Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-01-47-T, 15 March 2006) [57]–[58], [64]; *Martić Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-95-11-T, 12 June 2007) [96], [99]. See also *UNTAET Regulation 2000/15*, UNTAET/REG/2000/15, ss 6.1(b)(ix), 6.1(e)(iv); *Iraqi Special Tribunal Statute* arts 13(b)(10), 13(d)(4); 10 USC § 950t(4).

66 *Strugar Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-01-42-A, 17 July 2008) [277]. Somewhat curiously, art 3(d) of the *ICTY Statute* speaks of 'destruction or wilful damage' to cultural property, giving the impression that only damage need be intentional. The provision is modelled on art 56 of the *Hague Rules*, which, unlike art 3(d) of the *ICTY Statute*, is limited in application to belligerent occupation; and the drafters of art 56 appeared to take the view that, whereas unintentional — hence not culpable — damage to cultural property was conceivable in the absence of active hostilities, with the result that a requirement of intent needed to be expressly stipulated, the unintentional destruction (that is, total razing) of such property was not. As it is, as seen above, the case law of the ICTY makes it clear that destruction of cultural property must also be intentional for the purposes of art 3(d) of the *ICTY Statute*.

67 See *Strugar Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-01-42-T, 31 January 2005) [329]; *Strugar Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-01-42-A, 17 July 2008) [279].

68 *Strugar Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-01-42-A, 17 July 2008) [277]. See also *Brđanin Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-99-36-T, 1 September 2004) [599], stating that the attack 'must have been either perpetrated intentionally, with the knowledge and will of the proscribed result or in reckless disregard of the substantial likelihood of the destruction or damage'; *Hadžihasanović Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-01-47-T, 15 March 2006) [59]; *Martić Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-95-11-T, 12 June 2007) [96].

69 *Rome Statute* art 30(2)(a). See also *UNTAET Regulation 2000/15*, UNTAET/REG/2000/15, s 18.2(a).

circumstances.[70] In *Strugar*, the fact that copies of the distinctive emblem[71] of the *1954 Hague Convention* 'were visible, from the JNA [Yugoslav People's Army] positions at Žarkovica and elsewhere, above the Old Town [of Dubrovnik] on 6 December 1991' was evidence going to the intent of the accused to destroy cultural property, 'as was the Old Town's status as a UNESCO World Heritage site'.[72]

(c) Unlawful Incidental Damage to Cultural Property

The implication from the ICTY Appeals Chamber judgments in *Blaškić*[73] and *Galić*[74] is that customary international law applicable in both international and non-international armed conflict recognises individual criminal responsibility for intentionally launching an attack in the knowledge that it will cause incidental damage to civilian objects, including cultural property, which is excessive in relation to the concrete and direct military advantage anticipated. No accused, however, has to date been prosecuted before the ICTY on this ground, just as none of the defendants at Nuremberg or Tokyo or before the post-Second World War national military tribunals was prosecuted for incidental damage to civilian objects. For its part, art 8(2)(b)(iv) of the *Rome Statute*, as reproduced verbatim in *UNTAET Regulation 2000/15*[75] and in the *Iraqi Special Tribunal Statute*,[76] vests the Court with jurisdiction over the war crime of intentionally launching an attack during an international armed conflict in the knowledge that the attack will cause incidental damage to civilian objects 'which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated'. But the *Rome Statute*, *UNTAET Regulation 2000/15* and the *Iraqi Special Tribunal Statute* do not recognise the equivalent conduct as a war crime if performed in non-international armed conflict, with the result that the customary position in this regard is unclear, especially given the absence to date of relevant prosecutions in other fora.

When it comes to determining whether the material conditions of the offence have been fulfilled, the test is one of proportionality,[77] even if the word is not used, and although the assessment called for is not an exact science, it must be made in good faith. As applied to cultural property, proportionality implicates qualitative as much as quantitative factors. The extent of incidental loss likely to

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70 *ICC Elements of Crimes*, 'General Introduction' [3]. See also *Prosecutor v Tadić (Judgment)* International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) [676] ('*Tadić Trial*').

71 See *1954 Hague Convention* arts 6, 16, 17. See also O'Keefe, *The Protection of Cultural Property in Armed Conflict*, above n 35, 116–18.

72 *Strugar Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-01-42-T, 31 January 2005) [329]. The Trial Chamber's conclusion, on the basis of this evidence, that the attack on the Old Town was deliberate was considered reasonable by the Appeals Chamber: *Strugar Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-01-42-A, 17 July 2008) [279].

73 *Blaškić Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14-A, 29 July 2004) [157].

74 *Prosecutor v Galić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-29-A, 30 November 2006) [190]–[192] ('*Galić Appeal*').

75 *UNTAET Regulation 2000/15*, UNTAET/REG/2000/15, s 6.1(b)(iv).

76 *Iraqi Special Tribunal Statute* art 13(b)(4).

77 See, eg, *Galić Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-29-A, 30 November 2006) [190].

be occasioned by damage to or destruction of such property is a question not just of square or cubic metres but also of the cultural value represented thereby. A textbook example of the application of the rule of proportionality came during the Gulf War in 1991, when Iraq positioned two fighter aircraft next to the world-renowned ancient ziggurat at Ur. Coalition commanders decided not to attack the aircraft

> on the basis of respect for cultural property and the belief that positioning of the aircraft adjacent to Ur (without servicing equipment or a runway nearby) effectively had placed each out of action, thereby limiting the value of their destruction by Coalition air forces when weighed against the risk of damage to the temple.[78]

The distinction between the standard of disproportionality laid down in the ICTY jurisprudence ('excessive') and that demanded by the *Rome Statute* ('clearly excessive') may not import a practical difference. The adverb 'clearly' was inserted in the latter so as to allay fears, especially on the part of the US, that the ICC might hold an accused criminally responsible for a disproportionate attack resulting from no more than bona fide miscalculation or poor execution.[79] It goes as much to mens rea as to actus reus, being there to emphasise that criminal responsibility arises only in respect of consciously disproportionate attacks.

The *Rome Statute* and its imitators do not require that incidental damage to civilian objects, clearly disproportionate or otherwise, actually eventuate from the impugned attack. As far as the actus reus of the war crime goes, all that is necessary is that the attack 'was such that it would cause' clearly disproportionate incidental damage to civilian objects.[80] That said, it would be almost impossible to prove the requisite elements of the crime, both material and mental,[81] if such damage did not in fact materialise.

In terms of the requisite mental element of the crime, the attack in question (which will necessarily be directed at a military objective) must, as the text of art 8(2)(b)(iv) of the *Rome Statute* makes plain, be intentional and launched in the knowledge that it will, in the ordinary course of events,[82] cause clearly disproportionate incidental damage to civilian objects. It is not, strictly speaking, necessary that the accused know that the property likely to be damaged is cultural property. It is sufficient that he or she knows that it is a civilian object of some sort. But unawareness of the cultural character of the property will make a difference to the proportionality calculus: it is one thing to weigh the military advantage to be gained by an attack against the destruction of an architecturally

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78 US Department of Defense, 'Report to Congress on the Conduct of the Persian Gulf War — Appendix on the Role of the Law of War' (1992) 31 ILM 612, 626.

79 The US has long harboured strong reservations as to criminal responsibility for disproportionate attacks, and the *Military Commissions Act* does not include an equivalent war crime. Indeed, 10 USC § 950p(b) provides that the intent requirement for the war crimes of, inter alia, intentionally attacking civilians, intentionally attacking civilian objects and intentionally attacking protected property, including cultural property, 'precludes [their] applicability … with regard to collateral damage or to death, damage, or injury incident to a lawful attack'.

80 *ICC Elements of Crimes* art 8(2)(b)(iv) [2].

81 See *ICC Elements of Crimes* art 8(2)(b)(iv) [2] ('The attack was such that it would cause'), [3] ('The perpetrator knew that the attack would cause').

82 See *Rome Statute* art 30(3). See also *UNTAET Regulation 2000/15*, UNTAET/REG/2000/15, s 18.3.

and historically undistinguished multi-storey car park; it is quite another to weigh it against the flattening of a national museum of modern art.

(d) Unlawful Acts of Hostility against Cultural Property Other than Attacks

Unlawful acts of hostility against cultural property other than attacks, such as its demolition by the planting of explosives or by bulldozers, jackhammers or other wrecking equipment, also give rise to individual criminal responsibility under customary international law, regardless of whether the acts take place in international or non-international armed conflict and, in relation to international armed conflict, regardless of whether they occur during hostilities or belligerent occupation. In the international context, it will be recalled that several of the major German war criminals tried at Nuremberg were convicted for their roles in the premeditated razing of cultural property in occupied territory. For the purposes of the ICTY, acts of hostility against cultural property other than attacks are dealt with, alongside attacks, under art 3(d) of the *ICTY Statute*, which vests it with jurisdiction over the war crime 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'; and the accused in *Blaškić*, *Kordić*, *Naletilić* and *Brđanin* were all convicted of such acts, while the accused in *Plavšić* pleaded guilty in respect of them and those in *Hadžihasanović* were acquitted on this count. For its part, the *Rome Statute* treats acts of hostility against cultural property not amounting to attacks under the general rubric of the customary war crime of destroying (which is taken to encompass damaging) the enemy's property, unless such destruction (or damage) is imperatively demanded by the necessities of war, which the Statute recognises as being capable of commission in both international and non-international armed conflict.[83] The same goes for *UNTAET Regulation 2000/15*,[84] the *Iraqi Special Tribunal Statute*[85] and the *Military Commissions Act*.[86]

As regards the requisite material elements of the offence, destruction and damage of cultural property outside the context of an attack is not unlawful if and to the extent that, in the words of arts 8(2)(b)(xiii) and 8(2)(e)(xii) of the *Rome Statute*, it is imperatively demanded by the necessities of war — in other words, as long and in so far as it is militarily necessary, which presupposes no feasible alternative for dealing with the situation. Demolitions may be necessary in some cases to impede the progress of enemy columns, to clear a line of fire or

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83 *Rome Statute* arts 8(2)(b)(xiii) (international) and 8(2)(e)(xii) (non-international). Common para 3 of the *ICC Elements of Crimes* for these offences requires that the property destroyed be 'protected from that destruction … under the international law of armed conflict'. Cultural property is protected from acts of hostility other than attacks by the customary international law of armed conflict in both international and non-international armed conflicts unless such acts are imperatively demanded by the necessities of war: see O'Keefe, *The Protection of Cultural Property in Armed Conflict*, above n 35, 331–4.

84 *UNTAET Regulation 2000/15*, UNTAET/2000/15, ss 6.1(b)(xiii) (international), 6.1(e)(xii) (non-international).

85 *Iraqi Special Tribunal Statute* arts 13(b)(14) (international), 13(d)(12) (non-international).

86 See also 10 USC § 950t(16), which stipulates that the destruction of the relevant property be 'in violation of the law of war'. It will be recalled from above n 83 that the customary law of war prohibits acts of hostility against cultural property other than attacks, in both international and non-international armed conflicts, unless such acts are imperatively demanded by the necessities of war.

to deny cover to enemy fighters, although their extent will need to be calibrated to the degree of the military necessity. In *Brđanin*, conversely, where the accused was held responsible for destroying mosques and churches with mines and other explosives, for tearing them down with heavy machinery and for setting fire to them, there was 'nothing to suggest that their destruction provided any kind of advantage in weakening the military forces opposing the Bosnian Serbs, favoured the Bosnian Serb position, or was otherwise justified by military necessity'.[87] That is, the evidence did not indicate to the Appeals Chamber that the 'total or partial destruction [of the relevant cultural property] offered a definite military advantage to the Bosnian Serb forces'.[88]

As for mens rea, intent is again required,[89] as is knowledge.[90] For the purposes of the ICTY, the latter means knowledge that the destroyed or damaged property was an institution dedicated to religion, charity and education or the arts and sciences, or a historic monument, or a work of art or science,[91] in the words of art 3(d) of the *ICTY Statute*. For the purposes of the *Rome Statute*, it effectively means knowledge that the property was civilian in character.[92]

(e) Unlawful Appropriation of Cultural Property

Customary international law recognises individual criminal responsibility for the unlawful plunder of public or private property, including cultural property, whether in international or non-international armed conflict and, as regards international armed conflict, whether during hostilities or belligerent

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87 *Brđanin Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-99-36-A, 3 April 2007) [342].

88 Ibid [340].

89 See *Rome Statute* art 30(1); *Blaškić Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 3 March 2000) [185]; *Kordić Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14/2-T, 26 February 2001) [361]; *Naletilić Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-34-T, 31 March 2003) [605]; *Brđanin Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-99-36-T, 1 September 2004) [599]; *Strugar Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-01-42-T, 31 January 2005) [311]–[312]; *Hadžihasanović Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-01-47-T, 15 March 2006) [57]–[58], [64]; *Martić Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-95-11-T, 12 June 2007) [96], [99]. See also *UNTAET Regulation 2000/15*, UNTAET/REG/2000/15, s 18.1; 10 USC § 950t(16). Recall that it is unclear whether customary international law accords with the statement in *Strugar Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-01-42-A, 17 July 2008) [277] that intent encompasses both deliberate conduct and recklessness.

90 See *Rome Statute* art 30(1); *UNTAET Regulation 2000/15*, UNTAET/REG/2000/15, s 18.1.

91 *Strugar Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-01-42-T, 31 January 2005) [329]; *Strugar Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-01-42-A, 17 July 2008) [279].

92 It will be recalled that common para 3 of the *ICC Elements of Crimes* for the offences under arts 8(2)(b)(xiii) and 8(2)(e)(xii) requires that the property destroyed be 'protected from that destruction … under the international law of armed conflict': see above n 83. Common para 4 goes on to require that the perpetrator 'was aware of the factual circumstances that established the status of the property'.

occupation.[93] Article 6(b) of the *Nuremberg Charter* vested the International Military Tribunal ('IMT') at Nuremberg with jurisdiction over the war crime of that name, viz 'plunder of public or private property',[94] and, in the context of belligerent occupation, the Tribunal held the accused Rosenberg 'responsible for a system of organised plunder of both public and private property throughout the invaded countries of Europe'.[95] Article 3(e) of the *ICTY Statute* vests that Tribunal with jurisdiction over the same war crime, and the Tribunal has held that the offence, which it has recognised as customary,[96]

> should be understood to embrace all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international criminal law, including those acts traditionally described as 'pillage'.[97]

In other words, the offence encompasses 'both widespread and systematised acts of dispossession and acquisition of property in violation of the rights of the owners and isolated acts of theft or plunder by individuals for their private gain'.[98] In addition to the offence in art 3(e), art 3(d) of the *ICTY Statute* grants the Tribunal jurisdiction over the specific war crime of 'seizure of … institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science'. The relevant case law of the ICTY has proceeded on the basis that the war crimes referred to in arts 3(d) and (e) of the *Statute* apply to international and non-international armed conflict alike. For its part, the *Rome Statute* recognises, in both international and non-international armed conflict, the war crimes of seizing the enemy's property unless such

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93 See *Kordić Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14/2-A, 17 December 2004) [78].

94 See also *Control Council Law No 10* art II(1)(b).

95 *Nuremberg Judgment* (1947) 41 *American Journal of International Law* 172, 287.

96 *Hadžihasanović Interlocutory Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-01-47-AR73.3, 11 March 2005) [37].

97 Ibid. See also *Blaškić Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14-A, 29 July 2004) [147]; *Kordić Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14/2-A, 17 December 2004) [77], [79]. Pillage refers to every-man-for-himself looting by the soldiery, with each keeping what he lays his hands on, as distinct from a military force's organised appropriation of property in the name of the state or at least of a superior. Stating the obvious, common para 3 of the *ICC Elements of Crimes*, in respect of the crime of pillage under arts 8(2)(b)(xvi) and 8(2)(e)(v) of the *Rome Statute*, requires that the appropriation 'was without the consent of the owner'.

98 *Kordić Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14/2-T, 26 February 2001) [352], quoted in *Hadžihasanović Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-01-47-T, 15 March 2006) [49]. See also *Prosecutor v Delalić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) [590]; *Prosecutor v Jelisić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-T-10, 14 December 1999) [48]; *Blaškić Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 3 March 2000) [184]; *Naletilić Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-34-T, 31 March 2003) [612].

seizure is imperatively demanded by the necessities of war[99] and of pillaging a town or place, even when taken by assault.[100] The same is the case[101] under *UNTAET Regulation 2000/15*[102] and the *Iraqi Special Tribunal Statute*.[103]

As a formal matter, the appropriation of cultural property is not a war crime if it is imperatively demanded by the necessities of war.[104] In practice, it is, in realistic terms, impossible to envisage a legitimate military rationale for seizing cultural property.

The requisite mens rea of the respective offences is intent[105] and knowledge.[106]

2 *Treaty Law*

The *1954 Hague Convention*, *Additional Protocol I* and the *Second Protocol to the 1954 Hague Convention* ('*Second Protocol*') each contains a provision, or provisions, on individual criminal responsibility for acts inimical to the protection of cultural property in armed conflict. None of these has yet served as a basis for prosecution in national or international proceedings, and perhaps none is likely ever to play a significant role. But an examination of each is nonetheless warranted, not the least on account of what can be the cryptic and technical nature of the relevant articles.

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99 *Rome Statute* arts 8(2)(b)(xiii) (international), 8(2)(e)(xii) (non-international). As with the destruction and damage of enemy property, common para 3 of the *ICC Elements of Crimes* for these offences requires that the property destroyed be 'protected from that … seizure under the international law of armed conflict'. Cultural property is protected from seizure by the customary international law of armed conflict in both international and non-international armed conflicts unless such seizure is imperatively demanded by the necessities of war: see O'Keefe, *The Protection of Cultural Property in Armed Conflict*, above n 35, 336–8.

100 *Rome Statute* arts 8(2)(b)(xvi) (international), 8(2)(e)(v) (non-international).

101 Cf 10 USC § 950t(5), which recognises only the war crime of pillage, namely 'in the absence of military necessity appropriat[ing] or seiz[ing] property for private or personal use, without the consent of a person with authority to permit such appropriation or seizure'.

102 In respect of seizing the enemy's property, see *UNTAET Regulation 2000/15*, UNTAET/REG/2000/15, ss 6.1(b)(xiii) (international), 6.1(e)(xii) (non-international). In respect of pillage, see ss 6.1(b)(xvi) (international), 6.1(e)(v) (non-international).

103 In respect of seizing the enemy's property, see *Iraqi Special Tribunal Statute* arts 13(b)(14) (international), 13(d)(12) (non-international); in respect of pillage, see arts 13(b)(17) (international), 13(d)(5) (non-international).

104 As regards arts 8(2)(b)(xiii) and 8(2)(e)(xii) of the *Rome Statute*, this is specified in the text. As regards pillage under arts 8(2)(b)(xvi) and 8(2)(e)(v), a common footnote to common para 2 of the relevant *ICC Elements of Crimes* states that 'appropriations justified by military necessity cannot constitute the crime of pillaging'.

105 *Rome Statute* art 30(1); *Kordić Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14/2-A, 17 December 2004) [84]. See also *UNTAET Regulation 2000/15*, UNTAET/REG/2000/15, s 18.1. In the specific context of the crime of pillage under arts 8(2)(b)(xvi) and 8(2)(e)(v) of the *Rome Statute*, common para 2 of the relevant *ICC Elements of Crimes* requires that the perpetrator 'intended to deprive the owner of the property and to appropriate it for private or personal use'.

106 *Rome Statute* art 30(1). See also *UNTAET Regulation 2000/15*, UNTAET/REG/2000/15, s 18.1. Recall that, for the purposes of art 3(d) of the *ICTY Statute*, the latter means knowledge that the destroyed or damaged property was an institution dedicated to religion, charity and education or the arts and sciences, or a historic monument or a work of art or science, while for the purposes of the *Rome Statute* it effectively means knowledge that the property was civilian.

(a) 1954 Hague Convention*: Article 28*

The mandatory punishment of individuals responsible for the wilful destruction, damage or plunder of cultural property in the course of armed conflict was one of the rationales of the *1954 Hague Convention*. Indeed, the UNESCO Secretariat's first report to the Organization's General Conference on the drafting of the *Convention* was entitled 'Report on the International Protection of Cultural Property, by Penal Measures, in the Event of Armed Conflict'.[107] The Secretariat, while pointing out that reparation would be owed in principle under the law of state responsibility for the destruction of cultural property contrary to the laws of war, added that there was 'no need to stress … that the possibility of civil reparations is of very minor interest when we are concerned with property which is essentially irreplaceable'.[108] It was in this light that the intergovernmental conference at which the *1954 Hague Convention* was finalised and opened for signature adopted art 28 of the *Convention* — 'one of the most difficult of all', involving as it did international criminal law, which was then in its infancy.[109] Article 28 requires the High Contracting Parties 'to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the … Convention'.

Article 28, like the *1954 Hague Convention* as a whole, applies to a more selective range of cultural property than does the customary international law applicable during armed conflict. Whereas the latter serves to protect all historic monuments, works of art and the like, the *1954 Hague Convention* applies, in accordance with art 1(a), to 'movable or immovable cultural property of great importance to the cultural heritage of every people' — that is, to cultural property of great importance to the national cultural heritage of each respective High Contracting Party, as determined by that party. It also applies, in accordance with art 1(b), to buildings whose main and effective purpose is to preserve or exhibit, and refuges intended to shelter in the event of armed conflict, the movable cultural property defined in art 1(a); and, in accordance with art 1(c), to centres containing a large amount of cultural property as defined in art 1(a) and (b), known under the *Convention* as 'centres containing monuments'. In the practice of the parties, the total immovable cultural property to which the *1954 Hague Convention* applies is generally in the order of tens of thousands of

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107 See *Measures for Ensuring the Co-operation of Interested States in the Protection, Preservation and Restoration of Antiquities, Monuments and Historical Sites; and Possibility of Establishing an International Fund to Subsidize Such Preservation and Restoration* (UNESCO Doc 5 C/PRG/6, UNESCO, 27 March 1950) annex I ('*Report on the International Protection of Cultural Property, by Penal Measures, in the Event of Armed Conflict*').

108 Ibid 5 [III].

109 *Draft International Convention for the Protection, in the Event of Armed Conflict, of Monuments, Collections and Other Cultural Property* (UNESCO Doc 7 C/PRG/7, UNESCO, 30 September 1952) annex I ('*Committee of Governmental Experts convened in Paris from 21 July to 14 August 1952 to Draw Up the Final Draft of an International Convention for the Protection of Cultural Property in the Event of Armed Conflict: Report of the Rapporteur*') 14 ('*Committee of Governmental Experts: Report of the Rapporteur*'); *Records of the Conference Convened by the United Nations Educational, Scientific and Cultural Organization Held at The Hague from 21 April to 14 May 1954* (Staatsdrukkerij- en uitgeverijbedrijf, 1961) 314 ('*Records 1954*').

items in the territory of each party, while the few figures available for movable cultural property tentatively point to the contents of a hundred to a few hundred museums, art galleries, libraries and archives per party.[110]

It is not clear whether the obligation laid down in art 28 applies only to breaches of the *1954 Hague Convention* committed during international armed conflict, including belligerent occupation, or whether it extends to breaches committed during armed conflict not of an international character. On a narrow reading of art 19(1) of the *Convention*, in accordance with which 'each party to the conflict shall be bound to apply, as a minimum, the provisions of the present *Convention* which relate to respect for cultural property' in the event of an armed conflict not of an international character occurring within the territory of one of the parties, art 4 ('Respect for Cultural Property') is the only provision of the *Convention* which relates to respect for cultural property, and, in this light, art 28 does not apply in the event of non-international armed conflict. On another view, art 28 is indeed a provision which relates to respect for cultural property, albeit in an adjectival sense: where art 4 of the *Convention* lays down the primary rules relevant to respect, art 28 provides for a special secondary rule in the event of the breach of one of these primary rules — namely, that such a breach is to give rise under the domestic law of the respective parties to the individual criminal responsibility of the perpetrator. Putting it another way, the legal consequence of art 19 is that failure to observe art 4 in the course of non-international armed conflict is a breach of the *Convention*, and art 28 obliges the parties to prosecute and impose penal or disciplinary sanctions on those persons who commit or who order to be committed a breach of the *Convention*. Subsequent practice is unenlightening, since there has never been a trial in the courts of any High Contracting Party for a criminal breach of the *Convention*. For its part, the UN's Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135 suggested, no more helpfully, that breaches of the *Convention* committed during non-international armed conflict 'perhaps' gave rise to individual criminal responsibility.[111]

Turning to the text of art 28, the equally authoritative[112] French version of the words 'within the framework of their ordinary criminal jurisdiction', viz 'dans le cadre de leur système de droit pénal', clarifies the meaning of this opaque phrase to some extent. So do the *travaux préparatoires*: as drafted by a 1952 committee of governmental experts, what was to become the English version of art 28 had

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110 See O'Keefe, *The Protection of Cultural Property in Armed Conflict*, above n 35, 101–11; Roger O'Keefe, 'Protection of Cultural Property' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (Oxford University Press, 2008) 433, 437–8.

111 *Identical Letters Dated 15 March 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council*, UN GAOR, 53rd sess, Agenda Item 110(b), UN Doc A/53/850, UN SCOR, 54th sess, UN Doc S/1999/231 (16 March 1999) annex ('*Report of the Group of Experts for Cambodia Established pursuant to General Assembly Resolution 52/135*') [76].

112 See *1954 Hague Convention* art 29(1). Article 33(3) of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ('*VCLT*'), states that the terms of a treaty are presumed to have the same meaning in each authentic text.

read 'within the framework of their legal systems',[113] but the eventual draft convention as fine-tuned by UNESCO replaced 'legal systems' with 'ordinary criminal jurisdiction'.[114] The word 'ordinary' is nonetheless a little obscure, and might be thought to suggest that art 28 stipulates prosecution strictly before civil (that is, non-military) courts under the general (that is, non-military) criminal law. This is not the case. The reference to the alternative of disciplinary sanctions, which are imposable only on persons subject to military discipline, necessarily implies that trial before a military tribunal under military law is permissible; and it is a fact that many of the parties rely for their implementation of art 28 on military criminal law, as part of their 'système de droit pénal'. As it is, and as will be seen immediately below, the *travaux préparatoires* reveal that the words 'within the framework of their ordinary criminal jurisdiction' were inserted for an altogether different purpose.

Article 28 leaves open the basis or bases under international law on which High Contracting Parties are to assert jurisdiction over criminal breaches of the *Convention*. The provision expressly states that such offences are to be punishable whatever the nationality of the offender, but this does not advance things very far, since the real question is whether this includes offences committed by non-nationals outside the territory of the forum state. The USSR had argued in favour of explicit provision for universal jurisdiction over 'serious violations of the Convention', including, inter alia, all destruction not justified by military necessity of cultural property enjoying so-called 'special protection' in accordance with ch II of the *Convention*.[115] Basing itself on art 146 of the

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113 *Draft International Convention for the Protection, in the Event of Armed Conflict, of Monuments, Collections and Other Cultural Property* (UNESCO Doc 7 C/PRG/7, UNESCO, 30 September 1952) annex II ('*Draft Convention for the Protection of Cultural Property in the Event of Armed Conflict Drawn Up by a Conference of Governmental Experts Held in Paris, 21 July to 14 August 1952*') 26.

114 *Draft Convention for the Protection of Cultural Property in the Event of Armed Conflict* (UNESCO Doc CBC/3, UNESCO, undated) 20. The French text was amended from 'système juridique' to 'système de droit pénal'.

115 For the *Convention*'s effectively defunct regime of 'special protection', see *1954 Hague Convention* ch II. See also O'Keefe, *The Protection of Cultural Property in Armed Conflict*, above n 35, 94, 100, 140–61; O'Keefe, 'Protection of Cultural Property', above n 110, 453–6. To be covered by the regime, eligible cultural property must be entered in the 'International Register of Cultural Property under Special Protection', in accordance with art 8(6) of the *Convention*. The Register presently comprises only four refuges intended to shelter cultural property in the event of armed conflict (three in the Netherlands and one in Germany) and one centre containing monuments (the Vatican City).

Geneva Convention IV,[116] it suggested the following text:

> Each of the High Contracting Parties undertakes to seek persons accused of committing or causing the commission of serious violations of the Convention, and to bring them to trial, before its own courts, whatever nationality they may be. In accordance with the provisions of its legislation, it may, if it so desires, hand them over for trial to another Party concerned, if the latter possesses evidence constituting counts of indictment against such persons.[117]

Nor was there any objection as a matter of international law to a party's exercise of universal jurisdiction over criminal breaches of the *Convention*. The US, however, drew attention to the practical hurdle posed by the constitutional incapacity of its federal government to expand the territorial jurisdiction of the criminal courts of its various states,[118] a problem shared by some other federal countries. In the event, the Soviet delegation was prepared to withdraw its amendment and to support the Legal Committee's proposed text,[119] which suggests that it was content that the final version of art 28 did not rule out universality. At the same time, the more non-committal wording and the insertion of the phrase 'within the framework of their ordinary criminal jurisdiction' indicate that universality is not obligatory. In the final analysis, going both on the ordinary meaning of the provision and on the *travaux préparatoires*, the obligation imposed by art 28 permits but does not compel a party to empower its courts to exercise universal jurisdiction over criminal breaches of the *Convention*.[120]

The respective actus rei of the various offences punishable under art 28 are to be derived from the substantive provisions of the *Convention*. No textual distinction is drawn in this regard between, on the one hand, the core obligations pertaining to respect for cultural property (arts 4(1)–(4)) and the immunity of cultural property under special protection (art 9) and, on the other, the *Convention*'s other obligations, such as that of peacetime preparation for safeguarding cultural property against the foreseeable effects of armed conflict (art 3), that of support for the competent national authorities of occupied territory in safeguarding and preserving the territory's cultural property (art 5(1)) and that of dissemination of the text of the *Convention* (art 25). A High Contracting Party would be entitled, however, to reserve specifically penal sanctions for violations

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116 *Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 973 UNTS 287 (entered into force 21 October 1950) ('*Geneva Convention IV*').

117 UNESCO Doc CBC/DR/71, *Records 1954*, 390.

118 *Records 1954*, 390 [1613].

119 Ibid [1614].

120 See also A R Carnegie, 'Jurisdiction over Violations of the Laws and Customs of War' (1963) 39 *British Year Book of International Law* 402, 409; Yoram Dinstein, 'International Criminal Law' (1985) 20 *Israel Law Review* 206, 216. The claim in Jiří Toman, *The Protection of Cultural Property in the Event of Armed Conflict: Commentary on the Convention for the Protection of Cultural Property in the Event of Armed Conflict and Its Protocol, signed on 14 May 1954 in The Hague, and on Other Instruments of International Law concerning Such Protection* (Dartmouth/UNESCO Publishing, 1996) 294, asserting that art 28 obliges parties to assert universal criminal jurisdiction, is unsustainable, and ascribes an object and purpose to the provision that goes beyond what is warranted by its wording or drafting history.

of the *Convention*'s core provisions,[121] while stipulating only disciplinary sanctions for other breaches. The former can be taken to comprise the obligations in art 4(1) to refrain from the use of cultural property for purposes likely to expose it to destruction or damage in the event of armed conflict and to refrain from acts of hostility against cultural property, both of these obligations being subject to the reservation in respect of military necessity provided for in art 4(2);[122] the prohibition implied by art 4(3) on any form of theft, pillage or misappropriation of, and any acts of vandalism against, cultural property;[123] the prohibition in art 4(4) on reprisals against cultural property;[124] and the obligations in art 9 to refrain from acts of hostility against, and from any use for military purposes of, cultural property under special protection, both obligations being subject to art 11's provisions on withdrawal of immunity.[125]

In common with most treaty provisions mandating penal sanctions, art 28 does not stipulate, beyond the specific mention of actual commission and command responsibility, the forms of responsibility (for example, attempt, conspiracy and complicity) for the various possible breaches of the *Convention* that are to be rendered punishable by the parties' respective courts. Neither does it specify the requisite mental element or the maximum or minimum penalties imposable. The intention of the drafters was a broad text which would 'leave the Parties free to decide on the nature of the crime and the sanctions to be adopted'.[126] The drafters did not wish to oblige a party to take measures which were not already permitted under the principles of its public law.[127] The aim was an open-textured provision capable of implementation by states of every criminal justice tradition and peculiarity, a provision to whose bare bones each party's own corpus of criminal law would add flesh.

When it came, nonetheless, to the mental element of an offence pursuant to art 28, the US and UK — whose criminal justice traditions did not countenance criminal responsibility on the basis of strict liability — pushed during the drafting for a requirement of knowledge, believing that the 'somewhat vague' definition of cultural property in art 1 'made it possible for a Party to violate the *Convention* unwittingly'.[128] Their proposal to insert the word 'knowingly'[129] was not, however, reflected in the final version of the provision, and, in the end, the matter is one for the domestic criminal law of each party, given the deliberate unspecificity of art 28. That said, as a matter of customary international law, war

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121 It might also be desirable to extend penal sanctions to the wilful misuse, contrary to art 17(3), of the *1954 Hague Convention*'s distinctive emblem, at least when committed perfidiously.

122 For details as to these provisions, see O'Keefe, *The Protection of Cultural Property in Armed Conflict*, above n 35, 120–32.

123 See ibid 120–1, 132–4. For an example of the same a fortiori reasoning as that used to read a prohibition into the obligation in art 4(3) to prevent the acts in question, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* (2007) 46 ILM 188, 232 [166].

124 See O'Keefe, *The Protection of Cultural Property in Armed Conflict*, above n 35, 120–1, 134–5.

125 See ibid 140–1, 156–61.

126 *Records 1954*, 390 [1612] (Italy).

127 *Committee of Governmental Experts: Report of the Rapporteur*, above n 109 14.

128 *Records 1954*, 390 [1610] (UK), [1613] (US).

129 See UNESCO Docs CBC/DR/87 (UK), CBC/DR/124 (US), *Records 1954*, 390.

crimes can be committed only with intent and knowledge,[130] the latter meaning 'awareness that a circumstance exists'.[131] The question is what that circumstance might be. It is perhaps relevant merely that the accused is aware that the object in question is a 'monument of architecture, art or history, whether religious or secular', an archaeological site, or any other sort of movable or immovable property referred to in art 1 of the *1954 Hague Convention*. On the other hand, it could be argued by analogy with grave breaches of the *Geneva Conventions*[132] that the perpetrator must have been aware of the factual circumstances which established that the object was protected by the *Convention*.[133] Either way, since the accused's knowledge can be inferred from relevant facts and circumstances,[134] the fact that the cultural property was marked with the distinctive emblem of the *Convention* will be relevant. It will be recalled[135] that in *Strugar*, as 'a further evidentiary issue' regarding the intent to destroy cultural property in the Old Town of Dubrovnik, the ICTY 'accept[ed] the evidence that protective UNESCO emblems were visible, from the JNA positions at Žarkovica and elsewhere, above the Old Town on 6 December 1991'.[136] But marking, it should be stressed, is not the sole means by which an attacker may gain knowledge of the *Convention*'s application to given cultural property.

War crimes within the meaning of art 28 of the *Convention* fall within the jurisdiction of the Extraordinary Chambers in the Courts of Cambodia,[137] mandated to try the remnants of the Khmer Rouge leadership. But no charges have been laid to date on this basis, and none are likely.

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130 See above n 63.

131 See above n 64.

132 *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949 75 UNTS 31 (entered into force 21 October 1950) ('*Geneva Convention I*'); *Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) ('*Geneva Convention II*'); *Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) ('*Geneva Convention III*'); *Geneva Convention IV* (collectively, '*Geneva Conventions*').

133 See *ICC Elements of Crimes* art 8(2)(a)(iv) [5].

134 See above n 70.

135 See above Part IIA 1(b).

136 *Strugar Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-01-42-T, 31 January 2005) [329]. Recall that the Trial Chamber's conclusion, on the basis of this and other evidence, that the attack on the Old Town was deliberate was considered reasonable by the Appeal Chamber: see above n 72.

137 See *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea 2004* (Cambodia), art 7 ('*ECCC Law*'), read in combination with the *Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea*, signed 6 June 2003, 2239 UNTS 117 (entered into force 29 April 2005) art 2.

(b) Additional Protocol I*: Article 85(4)(d)*

Part V section II of *Additional Protocol I* — applicable, like *Additional Protocol I* as a whole, to international armed conflicts[138] — provides for criminal sanctions for the suppression of certain breaches of its obligations, operable via the penal provisions of the *Geneva Conventions*.[139] Article 85(1) states that the provisions of the *Geneva Conventions* relating to the repression of breaches and grave breaches, supplemented by Part V section II of *Additional Protocol I*, are to apply to the repression of breaches and grave breaches of the *Protocol*. This means, first, that parties are required to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the *Protocol*. They are also obliged to search for persons alleged to have committed, or to have ordered to be committed, grave breaches of the *Protocol*[140] and to bring them, regardless of their nationality, before their courts. The last imposes a duty on parties to empower their criminal courts to exercise universal jurisdiction over grave breaches,[141] along with a duty to prosecute such breaches. As an alternative to prosecution, a party 'may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case'. Additionally, each party is to take measures necessary for the suppression of all acts contrary to the *Protocol* other than grave breaches. Municipal criminalisation of what might be called 'non-grave' breaches is a permissible and appropriate means of giving effect to this obligation, as is the assertion by a party of universal criminal jurisdiction over such breaches.[142] Lastly, *Additional Protocol I* supplements the obligations laid down by the provisions of the *Geneva Conventions* relating to the suppression of grave and other breaches with some obligations of its own. Article 86 deals with culpable omissions, recognising in sub-para (2) the doctrines of command and other superior responsibility. Article 87 obliges parties and the parties to the conflict to impose duties of prevention, suppression and punishment on commanders in respect of breaches of the *Geneva Conventions* and of *Additional Protocol I*.

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138 See *Additional Protocol I* art 1(3), referring in turn to art 2 common to the *Geneva Conventions*. In addition, in a divergence from both the *Geneva Conventions* and the *1954 Hague Convention*, *Additional Protocol I* also applies, via a deeming provision in art 1(4), to 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right to self-determination, as enshrined in the Charter of the United Nations and the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations'.

139 *Geneva Convention I* arts 49, 50; *Geneva Convention II*, arts 50, 51; *Geneva Convention III* arts 129, 130; *Geneva Convention IV* arts 146, 147. In accordance with *Additional Protocol I* art 1(3), the *Protocol* supplements the *Geneva Conventions*, to which parties to the *Protocol* must also be parties.

140 The obligation to search for suspects is limited to situations where a party realises that such a person is present in its territory: see, eg, Jean S Pictet (ed), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War: Commentary* (International Committee of the Red Cross, 1958) 593.

141 See Roger O'Keefe, 'The Grave Breaches Regime and Universal Jurisdiction' (2009) 7 *Journal of International Criminal Justice* 811, 813–19.

142 See also Theodor Meron, 'International Criminalization of Internal Atrocities' (1995) 89 *American Journal of International Law* 554, 568–71. This is the approach taken by, inter alia, the US, Canada, Belgium, Switzerland and Nigeria.

Article 88 imposes on parties, and the parties to the conflict, obligations of mutual assistance in criminal matters related to grave breaches, but seemingly not other breaches, of the *Geneva Conventions* and *Additional Protocol I*.

Precisely which breaches are to be considered grave breaches of *Additional Protocol I* is spelled out in art 85(2)–(4), with art 85(4) identifying a range of acts not necessarily causing death or serious injury which constitute grave breaches 'when committed wilfully and in violation of the Conventions or the Protocol'.[143] Of particular relevance is art 85(4)(d), a curiously drafted provision which defines as a grave breach of the *Protocol*

> making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, sub-paragraph (b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives.

The requirement in the chapeau to art 85(4) that the acts enumerated must be committed in violation of the *Geneva Conventions* or *Additional Protocol I* means, in effect, that, for the purposes of art 85(4)(d), the attack in question must constitute a breach of art 53(a) of the *Protocol*, the substantive provision prohibiting acts of hostility against cultural property.[144] The scope of the cultural property encompassed by this provision is essentially the same as that covered by the *1954 Hague Convention*.[145]

It is not clear what was intended in art 85(4)(d) by the reference to 'special protection … by special arrangement, for example, within the framework of a competent international organization'. It is likely, in the light of the privileged status accorded it by art 53 of *Additional Protocol I*[146] and by *Resolution 20(IV)*

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143 *Additional Protocol I* art 85(4) chapeau.

144 For details as to art 53 of *Additional Protocol I*, see O'Keefe, *The Protection of Cultural Property in Armed Conflict*, above n 35, 203–4, 207–18.

145 See ibid 209–14; O'Keefe, 'Protection of Cultural Property', above n 110, 439–42. See also the *Russian Federation's Declaration on Becoming Party to the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on 3 May 1996*, 2308 UNTS 134 (2 March 2005) [3]:

> For the purposes of interpreting subparagraph 1(i) of article 7, of Protocol II, the Russian Federation understands the cultural or spiritual heritage of peoples as cultural property in the terms of article 1 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954.

The *Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices as amended on 3 May 1996*, opened for signature 3 May 1996, 2048 UNTS 93 (entered into force 3 December 1998) art 7(1)(i) uses the expression 'historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples' as found in *Additional Protocol I* art 53.

146 The chapeau to art 53 of *Additional Protocol I* declares the provision to be '[w]ithout prejudice to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954'.

of the Diplomatic Conference of Geneva[147] at which the two *Additional Protocols*[148] were adopted, that the *1954 Hague Convention* was viewed as a 'special arrangement' within the meaning of the provision. But it is less certain whether the drafters envisaged that all cultural property protected by the *Convention*, as *lex specialis* to the *lex generalis* of *Additional Protocol I*, was to be considered under 'special protection' within the meaning of art 85(4)(d) or only those items of immovable cultural property enjoying 'special protection' within the meaning of ch II of the *Convention* by virtue of their entry in the International Register of Cultural Property under Special Protection.[149] Given, however, that 'works of art', as mentioned in art 85(4)(d) of *Additional Protocol I*, cannot enjoy special protection under ch II of the *Convention* in their own right,[150] it must be the case that all cultural property covered by the *Convention* was seen to fall within the provision.[151] As it is, the application of a treaty provision is not restricted to that contemplated by its drafters.[152] Provided that a given legal regime can be said to afford 'special protection … by special arrangement', it meets this criterion of art 85(4)(d). In this light, those historic monuments inscribed on the World Heritage List in accordance with the provisions of the *World Heritage Convention*[153] would equally satisfy the requirement,[154] as would those under the protection of the *Roerich Pact*[155] and

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147 See *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977)* (Federal Political Department, 1978) vol 1, part I, 213 ('*Official Records, Geneva (1974–1977)*'). Resolution 20(IV) reads:

> *Welcoming* the adoption of Article 53 relating to the protection of cultural objects and places of worship as defined in the said Article, contained in the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I),
>
> *Acknowledging* that the Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Additional Protocol, signed at The Hague on 14 May 1954, constitutes an instrument of paramount importance for the international protection of the cultural heritage of all mankind against the effects of armed conflict and that the application of this Convention will in no way be prejudiced by the adoption of the Article referred to in the preceding paragraph,
>
> *Urges* States which have not yet done so to become Parties to the aforementioned Convention.

148 *Additional Protocol I*; *Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) ('*Additional Protocol II*').

149 See above n 115.

150 See *1954 Hague Convention* art 8(1).

151 For this reason, the assertion in Henckaerts and Doswald-Beck, above n 36, 580 that '[i]n practice [art 85(4)(d)] refers to the special protection regime created by the Hague Convention for the Protection of Cultural Property' is untenable.

152 See, eg, in the English courts, *R v Immigration Appeal Tribunal, Ex parte Shah* [1999] 2 AC 629, 651 (Lord Hoffmann); *Sepet v Secretary of State for the Home Department* [2003] 1 WLR 856, 862 [6] (Lord Bingham); *R v Asfaw* [2008] 1 AC 1061, 1095 (Lord Hope).

153 See *World Heritage Convention* art 11(2).

154 See also Emmanuel J Roucounas, 'Les infractions graves au droit humanitaire (Article 85 du Protocole additionnel I aux Conventions de Genève)' (1978) 31 *Revue Hellénique de Droit International* 57, 113–4.

those the subject of any ad hoc arrangement.[156] Specifics aside, the bottom line is that the special protection of the object in question by some sort of special arrangement is an essential material element of a war crime under art 85(4)(d). The protection of art 53 of *Additional Protocol I* alone is not enough. But what is not indicated is whether the special arrangement in question must be in force as between both the attacking party and the party whose cultural property is the object of attack or whether it suffices that the latter alone is a party to such an arrangement.[157] On the whole, art 85(4)(d)'s condition precedent of special protection pursuant to a special agreement is an odd one, perhaps being intended as a means of urging states which have not yet done so to become parties to the *1954 Hague Convention*, in the words of Resolution 20(IV) of the Diplomatic Conference of Geneva.[158]

The phrase 'clearly-recognized', which introduces a requirement of knowledge into the mens rea of the offence, is ambiguous. It may refer simply to the identification of the object of attack as a historic monument, work of art or place of worship. Alternatively, it may refer to the additional recognition of the historic monument, work of art or place of worship as one which constitutes the cultural or spiritual heritage of a people and to which special protection has been given by special arrangement.[159] The *travaux préparatoires* are silent on the question.[160] Either way, the fact that the object attacked was marked at the time with the distinctive emblem of the *1954 Hague Convention* would serve as evidence from which to infer that the accused both recognised it as cultural property[161] and recognised that special protection had been given it by special agreement. The same can be said, albeit with somewhat less force, of the object's entry in the International Register of Cultural Property under Special Protection (as per the regime of 'special protection' provided for in ch II of the *1954 Hague Convention*) or in the List of Cultural Property under Enhanced Protection (as per the regime of 'enhanced protection' embodied in ch 3 of the *Second Protocol* to the *Convention*),[162] as long as in any given case the Register or List was

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155 *Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments*, opened for signature 15 April 1935, 167 LNTS 290 (entered into force 26 August 1935) ('*Roerich Pact*' or '*Washington Pact*'). The *Roerich Pact* remains in force among ten American states, including the US: see O'Keefe, *Protection of Cultural Property in Armed Conflict*, above n 35, 51–2.

156 See, eg, *1954 Hague Convention* art 24.

157 Obviously, both must be parties to *Additional Protocol I*, in the light of which it cannot be said that the second alternative violates the *pacta tertiis* principle, as reflected in *VCLT* art 34.

158 See *Official Records, Geneva (1974–1977),* above n 147, 213.

159 See Jean de Breucker, 'La répression des infractions graves aux dispositions du premier Protocole additionel aux quatre Conventions de Genève du 12 août 1949' (1977) 16 *Revue de Droit Pénal Militaire et de Droit de la Guerre* 497, 505.

160 For its part, the *ICRC Commentary* misses the point: see Sandoz, Swinarski and Zimmermann (eds), above n 57, 1002 [3517] n 36.

161 Recall *Strugar Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-01-42-T, 31 January 2005) [329].

162 For details as to the *Second Protocol*'s regime of 'enhanced protection', see O'Keefe, *Protection of Cultural Property in Armed Conflict*, above n 35, 241, 263–74; O'Keefe, 'Protection of Cultural Property', above n 110, 456–61. To be covered by the regime, eligible cultural property must be entered in the 'List of Cultural Property under Enhanced Protection' referred to in arts 11 and 27(1)(b) of the *Second Protocol*. No item of cultural property has yet been entered in the List.

adequately publicised. The inscription of the attacked object on the World Heritage List, again if sufficiently publicised and/or if signalled at the site by the display of the World Heritage emblem, would serve the same purpose.[163]

The stipulation that the attack cause extensive destruction of the historic monument, work of art or place of worship, a *de minimis* provision taken from art 50 of the *First Geneva Convention*, art 51 of the *Second Geneva Convention* and art 147 of the *Fourth Geneva Convention*, is what distinguishes a grave breach of *Additional Protocol I* from other breaches which also relate solely to property. The word 'extensive' has no precise legal content, and remains a matter of appreciation in each case.

The requirement that the historic monument, work of art or place of worship the object of attack not be located in the immediate proximity of military objectives does not imply that objects so located may lawfully be attacked. Rather, it is an evidentiary precaution, linked to the requirement that the attack be committed wilfully, and seeks to obviate the imposition of criminal responsibility on the basis of negligence. It is designed to ensure that an accused is convicted under art 85(4)(d) only for deliberately making cultural property protected by art 53 the object of attack, and not for either a misdirected attack against a legitimate military objective or a well-directed attack against a military objective which causes extensive damage to cultural property nearby. An analogous issue was raised under the customary international law of war crimes in *Strugar*, dealing with the attack on the Old Town of Dubrovnik on 6 December 1991, where a Trial Chamber of the ICTY held 'that the special protection awarded to cultural property itself may not be lost simply because of military activities or military installations in the immediate vicinity of the cultural property'.[164] The Trial Chamber added that in such a case, however, 'the practical result may be that it cannot be established that the acts which caused destruction of or damage to cultural property were "directed against" that cultural property, rather than the military installation or [activity] in its immediate vicinity'.[165]

In addition to art 85(4)(d), two other grave breaches provided for in art 85 of *Additional Protocol I* have relevance for the protection of cultural property in international armed conflict.

Article 85(3)(b) establishes the grave breach — 'when committed wilfully, in violation of the relevant provisions of [the] Protocol, and causing death or serious injury to body or health'[166] — of 'launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that the attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2(a)(iii)'. The reference to art

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163 See *Strugar Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-01-42-T, 31 January 2005) [329] (citations omitted):

> [T]he direct perpetrators' intent to deliberately destroy cultural property is inferred by the Chamber from the evidence of the deliberate attack on the Old Town, the unique cultural and historical character of which was a matter of renown, as was the Old Town's status as a UNESCO World Heritage site.

164 Ibid [310].

165 Ibid.

166 *Additional Protocol I* art 85(3) chapeau.

57(2)(a)(iii), although confusingly placed, is to the term 'indiscriminate attack', and means an attack 'which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'. The relevant substantive provisions of *Additional Protocol I* the violation of which is required are art 57(2)(a)(iii) itself and, in the event that the attack has the consequences foreseen, art 51(5)(b). Cultural property is a species of civilian object for the purposes of art 85(3)(b).

Finally, art 85(3)(f) states that 'the perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red sun and lion or of other protective signs recognized by the Conventions or [the] Protocol' constitutes a grave breach of *Additional Protocol I*, when committed wilfully, in violation of the relevant provisions of the *Protocol*, and causing death or serious injury to body or health. The *ICRC Commentary* suggests that a perfidious use of the distinctive emblem of the *1954 Hague Convention* causing death or serious injury would constitute a grave breach of *Additional Protocol I* under art 85(3)(f),[167] and it would certainly appear that the phrase 'other protective signs recognized by the Conventions or [the] Protocol' used in the provision was intended as an omnibus expression encompassing both the 'other emblems, signs or signals provided for by the Conventions or by [the] Protocol' referred to in art 38(1) of *Additional Protocol I*[168] and the 'other internationally recognized protective emblems, signs or signals, including the flag of truce, and the protective emblem of cultural property' mentioned in the same provision.

(c) Second Protocol *to the* 1954 Hague Convention*: Chapter 4*

The process of review in the 1990s of the *1954 Hague Convention*[169] — a process which culminated in the adoption on 26 March 1999 of the *Second Protocol* to the *Convention*,[170] applicable to the same range of cultural property as the *Convention* itself[171] — had revealed dissatisfaction with the penal sanctions prescribed by art 28 of the former, a provision generally seen as too weak. The simplistic view expressed by some (ignoring customary international law, art 85(4)(d) of *Additional Protocol I* and elementary criminology) was that a stiffer criminal-law deterrent might have prevented the ravaging of cultural property during the wars in Croatia and Bosnia-Herzegovina. The adoption in 1993 of art 3(d) of the *ICTY Statute*, vesting the Tribunal with jurisdiction over the customary war crime of 'seizure of, destruction or wilful damage done to

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167 Sandoz, Swinarksi and Zimmermann (eds), above n 57, 999 [3498]. See also Toman, above n 120, 187.

168 See, eg, the signs, 'as may be agreed upon with the other Party', to be displayed, in accordance with art 59(6) of *Additional Protocol I*, by the party in control of a non-defended locality established by mutual agreement pursuant to art 59(5) and, in accordance with art 60(5) of *Additional Protocol I*, by the party in control of a demilitarised zone: Sandoz, Swinarski and Zimmermann (eds), above n 57, 998 [3495].

169 See O'Keefe, *Protection of Cultural Property in Armed Conflict*, above n 35, 236–41.

170 The *Second Protocol* supplements, rather than supplants, the *Convention*, on which it was designed to improve: see *Second Protocol* art 2. For details as to the relationship between the two instruments, see O'Keefe, *Protection of Cultural Property in Armed Conflict*, above n 35, 242–5.

171 See *Second Protocol* art 1(b). For the cultural property to which the *1954 Hague Convention* relates, see above Part IIA 2(a).

institutions dedicated to … the arts and sciences, historic monuments and works of art and science', represented a vindication of the *Convention*'s object and purpose, and, at the same time, threw into even sharper relief the inadequacy of its penal regime. The contrast was made starker still by the adoption in 1998 of arts 8(2)(b)(ix) and 8(2)(e)(iv) of the *Rome Statute*, recognising the Court's jurisdiction over the war crime, committed in international and non-international armed conflict respectively, of intentionally directing attacks against buildings dedicated to, inter alia, art or science or against historic monuments, provided they are not military objectives. Ultimately, the regime of penal sanctions for violations of the *Second Protocol* established in ch 4 became one of the *Protocol*'s major raisons d'être, one of the measures to reinforce the implementation of the *Convention* cited as necessary in the second recital of the *Protocol*'s preamble; and while some delegates to the diplomatic conference at which the *Protocol* was adopted thought that its provisions 'should exactly reflect those in Additional Protocol I',[172] and others those in the *Rome Statute*, the comprehensive and weighty package of provisions eventually adopted in ch 4 differs from both.

Chapter 4, like the *Second Protocol* as a whole,[173] applies to armed conflicts of an international and non-international character alike. The extension of the *Protocol*'s penal regime to internal conflicts was initially opposed by some delegates, in particular China and India, who resisted the incursion into what they saw as their *domaine réservé*. The quid pro quo for their eventual acceptance of ch 4 as adopted was art 22(4), which states that nothing in the *Protocol* is to prejudice 'the primary jurisdiction of a Party in whose territory an armed conflict not of an international character occurs over the violations set forth in Article 15'. Article 22(4) must be read in the light of art 16(1), which obliges states parties to establish their criminal jurisdiction over serious violations of the *Protocol* not only on the basis of territoriality[174] but also on two extraterritorial bases, namely nationality[175] and universality,[176] and in the light of art 16(2)(a), which states that the *Protocol* does not preclude 'the exercise of jurisdiction under national and international law that may be applicable, or affect the exercise of jurisdiction under customary international law'. The effect of art 22(4) is to assert a hierarchy among these potentially concurrent prescriptive jurisdictions in cases of serious violations committed during a non-international armed conflict on the territory of a state party. It implies that a party seeking to exercise an extraterritorial head of prescriptive jurisdiction over such a violation must, if requested, defer to the jurisdiction of the party in whose territory the armed conflict, and hence the alleged serious violation, took place. This was

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172 *Diplomatic Conference on the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 15–26 March 1999): Summary Report* (UNESCO, Paris, June 1999) [7] ('*Summary Report*'). See also [28].

173 See *Second Protocol* arts 3(1), 22. See also O'Keefe, *Protection of Cultural Property in Armed Conflict*, above n 35, 245–7.

174 *Second Protocol* art 16(1)(a), applicable to all serious violations of the Protocol.

175 Ibid art 16(1)(b), applicable to all serious violations of the *Protocol*.

176 Ibid art 16(1)(c), applicable only to those serious violations of the *Protocol* set forth in arts 15(1)(a)–(c).

something of a concession, given the classical position that no hierarchy pertains among concurrent criminal jurisdictions.[177]

Chapter 4 imposes on parties two distinct sets of obligations. The first mandates legislative measures of a specifically penal nature, the second legislative and other measures which may include those of a penal nature. The first set of obligations attaches to the five 'serious violations' of the *Second Protocol* defined in art 15(1), the label being settled on as a means of both likening them to and distinguishing them from the grave breaches of the *Geneva Conventions* and of *Additional Protocol I*. These obligations are to be found in arts 15(2) to 19. The second set of obligations is referable to the two 'other violations' referred to in art 21. These obligations are to be found in art 21 itself.

Article 38, included *ex abundante cautela* in ch 8 ('Execution of this Protocol'), emphasises that nothing in the *Second Protocol* relating to individual criminal responsibility affects the responsibility of states under international law for breaches of the *Protocol*, a reference specifically to the secondary obligation to provide reparation.[178]

(i) Serious Violations

Article 15(1) enumerates five offences within the meaning of the *Second Protocol*, known collectively as serious violations of the *Protocol*. The chapeau to art 15(1) provides that a person commits an offence within the meaning of the *Protocol* if he or she intentionally and in violation of the *Convention* or the *Protocol* commits any of the acts outlined. In other words, the requirements of intent and of a relevant breach of the *1954 Hague Convention* or *Second Protocol* apply to each of the five serious violations defined in the provision. It is unclear whether intent in this context implies knowledge simply that the property is a 'monument of architecture, art or history, whether religious or secular', an archaeological site, or any other sort of movable or immovable property referred to in art 1 of the *Convention* or, instead, knowledge that the cultural property in question is protected by the *Convention*, is protected by the *Convention* and the *Protocol*, or has been placed under enhanced protection, as the case may be.

The first two acts relate solely to cultural property under the regime of enhanced protection established under ch 3 of the *Second Protocol*. Article 15(1)(a) cites making cultural property under enhanced protection the object of attack as an offence within the meaning of the *Protocol*. The chapeau's

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177 See, eg, Harvard Law School Research in International Law, 'Jurisdiction with Respect to Crime' (1935) 29 *American Journal of International Law Supplement* 435, 583; *Attorney-General of the Government of Israel v Adolf Eichmann* (1962) 36 ILR 5, 302; *Prosecutor v Janković (Decision on Rule 11*bis *Referral)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-23/2-AR11bis.2, 15 November 2005) [34]; International Bar Association Legal Practice Division, *Report of the Task Force on Extraterritorial Jurisdiction* (28 September 2008) International Bar Association, 167 <http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx>; *AU–EU Expert Report on the Principle of Universal Jurisdiction* (Doc 8671/09, Council of the European Union, 16 April 2009) annex ('*AU–EU Technical Ad Hoc Expert Group on the Principle of Universal Jurisdiction: Report*') 11 [14] 11 ('*AU–EU Expert Group Report on the Principle of Universal Jurisdiction*').

178 See *Factory at Chorzów (Claim for Indemnity) (Merits)* [1928] PCIJ (ser A) No 17, 47; *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN GAOR, 56th sess, 85th plen mtg, Agenda Item 162, UN Doc A/RES/56/83 (12 December 2001) annex ('*Articles on Responsibility of States for Internationally Wrongful Acts*') art 31.

requirement that the acts in question be committed in violation of the *Convention* or the *Protocol* indicates that not every attack against cultural property under enhanced protection constitutes an offence for the purposes of art 15(1)(a), but only those incapable of justification by reference to art 13 ('Loss of Enhanced Protection') of the *Protocol*.[179] Like art 12 of the *Protocol*, the substantive provision establishing the immunity of cultural property under enhanced protection, art 15(1)(a) refers specifically, and inexplicably, to making such property the object of attack, as distinct from directing any act of hostility against it (the formulation used in art 4(1) of the *Convention* and art 6(a) of the *Protocol*), with the result that the provision does not, on its face, recognise as a serious violation of the *Protocol* the demolition of cultural property under enhanced protection or any other act of hostility against it other than an attack. Since the word 'attack' is nowhere defined in the *Second Protocol*, and since the meaning ascribed to it in *Additional Protocol I* (where the term, as herein used, was coined) is a special meaning,[180] not the ordinary meaning of the word,[181] there is perhaps room to argue that, as specifically employed in art 15(1)(a), 'attack' can encompass demolitions. But the argument is tenuous, and smacks of special pleading. Moreover, if the accused is tried under a municipal provision in precisely the same terms as art 15(1)(a), this sort of expansive interpretation to his or her detriment is likely to offend against the requirement of certainty inherent in the principle *nullum crimen sine lege*, a guarantee accorded the status of an international human right in, inter alia, art 15(1) of the *International Covenant on Civil and Political Rights*.[182] In the end, the best way to fill the lacuna is for parties to legislate in more precise terms when establishing as an offence under their domestic law the offence embodied in art 15(1)(a). As for art 15(1)(b), this deems using cultural property under enhanced protection, or its immediate surroundings, in support of military action to be an offence within the meaning of the *Protocol*. The substantive provision of the *Protocol* to which art 15(1)(b) relates is again art 12, to which, as specifically regards the use of cultural property, art 13 provides no exception. It is crucial to note that neither provision stipulates destruction or damage of the relevant cultural property as a material element of the offence: criminal responsibility is imposed under arts 15(1)(a) and 15(1)(b) regardless of the result of the acts impugned.

Article 15(1)(c) recognises as an offence within the meaning of the *Second Protocol* extensive destruction or appropriation of cultural property protected under the *Convention* and the *Protocol*. The phrase 'under the Convention and [the] Protocol', as used also in the following provision, indicates that the cultural property in question is that covered by the general provisions regarding

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179 For details as to arts 12 ('Immunity of cultural property under enhanced protection') and 13 ('Loss of enhanced protection') of the *Second Protocol*, see O'Keefe, *Protection of Cultural Property in Armed Conflict*, above n 35, 271–4; O'Keefe, 'Protection of Cultural Property', above n 110, 459–61.

180 See *Additional Protocol I* art 49(1): '"Attacks" means acts of violence against the adversary, whether in offence or defence.' See also *VCLT* art 31(4).

181 See *VCLT* art 31(1).

182 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). The first sentence of art 15(1) of the *ICCPR* reads: 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.'

protection embodied in ch I of the *Convention* and ch 2 of the *Protocol*. In this connection, it is crucial to emphasise that, insofar as ch 3 of the *Protocol* does not constitute *lex specialis* to them, cultural property under enhanced protection benefits as much from these general provisions of the *Convention* and *Protocol* as does cultural property covered only by these provisions.[183] As a consequence, art 15(1)(c) relates to the destruction and appropriation both of cultural property solely under so-called 'general protection' and of cultural property additionally under enhanced protection.[184] In the light of the specific provision in arts 15(1)(a) and 15(1)(d) for making cultural property under enhanced and general protection respectively the object of attack, the reference to 'destruction' in art 15(1)(c) must refer to destruction caused by acts of hostility other than attacks. One such means of destruction would be by way of demolitions and the like contrary to art 4(1) of the *Convention*,[185] even if, in the case of cultural property under enhanced protection, it is perverse that such acts must cause extensive destruction, in accordance with of art 15(1)(c), while the unlawful acts vis-à-vis such property recognised as offences in arts 15(1)(a) and (b) do not. The other destruction encompassed by art 15(1)(c), in relation to cultural property under general and enhanced protection alike, is that by way of incidental damage, in circumstances where the attacking party has failed to take the precautions in attack specified in either art 7(c) or art 7(d)(ii) of the *Protocol*, both of which demand the application of a rule of proportionality.[186] It must, however, be kept in mind that occasioning incidental damage will constitute a crime under the provision only when committed intentionally, in accordance with the chapeau to art 15(1). Negligently inflicting incidental damage to cultural property covered by art 15(1)(c) is not a serious violation of the *Protocol*. The requirement that, in order for it to amount to a war crime, incidental damage to cultural property must be 'extensive' is drawn from art 85(4)(d) of *Additional Protocol I*, where it derives in turn from art 50 of the *First Geneva Convention*, art 51 of the *Second Geneva Convention* and art 147 of the *Fourth Geneva Convention*. As for the extensive appropriation of cultural property protected under the *Convention* and the *Protocol*, the relevant substantive prohibitions are that implied in art 4(3) of the *Convention* (the prohibition on any form of theft, pillage or misappropriation of, and acts of vandalism against, cultural property) and, insofar as any of the relevant acts amount to 'appropriation', that implied in art 9(1)(a) of the *Protocol* (the prohibition on any illicit export, other removal or transfer of ownership of

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183 See *Second Protocol* art 4(a). See also O'Keefe, *Protection of Cultural Property in Armed Conflict*, above n 35, 244, 264; O'Keefe, 'Protection of Cultural Property', above n 110, 457.

184 For what it is worth, art 15(1)(c) of the *Second Protocol* also extends to cultural property which remains under the regime of special protection provided for in ch II of the *1954 Hague Convention*, given that, where the parties to the conflict are parties to both instruments, specially-protected cultural property enjoys the benefits, to the extent that the provisions of ch II do not constitute *lex specialis*, not only of the general provisions regarding protection laid down in ch I of the *Convention*, but also of those laid down in ch 2 of the *Protocol*.

185 As regards art 4(1) and cultural property under general protection, see O'Keefe, *Protection of Cultural Property in Armed Conflict*, above n 35, 130–1. As regards art 4(1) and cultural property under enhanced protection, see 271–3.

186 For details as to arts 7(c) and 7(d)(ii) of the *Second Protocol*, see ibid 257–9.

cultural property).[187] Although art 4(3) of the *Convention* is reflected more explicitly in sub-para (e) of art 15(1), the latter relates only to cultural property under general protection and is not subject to the same jurisdictional regime as art 15(1)(c).

Article 15(1)(d) embodies the offence of making cultural property protected under the *Convention* and the *Second Protocol* the object of attack. Since cultural property under enhanced protection is specifically covered by art 15(1)(a), art 15(1)(d) relates to cultural property under general protection only. The substantive prohibition in question is art 4(1) of the *Convention*, as modified by art 4(2), as refined in turn by art 6(a) of the *Second Protocol*.[188] As with art 15(1)(a), the use of the term 'making cultural property … the object of attack' in art 15(1)(d), as opposed to the more inclusive 'directing an act of hostility against' such property, has the perverse effect of excluding demolitions from the ambit of the offence. Again, there is some room for reading demolitions into the provision; but, again, the argument is a weak one. In the final analysis, it is up to the parties to remedy this oversight when enacting art 15(1)(d) into domestic law.

Lastly, art 15(1)(e) recognises the offence of theft, pillage or misappropriation of, or acts of vandalism directed against, cultural property protected under the *Convention*. The substantive provision to which art 15(1)(e) relates is art 4(3) of the *Convention*. The cultural property in question is cultural property under general protection alone. The term 'protected under the *Convention*' is somewhat misleading, in that, as regards parties to the *Second Protocol*, cultural property under general protection enjoys the benefit of the general provisions regarding protection laid down in both the *Convention* and the *Protocol*. It would seem that the expression is intended to convey that the substantive rule implicated by art 15(1)(e) is found only in the *Convention*.

Chapter 4 imposes on states party to the *Second Protocol* a range of obligations in respect of the serious violations of the *Protocol* enumerated in art 15(1).

The first limb of the first sentence of art 15(2) lays down the most fundamental of these obligations, providing that each party 'shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth' in art 15(1). The obligation applies to all the offences defined in sub-paras (a) to (e) of that provision. The precise measures necessitated by the first limb of the first sentence of art 15(2) depend on the domestic law of the party in question.

The second limb of the first sentence of art 15(2) further obliges parties to adopt such measures as may be necessary to make the offences in question punishable by 'appropriate penalties'. The provision itself contains no indication of what penalties are to be considered appropriate. In this light, the first limb of the second sentence of art 15(2) is relevant. This provides that, when

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187 As to the former, see above n 123. As to the latter, see O'Keefe, *Protection of Cultural Property in Armed Conflict*, above n 35, 259–61; O'Keefe, 'Protection of Cultural Property', above n 110, 467.

188 For the effect of art 6(a) of the *Second Protocol* on arts 4(1) and 4(2) of the *1954 Hague Convention*, see O'Keefe, *Protection of Cultural Property in Armed Conflict*, above n 35, 251–6.

implementing their obligations under the first sentence, the parties 'shall comply with general principles of law and international law'. International legal principles regarding the imposition of penalties for war crimes and, a fortiori, for war crimes specifically in respect of cultural property are at present embryonic. What seems clear, however, is that imprisonment is the only appropriate penalty.[189] Fines and forfeiture alone are inappropriate for war crimes, although they may be imposed in addition to a custodial sentence.[190]

The relevance of the second sentence of art 15(2) is not limited to the penalties to attach under domestic law to the offences enumerated in art 15(1), but encompasses all aspects of the domestic criminalisation of serious violations of the *Second Protocol*. The second sentence of art 15(2) states in full that, when adopting the measures required by the first sentence of the provision, parties are to comply with 'general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act'. The provision relates in particular to the material scope[191] of the offences defined in art 15(1) — that is, to the various modes of participation in, and secondary forms of criminal responsibility for, serious violations of the *Protocol*.[192]

Article 16(1) obliges each party to the *Second Protocol* to take the necessary legislative measures to establish its jurisdiction over the offences set forth in art 15 on three specific bases, two of which are applicable to all serious violations, the third only to those serious violations laid down in art 15(1)(a)–(c). As regards all offences within the meaning of the *Protocol*, art 16(1) obliges a party to establish jurisdiction when the offence is committed in the territory of that state, as provided for in sub-para (a), and when the alleged offender is a national of that state, in accordance with sub-para (b). In other words, a party must vest its domestic criminal courts with jurisdiction over all the offences set forth in art 15(1) on the basis of territoriality and, in relation to extraterritorial conduct, on the basis of nationality (or 'active personality'). As regards only those offences defined in sub-paras (a)–(c) of art 15(1), each party is further obliged, in accordance with sub-para (c) of art 16(1), to establish jurisdiction 'when the alleged offender is present in its territory'. That is, a party must establish jurisdiction over the offences set forth in arts 15(1)(a)–(c) on the basis of universality,[193] although the obligation is limited to situations where the alleged

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189 See, eg, *Rome Statute* art 77; *ICTY Statute* art 24; SC Res 955, UN SCOR, 49th sess, 3453 mtg, UN Doc S/RES/955 (8 November 1994) annex ('*ICTR Statute*') art 23; *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, signed 16 January 2002, 2178 UNTS 137 (entered into force 12 April 2002) annex ('*Statute of the Special Court for Sierra Leone*') art 19. Even if each of these provisions pertains to trial only by the international criminal court or tribunal in question, they are all indicative of the principles one might expect to be embodied in domestic war crimes legislation.

190 See below Part III for considerations relevant to sentencing for such offences.

191 Recall, by way of contrast, that the mental element required for serious violations (viz intent) is specified in the chapeau to art 15(1) of the *Second Protocol*.

192 See *Rome Statute* arts 25 and 28, as more or less indicative of the various modes of participation in war crimes, and the two secondary forms of responsibility in respect of them, recognised by customary international law.

193 See Roger O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 *Journal of International Criminal Justice* 735, 751, 755–6; *AU–EU Expert Group Report on the Principle of Universal Jurisdiction* 7 [9].

offender is subsequently present in the territory of the prosecuting state. There is no obligation on parties to make legislative provision, even where domestically permissible, for trial in absentia pursuant to universal prescriptive jurisdiction.

Paragraph 1 of art 16 is stated to be without prejudice to para 2, which contains two provisions of a clarificatory nature. Sub-paragraph (a) provides that the *Protocol* 'does not preclude the incurring of individual criminal responsibility or the exercise of jurisdiction under national and international law that may be applicable, or affect the exercise of jurisdiction under customary international law'. A provision to the effect that nothing in the *Convention* in question mandating the establishment of specific heads of jurisdiction excludes the exercise of jurisdiction in accordance with national law is a common feature of international criminal conventions, although its meaning is opaque. One possible construction is that such a clause effectively constitutes an agreement among the parties that the exercise of any head of prescriptive jurisdiction, including universal jurisdiction[194] where it is not mandated by the treaty,[195] over the offences provided for in the instrument is to be treated as permissible — but not mandatory, in contrast to the heads of jurisdiction cited in art 16(1) — as among the parties. Alternatively, the effect of such a clause may be simply to leave legally unaffected the exercise under national law of such jurisdiction as may be permissible under customary international law or another convention and not mandated or, where relevant, explicitly permitted by the treaty. The insertion in art 16(2)(a) of additional reference to the incurring of individual criminal responsibility, of the words 'and international law' and of the second clause relating to customary international law does nothing to clarify the situation. As for art 16(2)(b), it provides:

> Except in so far as a State which is not Party to this Protocol may accept and apply its provisions in accordance with Article 3 paragraph 2, members of the armed forces and nationals of a State which is not Party to this Protocol, except for those nationals serving in the armed forces of a State which is Party to this Protocol, do not incur individual criminal responsibility by virtue of this Protocol, nor does this Protocol impose an obligation to establish jurisdiction over such persons or to extradite them.

The provision, inserted at the instigation of the US, is intended to acknowledge the effect of the *pacta tertiis* rule of the law of treaties.[196] Article 16(2)(b) does not, however, render impermissible the exercise by a party of prescriptive

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194 In *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment)* [2002] ICJ Rep 3, 174–5 [61] (Judge Van den Wyngaert) ('*Arrest Warrant Case*'), Judge ad hoc Van den Wyngaert expressed the view that such provisions did not exclude the exercise of universal jurisdiction over the offences in question. But this conclusion is predicated on her affirmation, at least in principle, of the '*Lotus* presumption' (see *SS Lotus (France v Turkey) (Judgment)* [1927] PCIJ (ser A) No 10, 19). Judges Higgins, Kooijmans and Buergenthal were noticeably more cautious: see *Arrest Warrant Case* [2002] ICJ Rep 3, 78–9 [51] (Judges Higgins, Kooijmans and Buergenthal).

195 Recall, in the present context, that art 16(1)(c) of the *Second Protocol* does not mandate universal jurisdiction in respect of the serious violations specified in art 15(1)(d) and art 15(1)(e).

196 See *VCLT* art 34: 'A treaty does not create either obligations or rights for a third State without its consent.' For the interaction between the *pacta tertiis* rule and the jurisdictional provisions of treaties in the field of international humanitarian law and international criminal law, see O'Keefe, 'Grave Breaches Regime', above n 141, 812 n 4.

criminal jurisdiction over a third-party national on the basis of any head of jurisdiction permitted by customary international law.[197] One of these, namely service in the armed forces of the prescribing party, is expressly mentioned.

Article 16(2) is itself stated to be without prejudice to art 28 of the *1954 Hague Convention*. It will be recalled that the obligation imposed by art 28 permits a party to empower its courts to exercise universal jurisdiction over all criminal breaches of the *Convention*. The effect of art 16(2)'s 'without prejudice' clause is that nothing in art 16 of the *Second Protocol* alters this.

It should lastly be noted that, at the diplomatic conference at which the *Second Protocol* was adopted, the chairperson of the working group on ch 4 made an interpretative statement with regard to art 16. By way of further reassurance of those states concerned by the applicability of ch 4 to non-international armed conflict,[198] he clarified, if clarification were needed, that nothing in the *Protocol*, including art 16, 'in any way limits the State's ability to legislate, criminalize or otherwise deal with any substantive offences including conduct addressed in [the] Protocol'. He also stated for the avoidance of doubt that nothing in art 16(2)(b) 'should be interpreted as in any way affecting the application of Article 16(1)(a)'.[199]

As regards those serious violations of the *Second Protocol* embodied in arts 15(1)(a)–(c), art 17(1) imposes on a party in whose territory the alleged offender is found the obligation, if it does not extradite that person, to

> submit, without exception whatsoever and without undue delay, the case to its competent authorities, for the purpose of prosecution, through proceedings in accordance with its domestic law or with, if applicable, the relevant rules of international law.

This obligation, again common to many international criminal conventions, is usually referred to as the obligation to try or extradite (*aut dedere aut judicare*) or to prosecute or extradite (*aut dedere aut prosequi*) an alleged offender. But it is more precisely an obligation on the parties, in the event that they do not extradite the suspect, to submit the case to their prosecuting authorities with a view to prosecution. These authorities are not obliged, in the absence of a satisfactory case, to proceed to trial.[200] Although it is by no means clear, the enigmatic reference in art 17(1) to the relevant rules of international law, a reference not found in other conventions, would appear to make somewhat pedantic allowance for the possible prosecution of serious violations of the

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197 As for extradition, as long as the suspect is present in the territory of the requested state, that state enjoys enforcement jurisdiction over him or her. Whether the state also needs to point to some permissible head of prescriptive jurisdiction over the offence depends on whether any relevant treaty and/or the state's domestic extradition law imposes a requirement of double criminality as a condition precedent to extradition.

198 See also *Second Protocol* art 22(4).

199 *Summary Report* annex I ('*Final Act of the Diplomatic Conference on the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*') [11].

200 See, eg, 'Report of the International Law Commission on the Work of Its Twenty-Fourth Session (2 May – 7 July 1972)' [1972] II *Yearbook of the International Law Commission* 219, 318; ILC, *Report on the Work of Its Fifty-Eighth Session — 1 May to 9 June and 3 July to 11 August 2006*, UN GAOR, 61st sess, Supp No 10, UN Doc A/61/10, 396 [221].

Protocol before a so-called 'mixed' criminal tribunal established on the territory of a party and regulated by international law.

Article 17(2) embodies fundamental procedural safeguards for alleged offenders. 'Without prejudice to, if applicable, the relevant rules of international law,' the provision stipulates that:

> any person regarding whom proceedings are being carried out in connection with the Convention or [the] Protocol shall be guaranteed fair treatment and a fair trial in accordance with domestic law and international law at all stages of the proceedings, and in no cases shall be provided guarantees less favorable to such person than those provided by international law.

These guarantees are not limited to proceedings in respect of the serious violations provided for in art 15(1)(a) to (c), but extend to all serious violations of the *Protocol*, as well as to proceedings pursuant to legislative measures of a penal nature taken by parties in accordance with art 21. Nor are the guarantees in question restricted to prosecution, but apply equally to extradition proceedings.

Article 18, applicable only to those serious violations of the *Protocol* set forth in art 15(1)(a)–(c), contains a range of technical provisions relevant to extradition. Article 19(1), inspired by art 88 of *Additional Protocol I* and the more recent international criminal conventions, obliges parties to afford one another

> the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect of the offences set forth in Article 15, including assistance in obtaining evidence at their disposal necessary for the proceedings.

The obligation of mutual legal assistance applies to all serious violations of the *Protocol*. For its part, art 20 clarifies the permissible grounds on which a party may refuse a request for extradition in respect of the offences set forth in art 15(1)(a)–(c) or for mutual legal assistance in respect of any of the offences in art 15(1). In line with the recent trend in international criminal conventions, art 20(1) abrogates the 'political offence exception', as occasionally invoked to resist requests for extradition or mutual legal assistance, in relation to the offences in question. It states that the relevant offences 'shall not be regarded as political offences nor as offences connected with political offences nor as offences inspired by political motives', so that a request for extradition or for mutual legal assistance based on such offences 'may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives'. Article 20(2) qualifies art 20(1) by providing that nothing in the *Protocol* shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance if the requested party has substantial grounds for believing that the request for extradition or for mutual legal assistance

> has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.

This is again in keeping with recent treaty developments in international criminal law.

(ii) Other Violations

Article 21 of the *Second Protocol* — relating to 'other violations', as distinct from the serious violations of the *Protocol* enumerated in art 15(1) — imposes on parties an obligation to adopt 'such legislative, administrative or disciplinary measures as may be necessary to suppress' two specified acts, when committed intentionally. Article 21(a) cites any use of cultural property in violation of the *1954 Hague Convention* or the *Second Protocol*. Given that the unlawful use of cultural property under enhanced protection is deemed a serious violation of the *Protocol* in art 15(1)(b), the reference in art 21(a) is to cultural property protected solely by the general provisions regarding protection embodied in ch I of the *Convention* and ch 2 of the *Protocol*. The relevant substantive provisions are arts 4(1) and 4(2) of the former and art 6(b) of the latter.[201] Article 21(b) of the *Protocol* names as the second 'other violation' any illicit export, other removal or transfer of ownership of cultural property from occupied territory in violation of the *Convention* or the *Protocol*. Despite the reference in sub-para (b) to the *Convention*, the only relevant substantive provision is art 9(1)(a) of the *Protocol*. Article 21 would justify, although not require, legislative measures by a party to establish as criminal offences under its domestic law the violations referred to in sub-paras (a) and (b). It would also justify, but not compel, the establishment by a party of universal jurisdiction over the offences in question. The obligation laid down in art 21 of the *Protocol* is declared to be without prejudice to art 28 of the *Convention*.

B *Crimes against Humanity*

The IMT at Nuremberg held that the unlawful destruction and plunder of cultural property in the occupied territories of the East amounted not only to war crimes on a vast scale but also to crimes against humanity,[202] of which several of the German major war criminals, foremost among them plunderer-in-chief Alfred Rosenberg,[203] were found guilty. Over half a century later, a Trial Chamber of the ICTY — quoting from, inter alia, the Nuremberg judgment as it pertained to Rosenberg[204] and the ILC's draft commentary to its *Draft Code of Crimes against the Peace and Security of Mankind* as provisionally adopted at its forty-third session[205] — held in *Blaškić* that the specific crime against humanity

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201 For details as to art 6(b) of the *Second Protocol*, see O'Keefe, *Protection of Cultural Property in Armed Conflict*, above n 35, 256.

202 *Nuremberg Judgment* (1947) 41 *American Journal of International Law* 172, 249.

203 See above n 21.

204 *Blaškić Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 3 March 2000) [228].

205 Ibid [231]. For the text of, and commentary to, the *Draft Code of Crimes* as provisionally adopted, see ILC, *Report of the International Law Commission on the Work of Its Forty-Third Session, 29 April – 19 July 1991*, UN GAOR, 46th sess, Supp No 10, UN Doc A/46/10 ch IV D ('*Draft Code of Crimes against the peace and Security of Mankind*'). For the final text of the *Draft Code of Crimes*, see above n 23.

of 'persecutions on political, racial and religious grounds' recognised in art 5(h) of the *ICTY Statute*[206]

> encompasses not only bodily and mental harm and infringements upon individual freedom but also acts … such as those targeting property, so long as the victimised persons were specially selected on grounds linked to their belonging to a particular community.[207]

The Chamber accepted the prosecution's contention that persecution could take the form of the discriminatory confiscation or destruction of symbolic buildings belonging to the Muslim population of Bosnia-Herzegovina.[208]

Various ICTY Trial Chambers have affirmed, first, that discriminatory destruction of or extensive[209] damage to cultural property can, as a matter of customary international law, amount to persecution as a crime against humanity.[210] The Appeals Chamber has effectively endorsed this position. In *Blaškić*, after quoting the Trial Chamber's finding that the discriminatory destruction of, inter alia, symbolic buildings could constitute persecution as a

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206 See also *ICTR Statute* art 3(h). Although the provision refers conjunctively to persecution on 'political, racial and religious grounds', the ICTY has held that this should be read disjunctively, in accordance with customary international law, so that persecution on any one of these grounds suffices: *Tadić Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) [713]. See also *Nuremberg Charter* art 6(c); *Control Council Law No 10* art II(1)(c); *Rome Statute* art 7(1)(h); *UNTAET Regulation 2000/15*, UNTAET/REG/2000/15, s 5.1(h); *Statute of the Special Court for Sierra Leone* art 2(h); *Iraqi Special Tribunal Statute* art 12(a)(8). Article 5 of the *ECCC Law* refers to 'national, political, ethnical, racial or religious grounds' in the chapeau but to 'political, racial, and religious grounds' in the specific provision on persecutions.

207 *Blaškić Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 3 March 2000) [233]. See also *Tadić Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) [703]–[704], quoting the same passage from the ILC's provisionally adopted commentary on persecution.

208 *Blaškić Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 3 March 2000) [227].

209 *Milutinović Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-05-87-T, 26 February 2009) [207].

210 *Kordić Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14/2-T, 26 February 2001) [207]; *Brđanin Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-99-36-T, 1 September 2004) [1023]; *Plavšić Sentencing Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-00-39&40/1-S, 27 February 2003) [15]; *Prosecutor v Stakić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-97-24-T, 31 July 2003) [768] (destruction of and wilful damage to Bosnian Muslim and Bosnian Croat religious property in Bosnia-Herzegovina); *Prosecutor v Deronjić (Sentencing Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-02-61-S, 30 March 2004) [122] ('*Deronjić Sentencing Judgment*') (destruction of Bosnian Muslim religious property in Bosnia-Herzegovina); *Prosecutor v Babić (Sentencing Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-03-72-S, 29 June 2004) [30]–[31] (destruction of and wilful damage to Croat and other non-Serb cultural institutions, historic monuments and religious property in the Krajina region of Croatia); *Martić Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-95-11-T, 12 June 2007) [119]; *Prosecutor v Krajišnik (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-00-39-T, 27 September 2006) [782]–[783] ('*Krajišnik Trial*') (destruction of and wilful damage to Bosnian Muslim and Bosnian Croat religious property and historic monuments and town centres in Bosnia-Herzegovina); *Milutinović Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-05-87-T, 26 February 2009) [205].

crime against humanity, the Appeals Chamber affirmed that 'the destruction of property, depending on the nature and extent of the destruction, may constitute a crime [against humanity] of persecutions of equal gravity to other crimes listed in Article 5 of the Statute'.[211] In short, as summarised by the Trial Chamber in *Milutinović*, 'the Tribunal's jurisprudence specifically [recognises] destruction of religious sites and cultural monuments as persecution, a crime against humanity',[212] when this destruction is impermissibly discriminatory. This conclusion is in no way contradicted by art 7(1)(h) of the *Rome Statute*, as reproduced verbatim in s 5(1)(h) of *UNTAET Regulation 2000/15* and art 12(a)(8) of the *Iraqi Special Tribunal Statute*, which recognises as a crime against humanity '[p]ersecution against any identifiable group or collectivity … in connection with any [other crime against humanity] or any crime within the jurisdiction of the Court'.[213] Since unlawful destruction of cultural property constitutes a war crime in both international and non-international armed conflict under art 8 of the *Rome Statute*,[214] it can also constitute a crime against humanity under art 7(1)(h). As for other requisite elements of the actus reus of persecution by means of discriminatory destruction of or damage to cultural property, it was stated in the *Milutinović Trial* that the destruction or damage must have resulted from an act directed against the cultural property[215] and must not have been justified by military necessity, the latter implicating, in cases involving attacks, the question whether the property constituted a military objective.[216]

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211 *Blaškić Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14-A, 29 July 2004) [149]. See also *Kordić Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14/2-A, 17 December 2004) [108].

212 *Milutinović Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-05-87-T, 26 February 2009) [205]. Numerous accused are presently on trial for, inter alia, crimes against humanity of this sort: see *Šešelj Third Amended Indictment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-03-67-T, 7 December 2007) [17(j)]; *Prlić Second Amended Indictment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-04-74-T, 11 June 2008) [229]; *Prosecutor v Đorđević (Fourth Amended Indictment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-05-87/1-PT, 9 July 2008) [77(d)]; *Prosecutor v Karadžić (Prosecution's Marked-Up Indictment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-95-5/18-PT, 19 October 2009) [60(j)]; *Prosecutor v Stanišić (Second Amended Consolidated Indictment)*, (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-08-91-PT, 23 November 2009) [26(i)], [27(i)].

213 'Persecution' is defined in the *Rome Statute* art 7(2)(g) to mean 'the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity'. See also, identically, *UNTAET Regulation 2000/15*, UNTAET/REG/2000/15, s 5.2(f); *Iraqi Special Tribunal Statute* art 12(b)(6).

214 In relation to attacks, see *Rome Statute* arts 8(2)(b)(ix) and 8(2)(e)(iv). In relation to other forms of destruction, see arts 8(2)(b)(xiii) and 8(2)(e)(xii).

215 *Milutinović Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-05-87-T, 26 February 2009) [209]. The situation may, at least theoretically, be different under the *Rome Statute*, given that intentionally launching an attack during international armed conflict, in the knowledge that the attack will cause disproportionate incidental damage to cultural property, is a war crime under art 8(2)(b)(iv) of the *Statute*, with the result that the same act, provided it satisfies the other elements of the offence, may also constitute the crime against humanity of persecution.

216 *Milutinović Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-05-87-T, 26 February 2009) [208].

Several ICTY Trial Chambers have similarly held that the plunder of public or private property, if discriminatory, can amount to the crime against humanity of persecution,[217] a ruling which would encompass the plunder of cultural property. In *Blaškić*, on the other hand, the Appeals Chamber, while not referring specifically to cultural property, thought that 'there may be some doubt … as to whether acts of plunder, in and of themselves, may rise to the level of gravity required for crimes against humanity'.[218] It did acknowledge, however, that art 7(1)(h) of the *Rome Statute* was more expansive in this regard.[219] In the subsequent judgment in the *Krajišnik Trial*, the Trial Chamber, referring to the Nuremberg judgment and to the case law of the US Military Tribunal at Nuremberg, concluded that 'an act of appropriation or plunder that has a severe impact on the victim, carried out on discriminatory grounds, and for which the general elements of crimes against humanity are fulfilled, constitutes the crime of persecution'.[220] It is also relevant that in the *Strugar Trial*, in relation to the destruction of cultural property, the Trial Chamber stated not only that 'the victim of the offence at issue is to be understood broadly as a "people", rather than any particular individual', but also that the consequences of the offence for this victim (viz that people) could be said to be grave.[221] As for art 7(1)(h) of the *Rome Statute*, since any seizure of the enemy or other adversary's property not imperatively demanded by the necessities of war constitutes a war crime in both international and non-international armed conflict under art 8 of the *Rome Statute*,[222] and since the same goes for pillaging,[223] these same acts can represent crimes against humanity. In the final analysis, therefore, it is sufficiently clear that the discriminatory plunder of cultural property is capable of constituting under customary international law the crime against humanity of persecution.

As for the grounds of discrimination deemed impermissible in the context of the crime of persecution, while art 5(h) of the *ICTY Statute* restricts itself to political, racial and religious traits, customary international law probably accords with the more expansive approach taken by art 7(1)(h) of the *Rome Statute*, which refers to persecution 'on political, racial, national, ethnic, cultural, religious, gender … or other grounds that are universally recognized as impermissible under international law'.

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217 *Tadić Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) [704]; *Kordić Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14/2-T, 26 February 2001) [205]; *Naletilić Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-34-T, 31 March 2003) [698]. See also *Plavšić Sentencing Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-00-39&40/1-S, 27 February 2003) [15].

218 *Blaškić Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14-A, 29 July 2004) [148].

219 Ibid [148] n 310.

220 *Krajišnik Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-00-39-T, 27 September 2006) [711].

221 *Strugar Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-01-42-T, 31 January 2005) [232].

222 See *Rome Statute* arts 8(2)(b)(xiii), 8(2)(e)(xii) respectively.

223 See ibid arts 8(2)(b)(xvi), 8(2)(e)(v) respectively, as referenced in *Blaškić Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14-A, 29 July 2004) [148] n 310.

Turning to the generic material elements of crimes against humanity, the cardinal feature of such crimes is that they are directed against a civilian population (meaning any civilian population, not just the civilian population of occupied territory).[224] In addition, they must be committed 'as part of a widespread or systematic attack' on that civilian population.[225] In *Kunarac*, the Appeals Chamber of the ICTY made it clear that 'only the attack, not the individual acts of the accused, must be widespread or systematic', so that, 'all other conditions being met, a single or relatively limited number of acts on his or her part would qualify as a crime against humanity, unless those acts may be said to be isolated or random'.[226] This is the case even in relation to the crime against humanity of persecution,[227] including, it would seem, persecution comprising the destruction of cultural property, with the accused in *Deronjić* pleading guilty to, and being duly sentenced in respect of, the crime against humanity of persecution in relation to, inter alia, the destruction of a single mosque.[228] The Appeals Chamber in *Kunarac* also rejected the condition posited by earlier Trial Chambers that crimes against humanity must be committed in pursuance of some sort of policy.[229] It is unclear, however, whether this accords with custom, and it is not the position under the *Rome Statute*.[230]

A state of armed conflict is not a legal precondition to the commission of a crime against humanity.[231] That is, a crime against humanity can be committed

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224 See *Nuremberg Charter* art 6(c); *Control Council Law No 10* art II(1)(c); *ICTY Statute* art 5; *ICTR Statute* art 3; *Rome Statute* art 7(1); *UNTAET Regulation 2000/15*, UNTAET/REG/2000/15, s 5.1; *Iraqi Special Tribunal Statute* art 12(a); *ECCC Law* art 5.

225 *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc S/25704, 13 [48]; *ICTR Statute* art 3; *Draft Code of Crimes*, UN Doc A/51/10, art 18 ('committed in a systematic manner or on a large scale'); *Rome Statute* art 7(1); *UNTAET Regulation 2000/15*, UNTAET/REG/2000/15, s 5.1; *Iraqi Special Tribunal Statute* art 12(a); *ECCC Law* art 5.

226 *Kunarac Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-23 and IT-96-23/1-A, 12 June 2002) [96].

227 See *Prosecutor v Vasiljević (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-32-A, 25 February 2004) [113].

228 See *Deronjić (Sentencing Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-02-61-S, 30 March 2004) Disposition. In this light, there is nothing to prevent the bombing of the al-Askari or Golden Mosque in Samarra, Iraq, in February 2006 — which was part of a systematic attack against the Shi'ite population of the country, which included attacks on other Shi'ite mosques — from being legally characterised as a crime against humanity.

229 *Kunarac Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-23 and IT-96-23/1-A, 12 June 2002) [98]. See also *Prosecutor v Semanza (Judgment)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-97-20-A, 20 May 2005) [269].

230 See the definition of the expression 'attack directed against any civilian population' in *Rome Statute* art 7(2)(a) ('pursuant to or in furtherance of a State or organizational policy to commit such attack'). See also *Iraqi Special Tribunal Statute* art 12(b)(1).

231 *Tadić Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) [713]; *ICTR Statute* art 3; *Draft Code of Crimes*, UN Doc A/51/10, art 18 and [6] of commentary thereto; *Rome Statute* art 7; *UNTAET Regulation 2000/15*, UNTAET/REG/2000/15, s 5.1; *Iraqi Special Tribunal Statute* art 12; *ECCC Law* art 5. While art 5 of the *ICTY Statute* makes the existence of an armed conflict (international or non-international) a condition of a crime against humanity for the purposes of the Tribunal's jurisdiction, it was recognised by the drafters that customary international law was not so restrictive: *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc S/25704, 13 [47].

in time of peace. It is a fortiori immaterial, if crimes against humanity are indeed committed in the context of armed conflict, whether the conflict is international or non-international and whether the crime against humanity has a nexus to it.

The requisite mens rea for a crime against humanity is intent to commit the underlying offence combined with knowledge of the widespread or systematic attack on the civilian population.[232] The latter means that the perpetrator 'knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population'.[233] To satisfy the additional requisite intent of the specific offence of persecution, the accused must have acted with the intent to discriminate on one of the specified grounds.[234] As for persecution specifically in the form of the discriminatory destruction of cultural property, the accused must have intended to destroy or extensively damage the property or have acted in reckless disregard of the likelihood of such destruction or damage.[235]

C *Genocide*

In General Assembly Resolution 96 (I) of 11 December 1946,[236] the member states of the UN affirmed that genocide was a crime under general international law.[237] This affirmation was confirmed in art I of the *Convention on the Prevention and Punishment of the Crime of Genocide*,[238] adopted in 1948, which specifies that genocide is a crime under international law 'whether committed in time of peace or in time of war'.[239] Article II of the *Genocide*

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232 *Kunarac Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-23 & IT-96-23/1-A, 12 June 2002) [102]. See also *Rome Statute* arts 7(1), 30(1); *UNTAET Regulation 2000/15*, UNTAET/REG/2000/15, ss 5.1, 18.1; *Iraqi Special Tribunal Statute* art 12(a).

233 *ICC Elements of Crimes* art 7(1)(a) [3]. But art 7 'Introduction' [2] states that

> this should not be interpreted as requiring proof that the perpetrator had knowledge of all the characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.

See also *Kunarac Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-23 & IT-96-23/1-A, 12 June 2002) [102].

234 *Prosecutor v Tadić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) [305].

235 *Milutinović Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-05-87-T, 26 February 2009) [206], [210].

236 *The Crime of Genocide*, GA Res 96 (I), UN GAOR, 1st sess, 55th mtg, UN Doc A/RES/96(I) (11 December 1946).

237 The word 'affirmed' is rhetorical, since the genocidal acts of Nazi Germany were prosecuted after the Second World War by both the IMT and the US Military Tribunals at Nuremberg as a species of crime against humanity, not as the crime of genocide as such. Moreover, only those genocidal acts committed after the outbreak of the war were prosecuted.

238 Opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) ('*Genocide Convention*').

239 A fortiori, it is immaterial whether the commission of genocide in wartime is in international or non-international armed conflict.

Convention defines the international crime of genocide as

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical [sic], racial or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.

Draft versions of the *Genocide Convention* had encompassed the concept of 'cultural genocide'. This referred, in the earliest draft, to '[s]ystematic destruction of historical or religious monuments or their diversion to alien uses' and 'destruction or dispers[al] of documents and objects of historical, artistic, or religious value and of objects used in religious worship'.[240] A later version spoke of '[d]estroying … libraries, museums, schools, historical monuments, places of worship and other cultural institutions and objects of the group' with the intent to destroy the culture of that group.[241] But the concept of cultural genocide was rejected by the Sixth Committee of the General Assembly,[242] which prepared the final text of the *Genocide Convention* as eventually adopted by the Assembly in plenary.

In *Reservations to the Convention on Genocide*,[243] the International Court of Justice stated that the principles of the *Genocide Convention* 'are principles which are recognized by civilized nations as binding on States, even without any conventional obligation',[244] a statement which applied as much to the definition of the crime as to the obligations arising for states. The definition laid down in art II of the *Genocide Convention* was subsequently reproduced verbatim in art 4(2) of the *ICTY Statute*, the UN Secretary-General having taken the view that the *Genocide Convention*'s definition of genocide accorded with customary international law,[245] and in art 2(2) of the *ICTR Statute*. It was again restated unamended in art 17 of the *Draft Code of Crimes*, as finally adopted by the ILC

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240 *Draft Convention on the Crime of Genocide*, UN ESCOR, UN Doc E/447 (26 June 1947) pt I ('*Draft Convention for the Prevention and Punishment of Genocide*') art I(II)(3)(e).

241 Ad Hoc Committee on Genocide, *Report of the Committee and Draft Convention Drawn Up by the Committee*, UN ESCOR, UN Doc E/794 (24 May 1948) annex ('*Draft Convention on the Prevention and Punishment of the Crime of Genocide*') art III(2) .

242 Many delegates to the Sixth Committee opposed, in the words of the South African representative, 'any attempt to destroy the cultural heritage of a group or to prevent a group from making its specific contribution to the cultural heritage of mankind'. But they equally thought that a convention on genocide was not the place to express this opposition: *Eighty-Third Meeting, Held at Palais de Chaillot, Paris, on Monday, 25 October 1948*, UN GAOR, 6th Comm, 3rd sess, UN Doc A/C.6/SR.83 (25 October 1948) 202. In the event, the motion to remove reference to cultural genocide was carried 25 to 16, with four abstentions and 13 delegations absent during the vote: 206.

243 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep 15 ('*Reservations to the Convention on Genocide*').

244 Ibid 23. See also *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda) (Jurisdiction and Admissibility)* [2006] ICJ Rep, 6, 31 [64].

245 *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)* UN Doc S/25704, 12 [45], citing *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* [1951] ICJ Rep 15, 23.

in 1996. Paragraph 12 of the commentary to art 17 of the *Draft Code* explicitly dismisses the concept of 'cultural genocide':

> As clearly shown by the preparatory work for the Convention, the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group. The national or religious element and the racial or ethnic element are not taken into consideration in the definition of the word 'destruction', which must be taken only in its material sense, its physical or biological sense. It is true that the 1947 draft Convention prepared by the Secretary-General and the 1948 draft prepared by the *Ad Hoc* Committee on Genocide contained provisions on 'cultural genocide' covering any deliberate act committed with the intent to destroy the language, religion or culture of a group, such as prohibiting the use of the language of the group in daily intercourse or in schools or the printing and circulation of publications in the language of the group or destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group. However, the text of the Convention, as prepared by the Sixth Committee and adopted by the General Assembly, did not include the concept of 'cultural genocide' contained in the two drafts and simply listed acts which come within the category of 'physical' or 'biological' genocide. The first three subparagraphs of the present article list acts of 'physical genocide', while the last two list acts of 'biological genocide'.[246]

Three years later, art 6 of the *Rome Statute* again reproduced word for word the definition of genocide used in art II of the *Genocide Convention*.[247] Never at any point during the proceedings of the Ad Hoc Committee on the Establishment of an International Criminal Court, the Preparatory Committee on the Establishment of an International Criminal Court or the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court was it proposed to widen the definition of genocide to embrace the concept of 'cultural genocide'.

The idea of cultural genocide was explicitly rejected once more by a Trial Chamber of the ICTY in *Krstić*. Recalling the drafting of the *Genocide Convention* and the view of the ILC, the Tribunal concluded that 'customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group', with the

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246 *Report of the International Law Commission on the Work of Its Forty-Eighth Session*, UN Doc A/51/10, 90–1 (citations omitted).

247 See also *UNTAET Regulation 2000/15*, UNTAET/REG/2000/15, s 4; *Iraqi Special Tribunal Statute* art 11; *ECCC Law* art 4.

consequence that

> an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide.[248]

But the Tribunal added a rider:

> The Trial Chamber however points out that where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group. In this case, the Trial Chamber will thus take into account as evidence of intent to destroy the group the deliberate destruction of mosques and houses belonging to members of the group.[249]

The Appeals Chamber subsequently affirmed that the conventional definition of genocide represented customary international law[250] and that the Trial Chamber had 'correctly identified the governing legal principle'.[251] In his partial dissenting opinion, Judge Shahabuddeen, accepting that the notion of 'cultural genocide' fell outside the actus reus of genocide as defined by customary international law, nonetheless emphasised what the Trial Chamber had suggested in its rider, namely that '[t]he destruction of culture may serve evidentially to confirm an intent, to be gathered from other circumstances, to destroy the group as such'.[252] In *Krstić* itself, 'the razing of the principal mosque confirm[ed] an intent to destroy the Srebrenica part of the Bosnian Muslim group'.[253]

The rejection of cultural genocide as an international legal concept was whole-heartedly endorsed by the ICJ in *Application of the Genocide Convention*:

> [I]n the Court's view, the destruction of historical, cultural and religious heritage cannot be considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group. Although such destruction may be highly significant inasmuch as it is directed to the elimination of all traces of the cultural or religious presence of a group, and contrary to other legal norms, it does not fall within the categories of acts of genocide set out in Article II of the Convention. In this regard, the Court observes that, during its consideration of the draft text of the Convention, the Sixth Committee of the General Assembly decided not to include cultural genocide in the list of punishable acts. Moreover, the ILC subsequently confirmed this approach … Furthermore, the ICTY took a similar view in the *Krstić* case, finding that even in customary law, 'despite recent developments', the definition of acts of genocide is limited to those seeking the physical or biological destruction of a group. The Court concludes that the destruction of historical, religious and

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248 *Prosecutor v Krstić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-33-T, 2 August 2001) [580].

249 Ibid.

250 *Prosecutor v Krstić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-33-A, 19 April 2004) [25].

251 Ibid [26].

252 Ibid [53] (Partial Dissenting Opinion of Judge Shahabuddeen).

253 Ibid.

> cultural heritage cannot be considered to be a genocidal act within the meaning of Article II of the Genocide Convention.[254]

The ICJ added, however:

> At the same time, [the Court] also endorses the observation made in the *Krstić* case that 'where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group'.[255]

In the light of the ICJ's statements, these principles seem set in stone.

III SENTENCING

When it comes to sentencing in respect of war crimes and crimes against humanity against cultural property, the ICTY Trial Chamber in *Strugar*, relating to the attack on the Old Town of Dubrovnik, noted — citing art 1(a) of the *1954 Hague Convention* — 'that such property is, by definition, of "great importance to the cultural heritage of [a] people"', with the consequence that 'the victim of the offence at issue is to be understood broadly as a "people", rather than any particular individual'.[256] Moreover, the Trial Chamber continued, the consequences of the offence for this victim could be said to be grave.257 Similarly, in Krajišnik, relating to the destruction of religious and other cultural property in Bosnia-Herzegovina, including the Alidža mosque in Foča (dating from 1550) and the Arnaudija mosque in Banja Luka (built in 1594), the Trial Chamber held that sentencing in respect of such crimes may take into account the social consequences of the destruction of the relevant religious and cultural monuments for the targeted community.[258] Nor is it only the local or national community whose interests may be acknowledged. In the Sentencing Judgment in *Jokić*, also relating to the attack on Dubrovnik, the Trial Chamber referred to the war crime of destroying or wilfully damaging historic monuments and works of art as 'a violation of values especially protected by the international community',[259] and stated that any sentence in the case before it had to acknowledge that the attack on the Old Town of Dubrovnik was an attack 'against the cultural heritage of humankind'.[260] The presence of the Old Town

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254 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Merits)* [2007] ICJ Rep 4, 124 [344] (citations omitted).

255 Ibid.

256 *Strugar Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-01-42-T, 31 January 2005) [232] (citations omitted).

257 Ibid.

258 *Krajišnik Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-00-39-T, 27 September 2006) [1148]. The first mosque referred to is also known as the Aladža Mosque, the Coloured Mosque and the Mosque of Hasan Nazir.

259 *Jokić Sentencing Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-01-42/1-S, 18 March 2004) [46].

260 Ibid [51]. Recall also, in this regard, the preamble (second recital) to the *1954 Hague Convention*, which expresses the conviction of the High Contracting Parties that 'damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world'.

on the World Heritage List[261] appeared to add to the gravity of the offence in both *Strugar* and *Jokić*,[262] with the Trial Chamber in *Jokić* drawing attention to the statement in the preamble to the *World Heritage Convention* that 'deterioration or disappearance of any item of the cultural … heritage constitutes a harmful impoverishment of the heritage of all the nations of the world'.[263] The latter Chamber further observed, more prosaically, that, 'since it is a serious violation of international humanitarian law to attack civilian buildings, it is a crime of even greater seriousness to direct an attack on an especially protected site, such as the Old Town, constituted of civilian buildings'.[264] For its part, the Trial Chamber in the *Plavšić Sentencing Judgment*, a case involving much the same cultural property as *Krajišnik*, went beyond textual indicators and abstract considerations to take into account the historical and architectural significance of the specific cultural property destroyed:

> Some of these monuments … dated from the Middle Ages. They were, quite obviously, culturally, historically and regionally significant sites. As one example, the Prosecution referred to the wanton destruction of the Alidža mosque in Foča, which had been in existence since the year 1550. According to the witness, this mosque was a 'pearl amongst the cultural heritage in this part of Europe'.[265]

For these and other reasons, the Tribunal concluded that the accused was guilty of 'a crime of the utmost gravity'.[266] Additionally, the Trial Chamber in *Jokić* considered relevant to the sentence to be imposed for the criminal destruction or damage of cultural property the fact that

> [r]estoration of buildings of this kind, when possible, can never return the buildings to their state prior to the attack because a certain amount of original, historically authentic, material will have been destroyed, thus affecting the inherent value of the buildings.[267]

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261 See *World Heritage Convention* art 11(2).

262 *Strugar Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-01-42-T, 31 January 2005) [461]; *Jokić Sentencing Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-01-42/1-S, 18 March 2004) [49], [66]–[67].

263 *Jokić Sentencing Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-01-42/1-S, 18 March 2004) [49] (emphasis altered). This preambular statement extends to all elements of the cultural heritage, not just (as the Trial Chamber seems to suggest) to those inscribed on the World Heritage List. That said, the latter are defined, in accordance with art 1 of the *World Heritage Convention*, to be 'of outstanding universal value from the point of view of history, art or science', with the consequence that their destruction ought to weigh particularly heavily in the balance. Consider also the cultural property protected under the regime of 'enhanced protection' laid down in ch 3 of the *Second Protocol*, which is defined in art 10(a) as 'cultural heritage of the greatest importance for humanity'.

264 *Jokić Sentencing Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-01-42/1-S, 18 March 2004) [53].

265 *Plavšić Sentencing Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber , Case No IT-00-39&40/1-S, 27 February 2003) [44] (citations omitted).

266 Ibid [52].

267 *Jokić Sentencing Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-01-42/1-S, 18 March 2004) [52].

Finally, and more mundanely, the extent of the damage weighed against the accused in both *Jokić* and *Strugar*.[268]

IV CONCLUSION

One upshot of the destruction of the Buddhas of Bamiyan in 2001 was the UNESCO *Declaration concerning the Intentional Destruction of Cultural Heritage*,[269] adopted by the Organization's General Conference in 2003 and welcomed by the UN General Assembly.[270] 'Reiterating … that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world"', '[m]indful of the development of rules of customary international law, as also affirmed by the relevant case-law, related to the protection of cultural heritage in peacetime as well as in the event of armed conflict' and

> recalling Articles 8(2)(b)(ix) and 8(2)(e)(iv) of the Rome Statute of the International Criminal Court, and, as appropriate, Article 3(d) of the Statute of the International Criminal Tribunal for the former Yugoslavia, related to the intentional destruction of cultural heritage,[271]

the General Conference resolved that states

> should take all appropriate measures, in accordance with international law, to establish jurisdiction over, and provide effective criminal sanctions against, those persons who commit, or order to be committed, acts of intentional destruction of cultural heritage of great importance for humanity, whether or not it is inscribed on a list maintained by UNESCO or another international organization;[272]

and that,

> [f]or the purposes of more comprehensive protection, each State is encouraged to take all appropriate measures, in accordance with international law, to cooperate with other States concerned with a view to establishing jurisdiction over, and providing effective criminal sanctions against, those persons who have committed or have ordered to be committed acts referred to above … and who are found present on its territory, regardless of their nationality and the place where such act occurred.[273]

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268 Ibid [53]; *Strugar Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-01-42-T, 31 January 2005) [461].

269 *Records of the General Conference, 32nd Session, Paris, 29 September to 17 October 2003, vol 1 Resolutions* (UNESCO Doc 32 C/Resolutions, UNESCO, 29 September to 17 October 2003, Resolution 32 C/Res 33) resolution 33 ('*Declaration concerning the Intentional destruction of Cultural Heritage*'). The Director-General of UNESCO stated that the then-proposed Declaration 'would not be intended to create obligations for States, but would restate the fundamental principles of the existing legal instruments': *Acts constituting 'A Crime against the Common Heritage of Humanity'* (UNESCO Doc 31C/46, UNESCO, 12 September 2001) 3 [6](c).

270 See *Return or Restitution of Cultural Property to the Countries of Origin*, GA Res 58/17, UN GAOR, 58th sess, 68th plen mtg, Agenda Item 43, UN Doc A/RES/58/17 (3 December 2003) [3].

271 *Declaration concerning the Intentional Destruction of Cultural Heritage*, preamble, quoting from the preamble to the *1954 Hague Convention*.

272 Ibid [VII].

273 Ibid [VIII](2), referring to the acts mentioned in [VII].

These hortatory statements attest to what states see as the central role to be played by international criminal law, chiefly in the form of the law of war crimes and crimes against humanity, in the protection of cultural property from destruction and damage and from all forms of misappropriation. Of course, punishment ex post facto in accordance with international law cannot bring destroyed or plundered cultural treasures back or restore those damaged by intentional and unnecessary acts of violence.[274] One can only hope that it serves to deter future barbarism of this sort,[275] as well as going some way to rebalancing the scales of justice and affirming the collective interest in the preservation of the cultural heritage of humankind.

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274 That said, note the provision for reparations to victims, including restitution, compensation and rehabilitation, in art 75 of the *Rome Statute*. Under r 85(b) of the International Criminal Court, *Rules of Procedure and Evidence*, Doc ICC-ASP/1/3 (adopted 9 September 2002), 'victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science … and to their historic monuments'.

275 It has to be acknowledged that the deterrent value of international criminal law remains an open question.