



From the SelectedWorks of Ana Filipa Vrdoljak

January 2009

Cultural Heritage in Human Rights and Humanitarian Law

Contact
Author

Start Your Own
SelectedWorks

Notify Me
of New Work

Available at: http://works.bepress.com/ana_filipa_vrdoljak/15

Cultural Heritage in Human Rights and Humanitarian Law

Ana Filipa Vrdoljak

The exceptionalism originally afforded cultural heritage in international humanitarian law arose from its perceived significance to humanity through its advancement of the arts and sciences, and knowledge. By the mid-twentieth century, and the rise of human rights in international law, this rationale was recalibrated to emphasise its importance to the enjoyment of human rights and promotion of cultural diversity. This shift in rationale manifested itself most clearly in the articulation and prosecution of war crimes, crimes against humanity and genocide. Cultural heritage and its protection was no longer based on its exclusivity but its intrinsic importance to people and individuals, to their identity and their enjoyment of their human rights.

In examining the protection of cultural heritage in this chapter, I focus on this shifting rationale to highlight the ever-present interplay and interdependence between international humanitarian law and human rights law. First, I outline the exceptional treatment of cultural heritage in general international humanitarian law instruments, and its overlap with international human rights law. Then, I detail how this protection has been built upon by the specialist regime for the protection of cultural heritage during armed conflict and belligerent occupation developed under the auspices of UNESCO. Next, I analyse international criminal law jurisprudence from the International Military Tribunal, Nuremberg to the International Criminal Court for the former Yugoslavia, to show how efforts to prosecute violations of the laws and customs of war relating to cultural heritage have been intrinsic to the articulation and prosecution of crimes against humanity and genocide. Finally, I consider the evolving and potential future normative trends in this field in the light of recent developments.

Cultural Heritage in Human Rights and Humanitarian Law

*Ana Filipa Vrdoljak**

1. Introduction

The public outcry in response to the looting of the Baghdad Museum following the 2003 invasion of Iraq and the bombardment of the historic city of Dubrovnik in 1991 are contemporary examples of international condemnation of attacks upon cultural heritage during armed conflict and belligerent occupation. This international concern has manifested itself since the earliest codification of the laws of war which provided cultural heritage with a protection regime distinct from other civilian property, and stated categorically that violations shall be subject to legal sanctions. These general international humanitarian law instruments are augmented by a specialist multilateral framework which governs the protection of the cultural heritage in preparation for armed conflict, during armed conflict and belligerent occupation. International humanitarian law was the first specialist field within international law to afford cultural heritage such exceptionalism. The rationale underlining this protection – its importance to all humanity – has evolved and spread beyond armed conflict and belligerent occupation.

The exceptionalism originally afforded cultural heritage in international humanitarian law arose from its perceived significance to humanity through its advancement of the arts and sciences, and knowledge. By the mid-twentieth century, and the rise of human rights in international law, this rationale was recalibrated to emphasise its importance to the enjoyment of human rights and promotion of cultural diversity. This shift in rationale manifested itself most clearly in the articulation and prosecution of war crimes, crimes against humanity and genocide. Cultural heritage and its protection was no longer based on its exclusivity but its intrinsic importance to people and individuals, to their identity and their enjoyment of their human rights. It has become fundamental in establishing cases of violations of international

* Associate Professor, Faculty of Law, University of Western Australia, Perth, Australia. I am grateful for the funding provided for this project by the European Commission's Marie Curie FP6 Action (No.MIF1-CT-2006-021861) hosted by the Law Department, European University Institute, Fiesole, Italy.

humanitarian law and international criminal law, and assessing the claims of victims of gross violations of human rights. Furthermore, this shift in rationale has been reinforced with a broadening notion of cultural heritage in the late twentieth century. No longer confined to tangible heritage like monuments, sites and works of art of exceptional importance to all humanity, cultural heritage encompasses the intangible and the ephemeral, like language, traditional knowledge, songs, dance, deemed significant by a group (not necessarily a state).

In examining the protection of cultural heritage in this chapter, I focus on this shifting rationale to highlight the ever-present interplay and interdependence between international humanitarian law and human rights law. First, I outline the exceptional treatment of cultural heritage in general international humanitarian law instruments including those covering non-international armed conflicts, and its overlap with international human rights law. Then, I detail how this protection has been built upon by the specialist regime for the protection of cultural heritage during armed conflict and belligerent occupation developed under the auspices of UNESCO. Next, I analyse international criminal law jurisprudence from the International Military Tribunal, Nuremberg to the International Criminal Court for the former Yugoslavia, to show how efforts to prosecute violations of the laws and customs of war relating to cultural heritage have been intrinsic to the articulation and prosecution of crimes against humanity and genocide. Finally, I consider the evolving and potential future normative trends in this field in the light of recent developments with reference to obligations *erga omnes*, intentional destruction and the content of the obligation, and intangible heritage and cultural diversity.

2. International humanitarian law and cultural heritage

From the nineteenth century codification efforts to humanise the laws of war, international humanitarian law have bestowed singular treatment upon cultural heritage. It has afforded it protection over and above other civilian property and pronounced explicitly that violations of such obligations should be subject to legal sanctions. While these protective and punitive strands would be elaborated by international cultural heritage law and international criminal law, which I examine in Parts 3 and 4 respectively below, this basic feature remains intact in contemporary international humanitarian law.

As the reach of international humanitarian law was extended to non-international conflicts with the emergence of human rights in international law, the provisions relating to cultural heritage were likewise extended. This development together with the recalibration of other international humanitarian law and human rights provisions has reinforced the interdependence of the protection of cultural heritage (tangible and intangible) and the effective enjoyment of human rights by individuals and groups.

A *Early developments*

Philosophers and scholars since antiquity have condemned attacks on sacred places and ceremonial objects.¹ This prohibition traversed cultures and religious traditions.² While Hugo Grotius wrote in 1625 that: '[T]he law of nations in itself [did] not exempt things that are sacred, that is, things dedicated to God or to the gods ... in a public war anyone at all becomes owner, without limit or restriction, of what he has taken from the enemy'.³ The practice of states from the Treaty of Westphalia of 1648 onwards, evidenced peace treaties which implicitly condemned pillage by sanctioning the return of plunder.⁴ With the rise of humanism during this period, the rationale of exceptionalism was gradually secularised with historic monuments and sites, and

¹ See A. Gentili, *De Juris Belli Libri Tres*, trans. F. W. Kelse, (1598, reprinted 1933), Book III, chapter 6, at 313-14; De Visscher, 'International Protection of Works of Art and Historic Monuments', in: Department of State Publication 3590, International Information and Cultural Series 8, reprinted in Documents and State Papers, June 1949, 821, at 823-825; Nahlik, 'Protection internationale des biens culturels en cas de conflit armé', 120 RCADI (1967-I), 61; J. 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*, (1996), at 3-7; and R. O'Keefe, *The Protection of Cultural Property in Armed Conflict* (2006), at 5-13.

² A. Ndam Njoya, The African Concept, in UNESCO, *International Dimensions of Humanitarian Law*, (1988), at 8; S. Adachi, The Asian Concept, at 16; and H. Sultan, The Islamic Concept, at 38.

³ *De Jure Belli Ac Pacis* (The Law of War and Peace), (1625) Book III, chapter 1, §4.

⁴ Nahlik, *supra* note 1 at 77. In particular, the Congress of Vienna of 1815 following the defeat of Napoleon: Müntz, 'Les annexions de collections d'art ou de bibliothèques et leur rôle dans les relations internationales', 8 *Revue d'histoire diplomatique* (1895) 481, and 9 *Revue d'histoire diplomatique* (1895); W. Treue, *Art Plunder: The Fate of Art in War and Unrest*, trans. B. Creighton (1961), at 186-99; and A. F. Vrdoljak, *International Law, Museums and the Return of Cultural Objects*, (2006), at 23-29.

works of art and science protected because of their aesthetic beauty and scientific significance and not simply their religious importance.⁵

Writing during the Enlightenment, Emer de Vattel argued that certain buildings, sites and objects ‘of remarkable beauty’ which were ‘an honour to the human race and which do not add to the strength of the enemy’ should be spared. He asked: ‘What is gained by destroying them? It is the act of a declared enemy of the human race thus wantonly to deprive men of these monuments of art and models of architecture.’⁶ Working during the same period, Jean-Jacques Rousseau likewise maintained that private property of civilians and public property not serving a direct military purpose, like places of worship or education and libraries, collections and laboratories should be quarantined from hostilities. He wrote: ‘War ... is not a relation between men, but between states; in war individuals are enemies wholly by chance, not as men, not even as citizens, but only as soldiers; not as members of their country, but only as its defenders’.⁷ This rationale of protecting certain cultural heritage of importance to humanity because of its significance to the arts and sciences, and the distinction made between private and public property figured prominently in the nineteenth century efforts to humanise and codify the rules of war at the international level.

The perceived exceptional nature of certain cultural heritage compared to other property manifested itself from the first codification initiatives in the mid-nineteenth century. The Instructions for the Government of Armies of the United States in the Field prepared by Francis Lieber (Lieber Code), promulgated as General Order No.100 by President Abraham Lincoln in 1863 during the US Civil War made the distinction between private and public property.⁸ Article 34 provided that ‘as a

⁵ J. Przyhuski, *Leges seu statuta ac privilegia Regni Poloniae* (1553), at 875 cited in Nahlik, *supra* note 1, at 73, and Toman, *supra* note 1, at 4; and J. Gentilis, *Dissertatio de eo quod in bello licet* (1690), at 21, cited in Nahlik, *supra* note 1, at 75.

⁶ E. de Vattel, *Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains*, (1758, reprinted 1916), Book 3, Chapter 9, §168. See also §173.

⁷ J.-J. Rousseau, *The Social Contract*, (1762, reprinted 1968), at 56-57.

⁸ Prepared by Francis Lieber and promulgated as General Order No.100 by President Lincoln, 24 April 1863, reproduced in D. Schindler and J. Toman (eds), *The Laws of Armed Conflict. A Collection of Conventions, Resolutions and Other Documents*, (4th revised and completed edn, 2004), at 3.

general rule' the property of churches, hospitals, charitable organisations, places of education and learning, museums of fine arts or science were deemed to be private property. During hostilities, 'classical works of art, libraries, scientific collections of precious instruments, such as astronomical telescopes, as well as hospitals' were to be protected against 'all avoidable injury' even if located in fortified areas (Article 35). Yet, it also provided that if such property of the enemy could be removed 'without injury', the ruler of the conquering force could order its seizure with ownership to be settled by the subsequent peace treaty. However, Article 36 also stated that: 'In no case shall they be sold or given away, if captured by the armies of the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured.' This provision would find little support in later codification of international humanitarian law which strictly forbade pillage either during hostilities or belligerent occupation. In 1868, Johann Caspar Bluntschli noted that while custom at the start of the century did not support the protection of cultural heritage during armed conflict, popular opinion increasingly viewed it as vandalism of 'eternal monuments to the peaceful development of nations', with no direct benefit to the warring parties.⁹

Public outcry at the destruction of Strasbourg's cathedral and library during the Franco-Prussian War of 1870-1871 precipitated in part the international conference instigated by Jean Henri Dunant, the founder of the International Committee of the Red Cross, in mid-1874.¹⁰ It resulted in the International Regulations on the Laws and Customs of War (Brussels Declaration), which although it never came into force, prefigured many elements which characterise protection of cultural heritage in contemporary international humanitarian law.¹¹ It provided that during belligerent occupation the property of municipalities and 'institutions dedicated to religion, charity and education, the arts and sciences even when State property' were to be treated as private property. The destruction, damage or seizure of these institutions, historic monuments or works of art and science were to be prosecuted by competent authorities (Article 8). The more general term – 'religious'

⁹ Reprinted as J.-G. Bluntschli, *Le droit international codifié* (1895), at 602.

¹⁰ G. Rolin-Jaequemyns, 'Essai complémentaire sur la guerre franco-allemande dans ses rapports avec le droit international', 2 *Revue de droit international* (1871) 288, at 302.

¹¹ International Declaration concerning the Laws and Customs of War, 27 August 1874, not ratified, 1(supp.) *AJIL* (1907), at 96; and Schindler and Toman, *supra* note 8, at 21.

buildings – was used at the behest of the Turkish delegation.¹² During bombardment and sieges, a commander was required to take ‘necessary steps ... to spare, as far as possible’ buildings dedicated to art, science, charitable purposes, and hospitals and where the wounded were housed as long as it is not being used at the time for military purposes (Article 17). However, the besieged were obliged to indicate the presence of such buildings by ‘distinctive and visible signs communicated to other combatants’ beforehand. In contrast to the Lieber Code, it prohibited conquering troops pillaging towns that had fallen under their control (Article 18).

The Laws of War on Land (Oxford Manual) adopted by the *Institut de droit international* on 9 September 1880 deliberately reflected the provisions of the Brussels Declaration ‘not [seeking] innovations [but] content[ing] itself with stating clearly and codifying the accepted ideas of our age so far as this has appeared allowable and practicable’.¹³

B 1899 Hague II and 1907 Hague IV Conventions and Regulations

The first binding international obligations for the protection of cultural heritage related to the rules of war emerged from the series of international conferences held at The Hague in 1899 and 1907.¹⁴ Convention (II) with Respect to the Laws and Customs of War on Land and Annex, adopted in 1899 (1899 Hague II Convention) and Convention (IV) respecting the Laws and Customs of War on Land, adopted in 1907 (1907 Hague IV Convention) are only applicable in respect of international armed conflict and if all belligerents are party to the treaty.¹⁵ Nonetheless, the International Military Tribunal at Nuremberg found that by 1939, the

¹² See Toman, *supra* note 1, at 9.

¹³ Preface to Institut de droit international, ‘Les lois de la guerre sur terre. Manuel publié par l’Institut de droit international’, 5 *Annuaire de l’Institut de Droit International* (1881-82) 157; and Schindler and Toman, *supra* note 8, at 29, in particular see Articles 32, 34 and 53.

¹⁴ See Huber, ‘La propriété publique en cas de guerre sur terre’, *Revue Générale de Droit International Public*, (1913), at 657.

¹⁵ Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 29 July 1899, in force 4 September 1900, 187 *Parry’s CTS* (1898–99) 429, 1(supp.) *AJIL* (1907) 129; and Schindler and Toman, *supra* note 8, at 55; and Convention (IV) respecting the Laws and Customs of War on Land, and Annex, The Hague, 18 October 1907, in force 26 January 1910, 208 *Parry’s CTS* (1907) 77, 2(supp.) *AJIL* (1908) 90; and Schindler and Toman, *supra* note 8, at 55. See also Convention (IX) concerning Bombardment by Naval Forces in Time of War, 18 October 1907, in force 26 January 1910, in Schindler and Toman, *supra* note 8, at 1087, in which Article 4 equivalent to Article 27 of 1907 Hague IV Regulations.

regulations (Hague Regulations) annexed to these conventions were ‘recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war’.¹⁶ The International Court of Justice,¹⁷ and the International Criminal Tribunal for the former Yugoslavia (ICTY) have recognised and reaffirmed that these obligations form part of customary international law, that is, binding even on non-states parties.¹⁸

The 1907 Hague IV Convention in its preamble makes reference to its predecessor, the 1899 Hague II Convention and the 1874 Brussels Declaration.¹⁹ It also notes that until a ‘more complete code of the laws of war’ was agreed upon in those instances falling outside the Convention, civilians and combatants remained protected by international law principles ‘result[ing] from the usages established between civilized peoples, from the laws of humanity, and the requirements of the public conscience’.²⁰ In addition to the general provisions relating to the protection of civilian property, the regulations contain specialist provisions covering cultural property during siege and bombardment (Article 27) and belligerent occupation (Article 56).

During hostilities, ‘all necessary steps should be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected’ as long as they are not used for military purposes, marked with the distinctive sign, and notified to the enemy (Article 27). This provision covers immovable heritage, with movables only protected if housed within such buildings. The inclusion of the term

¹⁶ *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946*, (42 vols, 1947-1949), vol.I, at 253-254; and 41 *AJIL* (1947) 172, at 248-249.

¹⁷ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports (1996) 226, at 256; and *Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports (2004) 136, at 172.

¹⁸ *Prosecutor v. Dario Kordić and Mario Čerkez*, Trial Judgment, No.IT-95-14/2-T, ICTY (26 February 2001), paras.359-62; and *Prosecutor v. Miodrag Jokić*, Trial Judgment, Case No.IT-01-42/1-S, Trial Chamber I, ICTY, (18 March 2004), para.48.

¹⁹ Fourth preambular recital, 1907 Hague IV Convention, *supra* note 15. See also Russian Circular Note proposing program of the first conference dated 30 December 1889, reprinted in: J. Brown Scott, *The Hague Conventions and Declarations of 1899 and 1907 accompanied by Tables of Signatures, Ratifications, and Adhesions of the Various Powers and Texts of Reservations*, (3rd edn, 1918), at xviii.

²⁰ Eighth preambular recital, 1907 Hague IV Convention, *ibid.*

‘historic monuments’ was made at the request of the Greek delegation to align the *ratione materiae* more closely with Article 56.²¹ Pillage is prohibited during hostilities and belligerent occupation (Articles 28 and 47).

During occupation, the ‘property of the communes, that of religious, charitable, and educational institutions, and those of arts and science’, even if public property, is accorded protection as private property with no proviso made for military necessity. Destruction, intentional damage or seizure perpetrated against these institutions, historical monuments, works of art or science, is forbidden and violations are to be made subject to legal proceedings (Article 56). The more neutral term – ‘religious’ buildings – was deliberately used rather than ‘churches’.²² Charles de Visscher noted this immunity covered not only immovable and movable property of these institutions but also their assets including funds and security.²³ He added that it was granted because these objects and sites were ‘dedicated to an ideal purpose.’²⁴

Finally, the Hague Regulations requirement that the occupying power take all measures they are able to return public order and safety ‘while respecting, unless absolutely prevented, the laws in force in the country’ necessarily relates to legislation covering cultural heritage (Article 43).²⁵ The International Court of Justice has stated that this duty meant that an occupying power could be held responsible not only for its own acts and omissions but also for failing to prevent others on that territory violating human rights and international humanitarian law.²⁶ However, during hostilities, they would only be liable for the acts and omissions of their own forces.

²¹ De Visscher, *supra* note 1 at 837. See Nahlik, ‘Protection of Cultural Property’, in UNESCO, *supra* note 2, at 205; and Nahlik, *supra* note 1, at 93-94.

²² A. Rolin, *Le droit moderne de la guerre* (1920), vol.1, §§535-540.

²³ De Visscher, *supra* note 1, at 828 citing the report of Baron Rolin Jaequemyns which stated that this provision circumscribed the power of the occupant ‘apply *a fortiori* to the invader during the period preceding the establishment of regular occupation’ (footnote 26).

²⁴ *Ibid.*

²⁵ 1907 Hague IV Convention, *supra* note 15. Cf. Article 43, 1899 Hague II Convention.

²⁶ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, No.116, 19 December 2005, at 60.

C ***1923 Hague Air Rules***

The Hague Regulations remain the essence of the protection afforded cultural property in international humanitarian law to date. However, the lacunae in this protection and lack of implementation during the First World War drew attention to the need for the regime to be strengthened.²⁷ There were various efforts on this front during the course of the conflict. A draft international convention was prepared by Ernst Zitelmann in the wake of a conference held between Austrian, German and Swiss legal scholars in early 1915.²⁸ It proposed the establishment of an international administration in Bern to maintain lists of monuments protected during armed conflict and occupation, with protection only being granted following acknowledgment of such status by the belligerents.²⁹

In 1918, the *Nederlandsche Oudheidkundige Bond* (Netherlands Archaeological Society or NOB) circulated a report which stated that damage to monuments and cultural objects impacted upon not only their owners and relevant states but also ‘humanity as a whole’.³⁰ It recommended the establishment of demilitarised zones around monuments and sites of cultural significance, giving them ‘international status’ and placing an obligation on the host state to ensure that they were not used for a military purpose.³¹ Under this proposal, an occupying power had to positively protect monuments and sites, and cooperate with the local authorities to these ends. Significantly, states would undertake preparation during peacetime for the protection of cultural property during war.³² Like the German-Swiss initiative, it too recommended the establishment of an international office to oversee compliance and oversight by neutrals. However, it made no conclusions regarding criminal

²⁷ Berlia, ‘Report on the International Protection of Cultural Property by Penal Measures in the Event of Armed Conflict’, 8 March 1950 UNESCO Doc.5C/PRG/6, Annex I, at 3-4.

²⁸ Jerusalem, ‘Monuments of Art in War-Time and International Law’, in P. Clemen (ed.), *Protection of Art During War and the German and Austrian Measures Taken for their Preservation, Rescue and Research* (1919), 135, at 140.

²⁹ See E. Zitelmann, *Der Krieg und die Denkmalpflege: Zeitschrift für Völkerrecht*, X (1916), S. I.

³⁰ ‘Pays-bas. La protection des monuments et objets historiques et artistiques contre les destruction de la guerre. Proposition de la Société néerlandaise d’archéologie’, 26 *Revue générale de droit international public* (1919) 329, at 331.

³¹ See De Visscher, *supra* note 1, at 838; and Berlia, *supra* note 27, at 4.

³² De Visscher, *supra* note 1, at 839; and *supra* note 27, at 4.

prosecution for violations by national or international courts.³³ De Visscher observed that although these recommendations were not taken up immediately they had a significant influence on the work of the Commission of Jurists who prepared the subsequent Hague Rules Concerning the Control of Radio in Time of War and Air Warfare (Hague Rules).³⁴

The Hague Rules drafted in 1923 for the first time provided for the delineation between general protection as contained in Article 27 of the 1907 Hague Regulations,³⁵ and special protection for monuments of greater historic importance.³⁶ This latter provision was the first detailed and specific legal regime for the protection of historic monuments during armed conflict.³⁷ This Italian initiative was prepared as a response to the aerial bombardment of Venice and Ravenna during the First World War and drew inspiration from the NOB report. It centred on two innovations: first, the creation of a ‘neutralized zone’ around ‘important historical (and artistic) monuments’ to immune them from bombardment provided they were not used for military purposes, and a system of international inspection of such sites.³⁸ Also, the notion of military defence as a qualifier of such protection is replaced with the more restrictive military ‘objective’.³⁹ Although the 1923 Hague Rules were not formally adopted they were accepted as broadly reflective of international law by the United Kingdom and Germany in the lead-up to the Second World War.⁴⁰

³³ De Visscher, *supra* note 1, at 835. See O’Keefe, *supra* note 1, at 42-43.

³⁴ De Visscher, *supra* note 1, at 839; and ‘Commission of Jurists to Consider and Report upon the Revision of the Rules of Warfare. General Report’, 32(supp.) *AJIL* (1938) 1, at 23.

³⁵ Art.25 of the Hague Rules Concerning the Control of Radio in Time of War and Air Warfare, Adopted 19 February 1923, not in force, UK Misc. No.14 (1924), Cmd 2201, 30 *Revue générale de droit international public* (1923) 1, and Schindler and Toman, *supra* note 8 at 315.

³⁶ Art.26, Hague Rules, *ibid.*

³⁷ De Visscher, *supra* note 1 at 839 and 841. See ‘Commission of Jurists’, *supra* note 34, at 23.

³⁸ ‘Commission of Jurists’, *supra* note 34, at 26-27; and De Visscher, *supra* note 1 at 842.

³⁹ Art.24, Hague Rules, *supra* note 35. While welcoming this change to the Hague Regulations, De Visscher was nonetheless scathing of the expansive interpretation given to military objective: *supra* note 1, at 839-40.

⁴⁰ O’Keefe, *supra* note 1, at 49.

D 1949 Geneva Convention IV and Universal Declaration of Human Rights

The renewed efforts in the immediate post-Second World War period to further articulate rules for the protection of civilians during armed conflict and belligerent occupation led to the finalisation of the various Geneva Conventions of 1949. Significantly, these international humanitarian law instruments, while reaffirming the protection of civilian property afforded in the 1899 and 1907 Hague Conventions, are silent on the protection of cultural property. However, the earlier Italian proposal of neutralized zones for the protection of cultural property was implemented in respect of protection of civilian populations in the Geneva framework.⁴¹ The protection afforded to civilian property necessarily covers cultural heritage. Article 53 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV) prohibits ‘destruction’ of civilian real or personal property subject to the proviso of military necessity.⁴² It is important to note that it only relates to destruction, thereby reaffirming that the occupying power may requisition or confiscate property for military purposes. However, pillaging is prohibited (Article 33).

In addition, provisions in Geneva Convention IV which encompass human rights also facilitate the protection of cultural heritage. For example, Article 27 of Geneva Convention IV, which reiterates Article 46 of the Hague Regulations, confirms that protected person’s honour, family rights, religious convictions and practices, and manners and customs shall be respected.⁴³ It is reaffirmed in the two Additional Protocols to Geneva Conventions finalised in 1977 with the deliberately broader wording: ‘convictions and religious practices’ used to encompass ‘all

⁴¹ ‘Historical Note concerning the Draft Convention for the Protection of Cultural Property in the Event of Armed Conflict’, UNESCO Doc.CBC/7, at 5, para.11; and 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 during Armed Conflict, Report of the Rapporteur, UNESCO Doc.7C/PRG/7, Annex I, at 5.

⁴² 12 August 1949, in force 21 October 1950, 75 UNTS 287, and Schindler and Toman, *supra* note 8, at 575.

⁴³ J. Pictet, *Geneva Convention relative to the Protection of Civilian Persons in Time of War, Commentary*, (1958), at 200; and Pilloup, ‘La Déclaration universelle des Droits de l’Homme et les Conventions internationales protégeant les victimes de la guerre’, *Revue internationale de la Croix-Rouge* (1949), at 252-258.

philosophical and ethical practices'.⁴⁴ The ICRC commentary states that this respect of the person includes their physical and intellectual integrity.⁴⁵ Intellectual integrity is defined as 'all the moral values which form part of man's heritage, and appl[y] to the whole complex structure of convictions, conceptions and aspirations peculiar to each individual.'⁴⁶ The phrase 'respect for religious practices and convictions' covers 'religious observances, services and rites.'⁴⁷ This provision is augmented by Article 38(3) (hostile territory) and Article 58 (occupation) of Geneva Convention IV concerning access to religious ministers, and books and other materials to facilitate the protected communities in their religious observances and practices.⁴⁸

These obligations in respect religious practices are extended to prisoners of war under Article 18 of the Hague Regulations, and reiterated and extended to internees by the 1949 Geneva Conventions and Additional Protocols.⁴⁹ With the ICRC commentary explaining that it covers: 'those [practices] of a physical character, methods of preparing food, periods of fast or prayer, or the wearing of ritual adornment.'⁵⁰ In addition, Article 130 provides that internees when they die shall be

⁴⁴ Art.75 of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 8 June 1977, in force 7 December 1978, 1125 UNTS 3, and Schindler and Toman, *supra* note 8, at 711; and Art.4(1) of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), 8 June 1977, in force 7 December 1978, 1125 UNTS 609, and Schindler and Toman, *supra* note 8, at 775. See Y. Sandoz *et al* (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, (1987), at 1370, ¶5422: that this slight drafting modification was deliberate: see *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, (1974-1977) (O.R.)*, vol.X, at 186-187, CDDH/405/Rev.1, paras.35 and 36; *O.R.* vol.XV, at 461, CDDH/407/Rev.1, para.43. The word "religious" only qualifies "practices"; so that convictions including philosophical and political convictions, as well as religious ones, are also protected.

⁴⁵ Pictet, *supra* note 43, at 201.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*, at 203.

⁴⁸ See Arts 15(5) concerning protection of civilian religious personnel and 69(1) of Additional Protocol I which refers to 'other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship.' The ICRC Commentary notes this is more broadly defined than Art.58 of Geneva Convention IV and the objects are not described because the civilian population itself determines what is of importance for their religious practices: Sandoz *et al*, *supra* note 44, at 812, ¶2781.

⁴⁹ See Art.16 of the Geneva Convention relative to the Treatment of Prisoners of War, 27 July 1929, in force 19 June 1931, 118 LNTS 343; Arts 34-37 of Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949, in force 21 October 1950, 75 UNTS 135. In respect of internees see Art.93, Geneva Convention IV; and Art.5(1)(d), Additional Protocol II.

⁵⁰ Pictet, *supra* note 43, at 406.

‘honourably buried, if possible according to the rites of the religion to which they belonged...’.⁵¹

Article 27 of Geneva Convention IV also refers to respect for the ‘manners and customs’ of protected persons which covers both individual and communal elements.⁵² By way of explanation, the ICRC commentary notes: ‘Everybody remembers the measures adopted in certain cases during the Second World War, which could with justice be described as “cultural genocide”. The clause under discussion is intended to prevent a reversion to such practices’.⁵³ The overlap between genocide, international humanitarian law and human rights is considered below in the light of ICTY jurisprudence.

The protection afforded children during armed conflict and belligerent occupation under international law extends to their cultural, and religious, heritage. During armed conflict, parties must take necessary measures to ensure that children under fifteen years that are orphaned or separated from their families, whether they are nationals or not, can exercise their religion and their education in ‘a similar cultural tradition’, where possible.⁵⁴ According to the ICRC, this provision is ‘intended to exclude any religious or political propaganda designed to wean children from their natural milieu; for that would cause additional suffering to human beings already grievously stricken by the loss of their parents.’⁵⁵ The same obligations apply to neutral countries to which the children may be transferred.⁵⁶ During belligerent occupation, where local institutions are unable to do so, the occupying power must organise that persons of the same nationality, language and religion as the child maintain and educate them, where the child is orphaned, separated from their parents or cannot be adequately cared for by next of kin or friends (Article 50).⁵⁷ This provision, which is based on Article 18(2) of the International Covenant of Civil and

⁵¹ *Ibid.*, at 506. See also Art.76(3), 1929 Geneva Convention.

⁵² *Ibid.*

⁵³ *Ibid.*, at 204.

⁵⁴ Art.24, 1949 Geneva Convention IV. See Pictet, *supra* note 43 at 186.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*, at 188; and *Final Record of the Diplomatic Conference of Geneva of 1949*, (1963, 3 vols), vol. II-A, at 638.

⁵⁷ *Final Record, ibid.*, vol. II-A, at 828.

Political Rights covering the right to freedom of thought, conscience and religion and defined as a non-derogable right, was the subject of extended deliberation.⁵⁸ In respect of the equivalent provision in Additional Protocol II, it was noted that continuity of education is crucial to ensuring that children ‘retain their cultural identity and a link with their roots’ and it sought to prohibit practices where they were deliberately schooled in the cultural, religious or moral practices of the occupying power.⁵⁹ As I explain below, this aim ties in with those raised during deliberations over the definition of genocide contained in the 1948 Genocide Convention.

Drafted, deliberated and adopted by the international community at the same time as the Universal Declaration of Human Rights, it is not a coincidence that the 1949 Geneva Conventions have overlapping concerns with that instrument. There are several provisions contained within general human rights instruments which have been interpreted broadly to afford protection to cultural heritage during armed conflict and belligerent occupation. While some human rights treaties provide for derogation during ‘states of emergency’,⁶⁰ the UN General Assembly and the International Court of Justice have confirmed the continuing operation of non-derogable human rights norms during armed conflict.⁶¹ In addition, in 2007 the Human Rights Council recognised the mutually reinforcing protection afforded cultural rights and cultural heritage by international humanitarian law and human rights.⁶²

⁵⁸ International Covenant on Civil and Political Rights, 16 December 1966, in force 23 March 1976, GA Res.2200A (XXI), 21 UN GAOR Supp. (No.16) at 52, UN Doc.A/6316 (1966), 999 UNTS 171. See Sandoz *et al*, *supra* note 44, at 898-899; and *O.R.* vol.III, at 300-301, CDDH/III/304, CDDH/III/324 and Corr.1 and CDDH/III/325; and General Comment No. 22, Article 18 ICCPR, 30 July 1993. UN Doc.CCPR/C/21/Rev.1/Add.4, para.1.

⁵⁹ Art.4(3) Additional Protocol II, and Sandoz *et al*, *supra* note 44 at 1378, ¶4552. See *O.R.* vol.XV, at 79, CDDH/III/SR.46, para.11.

⁶⁰ Art.4 ICCPR; Art.27 of American Convention on Human Rights, 21 November 1969, in force 18 July 1978, OASTS No.36, 1144 UNTS 123; Art.15 of Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights or ECHR), 4 November 1950, in force 3 September 1953, ETS 5, 213 UNTS 221. No derogation is permitted under the African Charter on Human and Peoples’ Rights, 27 June 1981, in force 21 October 1986, OAU Doc.CAB/LEG/67/3 rev. 5, 1520 UNTS 217, but Art.27(2) which has been strictly interpreted by the African Commission on Human and Peoples’ Rights.

⁶¹ GA Res.2675 (XXV), 9 December 1970; and *Legality of Nuclear Weapons*, *supra* note 17, at 240; and *Wall in the Occupied Palestinian Territory*, *supra* note 17, at 173. See also Human Rights Committee, General Comment No.29, Art.4 ICCPR States of emergency, 31 August 2001, UN Doc. CCPR/C/21/Rev.1/Add.11, at para.3.

⁶² HRC Res.6/1, 27 September 2007, Protection of cultural rights and property in situations of armed conflict, UN Doc.A/HRC/RES/6/1.

The equivalent human rights provisions to the international humanitarian law protections outlined above include: the right to privacy and family life;⁶³ the right to freedom of expression including receiving and imparting information and ideas;⁶⁴ the right to education and full development of human personality;⁶⁵ and the right to freedom of thought, conscience and religion and which was defined as a non-derogable right by the Human Rights Committee.⁶⁶ The Committee's General Comment No.22 defines right to freedom of thought, conscience and religion broadly to encompass a holistic understanding of cultural heritage, including tangible (buildings of worship, ritual objects, distinctive clothing), intangible (language, rituals), persons (religious leaders, teachers), and extends to include the freedom to establish schools, and produce and disseminate texts.⁶⁷

This overlap between human rights and protection of cultural heritage during armed conflict and belligerent occupation is necessarily most pronounced in respect of those rights specifically related to culture, namely, the right to participated in cultural life,⁶⁸ and the so-called minority protection provision.⁶⁹ The International Court of Justice, the UN Committee on Economic, Social and Cultural Rights (CESCR), and Human Rights Council have interpreted the application of the ICESCR generally (including the right to participate in cultural life) to extend to 'both territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction.'⁷⁰ In respect of this obligation, states parties are required to report on:

⁶³ Art.12 of the Universal Declaration of Human Rights (UDHR), GA Res.217A(III), 10 December 1948; Art.17 ICCPR; and the European equivalent, Art.8 ECHR.

⁶⁴ Art.19 UDHR, Art.19(2) ICCPR, and Art.5 ECHR.

⁶⁵ Art.26(2) UDHR, Art.13(1) of International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 December 1966, in force 3 January 1976, GA Res.2200A(XXI), 21 UN GAOR Supp.(No.16), 49, and 993 UNTS 3, and Art.2 ECHR.

⁶⁶ Art.18 UDHR, Art.18(2) ICCPR, and Art.9 ECHR. See General Comment No.22, *supra* note 58, at para.1.

⁶⁷ *Ibid.* para.4.

⁶⁸ Art.27 UDHR, and Art.15 ICESCR.

⁶⁹ Art.27 ICCPR.

⁷⁰ *Wall in the Occupied Palestinian Territory*, *supra* note 17, at 180; UN Doc.E/C.12/1/Add.90; and HRC Res.6/19, 28 September 2007, Religious and cultural rights in the Occupied Palestinian Territory, including East Jerusalem, UN Doc.A/HRC/RES/6/19.

*[T]he measures taken to protect cultural diversity, promote awareness of the cultural heritage of ethnic, religious or linguistic minorities and of indigenous communities, and create favourable conditions for them to preserve, develop, express and disseminate their identity, history, culture, language, traditions and customs.*⁷¹

And:

*To ensure the protection of the moral and material interests of indigenous peoples relating to their cultural heritage and traditional knowledge.*⁷²

The latter reporting requirement reflects the protections contained in the UN Declaration on the Rights of Indigenous Peoples,⁷³ in particular Articles 11(culture), 12(religion) and 13(language). However, explicit extension of the application of the 1949 Geneva Conventions to indigenous peoples contained in Article 11 of the 1993 draft Declaration was deleted from the final text of this instrument.⁷⁴

Article 27 of the International Covenant on Civil and Political Rights covers cultural, religious and language rights of minorities. The Human Rights Committee's General Comment No.23 states that this provision imposes positive obligations on states parties.⁷⁵ UN Special Rapporteur Francesco Capotorti also suggested that 'culture' must be interpreted broadly to include customs, morals, traditions, rituals, types of housing, eating habits, as well as the arts, music, cultural organisations, literature and education.⁷⁶ The Committee has similarly endorses a wide concept of culture including, for example, a particular way of life associated with the use of land resources, especially in relation to indigenous peoples.⁷⁷ The inter-war minority guarantees from which Article 27 traces its lineage, was the same tradition from

⁷¹ Guidelines on Treaty-Specific Documents to be Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, 13 January 2009, UN Doc.E/C.12/2008/2 at 14, para.68.

⁷² *Ibid.*, at para.71(c).

⁷³ GA Res.61/295, 13 September 2007, UN Doc.A/RES/61/295.

⁷⁴ Draft UN Declaration on the Rights of Indigenous Peoples, approved by the Working Group on Indigenous Populations on 26 August 1994, UN Doc.E/CN.4/Sub.2/1994/56, 34 *ILM* (1995) 541.

⁷⁵ General Comment No.23, UN Doc.HRI/GEN/1/Rev.1, 38 (1994), paras.6.1, 6.2 and 9.

⁷⁶ UN Doc.E/CN.4/Sub.2/384/Rev.1 at 99-100.

⁷⁷ General Comment No.23, para.7, *supra* note 75.

which the articulation of the crime against humanity of persecution and genocide in international criminal law emerged.

E 1977 Additional Protocols I and II to the 1949 Geneva Conventions

The absence of specific reference to the protection of cultural heritage in the 1949 Geneva Conventions spurred the realisation of the first specialist international humanitarian law instrument for the protection of cultural heritage: the 1954 Hague Convention. However, before moving to this specialist framework, it is important to acknowledge other developments in international humanitarian law in this field. Foremost among these, formal and explicit reaffirmation of the exclusivity of cultural heritage over and above other civilian property in binding international humanitarian law instruments for the first time since the 1907 Hague Regulations is contained in Additional Protocols I and II to the Geneva Conventions which were adopted in 1977.⁷⁸ Furthermore, this protection was now afforded during non-international conflicts. Geneva Conventions Common Article 3 applies to armed conflict of ‘non-international character occurring on the territory of one of the contracting parties’; while Additional Protocol II refers to conflict between armed forces of High Contracting Parties and dissident armed forces or other organised armed groups which exercise control over part of territory (Article 1). The 1954 Hague Convention is likewise applicable to international and internal armed conflicts.⁷⁹

Additional Protocol I covering international armed conflicts defines general protection afforded civilian objects in Article 52. While there is a presumption of civilian use in respect of places of worship, schools, houses and other dwellings, the ICRC commentary suggests that it is confined to physical objects and not intangible elements of civilian life.⁸⁰ However, as explained below, during the 1940s, the UN War Crimes Commission interpreted the equivalent provision contained in the Hague

⁷⁸ See *O.R.*, vol.I, at 213, and CDDH/215/Rev.1, para.68-70, and *O.R.* vol.XV, at 277-278. For summary of the negotiating history of Art.53, Additional Protocol I and Art.16, Additional Protocol II, see Toman, *supra* note 1, at 382-383.

⁷⁹ Art.19 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, in force 7 August 1956, 249 UNTS 240; and Schindler and Toman, *supra* note 8, at 999, which only refers to conflicts not of an international character: See Toman, *supra* note 1, at 386-387.

⁸⁰ See Sandoz *et la*, *supra* note 44, at 633-34; and Toman, *supra* note 1, at 384.

Regulations to cover intangible aspects of cultural heritage related to the use of such objects and sites.

Furthermore, Additional Protocol I provides specific protection for cultural heritage. Article 53 is *lex specialis* in respect of historic monuments, works of art and places of worship which ‘constitute the cultural or spiritual heritage of peoples.’ The same phrase is used in Article 16 of Additional Protocol II concerning non-international armed conflicts. There is some conjecture concerning their *ratione materiae*.⁸¹ The provision relates to movable and immovable heritage, even if renovated or restored.⁸² While Article 53 operates without prejudice to the obligations contained in 1954 Hague Convention and other relevant international treaties including the Hague Regulations,⁸³ it appears that the definition of cultural heritage covered by it is distinguishable from that covered by the 1954 Hague Convention. The ICRC commentary intimates that this phrase: ‘the cultural *or* spiritual heritage of peoples’, is deliberately distinguishable from ‘of great importance to the cultural heritage of every people’ contained in the preamble of the 1954 Hague Convention.⁸⁴ It suggests that the *ratione materiae* is broader in respect of the Additional Protocols for two reasons. First, the word ‘peoples’ was intended to ‘transcend[] national borders’ and ‘problems of intolerance which arise with respect of religions which do not belong to the country’.⁸⁵ However, the ICRC maintains this provision only applies to ‘a limited amount of very important cultural property, namely that which forms part of the cultural or spiritual heritage of “peoples” (i.e., mankind), while the scope of the

⁸¹ Jiří Toman argues that the heritage protected by the Additional Protocols is broader because of the extension to include sites and objects of spiritual importance: *supra* note 1, at 388. Cf. Roger O’Keefe considers it no more than a shorthand form of the definition contained in the 1954 Hague Convention: *supra* note 1, at 209.

⁸² *O.R.* vol.XV, at 277-278, CDDH/215/Rev.1, paras.68-70.

⁸³ The Federal Republic of Germany, the United States and Canada indicated Art.53 did not displace existing customary international law encompassed in Art.27 1907 Hague IV Convention which covered various cultural and religious objects: *O.R.* vol.VI, 224, 225 and 240 Resolution 20 adopted by the Diplomatic Conference at the same time as the Protocols urged states who had not yet done so to become party to the 1954 Hague Convention. Consequently, this was interpreted as intending not to alter the existing legal framework for the protection of cultural property during armed conflict: Sandoz *et al*, *supra* note 44, at 641, ¶2046.

⁸⁴ Sandoz *et al*, *supra* note 44, at 646-647 and 1469-70, ¶¶2063-2068 and 4844 (emphasis added).

⁸⁵ *O.R.* vol. XV, at 220, CDDH/III/SR.59, para.68; and Sandoz *et al*, *supra* note 44, at 1469-70, ¶4844.

Hague Convention is broader ...'.⁸⁶ Second, the addition of the words 'or spiritual' encompasses 'the places referred to are those which have a quality of sanctity independently of their cultural value and express the conscience of the people.'⁸⁷ The ICRC study on customary international humanitarian law reaffirms this interpretation.⁸⁸ The ICRC position was referred to with approval by the ICTY Appeals Chamber in *Kordić and Čerkez*.⁸⁹ The Eritrea-Ethiopia Claims Commission likewise drew a distinction between Article 53 and the preamble of 1954 Hague Convention, which they found to be broader.⁹⁰

Unlike the 1954 Hague framework, the Additional Protocol I provides immunity for cultural property without the military necessity proviso.⁹¹ However, violation of the obligation not to use such objects and sites 'in support of the military effort' (Article 53(b)) may render it a military objective as defined under Article 52, to which the principle of proportionality is applicable.⁹² Nonetheless, as under the 1954 Hague Convention, they cannot be the object of reprisals (Article 53(c)).

The inclusion of a simplified form of this cultural property provision in Additional Protocol II covering non-international armed conflict was the subject of 'heated controversy'.⁹³ The primary concern of opponents was the perceived priority of other humanitarian concerns in such a condensed instrument.⁹⁴ Unlike Additional

⁸⁶ J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, (3 vols., 2005), vol.1, at 130.

⁸⁷ *Ibid.*, at 646-647, ¶¶2063-2068. The 1954 Hague Convention also covers sites, monuments and objects of religious importance: Art.1(1).

⁸⁸ Henckaerts and Doswald-Beck, *supra* note 86 at 130 and 132.

⁸⁹ Prosecutor v. Dario Kordić and Mario Čerkez, Appeal Judgment, Case No.IT-95-14/2, Appeals Chamber, ICTY (17 December 2004), para.91.

⁹⁰ Partial Award: Central Front. Eritrea's Claims 2, 4, 6, 7, 8 and 22, 43 ILM (2004), at 1249, para.113.

⁹¹ Cf. Art.27 Hague IV Convention referring to 'as far as possible'. If state is party to the 1954 Hague Convention and the Additional Protocol derogation under the specialist framework applies. However, if party to the Additional Protocols but not 1954 Hague Convention then no derogation permitted: Sandoz *et al*, *supra* note 44, at 647, ¶¶2071-73.

⁹² Sandoz *et al*, *supra* note 44, at 648, ¶2079; and Henckaerts and Doswald-Beck, *supra* note 86 at vol.II, 779-790, §§282-354.

⁹³ *O.R.*, vol.XV, at 107, CDDH/III/SR.49; and Sandoz *et al*, *supra* note 44, at 1466, ¶4828. Art.16 was adopted by 35 votes in favour, 15 against and 32 abstentions: see *O.R.* vol.VII, at 156-157, 162-163, CDDH/SR.53.

⁹⁴ *O.R.* vol.VII, at 156-157, 162-163, CDDH/SR.53.

Protocol I, this instrument covering as it does acts within a state makes a direct link between international humanitarian law and human rights in its preamble.⁹⁵ It was the first international humanitarian law instrument to use the phrase ‘human rights’.⁹⁶ The protections afforded in Additional Protocol II are viewed as encapsulating these core human rights which are viewed as non-derogable.⁹⁷ It is instructive then that the final text explicitly protects cultural heritage.

Contained in Part IV covering civilian populations, Article 16 provides a summarised version of the protection afforded in Article 53 of Additional Protocol I. Its *ratione materiae* is identical. However, it is only made without prejudice to the operation of the 1954 Hague Convention, the only multilateral treaty in force (with the exception of the regional 1935 Washington Treaty) which would have overlapping jurisdiction in respect of non-international armed conflicts.⁹⁸ Like Additional Protocol I, the immunity afforded makes no proviso for military necessity but this is removed when the object or site is ‘used ... in support of the military effort’. Therefore, like Article 53 of Additional Protocol I, Article 16 prohibits the targeting of such cultural property and its use as a military objective.⁹⁹ Unlike its sister provision, Article 16 does not prohibit reprisals. But Additional Protocol II does prohibit pillage (Article 4(2)(g)).

The specific protection afforded cultural heritage in international humanitarian law from its earliest codification is reinforced by the concomitant explicit obligation to punish violations. Provisions covering cultural property during belligerent occupation in the 1874 Brussels Declaration and 1907 Hague Regulations specifically state that violations ‘shall be made subject to legal proceedings.’¹⁰⁰ In respect of no

⁹⁵ First and second preambular recitals, Additional Protocol II.

⁹⁶ Sandoz et al, *supra* note 44 at 1339, ¶4427. See *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, Geneva, 3 May-3 June 1972, (second session), Report on the work of the Conference* (2 vols with Annexes, 1972), vol.I, at 120, ¶¶2.536-2.537 and 2.539. The fourth preambular recital of this protocol extends the application of the Martens Clause to non-international armed conflicts.

⁹⁷ Sandoz et al, *supra* note 44 at 1340-41, ¶¶4429-4430.

⁹⁸ Sandoz et al, *supra* note 44 at 1468, ¶4837: Referring to the failure to cite the 1970 UNESCO Convention and 1972 World Heritage Convention it states: ‘These omissions have no material consequences on protection.’ See also Toman, *supra* note 1, at 386.

⁹⁹ See Sandoz et al, *supra* note 44 at 1470, ¶4845.

¹⁰⁰ Art.8, 1874 Brussels Declaration; and Art.56, 1907 Hague IV Convention.

other provision in these instruments is such an obligation explicitly laid down. The obligation is reaffirmed by Article 85 of Additional Protocol I which provide for repression of grave breaches.¹⁰¹ Grave breaches include attacking and causing extensive damage to ‘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’ which were not being used in support of military effort nor located in the immediate proximity of military objective (Article 85(4)(d)). Special protection means not only that afforded under the 1954 Hague Convention, (and enhanced protection under the 1999 Second Protocol) but includes the lists established under the 1972 World Heritage and 2003 Intangible Heritage Conventions.¹⁰² The chapeau of the Article 85 requires that the breach be committed wilfully and in violation of the Protocol or Conventions. If the object or site is marked or on a list that is adequately circulated this would satisfied the *mens rea* requirement.¹⁰³ Article 85(3)(f) includes among grave breaches and war crimes the perfidious use of emblem recognised by the Conventions or Additional Protocol I.

Article 85(5) states that such grave breaches will be considered ‘war crimes’.¹⁰⁴ The international and hybrid criminal tribunals established under the auspices of the United Nations since the 1990s have jurisdiction in respect of war crimes relating to civilian property generally and cultural heritage specifically.¹⁰⁵

¹⁰¹ No grave breaches regime is explicitly applicable in respect of Article 16 of Additional Protocol II, but it can be implied by referring back to Geneva Conventions Common Article 3 in Article 1(1) which requires suppression of violations including criminalisation and universal jurisdiction.

¹⁰² Sandoz *et al*, *supra* note 44, at 1002-1003, ¶3517, footnote 37; Roucouas, ‘Les infractions graves au droit humanitaire (Article 85 du Protocole additionale I aux Conventions des Genève)’, 31 *Revue Hellénique de droit international* (1978) 57, at 113-114; and Toman, *supra* note 1 at 392.

¹⁰³ Sandoz *et al*, *supra* note 44, at 1002-1003, ¶3517; Roucouas, *ibid.*, at 109.

¹⁰⁴ See Toman, *supra* note 1, at 392-393 (concerning the deliberations over the inclusion of this sentence).

¹⁰⁵ Art.3(d) (seizure of, destruction or wilful damage done to institutions dedicated to religion, charity, education, the arts and sciences, historic monuments and works of art and science), Statute of the International Criminal Tribunal for the Former Yugoslavia, GA Res.827 of 25 May 1993, amended by GA Res.1166 (1998), 1329 (2000), 1411 (2002), 1431 (2002) 1481 (2003), 1597 (2005) and 1660 (2006) (ICTY Statute); Art.4(serious violations of Common Article 3 of 1949 Geneva Conventions and Additional Protocol II), Statute of the International Criminal Tribunal for Rwanda, SC Res.955 of 8 November 1994 as adopted and amended to SC Res.1717 of 13 October 2006; Arts.8(2)(b)(international conflicts), and 8(2)(e)(iv)(not international armed conflicts), Rome Statute of the International Criminal Court, 17 July 1998, in force 1 July 2002, UN Doc.A/CONF. 183/9; 37 ILM

Likewise and pursuant to obligations on High Contracting Parties contained in Part V, Section II of Additional Protocol I, a number of domestic penal codes provide for the prosecution of such violations in national courts.¹⁰⁶

Since the 1977 Additional Protocols, other instruments have been negotiated to limit the use of weapons and their impact on civilian populations and private property, which reference cultural heritage. For example, the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, with its three optional Protocols,¹⁰⁷ Protocol II Article 6(1)(b) refers to ‘historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples’,¹⁰⁸ and Protocol III Article 2 extends protection to civilian objects not specifically cultural heritage.¹⁰⁹

3. Specialist regime for cultural heritage: The Hague framework

As the *travaux préparatoires* of the 1954 Hague Convention and First Protocol clearly evidence, this specialist framework developed under the auspices of UNESCO

1002 (1998); 2187 UNTS 90; Art.3 (Serious violations of 1949 Geneva Conventions and Additional Protocol II including pillage), Statute of the Special Court for Sierra Leone, in Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, SC Res.1315 of 14 August 2000, 2178 UNTS 138, 145; 97 *AJIL* (2000) 295; UN Doc.S/2002/246, appendix II; Art.9 (jurisdiction includes grave breaches of the 1949 Geneva Conventions), 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, GA Res.57/228B of 22 May 2003, UN Doc.A/RES/57/228B (2003) Annex; Art.6 (destruction and serious damage to property, not justified by military necessity and carried out unlawfully and wantonly), Law on the Establishment of Extraordinary Chambers in the Court of Cambodia for the Prosecution of Crimes committed during the period of Democratic Kampuchea, with the inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006). This later law provides specific jurisdiction for the prosecution of persons violating obligations under the 1954 Hague Convention during the Khmer Rouge regime: Art.7.

¹⁰⁶ Also Arts.146 and 147 of Geneva Convention IV. For enactment into domestic legislation: see Henckaerts and Doswald-Beck, *supra* note 86, at vol.II, at 746-755, §§105-172.

¹⁰⁷ 10 October 1980, in force 2 December 1983, 1342 UNTS 137, and Schindler and Toman, *supra* note 8, at 181.

¹⁰⁸ Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), 10 October 1980, in force 2 December 1983, 1342 UNTS 137, and Schindler and Toman, *supra* note 8 at 191. Amended to cover non-international armed conflicts also, 3 May 1996, in force 3 December 1998, UN Doc.CCW/CONF.I/16, and Schindler and Toman, *supra* note 8 at 196.

¹⁰⁹ Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), 10 October 1980, in force 2 December 1983, 1342 UNTS 137, and Schindler and Toman, *supra* note 8 at 210.

after the Second World War was a product of its times. It cannot be fully understood without reference to the international humanitarian law instruments which preceded it, or by ignoring contemporaneous developments like the Nuremberg trials, the Genocide Convention and Universal Declaration of Human Rights.

A response to the silence of the 1949 Geneva Conventions concerning cultural heritage specifically, the 1954 Hague framework borrowed from them to articulate the first specialist instrument for the protection of cultural heritage during armed conflict and belligerent occupation. The 1954 Hague Convention also traces its lineage to the defunct inter-war efforts to establish a dedicated regime for cultural heritage, and this is especially evident in the inclusion of peacetime measures. However, the development came at a price, namely, the continued application of the military necessity proviso.

A *Roerich Pact and 1935 Washington Treaty*

The damage inflicted on cultural heritage during the First World War highlighted the inadequacies of existing general international humanitarian law instruments like the 1899 and 1907 Hague Conventions especially in the face of new technologies which render war total and no longer able to be confined to a discrete area. The distinction between defended and undefended towns was no longer sustainable. Such destruction of objects and sites described as ‘the common heritage of civilisation’ was viewed as ‘an outrage to humanity’ and drove initiatives for the formulation of a specialist instrument.¹¹⁰ Accordingly, as noted above, the first efforts occurred during the progress of the war including the Zitelmann proposal and the NOB report which paved the way for the shift in the modalities of protection contained in the instruments prepared during the interwar period.

The Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (1935 Washington Treaty) which incorporated the principles contained in the Roerich Pact was the first specialist multilateral instruments for the protection of cultural property during armed conflict and peacetime.¹¹¹ This was primarily a Pan-

¹¹⁰ C. Phillipson, *International Law and the Great War* (1915), at 168.

¹¹¹ 15 April 1935, in force 26 August 1935, OASTS No.33, 167 LNTS 289, 30(supp.) *AJIL* (1936) 195; and Schindler and Toman, *supra* note 8, at 991.

American Union initiative drafted by Georges Chklaver and Nicholas Roerich.¹¹² The preamble of the Roerich Pact referred to the obligation of all nations to promote ‘the advancement of the Arts and Science in the common interest of humanity’ and that ‘the Institutions dedicated to the education of youth, to Arts and Science, constitute[d] a common treasure of all the Nations of the World’.¹¹³ The draft text was originally presented to the League of Nations’ *Office International des Musées* (OIM). It subsequently found favour with the Pan-American Union which adopted it on 15 April 1935. The League had earlier rejected similar entreaties determining that it was ‘both difficult and inopportune’ to consider such a project when its efforts were devoted to the ‘elimination of war.’¹¹⁴

The preamble of the 1935 Washington Treaty defined its aim as the ‘preserv[ation] in any time of danger all nationally and privately owned immovable monuments which form the cultural treasures of peoples.’ It remains binding on eleven American countries including the United States. The instrument covers immovable objects namely, historic monuments, museums, scientific, artistic, educational and cultural institutions and related personnel, which are considered ‘neutral’,¹¹⁵ and to respected and protected by belligerents (Article 1). Movable objects are protected if located in such protected buildings. If the site or monument is used for military purposes the protection is lost (Article 5). However, the qualification of ‘military necessity’ itself is not mentioned in the instrument. The territorial state must pass necessary domestic legislation to effect such protection (Article 2), display a distinct flag over these institutions (which differs from the one provided under the

¹¹² 6 *Revue de droit international* (Paris) (1930) 593; and Seventh International Conference of American States, *Minutes and Antecedents with General Index*, Montevideo, 1933, n.p., Roerich Museum Archives, New York.

¹¹³ Second and Third recitals, Preamble, Roerich Pact, *ibid.* See G. Chklaver, ‘Projet d’une convention pour la protection des institutions et monuments consacrés aux arts et aux sciences’, 6 *Revue de droit international* (Paris) (1930) 589 at 590: where he refers to monuments and buildings which constitute the ‘common heritage of humanity’.

¹¹⁴ LNOJ, 18th Year, No.12 (December 1937), at 1047. The OIM preferred to circulate recommendations to national authorities based on those produced by the NOB covering peacetime measures for the preparation of protection of cultural heritage during armed conflict: J. Vergier-Boimond, *Villes sanitaires et cites d’asile* (1939), at 122-3 and 318-19.

¹¹⁵ Art.2, 1935 Washington Treaty provides: ‘The neutrality shall be recognized in the entire expanse of territories subject to the sovereignty of each of the Signatory and Acceding States, without any discrimination as to the State allegiance of said monuments and institutions.’

1907 Hague Regulations and 1954 Hague Convention) (Article 3),¹¹⁶ and provide a list of relevant sites to the Pan-American Union (Article 4). The 1954 Hague Convention is supplementary to the Roerich Pact in the relations between High Contracting Parties.¹¹⁷

B 1938 OIM draft Convention and 1939 OIM Declaration

During the same period, the League of Nations' International Committee on Intellectual Cooperation (ICIC) commenced preparing an instrument for the protection of cultural heritage during armed conflict precipitated by the outbreak of the Spanish Civil War and Sino-Japanese War.¹¹⁸ The OIM was charged with undertaking the necessary work and it commissioned Charles de Visscher to author a report having regard to the Committee of Jurists' work for the 1923 Hague Rules and the 1918 NOB survey.¹¹⁹ His report was then presented to the ICIC that approved a meeting of legal and military experts.¹²⁰ The preliminary draft international convention with regulations (1938 OIM draft Convention), prepared by Geouffre de Lapradelle, Nicholas Politis, De Visscher and others, was 'confine[d] ... to what seemed feasible in practice, rather than aim at a higher mark...'.¹²¹ The international conference called to negotiate this instrument in The Hague was cancelled because of the outbreak of the Second World War.¹²² Instead, a Declaration Concerning the Protection of Historic Buildings and Works of Art in Time of War pared down to the

¹¹⁶ This flag is replaced by the distinctive sign contained in Art.16 of 1954 Hague Convention: Art.36(2) 1954 Hague Convention.

¹¹⁷ Fourth preambular recital and Art.36(2), 1954 Hague Convention.

¹¹⁸ LNOJ, 18th Year, No.12 (December 1937), at 1047. See Thomas and Thomas, 'International aspects of the Civil War in Spain 1936-1939', in R. A. Falk (ed.), *The International Law of Civil War* (1971), at 111.

¹¹⁹ See De Visscher, 'La protection internationale des objets d'art et des monuments historiques. Deuxième Partie. Les monuments historiques et les œuvres d'art en temps de guerre et dans les traités de la paix' 16 *Revue de droit international (3ème série)* (1935), at 246, and 35-36 *Museion* (1936) 1; Office International des Musées, *La protection de monuments et œuvres d'art en temps de guerre*, (1939); and 2 *Art et Archéologie. Recueil de législation comparée de droit international* (1940), at 47.

¹²⁰ Doc.O.I.M.53.1926; Doc.O.I.M.96.1937; and ICIC Resolution, LNOJ, 18th Year, No.12 (December 1937), at 1004.

¹²¹ LNOJ, 19th Year, No.11 (November 1938), at 936-91; and De Visscher, *supra* note 1, at 861. See 'Report by the Directors' Committee of the International Museums Office to the International Committee on Intellectual Co-operation for the Year 1937/38, together with a Preliminary Draft International Convention on the Protection of Historic Buildings and Works of Art', in LNOJ, 19th Year, No.11 (November 1938), at 937.

¹²² UNESCO Doc.CBC/7, at 3, para.8.

ten articles was adopted by Belgium, Spain, Greece, the United States and the Netherlands (1939 OIM Declaration).¹²³

The OIM initiative's rationale for the protection of cultural property was encapsulated from its initial proposal. Bolivia raised the need for a multilateral specialist instrument which protected that which was 'a matter of importance to civilisation as a whole.'¹²⁴ The 1938 OIM draft convention's preamble provided:

Whereas the preservation of artistic treasures is a concern of the community of States and it is important that such treasures should receive international protection;

*Being convinced that the destruction of a master piece, whatever nation may have produced it, is a spiritual impoverishment for the entire international community.*¹²⁵

Only this second preambular recital was retained in the 1939 OIM Declaration.

The OIM draft convention was applicable to 'disturbances' and 'armed conflicts' within a state (draft Article 10), with obligations particularly those related to movable heritage and their removal for safekeeping modified accordingly. The experts' commentary advised that as the proposed instrument was 'conceived in a spirit of international solidarity' it was 'only natural that it also envisage[d] the dangers which threatened monuments and works of art during civil disturbances.'¹²⁶ The 1939 Declaration made no such concession.

Neither the declaration nor the draft convention had a dedicated provision defining its *ratione materiae*. It referred only to 'historic buildings', 'monuments' and 'works of art' and by extrapolation covers both movable and immovable heritage.

The international obligation to protect such cultural property fell to states in whose territory it was located.¹²⁷ Accordingly, such states were duty bound to provide

¹²³ De Visscher, *supra* note 1, at 859; 2 *Art et Archéologie. Recueil de législation comparée de droit international* (1940), supplement; Berlia, *supra* note 27, Annex I, at 5-7; and M. Deltenre, *General Collection of the Laws and Customs of War*, (1943), at 755-759.

¹²⁴ LNOJ, Special Supplement No.161 (1936), at 57.

¹²⁵ LNOJ, 19th Year, No.11 (November 1938), at 936.

¹²⁶ *Ibid.*

¹²⁷ LNOJ, 19th Year, No.11 (November 1938), at 937.

material protection to objects and sites against the destructive impact of war and ‘insure such protection by all the technical means at their disposal’ (Article 1). In their commentary, the experts noted these obligations implied ‘recognition of the principle that the preservation of artistic and historical treasures is a matter that concerns the world as a whole. The countries possessing artistic treasures are merely their custodians and remain accountable for them to the international community.’¹²⁸

The projected peacetime measures contained in the draft convention and inspired by the NOB report were incorporated, in abbreviated form, into the 1939 OIM Declaration. Signatories agreed to take ‘all possible precautions’ to spare cultural property during military engagements and that they were immuned from reprisals. Territorial states were to refrain from using cultural property and its surroundings for purposes that would expose it to attack (Article 2). Their armed forces were to be instructed to respect such property and were prohibited from looting or damaging it during the armed conflict (Article 3). ‘[E]ssentially important’ sites were to be marked as prescribed by Article 27 of the 1907 Hague Regulations by the competent governmental authorities and any abuse of the protective marking was to be prosecuted (Article 6). The obligation to respect remained for all cultural property, even if unmarked.

The 1939 Declaration retained the notion of ‘neutrality’ granted on the basis of removal of military advantage originally proposed by the NOB report and 1923 Hague Rules. The committee of experts commenting on the failure of the operation of the Hague Regulations noted: ‘It was felt that the only possible way to protect monuments and works of art ... was to meet the destructive effects of the war with defensive measures equally as effective, or, still better, to divest such monuments of anything likely to provoke their destruction.’¹²⁹ Accordingly, refuges established to house movable heritage were not to be put to use for a purpose nor located near a site which would render them military objectives (Article 4).¹³⁰ Further, in respect of monuments, groups of monuments or built-up areas, the safeguarding of which [was]

¹²⁸ *Ibid.*, at 961.

¹²⁹ LNOJ, 19th Year, No.11 (November 1938), at 961.

¹³⁰ States not involved in the armed conflict were encouraged to assist those that were by providing refuge for their movable heritage during the hostilities: Art.7, 1939 OIM Declaration.

of exceptional importance for the international community', states were encouraged to enter agreements for special protection during armed conflict (Article 5).¹³¹

During belligerent occupation, the occupying power was required to bring cultural property of 'artistic or historic interest' to the attention of its forces and counsel them that their preservation '[was] the concern of the entire international community' (Article 8). Also, existing national staff employed in respect of refuges, museums or monuments were afforded the same protection as the civilian population and were to be retained 'unless there is any legitimate military reason for their dismissal.' Furthermore, the occupying power was to take all necessary action to preserve damage cultural property, but could not go beyond 'strengthening' it.

Finally, the signatories agreed that any violations of the Declaration were to be examined by a Commission of Inquiry (Article 9). The Committee was composed of five persons from neutral countries having expertise in fine art, antiquities, arbitration or jurists with an international reputation. Two persons were nominated by the belligerent state alleging the breach and two nominated by the other belligerent, with the fifth member who acted as chairperson was nominated by these four. The Commission could also fulfil any other task entrusted to it by the belligerents designed to facilitate the aims of the Declaration.

At the outbreak of the war, US President Franklin D. Roosevelt requested reassurances from Germany, France and the United Kingdom that civilian populations and property would be spared.¹³² Germany, France, the United Kingdom and Poland responded affirmatively. Indeed, a joint French and British statement on 3 September 1939 advised that they 'solemnly and publicly affirm ... to preserve, with every possible measure, the monuments of civilisation ... they will exclude objectives which do not present a clearly defined military objective....'¹³³ The belligerents

¹³¹ The expert commentary noted a similar provision included in the draft convention was intended for those urban centres which have so many monuments that they could not satisfy the special protection requirements but nonetheless were 'of essential importance to the world at large': LNOJ, 19th Year, No.11 (November 1938), at 962.

¹³² OIM, *supra* note at 222.

¹³³ *Ibid.*, at 225-226.

largely adhered to these assurances until 1943.¹³⁴ The devastation wrought to civilians and their property thereafter by Axis forces became the subject of prosecutions before the post-war military tribunals, which are considered in Part 3 below.

C 1954 Hague Convention, and First and Second Hague Protocols

In 1949, the fourth UNESCO General Conference adopted a resolution acknowledging the need to protect ‘all objects of cultural value, particularly those kept in museums, libraries and archives, against the probable consequences of armed conflict’.¹³⁵ Thereafter, the UNESCO Secretariat restarted the process of formulating a convention suspended because of the war which led to the adoption of the Convention for the Protection of Cultural Property in the Event of Armed Conflict five years later (1954 Hague Convention).¹³⁶

The present day specialist international humanitarian law framework for the protection of cultural heritage during armed conflict and belligerent occupation includes the 1954 Hague Convention, the 1954 Hague Protocol,¹³⁷ and the 1999 Second Protocol.¹³⁸ Each instrument bears evidence of concessions made to encourage their uptake and ensure a minimum standard of conduct during hostilities and occupation.¹³⁹ The most significant compromise is the proviso of military necessity, which was retained in the 1999 Second Protocol negotiated two decades after the Additional Protocols to the 1949 Geneva Conventions.

¹³⁴ P. J. Boylan, ‘Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention of 1954)’, (1993), UNESCO Doc.CLT-93/WS/12, at 35-37.

¹³⁵ Resolution 6.42, in *Records of the General Conference of the United Nations Educational, Scientific and Cultural Organization, Fourth Session, Paris 1949, Resolutions* (1949), at 27.

¹³⁶ See UNESCO Doc.CBC/7.

¹³⁷ Protocol for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, in force 7 August 1956, 249 UNTS 358; and Schindler and Toman, *supra* note 8, at 1027.

¹³⁸ Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, in force 9 March 2004, 38 *ILM* (1999), at 769; and Schindler and Toman, *supra* note 8, at 1037.

¹³⁹ UNESCO Doc.7C/PRG/7, Annex I, at 6. During the Diplomatic Conference to finalise the Second Protocol, China, Denmark, Ireland, United Kingdom, and the United States ‘announced progress towards their participation in the Hague Convention’: Summary Report, Diplomatic Conference on the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, June 1999, at 2, para.8. China (2000), Denmark (2003) and the United States (2009) have become states parties.

The 1954 Hague Convention, and therefore the two protocols, owes much to the legacy of the inter-war efforts. Its preamble acknowledges it is ‘guided by the principles’ contained in the 1899 Hague II and 1907 Hague IV Conventions and the 1935 Washington Treaty.¹⁴⁰ The convention’s rationale contained in the second and third preambular recitals tacitly replicates that of the stalled OIM draft convention:

Being convinced 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;

*Considering that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection;*¹⁴¹

For the first time we have a reference to ‘cultural heritage’ rather than ‘cultural property’ in such an instrument.¹⁴² It points to its intergenerational importance, an aspect reaffirmed by a resolution adopted at the first meeting of the High Contracting Parties to the Convention noted that ‘the purpose of the Convention ... is to protect the cultural heritage of all peoples for future generations.’¹⁴³

The preamble also deliberately refers to ‘peoples’ rather than ‘states’.¹⁴⁴ The original text contained the words used in a 1932 ICIC Resolution which stated that the ‘preservation of the artistic and architectural heritage of mankind [was] a matter of interest to the *community of States*.’¹⁴⁵ This amendment together with the redrafted version of the current second preambular recital was proposed by the USSR

¹⁴⁰ Fourth preambular recital, 1954 Hague Convention.

¹⁴¹ Second and third preambular recitals, 1954 Hague Convention.

¹⁴² UNESCO Doc.7C/PRG/7, Annex II, at 20.

¹⁴³ UNESCO Doc.CUA/120, para.22.

¹⁴⁴ Cf. UNESCO Doc.7C/PRG/7, Annex II, at 20. See Toman, *supra* note 1, at 42, and O’Keefe, *supra* note 1, at 95.

¹⁴⁵ LNOJ, 13th Year, No.11 (November 1932), at 1776. The OIM draft had read: ‘Whereas the preservation of artistic treasures is a concern of the community of States and it is important that such treasures should receive international protection’: LNOJ, 19th Year, No.11 (November 1938), at 936, Appendix 2, sub-appendix. The draft preamble of the 1954 Hague Convention had originally read: ‘Considering that the preservation of the cultural heritage is the concern of the community of States and it is important that this heritage should receive international protection’: 7C/PRG/7, Annex II, at 20. The USSR suggested the following amendment: ‘Replace “is the concern of the community of States” by “is of great importance for all peoples of the world”’: Doc.CBC/DR/37.

delegation.¹⁴⁶ The *travaux* noted that armistice agreements and peace treaties after the conflict had provided for restitution of cultural property and the Nuremberg Tribunal has ‘introduced the principle of punishing attacks on the cultural heritage of a nation into positive international law.’¹⁴⁷ The Hague Convention was a response to the destruction caused by belligerents against enemy states and their own nationals during the Second World War. As I explain below, this rationale is concomitant with other instruments developed in response to those atrocities, including the Nuremberg Principles, the Genocide Convention and Universal Declaration of Human Rights.

Like the 1949 Geneva Conventions, the 1954 Hague Convention applies to international and non-international armed conflicts.¹⁴⁸ In respect of internal armed conflict each of the parties to the conflict is bound to the convention’s obligations ‘as a minimum’ (Article 19(1)). The application of the Convention to non-international armed conflict is recognised as forming part of customary international law.¹⁴⁹ In respect of international armed conflicts, if one of the parties is not a High Contracting Party, the treaty obligations remains binding on the High Contracting Parties and any other party which declares it accepts and applies the obligations. (Article 18(3)). The *travaux* record that this ‘refusal to regard non-contracting States purely and simply as third parties’ was deliberate because of the ‘moral obligation to respect the cultural property of an adversary not party to the Convention, such property belonging to the international community as well as the State concerned.’¹⁵⁰ In addition, it should be noted that the United Nations has indicated its willingness to be bound by this

¹⁴⁶ *Ibid.* The draft recital had read: ‘Being convinced that damage to cultural property results in a spiritual impoverishment for the whole of humanity’: 7C/PRG/7, Annex II, at 20. The OIM draft had read: ‘Being convinced that the destruction of a master piece, whatever nation may have produced it, is a spiritual impoverishment for the entire international community’: LNOJ, 19th Year, No.11 (November 1938), at 936, Appendix 2, sub-appendix.

¹⁴⁷ UNESCO Doc.7C/PRG/7, Annex I, at 5.

¹⁴⁸ Article 19, 1954 Hague Convention; and Art.22, 1999 Second Hague Protocol. The *travaux* of the First Protocol noted that: ‘Where property has changed hands on the national territory and has not been exported, the case is one for the national legislation alone’: UNESCO Doc.CL/717, Annex IV, 47. O’Keefe is of the opinion that the provisions relating to belligerent occupation (in particular 1954 Hague Protocol) do not extend to non-international armed conflict: *supra* note 1, at 98. Cf. Prott, ‘The Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention) 1954’, in M. Briat and J. A. Freedberg (eds), *Legal Aspects of International Trade in Art*, (1996), 167 at 170.

¹⁴⁹ Prosecutor v. Duško Tadić, Interlocutory Appeal on Jurisdiction Judgment, No.IT-94-1-A, Appeals Chamber, ICTY, (2 October 1995), paras.98 and 127.

¹⁵⁰ UNESCO Doc.7C/PRG/7, Annex I, at 5-6.

framework pursuant to the request contained in Resolution I of the Final Act of the Intergovernmental Conference in 1954.¹⁵¹

The definition of cultural property covered by the 1954 Hague Convention moves beyond the nature and purpose approach of earlier instruments. This elaborate definition covers publicly or privately owned, movable and immovable property ‘of great importance to the cultural heritage of every people’ including monuments, archaeological sites, groups of buildings, works of art, books, scientific collections, archives, buildings for their preservation including museums, libraries, archival depositories and refuges, and centres containing a large repository of cultural heritage (Article 1).¹⁵² Read consistently with the preamble, ‘importance’ of the cultural site or object should not be determined exclusively by the state where it is located. Rather it extends to ‘people’.¹⁵³ This definition is applied to the two optional protocols also.¹⁵⁴

The 1954 Hague Convention together with its regulations elaborate obligations for the safeguarding and respect of cultural property by the High Contracting Parties which takes effect during peacetime, armed conflict and belligerent occupation. The ‘safeguarding’ or positive measures to be implemented during peacetime and espoused by 1918 NOB report and 1923 Hague Rules finally find binding force in Article 3 of the Convention. It obliges High Contracting Parties ‘to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate’.¹⁵⁵ The measures to be taken are left to the discretion of the

¹⁵¹ *Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict* (1954), at 3-5, Toman and Schindler, *supra* note 8 at 995; and Secretary-General’s Bulletin on the Observance by UN Forces of International Humanitarian Law, 6 August 1999, UN Doc.ST/SGB/1999/13, para.6.6.

¹⁵² See Toman, *supra* note 1, at 45-56; and O’Keefe, *supra* note 1, at 101-111.

¹⁵³ O’Keefe argues it must be of national importance as importance is determined by the state party: *supra* note 1, at 103-4. While it is the responsibility of each state to identify which property is protected under the Convention, to read the definition narrowly is not only inconsistent with the spirit of the Convention as encapsulated in the preamble but subsequent developments in the field of cultural heritage law.

¹⁵⁴ Art.1, First Protocol; and Art.1(b), 1999 Second Protocol.

¹⁵⁵ See O’Keefe, *supra* note 1, at 111-120; Toman, *supra* note 1 at 59-66; and Boylan, *supra* note 134, at 61-73.

High Contracting Party in the light of its financial and technical circumstances.¹⁵⁶ This lack of detail led to further elaboration of the obligation in the Second Protocol, including the preparation of inventories, emergency measures against fire or structural collapse, plans for the removal of movable cultural property or their adequate protection *in situ*, and nomination of competent authorities.¹⁵⁷ Other relevant measures required by the Convention itself include the issuing of military regulations or instructions and fostering in the armed forces ‘a spirit of respect for the culture and cultural property of all peoples.’¹⁵⁸ Also, cultural property should be marked with the distinctive emblem.¹⁵⁹ Failure to undertake these obligations to safeguard in peacetime does not waive obligations to respect which arise when hostilities break out.¹⁶⁰

The obligations to respect (‘obligation not to do’) arising during hostilities,¹⁶¹ are triggered by a declaration of war or an armed conflict between two or more High Contracting Parties, even if not recognised as state of war by one of them.¹⁶² It applies to total or partial occupation of the territory of High Contracting Party even if there is no resistance. The obligation to respect includes, first, undertaking to respect cultural property situated within their *own* territory as well as within the territory of other High Contracting Parties, by refraining from any use of the property and its immediate surroundings for purposes which are likely to expose it to destruction or damage in

¹⁵⁶ UNESCO Doc.7C/PRG/7, Annex I, at 8; and A. Noblecourt, *Protection of Cultural Property in the Event of Armed Conflict* (1958). The reports of the High Contracting Parties to the convention provide detailed information about the preventive steps taken by individual states: see for example, Report on the activities from 1995 to 2004, UNESCO Doc.CLT.2005/WS/6.

¹⁵⁷ Art.5, 1999 Second Protocol, and Guideline 27 of Draft Guidelines for the Implementation of the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict Developed by the Committee for the Protection of Cultural Property in the Event of Armed Conflict at its Second Meeting, 17-19 December 2007, UNESCO Doc.CLT-07/CONF/212/3 Rev.2, at 12.

¹⁵⁸ Art.7(1), 1954 Hague Convention. Further, parties undertake to plan with their military personnel to secure cooperation with specialist civilian authorities: Art.7(2), 1954 Hague Convention and Art.82, Additional Protocol I. For a survey of military manuals: see Henckaerts and Doswald-Beck, *supra* note 86, at vol.II, Part 2, 782-786 and 793-796.

¹⁵⁹ Arts 6 and 16, 1954 Hague Convention.

¹⁶⁰ Art.4(5), 1954 Hague Convention.

¹⁶¹ The *travaux* notes that the obligation to respect ‘means abstention from endangering cultural property and the arrangements which ensure its safeguarding, and abstention from prejudicing them’: UNESCO Doc.7C/PRG/7, Annex, at 8.

¹⁶² Art.18, 1954 Hague Convention.

the event of armed conflict.¹⁶³ Second, they must refrain from any act of hostility directed against such property. This obligation is subject to the proviso that it will be waived if ‘military necessity imperatively requires.’¹⁶⁴

As noted above, this qualification does not form part of the protection afforded under general international humanitarian law and its inclusion in the 1954 Hague framework was contested.¹⁶⁵ Despite recommendations to the contrary,¹⁶⁶ its application was reaffirmed in the Second Protocol.¹⁶⁷

However, Article 6 of the Second Protocol provides that waiver on the basis of ‘imperative military necessity’ will only justify an attack on cultural property when and for as long as: by its function it is a military objective; and there is no ‘feasible alternative’ available to gain a similar military advantage. This decision can only be made by an officer commanding a force the equivalent of a battalion or larger, or a smaller force ‘where circumstances do not permit otherwise. Regardless, ‘an effective advance warning’ should be given where possible in the circumstances.’ This strict delimitation of ‘imperative military necessity’ overlaps substantially with the notion of ‘military objective’ as defined by Additional Protocol I.¹⁶⁸ Consequently, judicial interpretations of military objective and loss immunity arising under Article 52(2) of that protocol and equivalent provisions in the governing statutes of international

¹⁶³ Art.4(1), 1954 Hague Convention.

¹⁶⁴ Art.4(2), 1954 Hague Convention.

¹⁶⁵ See Toman, *supra* note 1, at 74-79; O’Keefe, *supra* note 1, at 121-128. Within the Legal Committee, the proposal to draft a provision along the lines of Art.11(1) was rejected. Instead, the following minute was added regarding interpretation of Art.4: ‘The obligation to respect an item of cultural property remains even if that item is used by the opposing Party for military purposes. The obligation of respect is therefore only withdrawn in the event of imperative military necessity’: CBC/DR/125, *Records*, at 221, para.1167.

¹⁶⁶ Boylan, *supra* note 134, at 17, para.G.4.

¹⁶⁷ Art.6, 1999 Second Protocol. The summary report of the Diplomatic Conference noted: ‘a few States wanted significant changes to the description of cultural property, considering that the draft weakened the provisions of the Hague Convention and was contrary to the provisions of the Additional Protocol I of the Geneva Convention.’ Others had requested that the provision relating to loss of general protection be reformulated to coincide with the Additional Protocol I, whilst other requested its removal all together: *supra* note 139, at 2, paras.9 and 10.

¹⁶⁸ O’Keefe, *supra* note 1 at 252-257. For state practice see Henckaerts and Doswald-Beck, *supra* note 86, at vol.1, at 130 and 132 and vol.2, Part I, at 726, 730-745, 779-780, and 782-786.

criminal tribunals are relevant.¹⁶⁹ Also, when launching an attack, a party must take the following precautions (without prejudice to existing international humanitarian law): feasible measures to ensure that the object to be attacked is not cultural property, feasible measures concerning method and means of attack to avoid or minimise incidental damage to cultural property, refrain from attacking where incidental damage to such property would be disproportionate to the military advantage gained, and cancel and suspend an attack when aware that the target is cultural property or attack is excessive to military advantage gained.¹⁷⁰ All Parties must not locate movable heritage near military objectives (or otherwise provide *in situ* protection) and remove military objective from the vicinity of immovable heritage.¹⁷¹

The remaining obligations contained within Article 4 of the Hague Convention are not subject to the military necessity proviso. Consequently, High Contracting Parties undertake to refrain from acts of reprisal against cultural property and to prohibit, prevent and stop the theft, pillage and misappropriation of and any acts of vandalism toward cultural heritage.¹⁷²

The 1954 Hague Convention also elaborates upon the obligations arising during belligerent occupation originally contained in the unrealised 1938 OIM draft convention.¹⁷³ The occupying power must cooperate with and support the competent national authorities for the protection of cultural heritage. If it is necessary to take measures to preserve the cultural heritage damaged by hostilities, and the competent authorities are unable to undertake the work, then the occupying power shall take ‘the most necessary measures of preservation’ with their cooperation, where possible. The provision extends to informing insurgent groups of their obligation to respect cultural

¹⁶⁹ See Prosecutor v. Pavle Strugar, Trial Judgment, Chamber II, ICTY, No.IT-01-42-T, (31 January 2005), para.295. See O’Keefe, *supra* note 1, at 125-132; Toman, *supra* note 1 at 389-390; and Sandoz *et al*, *supra* note 44, at 648, ¶2079.

¹⁷⁰ Art.7, 1999 Second Protocol.

¹⁷¹ Art.8, 1999 Second Protocol. This provision was modelled on Art.58 Additional Protocol I: Summary Report, *supra* note 139, at 3, para.13.

¹⁷² The ICRC states that it is reflective of customary international law in respect of international and non-international armed conflicts: Henckaerts and Doswald-Beck, *supra* note 86, at vol.1, at 132-136 and vol.2, Part I, at 790-813.

¹⁷³ Art.5, 1954 Hague Convention; and Arts 8 and 9, Regulations of the 1938 OIM draft Convention.

property. The obligation is clarified further by Article 9 of the Second Protocol.¹⁷⁴ It encompasses obligations espoused in the 1956 UNESCO Recommendation on International Principles Applicable to Archaeological Excavations.¹⁷⁵ It provides that the High Contracting Party must prevent and prohibit any illicit export, other removal or transfer of ownership of cultural property;¹⁷⁶ archaeological excavations except when 'strictly required to safeguard, record or preserve' cultural property; and changes to the cultural property intended to hide or destroy 'cultural, historical or scientific evidence'. Archaeological excavations or changes to cultural property in occupied territory shall only (unless circumstances do not permit) be carried out in close cooperation the competent national authorities of the occupied territory.

This protection afforded cultural heritage during occupation is augmented by the First Protocol concerning the removal and return of movable heritage. It draws upon the experience of the Allied Powers during and following the Second World War, in particular the principles contained in the 1938 OIM draft Convention and Declaration of the Allied Nations against Acts of Dispossession Committed in Territories under Enemy Occupation or Control (1943 London Declaration).¹⁷⁷ It requires High Contracting Parties to prevent the export of cultural objects from territory under their control (para.1). High Contracting Parties (even those not party to the conflict) must take into their custody cultural property from occupied territory which enters their territory immediately or upon request of the occupied territory's authorities (para.2). The property on their territory removed in contravention of Article 1 shall be returned to the competent authorities of the territory immediately upon cessation of the occupation (para.3). Cultural property must never be kept as war

¹⁷⁴ The Greek delegation had unsuccessfully tried to incorporate such an obligation in the Convention proper in the 1950s during the original negotiations: *Records, supra* note 180, at paras.1912-15.

¹⁷⁵ Art.32, Part VI of the 1956 UNESCO Recommendation, in *Records of the General Conference, Ninth Session, New Delhi 1956: Resolutions*, (1957), at 40.

¹⁷⁶ Arts 11 and 12 of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, in force 24 April 1972, 823 UNTS 231; and reports of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation: for example, GA Res.61/52 of 11 September 2006, UN Doc.A/RES/61/52.

¹⁷⁷ 5 January 1943, 8 *Department of State Bulletin* (1943) 21.

reparations (para.3).¹⁷⁸ There is no time limit for lodging a claim for the return of such cultural objects.¹⁷⁹ The High Contracting Party obligated to prevent the exportation in the first place shall pay an indemnity to the holder in good faith which is subsequently returned (para.4). This provision is more limited than the post-1945 restitution scheme because it does not extend to neutral third party States.¹⁸⁰ In circumstances where cultural property is deposited by a High Contracting Party in the custody of another for safekeeping against hostilities shall be returned at the cessation to the competent authorities of the territory (para.5). The initial inclusion of a draft provision covering restitution in the convention proper proved highly contentious and was consequently relegated to an optional protocol to placate certain states whom it was feared would not otherwise sign up to the Convention.¹⁸¹

The obligations contained in the 1954 Protocol have largely been replicated in Security Council resolutions concerning Iraq during the first Gulf War in 1990 and the invasion in 2003 which provided for the taking into safekeeping and restitution of cultural heritage removed from that country.¹⁸² They bound all UN Member States and not only states parties to the First Protocol. Indeed, it sometimes led to the passage of domestic laws stricter than the international obligations contained in the Hague framework by countries not parties to these instruments.¹⁸³

The 1954 Hague framework revived and absorbed the notion of special protection for cultural property of ‘very great importance’ flagged by the OIM draft Convention. The distinction made in the 1954 Hague Convention between general

¹⁷⁸ For discussion of contrary Russian state practice: Henckaerts and Doswald-Beck, *supra* note 86, vol.I, at 137-138 in which it notes that these acts of removal occurred prior to the operation of the First Protocol.

¹⁷⁹ See UNESCO Doc.CL/717, Annex IV, 47; Nahlik, *supra* note 1., at 147; and Prott, *supra* note 148.

¹⁸⁰ See *Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict — The Hague, 1954. Records of the Conference*, (1961), paras.1630 and 1637.

¹⁸¹ *Ibid.*, paras.1645-90 and 1750-56. See O’Keefe, *supra* note 1, at 196-201; Toman, *supra* note 1 at 333-356; O’Keefe, ‘The First Protocol of the Hague Convention Fifty Years On’, 9 *Art Antiquity and Law* (2004) 99 at 113; and Prott, *supra* note 148, at 163-73.

¹⁸² SC Res.661, 6 August 1990, and SC Res.1483, 22 May 2003, para.7.

¹⁸³ See, for example, Iraq (United Nations Sanctions) Order 2003 (UK), which shifted the burden of proof from the prosecution to the defendant. He or she has prove to that they ‘did not know and had no reason to suppose’ that the object was removed illegally from Iraq after the relevant date: Section 8(2) and (3).

protection (Chapter I) and special protection (Chapters II of Convention and Regulations) is significant for the purposes of the prosecution of war crimes, that is, grave breaches of international humanitarian law. However, the criteria laid down for attracting special protection were so onerous that very few sites or properties were listed. By 1999, only one site (the Vatican) and refuges nominated by the Netherlands, Austria and the Federal Republic of Germany had been listed.¹⁸⁴

The Second Protocol introduced another category of protection: enhanced protection. Pursuant to Article 10, to attract such protection it must be: (a) cultural heritage of the ‘greatest importance to humanity’;¹⁸⁵ (b) protected adequately by a national legal and administrative measures recognising its ‘exceptional cultural and historic value and ensuring the highest level of protection’;¹⁸⁶ and (c) not be used for military purposes or as a shield of military sites and the Party controlling the property must declare that it will not be used as such. The guarding of sites by armed

¹⁸⁴ Summary Report, *supra* note 139, at 2, para.6; and Toman, *supra* note 1, at 108-109.

¹⁸⁵ The draft Article had referred to its important to ‘all peoples’ but this was amended to ‘humanity’ to ‘emphasiz[e] the common interest in safeguarding important cultural heritage’: Summary Report, *supra* note 139 at 4. The draft guidelines provide that when evaluating whether a property satisfied these criteria it must evaluate its ‘exceptional cultural significance, and/or its uniqueness, and/or if its destruction would lead to irretrievable loss for humanity’ (draft Guideline 32). Exceptional cultural significance is determined by the following criteria:

- *it is an exceptional cultural property bearing a testimony of one or more period of the development of humankind at the national, regional or global level;*
- *it represents a masterpiece of human creativity;*
- *it bears an exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared;*
- *it exhibits an important interchange of human achievements, over a span of time or within a cultural area of the world on developments in arts and sciences;*
- *it has a central significance to the cultural identity of societies concerned.*

Uniqueness is defined as there being no other ‘comparable cultural property that is of the same cultural significance’ having regard to age, history, community, representativity, location, size and dimension, shape and design, purity and authenticity in style, integrity, context, artistic craftsmanship, aesthetic value and scientific value (draft Guideline 34). The criterion of ‘irretrievable loss for humanity’ is satisfied when damage or loss ‘result[s] in the impoverishment of the cultural diversity or cultural heritage of humankind’. Properties listed on the World Heritage List and Memory of the World Register are presumed to satisfy these criteria.

¹⁸⁶ The draft guidelines provide that the Committee must consider whether the national legal and administrative measures adequately identify and safeguard the property, are covered in military planning and training programmes, there are appropriate penal provisions, and (where appropriate) marking with the 1954 Hague Convention emblem (para.39). Such measures will only be considered adequate if effective in practice, that is, ‘based on a coherent system of protection and achieve the expected results’ (para.41). Peace time provisions would also cover adequate protection against negligence, decay or destruction.

custodians or police responsible for public order is deemed not to be a military purpose.¹⁸⁷

The Second Protocol establishes a committee which accepts nominations from High Contracting Parties, non-governmental organisations and other parties, and advises all Parties of the request.¹⁸⁸ It can seek the advice of governmental and non-governmental experts.¹⁸⁹ The property may be listed even if it does not satisfy the criteria provided the requesting Party has asked for international assistance.¹⁹⁰ There is also the possibility for the emergency granting of enhanced protection during hostilities.¹⁹¹ The protection is afforded when the property is listed by the Committee.¹⁹² The Committee is required to inform the UNESCO Director-General of its decision, who in turn notifies the UN Secretary-General. The relevant cultural property and its surroundings attract the immunity.¹⁹³ The protection will be terminated or suspended if it is a military objective;¹⁹⁴ or cancelled or suspended by the Committee when it no longer meets the criteria of Article 10,¹⁹⁵ or its continuous and serious use for the advancement of a military purpose.¹⁹⁶

¹⁸⁷ Art.8(4), 1954 Hague Convention.

¹⁸⁸ Art.11(1), (2) and (3), Second Protocol, and draft Guidelines 44 and 51.

¹⁸⁹ Arts.11(6) and 27(3), Second Protocol, and draft Guidelines 24 and 51.

¹⁹⁰ Art.11(8), Second Protocol, and draft Guideline 50.

¹⁹¹ Art.11(9), Second Protocol, and draft Guideline 63. Such requests must at a minimum: identify the cultural property, provide a description, define its use with declaration that it is not used for nor near vicinity of military objective; details of the responsible authorities; in the form required by the UNESCO secretariat, and duly signed by the Party's competent authority.

¹⁹² Art.12, Second Protocol.

¹⁹³ Art.13, Second Protocol.

¹⁹⁴ Art.13(1)(b), Second Protocol.

¹⁹⁵ Suspension being a provisional measure can only be ordered by the Committee if the conditions contained in Art.10 are no longer fulfilled but may be at later date. This applies only to conditions specified in Art.10(b) and (c) concerning adequate domestic measures and non-military use respectively (draft Guideline 84). As cancellation is a definitive measure it is applied only when the conditions contained in Art.10(a) are no longer met and cannot be met at a later date (draft Guideline 87).

¹⁹⁶ Arts 12 and 14(2), Second Protocol. The Committee may suspend the enhanced protection if the property or its immediate surroundings are used as a military objective (draft Guideline 85). Cancellation may be ordered exceptionally where it is used in such a manner for six months or more and 'there is no evidence that the use will stop' (draft Guideline 88). During the Diplomatic Conference, some states proposed the closure of the loophole by making loss of protection arising only from use in 'direct and indirect support of military operations'. Whilst the ICRC noted that Additional Protocol I was no longer limited to 'only a few unique objects: attack is now allowed only on military objectives,

Property ascribed enhanced protection may be the object of attack if this is the only feasible means of ceasing its use as a military objective, all feasible precautions as to choice of means and method are taken to terminate such use and avoid or minimise damage to it, and the attack can only be ordered at the highest operational level of command, and effective advance warning and reasonable time is given to opponent to stop such use.¹⁹⁷ The last requirement may be discarded in circumstances of self-defence.

Finally, the Second Hague Protocol elaborates upon the duty to prosecute violations. This obligation predates the 1954 Hague Convention and is contained in the 1907 Hague Regulations, referred to above.¹⁹⁸ High Contracting Parties to the Second Protocol must introduce domestic penal legislation (establishing jurisdiction and appropriate penalties) concerning serious violations occurring within their territory or perpetrated by nationals.¹⁹⁹ Serious violations are defined as acts committed intentionally and in violation of the Convention or Second Protocol, namely, attacks on property under enhanced protection, using such property or its immediate surroundings in support of military action, extensive destruction or appropriation of cultural property covered by general protection, making such property the object of attack, and theft, pillage or misappropriation of property under general protection.²⁰⁰ Universal jurisdiction must be established for the first three of these serious violations.²⁰¹ If a Party does not prosecute, then it must extradite to a country that can and which meets minimum standards in international law.²⁰² Further,

all other objects being protected. The protection accorded to these significant items should therefore be substantially higher than the general protection': Summary Report, *supra* note 139 at 4, para.18.

¹⁹⁷ Art.13(2), Second Protocol.

¹⁹⁸ Art.28, 1954 Hague Convention. USSR had unsuccessfully proposed a provision which drew inspiration from Article 146 of the 1949 Fourth Geneva Convention: *Records, supra* note 180, CBC/DR/71, at 390.

¹⁹⁹ Arts 15(2) and 16(1), Second Protocol.

²⁰⁰ Art.15(1), Second Protocol. The Summary Report of the Diplomatic Conference records drafters intended this provision to be consistent with Art.85, Additional Protocol I and the Rome Statute. However, serious concerns were raised about the initial draft particularly by the ICRC which questioned the omission of intentional attacks and pillage as war crimes, *supra* note 139 at 6, para.26 and 27.

²⁰¹ Art.16(1)(c), Second Protocol.

²⁰² Arts 17 and 18, Second Protocol. It also provides for grounds for refusal of extradition (political crimes or racial, religious etc motivations) and provision of mutual legal assistance: Arts 19 and 20.

a party may introduce legislative, administrative or disciplinary measures which suppress the intentional use of cultural property in violation of the Convention or Second Protocol, and illicit export, removal or transfer of ownership of cultural property from occupied territory in violation of the Convention or Protocol.²⁰³

4. International criminal law and cultural heritage

In the year that the Geneva Conventions were adopted, UNESCO reopened the question of a specialist instrument for the protection of cultural property during armed conflict and belligerent occupation. An expert report prepared for the organisation by Georges Berlia emphasized the importance of preventive and punitive measures.²⁰⁴ Preventive measures were encapsulated in the efforts like the 1938 OIM draft Convention which included obligations arising during peacetime to minimise the impact of hostilities. This approach was realised with the adoption of the Hague framework. Equally important were the punitive measures identified by Berlia. Written a few short years after the Nuremberg judgment, he made reference not only to war crimes but extended his discussion to crimes against humanity and genocide.

Berlia's early identification of the link between the international protection of cultural heritage and these newly articulated international crimes is central to my contention that the mid-twentieth century with the Nuremberg Judgment,²⁰⁵ and the adoption of the Genocide Convention and the UDHR represented a shift in the dynamics within the international community.²⁰⁶ The 1954 Hague Convention and all international instruments for the protection of cultural heritage which follow it must be understood within this context. It is a change encapsulated in the preamble of the 1954 Hague Convention. The rationale for the protection of cultural heritage is no longer its universal importance to humanity because of the advancement of the arts and sciences (though this important aim remains), rather it is more complex and

²⁰³ Art.21, Second Protocol.

²⁰⁴ Berlia, *supra* note 27, at 12.

²⁰⁵ Affirmed by GA Res.95 (I), 11 December 1946. See also Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, UN GAOR Supp. (No.12) at 11, UN Doc.A/1316 (1950); 1950 *ILCYb* 374, vol. II, and 44 *AJIL* (1950) 126.

²⁰⁶ Convention on the Prevention and Punishment of the Crime of Genocide, UNGA Res.260A(III), 9 December 1948, in force 12 January 1951, 78 UNTS 277; and Universal Declaration of Human Rights, GA Res.217A(III), 10 December 1948, and 43(supp.) *AJIL* (1949) 127.

relates to the significance of the heritage to peoples. This recalibration is reflected more broadly in recent multilateral instruments for the protection of cultural heritage,²⁰⁷ and human rights.²⁰⁸

This shift is best understood by looking at these individual international crimes as they have been developed from the Hague Regulations to the present day and how cultural heritage has been deployed in the prosecution of alleged perpetrators of these crimes. In this final part, I examine the jurisprudence from the Nuremberg trials to the work of the ICTY in respect of war crimes against cultural property, the crime against humanity of persecution and finally, the crime of genocide.

A Violation of the laws and customs of war

The first efforts to put the obligation to prosecute violations of the laws and customs of war relating to cultural heritage into practice occurred at the close of the First World War. In early 1919, Sub Commission III on the Responsibilities of the Authors of War and on Enforcement of Penalties for Violations of the Laws and Customs of War established during the Preliminary Peace Conference in Versailles had included ‘pillage’ and ‘wanton destruction of religious, charitable, educational, and historic buildings and monuments’ on its list of war crimes to be investigated and prosecuted.²⁰⁹ Thereby, in effect, pronouncing Articles 27, 28 and 56 of the Hague Regulations customary international law. France requested the extradition of sixteen persons from Germany to stand trial for violations pertaining to cultural property during the war, but no prosecutions were realised.²¹⁰ However, the 1919 list (prepared

²⁰⁷ See Convention concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972, in force 17 December 1975, 1037 UNTS 151; Universal Declaration on Cultural Diversity, 2 November 2001, UNESCO Doc.31C/Res.25, Annex I, 41 *ILM* (2002) 57; Convention for the Safeguarding of the Intangible Cultural Heritage, 17 October 2003, in force 20 April 2006, 2368 UNTS 1; Declaration concerning the Intentional Destruction of Cultural Heritage, 17 October 2003, UNESCO Doc.32C/Resolution 39; and Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 20 October 2005, in force 18 March 2007, in UNESCO, *Records of the General Conference, 33rd session, Paris, 3-21 October 2005*, (2 vols, 2005), vol.I, at 83.

²⁰⁸ See Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, GA Res.47/135, 18 December 1992, UN Doc.A/Res/47/135; 32 *ILM* (1993) 911; and Declaration on the Rights of Indigenous Peoples.

²⁰⁹ Reproduced in 14 *AJIL* (1920) 95 at 114-115; and UNWCC, *History of the United Nations War Crimes Commission and the Development of the Law of War* (1948), at 34.

²¹⁰ J. Horne and A. Kramer, *German Atrocities 1914. A History of Denial* (2001), at 448.

by delegations which included Italy and Japan) was revisited during the lead-up to the war crimes trials after 1944.

During the Second World War, the Allied Powers made successive announcements stating that they would hold Axis nationals who had violated the laws and customs of war to account at the end of the hostilities.²¹¹ The 1943 London Declaration reiterated this warning and explicitly extended it to violations concerning civilian property. Also, they advised such property would be subject to restitution whether it was held by nationals of Axis or neutral states.²¹² The jurisdiction of the International Military Tribunal (IMT) extended to violations of the laws and customs of war including ‘plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.’²¹³

The indictment of the major German war criminals at Nuremberg charged that as part of their ‘plan of criminal exploitation’, they had ‘destroyed industrial cities, cultural monuments, scientific institutions, and property of all types in the occupied territories.’²¹⁴ Alfred Rosenberg had headed ‘Einsatzstab Rosenberg’, a programme which confiscated cultural objects from private German collections and occupied territories to fill the regime’s own museums and institutions.²¹⁵ The IMT found that he had directed that the Hague Regulations ‘were not applicable to the Occupied Eastern Territories’. It noted he was ‘responsible for a system of organised plunder of both public and private property throughout the invaded countries of Europe.’²¹⁶ Rosenberg was found guilty of this and other counts of the indictment and sentenced to death.

There was little further jurisprudence on war crimes concerning cultural property until the establishment of the International Criminal Tribunal for the former

²¹¹ See in particular, Declaration of the Four Nations on General Security (Moscow Declaration), 30 October 1943, 38(supp.) *AJIL* (1944) 7-8.

²¹² Third preambular paragraph, 1943 London Declaration.

²¹³ Art.6(b) of the Charter of the International Military Tribunal, Nuremberg annexed to the Agreement by United Kingdom, United States, France and USSR for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 82 UNTS 279, and 39(supp.) *AJIL* (1945) 257.

²¹⁴ Count Three (War Crimes), Part E (Plunder of Public and Private Property), Indictment, in *Trial of the Major War Criminals*, *supra* note 16, vol.1, at 11-30.

²¹⁵ L. Nicholas, *The Rape of Europa: The fate of Europe's treasures in the Third Reich and the Second World War* (1994).

²¹⁶ Nuremberg Judgment, *supra* note 16, at 95-96, and 237ff.

Yugoslavia in 1993. From the earliest phases of the Yugoslav wars, the various parties to the conflict deliberately targeted the cultural and religious property of the opposing parties.²¹⁷ Likewise, the international community under the auspices of the United Nations quickly resolved to investigate and prosecute those responsible for these acts. The adoption of the ICTY Statute by the international community during the progress of the armed conflict was observed to have both punitive and deterrent aims.²¹⁸

The articulation of the crimes relating to the confiscation and destruction of cultural property in the ICTY Statute mimics Article 56 of the 1907 Hague Regulations rather than the Hague framework, even though all belligerents were Parties to the 1954 Convention and Protocol.²¹⁹ Article 3(d) of the Statute includes among the violations of the laws and customs of war:

*[S]eizure, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.*²²⁰

The ICTY has made clear that Article 3 is a catch-all provision which encompassed customary international law.²²¹ Under this provision, it must be shown that the

²¹⁷ Report of the Secretary-General to the President of the UN Security Council, annexing the Interim Report of the Commission of Experts Established Pursuant to SC Res.780(1992), UN Doc.S/1993/25274 (9 February 1993) (concluded that grave breaches and other violations of international humanitarian law had been committed in the territory of the former Yugoslavia including the destruction of cultural and religious property); M. Kéba M'Baye, Final Report of the United Nations Commission of Experts Established Pursuant to SC Res.780(1992), UN Doc.S/1994/674 (27 May 1994), Annex XI: Destruction of Cultural Property Report, pp. 66-68, para.285-97 (focused on Dubrovnik and the Mostar Bridge and only touched on the systematic nature of the destruction and damaging of cultural property); W. J. Fenwick, Annex XI.A: The Battle of Dubrovnik and the Law of Armed Conflict; European Community Monitoring Mission, Cultural Heritage Report No.2, April 1995, at 2.

²¹⁸ Frulli, 'Advancing the Protection of Cultural Property through the Implementation of Individual Criminal Responsibility: The Case-Law of the International Criminal Tribunal for the former Yugoslavia', 15 *Italian Yearbook of International Law* (2005) 195, at 197.

²¹⁹ Yugoslavia was a High Contracting Party to the 1954 Hague Convention and 1954 Hague Protocol, and after its dissolution the successor states have become parties: Croatia (1992), Slovenia (1992), Bosnia and Herzegovina (1993), Serbia (2001), and Montenegro (2007). Serbia (2002), Slovenia (2004), Croatia (2006), and Montenegro (2007) are High Contracting Parties to the 1999 Second Protocol.

²²⁰ While Art.3(d) ICTY Statute refers to 'seizure, destruction or damage', the Rome Statute's equivalent provision (Art.8(2)(b)(ix)) refers only to 'attacks against' such property not including works of art.

²²¹ Prosecutor v. Anto Furundžija, Trial Judgment, No.IT-95-17, (10 December 1998), para.133. Article 3 was originally published as Annex to the Report of the Secretary-General Pursuant to paragraph 2 of SC Res.808 (1993).

international or internal armed conflict existed and had a close nexus with the alleged acts.²²² This provision covering non-international armed conflict reflects developments contained in the 1949 Geneva Conventions and 1954 Hague Convention.

There have been a number of indictments brought under Article 3(d), including Slobodan Milošević ('Wilful destruction or wilful damage done to historic monuments and institutions dedicated to education or religion' in violation of the laws or customs of war).²²³ The most significant cases on this count pertain to the bombardment of the fortified city of Dubrovnik in early October 1991.²²⁴ The leading cases involved Miodrag Jokić, a commander of the Yugoslav People's Army and responsible for the forces which attacked Dubrovnik on 6 October 1991, and Pavle Strugar, his superior found to have 'legal and effective control' over the forces in the area during the relevant period, and Vladimir Kovačević.²²⁵

Several indictments issued by the ICTY reflect the overlap between this provision and protection afforded civilian objects generally in international humanitarian law.²²⁶ The tribunal has affirmed that civilian objects enjoy a 'similar level of protection as a civilian population.'²²⁷ The ICTY has repeatedly held that although acts under Article 3(d) overlap to a certain extent with the offence of unlawful attacks on civilian objects under Article 3(b). However, when the acts are

²²² Strugar Rule 98bis Motion, para.24; and Prosecutor v. Duško Tadić, Appeal Judgment, No.IT-94-1-A, Appeals Chamber, ICTY, (2 October 1995), paras.66-70.

²²³ Milošević Amended Indictment 'Bosnia and Herzegovina' (22 November 2002), Count 21; and Second Amended Indictment 'Croatia' (28 July 2004), Count 19, Case No.IT-02-54-T. There being an overlap between the counts under Articles 3(b) and 3(d) of the ICTY Statute.

²²⁴ For detailed treatment see C. Bories, *Les bombardements serbes sur la vieille ville de Dubrovnik: La protection internationale des biens culturels* (2005).

²²⁵ The matter of Prosecutor v. Vladimir Kovačević, Case No.IT-01-42-2 was ordered by the ICTY to be transferred to and tried by the Republic of Serbia on 17 November 2006.

²²⁶ Strugar Third Amended Indictment 'Dubrovnik' (10 December 2003), Counts 4, 5 and 6, Case No.IT-02-42-PT; and Jokić Second Amended Indictment 'Dubrovnik' (27 August 2003), Counts 4, 5 and 6, Case No.IT-01-42.

²²⁷ Prosecutor v. Pavle Strugar, Rule 98bis Motion, No.IT-01-42-T, Trial Chamber II, ICTY, (21 June 2004), para.62.

specifically directed at the ‘cultural heritage of a certain population’, Article 3(d) is *lex specialis*.²²⁸

In *Kordić and Čerkez*, the Trial Chamber confirmed that the prohibition contained in Article 3(d) in respect of ‘institutions dedicated to religion’, in particular, is customary international law.²²⁹ In that case, the defendants, who were Bosnian Croats were found guilty of violations of the laws and customs of war arising from deliberate armed attacks against historic mosques in Bosnia and Herzegovina. The tribunal supported its finding of customary international law with reference to Article 27 of the 1907 Hague Regulations, Article 53 of 1977 Additional Protocol I and Article 1 of the 1954 Hague Convention.²³⁰

When determining which property falls within the protection afforded under Article 3(d), the tribunal has referenced definitions contained in conventions covering both during armed conflict and peacetime including the Roerich Pact,²³¹ and 1972 World Heritage Convention. In *Strugar*, the Trial Chamber placed significant weight on the Old Town’s inscription on the World Heritage List. It observed that the List includes ‘cultural and natural properties deemed to be of outstanding universal value from the point of view of history, art or science’ and a reasonable trier of fact could conclude that it come within the meaning of cultural property covered by Article 3(d).²³²

In respect of the *actus reus* (requisite material) element of this war crime, the tribunal has considered customary law concerning attacks on cultural property. Early in the life of the tribunal, the Trial Chamber in *Blaškić* took a restrictive view finding that they should not have been used for military purposes at the time of the acts nor

²²⁸ Strugar Rule 98bis Motion.; Prosecutor v. Miodrag Jokić, Trial Judgment, No.IT-01-42/1-S, Trial Chamber I, ICTY, (18 March 2004), para.46; Dario Kordić and Mario Čerkez, Trial Judgment, No.IT-95-14/2-T, (26 February 2001), paras.36 and 360. Cf. Prosecutor v. Dario Kordić and Mario Čerkez, Appeal Judgment, Case No.IT-95-14/2-A, (17 December 2004), paras.89-92 concerning educational institutions.

²²⁹ Kordić and Čerkez, Trial Judgment, para.206.

²³⁰ *Ibid.*, at 359-362. See also Jokić, Trial Judgment, para.48.

²³¹ Kordić and Čerkez, Judgment, para.361.

²³² Strugar Rule 98bis Motion, paras.80-81, and Jokić, Trial Judgment, paras.49 and 51.

located in the ‘immediate vicinity of military objectives.’²³³ It moved away from this interpretation in *Strugar*, where it rejected the notion that it must not be in the immediate vicinity of military objectives at the time of the attack or that this would justify an attack. The tribunal emphasised that it was the cultural property’s use rather than location which was determinative of loss of immunity.²³⁴ Furthermore, the ICTY found it was presumed to enjoy the same general protection afforded to civilian objects, except where they had become military objectives because of ‘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.’²³⁵

In respect of the *mens rea* requirement of this crime, it must be shown that the defendant committed the act wilfully, that is, deliberately or with reckless disregard for the substantial likelihood of the destruction or damage of a protected cultural or religious property.²³⁶ The perpetrator must act with the knowledge that the object is cultural property. For example, in *Strugar* this was evidenced by that fact that Dubrovnik was included on the World Heritage List, whilst in *Jokić* the tribunal noted that the 1954 Hague emblem was clearly visible.²³⁷

In respect of sentencing for war crimes against cultural property, the tribunal has stated that ‘this crime represents a violation of values especially protected by the international community.’²³⁸ In *Jokić*, the Trial Chamber found that the attack on Dubrovnik was exacerbated because it was a ‘living city’ and ‘the existence of the

²³³ Prosecutor v. Tihomir Blaškić, Trial Judgment, No.IT-1995-14-T, Trial Chamber, ICTY (3 March 2000), para.185.

²³⁴ Prosecutor v. Pavle Strugar, Trial Judgment, Chamber II, ICTY, No.IT-01-42-T, (31 January 2005), para.310. Cf. O’Keefe, *supra* note 1, at 321-322 arguing that this customary international law provides that it is not solely use but nature, location and purpose of cultural property which may render it a military objective.

²³⁵ Prosecutor v. Radoslav Brđanin, Trial Judgment, Case No.IT-99-36-T, Trial Chamber II, ICTY, (1 September 2004), para.596. The court also noted even non-state parties to Additional Protocol I, including the United States, Turkey and India, recognised the customary law nature of Art.52(2) Additional Protocol I during the diplomatic conference called for the Second Hague Protocol in 1999: *ibid.*, at footnote 1509.

²³⁶ *Ibid.*, at para.599; and Prosecutor v. Pavle Strugar, Appeals Judgment, No.IT-01-42-A, Appeals Chamber, ICTY, (17 July 2008), paras.277-278.

²³⁷ Prosecutor v. Miodrag Jokić, Trial Judgment, No.IT-01-42/1-S, Trial Chamber I, ICTY, (18 March 2004), paras.23 and 49; and Strugar, Trial Judgment, paras.22, 183, 279, 327 and 329.

²³⁸ Jokić, Trial Judgment, para.46.

population was intimately intertwined with its ancient heritage.’²³⁹ It held that while ‘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.’²⁴⁰ A site once destroyed could not be returned to its original status.²⁴¹ Taking into account Jokić’s remorse he was sentenced to seven years imprisonment,²⁴² whilst Strugar was given eight years.²⁴³

B Crime against humanity of persecution

The prohibition of crimes against humanity in international law stretches back to the early twentieth century and the investigation by the 1919 Commission of offences committed by Germany and her allies against their own nationals, particularly in Turkey and Austria.²⁴⁴ Dissent from the United States meant no provision for the prosecution of these acts was incorporated in the peace treaty with Austria.²⁴⁵ However, under Article 230 of its peace treaty with Allied Powers (Treaty of Sèvres), Turkey was obliged to recognize and cooperate with any tribunal appointed by the Allies to prosecute alleged perpetrators, by providing relevant information and surrendering persons ‘responsible for the massacres committed during the continuance of the state of war on the territories which formed part of the Turkish Empire on 1st August 1914.’²⁴⁶ There was also provision made for the restitution of property removed from these communities.²⁴⁷ Significantly, whilst these

²³⁹ *Ibid.*, para.51.

²⁴⁰ *Ibid.*, para.53.

²⁴¹ *Ibid.*, para.52.

²⁴² Confirmed on appeal: Prosecutor v. Miodrag Jokić, Judgment on Sentencing Appeal, No.IT-01-42/1-A, Appeals Chamber, ICTY (30 August 2005).

²⁴³ This sentence was reduced on appeal to seven and a half years imprisonment: Strugar, Appeals Judgment, and pardoned by Decision of the President on the application for pardon or commutation of sentence of Pavle Strugar, No.IT-01-42-ES (16 January 2009).

²⁴⁴ 1919 Commission Report, *supra* note 209, at 114-115 and 122. Egon Schwelb later noted that most of the charges listed by the commission referred to the persecution of Armenian and Greek minorities by Turkish authorities: Schwelb, ‘Crimes Against Humanity’, 23 *BYBIL* (1946) 178, at 181.

²⁴⁵ 1919 Commission Report, *ibid.*, at 14; and ‘Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities’, Annex II, 4 April 1919, 14 *AJIL* (1920) 127, at 134.

²⁴⁶ Treaty of Peace with Turkey, 10 August 1920, not ratified, Cmd 964 (1920), *British and Foreign State Papers*, vol.113, at 652, and 15(supp.) *AJIL* (1921)179.

²⁴⁷ Art.144, Treaty of Peace with Turkey.

acts occurred within the context of an international armed conflict, the provision targeted the acts of a state against its own nationals. However, British attempts to try the perpetrators before an international tribunal and Turkish endeavours in national courts met with limited success.²⁴⁸

As noted earlier, during the Second World War the Allied Powers, warned that perpetrators of atrocities against civilians and civilian property that they would be held to account. Many atrocities of the Axis forces went beyond the established time and space parameters of existing international humanitarian law as defined by the Hague Regulations. They had occurred prior to the commencement of war and were often perpetrated by states against their own nationals within their own territory. Early Allied declarations concerning the punishment of these acts were tightly bound to the constraints of the Hague Conventions and made no reference to such acts. However, gradually it was accepted that the remit of the Nuremberg tribunal would not confine itself to the violation of the laws and customs of war committed against Allied combatants or occupied civilians, that is, war crimes. Rather, it was extended to include acts perpetrated against civilians that were stateless or Axis citizens on Axis territory.

This seminal leap in international law was encapsulated in Article 6(c) of the London Charter which extended the International Military Tribunal's jurisdiction to encompass crimes against humanity including 'persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.' Count Four of the Nuremberg Indictment detailed how 'Jews [were] systematically persecuted since 1933 ... from Germany and from the occupied Western Countries were sent to the Eastern Countries for extermination.'²⁴⁹ The IMT held that confiscation and destruction of religious and cultural institutions and objects of Jewish communities amounted to persecution that was a crime against humanity.²⁵⁰ The Allied Powers later remedied the drafting error for subsequent trials, that had led to the IMT to restrict its findings to acts committed during or in

²⁴⁸ Hughes, 'Recent Questions and Negotiations', 18 *AJIL* (1924) 229, at 237.

²⁴⁹ *Ibid.*

²⁵⁰ Nuremberg Judgment, *supra* note 16, at 243-247.

connection with the war.²⁵¹ Despite this significant limitation, the prosecution of crimes against humanity without reference to ‘time and place and national sovereignty’ heightened the Nuremberg Charter’s importance for the promotion of international human rights.²⁵²

Alfred Rosenberg was found guilty of crimes against humanity including the plunder in 1941 of Jewish homes in western Europe through his ‘Einsatzstab Rosenberg’. The tribunal also held that as supreme authority in the Occupied Eastern Territories from mid-1941, he was instrumental in the persecution of the Jews and opponents of the Nazi regime.²⁵³ Julius Streicher, who was not a member of the military, was found guilty on Count Four for his incitement of the persecution and extermination of Jews through propaganda including as publisher of the anti-Semitic newspaper, *Der Stürmer*. He was also found to have been responsible for the destruction of the Nuremberg synagogue in 1938.²⁵⁴ Later, the District Court of Jerusalem found Adolf Eichmann guilty of crimes against humanity (and war crimes) arising from among other things the destruction of synagogues and other religious institutions which amounted to persecution.²⁵⁵

The international and hybrid criminal tribunals established under the auspices of the United Nations since the 1990s have invariably extended jurisdiction to the crimes against humanity of persecution.²⁵⁶ The establishment of the ICTY a half

²⁵¹ See Robinson, ‘The International Military Tribunal and the Holocaust: Some Legal Reflections’, 7 *Israel Law Review* (1972), 1 at 7-12; and Article II(1)(c), Control Council Law No.10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945, *Official Gazette of the Control Council of Germany*, No.3, 31 January 1946, at 50-5.

²⁵² Schwelb, *supra* note 245.

²⁵³ Nuremberg Judgment, *supra* note 16, at 287-288.

²⁵⁴ Nuremberg Judgment, *supra* note 16, at 294-295. See also Von Schirach, *ibid.* at 310-311 found guilty of Count Four. Cf. Flick and Farben decided by the US Military Tribunal pursuant to Control Council Law No.10 where it held that acts against property did not constitute crimes against humanity: UNWCC, *Law Reports of Trials of War Criminals*, (15 vols, 1947-49), vol.VI, at 1215-1216, and vol.VIII, Part 2, at 1123-1133.

²⁵⁵ Attorney-General of the Government of Israel v. Adolf Eichmann, 361 ILR 5 (Dist. Ct. of Jerusalem, 1961), para.57.

²⁵⁶ Art.3(h) ICTR Statute; Art.7(1)(h) (Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as identified in paragraph 3, or other grounds universally recognised as impermissible under international law, in connection with any act, referred to in this paragraph or any other crime within the jurisdiction of the Court) and 2(g) defines ‘Persecution’ as ‘intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity’, Rome Statute, Art.2(h) Statute of the Special Court for Sierra Leone; Art.9 Statute of the Special Court for Cambodia; Art.3 (Religious Persecution)

century after Nuremberg reopened the question of persecution as it related to cultural heritage. During the first years of the Yugoslav conflicts, the International Law Commission in its 1991 Report on the Draft Code of Crimes Against Peace and Security related persecution on social, political, religious or cultural grounds to ‘human rights violations ... committed in a systematic manner or on a mass scale by government officials or by groups that exercise de facto power over a particular territory ...’.²⁵⁷ The ILC noted that the systematic destruction of monuments, buildings and sites of highly symbolic value for a specific social, religious or cultural group amounted to persecution.²⁵⁸ Moreover, this definition extended to intangible elements of heritage including the suppression of language, religious practices, and detention of community or religious leaders.

Under the ICTY Statute, crimes against humanity are covered by Article 5. This provision does not list acts against cultural property or civilian property per se nor does it define ‘persecution’. However, the ICTY has held that the destruction or damaging of the institutions of a particular political, racial or religious group is clearly a crime against humanity of persecution under Article 5(h).²⁵⁹ Referring to its own earlier jurisprudence, the Nuremberg Judgment and the 1991 ILC Report, the Trial Chamber in *Kordić and Čerkez* expounded that:

*This act, when perpetrated with the requisite discriminatory intent, amounts to an attack on the very religious identity of a people. As such, it manifests a nearly pure expression of the notion of ‘crimes against humanity’, for all humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects.*²⁶⁰

The ICTY has stated that the attacks must be directed against a civilian population, be widespread or systematic, and perpetrated on discriminatory grounds for damage

and Art.5 (Crimes Against Humanity including persecution), Law on the Establishment of Cambodian Extraordinary Chambers.

²⁵⁷ Report of the International Law Commission on the Work of its Forty-Third Session, UN Doc.A/46/10/suppl.10 (1991), at 268.

²⁵⁸ *Ibid.*

²⁵⁹ *Kordić and Čerkez*, Trial Judgment, para.207.

²⁶⁰ *Ibid.*, paras.206 and 207.

inflicted to cultural property to qualify as persecution.²⁶¹ This requirement is intended to ensure that crimes of a collective nature are penalised because a person is ‘victimised not because of his individual attributes but rather because of his membership of a targeted civilian population.’²⁶² Similarly, cultural property is protected not for its own sake, but because it represents a particular group. While it is now generally accepted that the crimes of humanity, including acts of persecution, do not need to take place during armed conflict, it is a requirement under Article 5 of the ICTY Statute. The tribunal must find a nexus with the international or internal armed conflict in order to have jurisdiction.²⁶³

The Lašva Valley cases with the defendants Tihomir Blaškić, Dario Kordić and Mario Čerkez serve to underscore the ICTY’s jurisprudence concerning acts against cultural property being defined as the crime against humanity of persecution. From November 1991 to March 1994, the primary political party in Croatia at the time, the Croatian Democratic Union (HDZ) espoused the right of secession of the ‘Croatian nation inside its historical and natural borders’. The Croatian Democratic Union of Bosnia and Herzegovina (HDZ-BiH) was the main Bosnian Croatian party and it had an identical platform. In November 1991, the Croatian Community of Herceg-Bosnia proclaimed its right to exist separately in the territory of Bosnia and Herzegovina. The Croatian Defence Council (HVO) was the Community’s supreme executive, administrative and defence authority. These groups, with their military and police forces, organised and executed a campaign of persecution and ethnic cleansing, which included targeting Bosnian Muslim civilians, their property and cultural heritage in the Lašva Valley.

In respect of the material element or *actus reus* of persecution under Article 5(h) of the ICTY Statute, the tribunal has found that it encompasses crimes against persons and crimes against property as long as it is accompanied by the requisite

²⁶¹ Prosecutor v. Zoran Kupreškić *et al*, Trial Judgment, Case No.IT-95-16-T, Trial Chamber, ICTY, (14 January 2000), para.544; and Prosecutor v. Tihomir Blaškić, Trial Judgment, Case No.IT-95-14-T, Trial Chamber, ICTY, (30 March 2000), para.207.

²⁶² Prosecutor v. Duško Tadić, Opinion Trial Judgment, No.IT-94-1-T, Trial Chamber, ICTY, (7 May 1997), at para.644.

²⁶³ Blaškić, Trial Judgment, paras.66 and 227; Tadić, Appeal Judgment, para.249, and Prosecutor v. Radislav Krstić, Trial Judgment, Case No.IT-98-33, Trial Chamber, ICTY (2 August 2001), para.480.

intent.²⁶⁴ Under this provision, the tribunal has dealt with crimes against property in general and those specifically directed at cultural property. It has held that comprehensive destruction of homes and property may cause forced transfer or deportation and, if done discriminatorily, constitutes ‘the destruction of the livelihood of a certain population’ and therefore, persecution.²⁶⁵ In *Blaškić*, the Trial Chamber convicted the defendant of the persecution which took ‘the form of confiscation or destruction’ by Bosnian Croat forces of ‘symbolic buildings ... belonging to the Muslim population of Bosnia-Herzegovina.’²⁶⁶ It found that ‘the methods of attack and the scale of the crimes committed against the Muslim population or the edifices symbolizing their culture sufficed to establish beyond reasonable doubt that the attack was aimed at the Muslim civilian population.’²⁶⁷

Further, the ICTY has held that vital element of crimes under Article 5 is that they are part of ‘a widespread or systematic attack against a civilian population.’²⁶⁸ Acts should not be examined in isolation but in terms of their cumulative effect.²⁶⁹ However, they do not need to be part of a pre-existing criminal policy or plan.²⁷⁰ While the tribunal acknowledged that this element of the test may exclude certain acts against property of a group from the realm of criminal persecution, it has affirmed that destruction of cultural property, even a single act, with the requisite discriminatory intent may constitute persecution.²⁷¹ Further, it has emphasised the need that it be directed against ‘civilian populations.’²⁷²

²⁶⁴ Blaškić, Trial Judgment, para.233.

²⁶⁵ Kupreškić *et al*, Trial Judgment, para.631 (involving the massacre and destruction of homes in Ahmići).

²⁶⁶ Blaškić, Trial Judgment, paras.227-228.

²⁶⁷ *Ibid.*, at para.425.

²⁶⁸ Krstić, Trial Judgment, para.535.

²⁶⁹ Kupreškić *et al*, Trial Judgment, para.615.

²⁷⁰ Blaškić, Appeal Judgment, para.120; and Prosecutor v. Dragoljub Kunarac *et al*, Appeal Judgment, Case No.IT-96-23, Appeals Chamber, ICTY (12 June 2002), at para.98.

²⁷¹ Kordić and Čerkez, Trial Judgment, paras.196, 199, 205 and 207.

²⁷² Kunarac *et al*, Appeal Judgment, paras.78, 87, and 90-92; Prosecutor v. Tihomir Blaškić, Appeals Judgment, Case No.IT-95-14-A, Appeals Chamber, ICTY, (29 July 2004), at paras.103-116; and Prosecutor v. Milan Martić, Appeals Judgment, Case No.IT-95-11-A, Appeals Chamber, ICTY, (8 October 2008), paras.310-314.

The Trial Chamber found that an act must reach the same level of gravity as the other crimes against humanity enumerated in Article 5. However, it has added that persecutory acts are not limited to acts listed in Article 5 or elsewhere in the ICTY Statute, ‘but also include the denial of other fundamental human rights, provided they are of equal gravity or severity.’²⁷³ The Appeals Chamber in *Blaškić* found that committing an act with the requisite intent is not sufficient, the act itself must ‘constitute the denial or infringement upon a fundamental right laid down in customary international law.’²⁷⁴ In *Kupreškić*, Trial Chamber stated: ‘[A]lthough the realm of human rights is dynamic and expansive, not every denial of a human right may constitute a crime against humanity.’²⁷⁵ The test will only be met when there is a gross violation of a fundamental right.²⁷⁶

Persecution requires a specific additional *mens rea* element over and above that needed for other crimes against humanity, namely a discriminatory intent ‘on political, racial or religious’ grounds’ (not necessarily cultural).²⁷⁷ Although the *actus reus* of persecution may be identical to other crimes against humanity it was distinguishable because it was committed on discriminatory grounds. The ICTY has pointed out that persecution may be ‘acts rendered serious not by their apparent cruelty but by the discrimination they seek to instil within humankind.’²⁷⁸ There is no additional requirement of ‘persecutory intent’.²⁷⁹ It noted that the intent to discriminate need not be the primary intent but a significant one.²⁸⁰ In addition, this discriminatory intent must be combined with knowledge of an attack on civilians and that the act forms part of that attack.²⁸¹

²⁷³ Krstić, Trial Judgment, para.535; and Prosecutor v. Radoslav Brđanin, Appeals Judgment, Appeals Chamber, ICTY, (3 April 2007), paras.296-297.

²⁷⁴ Prosecutor v. Tihomir Blaškić, Appeals Judgment, Case No.IT-95-14-A, Appeals Chamber, ICTY, (29 July 2004), para.139.

²⁷⁵ Kupreškić *et al*, Trial Judgment, para.618.

²⁷⁶ *Ibid.*, at para.621.

²⁷⁷ Blaškić, Trial Judgment, para.283; Krstić, Trial Judgment, para.480; and Kordić and Čerkez, Trial Judgment, paras.211 and 212.

²⁷⁸ Blaškić, Trial Judgment, para.227.

²⁷⁹ Blaškić, Appeals Judgment, para.165.

²⁸⁰ Kupreškić, Trial Judgment, paras.431, 607, and 625.

²⁸¹ Blaškić, Appeals Judgment, paras.121-128.

The severity of sentences handed down to persons convicted under this count compared to war crimes illustrates the gravity with which it is held by the tribunal. For example, the Trial Chamber sentenced Tihomir Blaškić to 45 years imprisonment after he was found guilty of crimes against humanity (and Article 3(d)) which included the destruction and plunder of property and, in particular, of institutions dedicated to religion and education,²⁸² while Dario Kordić received 25 years which was upheld on appeal and Mario Čerkez received fifteen years imprisonment reduced to six years on appeal.²⁸³

Several indictments brought before the ICTY for the wanton destruction or damage of cultural property related to religious or ethnic groups included charges of persecution and genocide. However, while such acts have been used to establish the *mens rea* of a defendant, that is, the discriminatory intent required for proving genocide and persecution. The targeting of cultural property may amount to *actus reus* in respect of the crime of persecution, but as explained below, the tribunal has not include such acts within the definition of genocide under Article 4 of the ICTY Statute.

C Genocide

Cultural heritage has been intimately connected to the prosecution of the crime of genocide in the international law since it was first articulated in the 1940s. However, that relationship has been fraught and remains contentious. The reasons are complex and perennial. In this section, I examine the contestations concerning the ‘cultural’ elements of genocide during the negotiation of the 1948 Genocide Convention, and then I consider how the evidence of the destruction or damage of cultural property of the targeted group has played a vital role in establishing individual criminal responsibility for genocide before the ICTY and state responsibility in the 2007 decision of the International Court of Justice in *Application*

²⁸² Blaškić’s sentence was substituted on appeal to nine years: Prosecutor v. Tihomir Blaškić, Appeal Judgment, Case No.IT-95-14-A, Appeals Chamber, ICTY, (29 July 2004).

²⁸³ Prosecutor v. Dario Kordić and Mario Čerkez, Appeal Judgment, Case No.IT-95-14/2, Appeals Chamber, ICTY (17 December 2004).

of the *Convention on the Prevention and Punishment of the Crime of Genocide* (*Genocide case*).²⁸⁴

1. *Nuremberg, 1948 Genocide Convention and cultural genocide*

The articulation of the crime of genocide in the mid-twentieth century evolved from existing international humanitarian law. Many acts perpetrated by the Nuremberg defendants as part of their genocidal programme had been outlawed by international law as evidenced by their inclusion on the 1919 List like denationalisation, pillage, confiscation of property, wanton destruction of religious, charitable, educational and historic buildings and monuments.²⁸⁵ The United Nations' War Crimes Commission (UNWCC) maintained that crimes like 'denationalisation' were not legal, even if they were not specifically enumerated in the various Hague Conventions.²⁸⁶ It pointed to the preamble of the 1907 Hague IV Convention which stipulates that if an act is not covered by the Convention, it must be considered in the light of principles derived from 'the laws of humanity and dictated by public conscience'.²⁸⁷

The term 'genocide' was only coined by Raphael Lemkin in 1943.²⁸⁸ The UNWCC's earliest response to genocide, following Lemkin's lobbying, was the re-articulation of the 'denationalisation of inhabitants of occupied territory'.²⁸⁹ To this end, the UNWCC's Committee III(Legal) focused on provisions like Articles 27 and 56 of the Hague Regulations. It employed an expansive interpretation of Article 56,²⁹⁰

²⁸⁴ *Bosnia and Herzegovina v. Serbia and Montenegro*, ICJ, Judgment of 26 February 2007, at <<http://www.icj-cij.org/docket/files/91/13685.pdf>> (viewed 21 January 2009).

²⁸⁵ 1919 Commission Report, *supra* note 209, at 114-115; and C.149, 4 October 1945, para.6, 6/34/PAG-3/1.1.0, United Nations War Crimes Commission 1943-1949, Predecessor Archives Group, United Nations Archives, New York (UNWCC Archive).

²⁸⁶ C.148, 28 September 1945, 2-3, 6/34/PAG-3/1.1.0, UNWCC Archive.

²⁸⁷ Eighth recital, Preamble, 1907 Hague IV Convention; and B. E cer, Scope of the Retributive Action of the United Nations according to their Official Declarations, III/4, 27 April 1944, 6, box 9, reel 36, PAG-3/1.1.3, UNWCC Archive.

²⁸⁸ R. Lemkin, *Axis Rule in Occupied Europe. Laws of Occupation, Analysis of Government, Proposals for Redress* (1944), Chapter 9.

²⁸⁹ See Notes of Committee III meeting, 9 October 1945, box 5, reel 34, PAG-3/1.0.2, UNWCC.

²⁹⁰ See E. Schwelb, Note on the Criminality of 'Attempts to Denationalise the Inhabitants of Occupied Territory', III/15, 10 September 1945, para.11; and Draft Report Committee III on the Criminality of 'Attempts to Denationalise the Inhabitants of Occupied Territory', III/17, 24 September 1945, paras.8 and 9, box 9, reel 36, PAG-3/1.1.3, UNWCC Archive.

by suggesting that the ‘rationale’ for this provision was the protection of spiritual values and intellectual life related to such institutions and objects.²⁹¹ Furthermore, the deliberate removal or destruction of cultural objects from the group was viewed as a fundamental component of this international crime.²⁹² When these provisions were interpreted in the spirit of the preamble of the Hague Convention, Committee III unanimously agreed that ‘denationalisation’ was forbidden by international law.²⁹³ Committee III defined ‘denationalisation’ as a crime driven by policies adopted by an occupying power for the purpose of ‘disrupting and disintegrating the national conscience, spiritual life and national individuality’.²⁹⁴ Noting that it was committed not against individuals but against the group.²⁹⁵

Lemkin argued that while the various acts often perpetrated to achieve a genocidal purpose were largely outlawed by international law, there was a need to recognise the heinousness of the acts which he termed ‘genocide’, that is, the aim to destroy the physical and cultural elements of targeted groups. For this reason, it was more than simply mass murder because it resulted in ‘the specific losses of civilization in the form of the cultural contributions which can only be made by groups of people united through national, racial or cultural characteristics.’²⁹⁶

The word genocide did not appear in the London Charter establishing the jurisdiction of the International Military Tribunal. However, Count Four of the indictment of the major war criminals, based on Article 6(c) of the Charter, charged them with ‘deliberate and systematic genocide, viz., the extermination of racial and national groups, against civilian populations of certain occupied territories in order to destroy particular races and classes of people, and national, racial or religious

²⁹¹ C.149, 4 October 1945, para.8, 6/34/PAG-3/1.1.0.

²⁹² Including the deportation of children to the occupier’s State to educate them; the interference in occupied people’s religious traditions; removal of national symbols and names; compulsory or automatic granting of citizenship of the occupier; and colonisation of the occupied territory by nationals of the occupier: III/17, 24 September 1945, para.6, 9/36/PAG-3/1.1.3, UNWCC Archive.

²⁹³ III/17, 24 September 1945, para.8, 9/36/PAG-3/1.1.3.

²⁹⁴ Report Sub-Committee, 2 December 1942, C.1, and Preliminary Report Chairman of Committee III, 28 September 1945, C.148, 2, box 6, reel 34, PAG-3/1.1.0, UNWCC Archive.

²⁹⁵ See Criminality of Attempts to Denationalise the Inhabitants of Occupied Territory, 4 October 1945, C.149, para.6, box 6, reel 34, PAG-3/1.1.0, UNWCC Archive.

²⁹⁶ Lemkin, *supra* note 288, at 84.

groups ...'.²⁹⁷ However, the term 'genocide' was not explicitly used in the Nuremberg Judgment. Lemkin conceded that the method by which the crime was incorporated into the indictment, via the count on crimes against humanity, proved problematic.²⁹⁸ He noted that whilst genocide usually occurred under the guise of armed conflict, any definition should not differentiate between acts taking place during peace or war time.²⁹⁹

Lemkin's broader notion of genocide, which included cultural elements, was affirmed by the second wave of prosecutions pursued under Control Council Law No.10, which did not require a nexus to be made between crimes against humanity and an armed conflict. The indictment in the case of *Ulrich Greifelt and Ors*, before the US Military Tribunal at Nuremberg, covered the 'systematic program of genocide, aimed at the destruction of foreign nations and ethnic groups, in part by murderous extermination, and in part by the elimination and suppression of national characteristics.'³⁰⁰ Likewise, in the *Artur Grieser* case, the Supreme National Tribunal of Poland using the term for the first time in a judgment denouncing 'physical and spiritual genocide' and attacks on smaller nations' right to exist and have 'an identity and culture of their own.'³⁰¹ The same court in the *Amon Leopold Goeth* case stated that 'the wholesale extermination of Jews and ... Poles had all the characteristics of genocide in the biological meaning of this term, and embraced in addition, the destruction of the cultural life of these nations.'³⁰²

Two months after the Nuremberg judgment, the UN General Assembly on 11 December 1946 unanimously adopted the Resolution on the Crime of Genocide (Genocide Resolution).³⁰³ The resolution augmented the view that genocide was a

²⁹⁷ Nuremberg Indictment, in *Trial Proceedings*, *supra* note 18, vol.1, at 11-30.

²⁹⁸ Lemkin, 'Genocide as a Crime under International Law', 41 *AJIL* (1947) 145, at 148.

²⁹⁹ Lemkin, *supra* note 288, at 93.

³⁰⁰ U.S. v. Greifelt and others (US Military Tribunal, Nuremberg), 13 LRTWC (1949) 1, at 36-42, and 15 *Annual Digest* (1948) 653, at 654.

³⁰¹ Poland v. Greiser (Supreme National Tribunal of Poland) 13 LRTWC (1949) 70 at 114, and 105, and 13 *Annual Digest* (1946) 387, at 389. The offences for which he was indicted included: 'Systematic destruction of Polish culture, robbery of Polish cultural treasures and germanization of the Polish country and population, and illegal seizure of public property' (*Ibid.*, 71).

³⁰² Poland v. Goeth (Supreme National Tribunal of Poland), 7 LRTWC (1946) 4, at 9, and 13 *Annual Digest* (1946) 268.

³⁰³ GA Res.96(I), 11 December 1946, *YBUN* (1946-47), at 255.

crime in international law before the Genocide Convention.³⁰⁴ In its advisory opinion on *Reservations to the Convention on Genocide*, the ICJ found that the Convention encapsulated ‘principles which are recognized by civilized nations as binding on States, even without any conventional obligations.’³⁰⁵

The Genocide Resolution states that genocide ‘is a crime under international law’, independent of crimes against humanity and without reference to a nexus to armed conflict.³⁰⁶ The Resolution’s preamble notes that genocide ‘shocked the conscience of mankind [and] resulted in great losses to humanity in the form of cultural and other contributions represented by these groups.’ The phrase recalls the humanitarian law origins of the proposed convention and the rationale propagated by Lemkin. It was a sentiment contained in the preamble of the 1954 Hague Convention. However, the resolution went on to define genocide narrowly as ‘a denial of the right to existence of entire human groups, as homicide is the denial of the right to live for individual human beings.’

Following a direction from the Economic and Social Council, the Secretary-General requested the Division of Human Rights prepared a draft Convention on the Prevention and Punishment of Genocide. The Secretariat draft categorized acts constituting genocide in three parts: physical, biological, and cultural.³⁰⁷ Acts that fell within the cultural element of its definition included those designed to destroy the characteristics of the group including the forced removal of children to another group, systematic and forced exile of representatives of the targeted group, complete prohibition on the use of its language, systematic destruction of books in the language

³⁰⁴ See Justice Trial (Josef Altostötter and others) (U.S. Military Tribunal), 4 LRTWC (1946) 48 stated that: ‘The General Assembly is not an international legislature, but it is the most authoritative organ in existence for the interpretation of world opinion. Its recognition as an international crime is persuasive evidence of the fact’; and *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide Case*, ICJ Reports 1951, 15, at 23, and *Barcelona Traction, Light and Power Co case (Belgium v. Spain)*, ICJ Reports 1970, 3 at 32.

³⁰⁵ *Ibid.*, at 23.

³⁰⁶ Paragraph 1, GA Res.96(I). The range of groups covered by the Genocide Resolution – ‘racial, religious, political and other groups’ – reflects the list contained in Article 6(c) of the London Charter except that that list was exhaustive. The initial draft of the Resolution was narrower and referred to ‘national, racial, ethnical or religious groups’, which is closer to the definition contained in Article II Genocide Convention: UN Doc.A/BUR/50.

³⁰⁷ Committee on the Progressive Development of International Law and its Codification, Draft Convention for the Prevention and Punishment of Genocide, prepared by the Secretariat, 6 June 1947, UN Doc.A/AC.10/42 (Secretariat draft).

or those related to its religious practices, and ‘systematic destruction of historical or religious monuments or their diversion to alien uses, or destruction or dispersion of documents or objects of historical, artistic, or religious interest and of religious accessories.’³⁰⁸

Of the legal experts consulted by the Secretariat, only Lemkin supported the inclusion of ‘cultural genocide.’ He argued a group’s right to exist was justified morally but also because of ‘the value of the contribution made by such a group to civilization generally.’ He reiterated: ‘If the diversity of cultures were destroyed, it would be as disastrous for civilization as the physical destruction of nations.’³⁰⁹ The other legal experts, Donnedieu de Vabres and Vespasian V. Pella maintained that these cultural elements ‘represented an undue extension of the notion of genocide and amounted to reconstituting the former protection of minorities (which has been based on other conceptions) under the cover of the term of genocide.’³¹⁰ The division between the proponents and opponents of the inclusion of cultural elements in the definition of genocide were sustained as the draft convention progressed through various stages in the UN system.³¹¹

³⁰⁸ Draft Article 3(e), UN Doc.A/AC.10/42 at 3.

³⁰⁹ See UN Doc.E/447, 27; and Contribution of the Convention on the Prevention and Punishment of the Crime of Genocide to the Prevention of Discrimination and the Protection of Minorities, December 7, 1949, UN Doc.E/CN.4/Sub.2/80, para.22.

³¹⁰ *Ibid.*

³¹¹ Ad Hoc Committee on Genocide, Report of the Committee and Draft Convention drawn up by the Committee, K. Azkoul, Rapporteur, 24 May 1948, UN Doc.E/794, 17: agreed to retain ‘cultural genocide’ but as a separate provision which was narrowly defined. Article III encompassed ‘any deliberate act committed with the intent to destroy the language, religion, or culture of a national, racial or religious group’. It referred specifically to the prohibition on the use of language of the group; and the destruction, or prevention of the use of libraries, museums, schools, historic monuments, places of worship or other cultural institutions and objects of the group. Article III was adopted 4-0-3. The United States condemned its inclusion declaring such acts were more appropriately dealt with under the protection of minorities: UN Doc.E/794, 18. Next, the discussion in the Sixth (Legal) Committee was confined simply to the question of whether the Convention should include cultural genocide. The Committee voted against the inclusion of the provision relating to cultural genocide (25-16-4): UN Doc.A/C.6/SR.83 at item 30, at 206; and Daes, ‘Protection of Minorities under the International Bill of Human Rights and the Genocide Convention’, in *Xenion: Festschrift für Pan J Zepos anlässlich seines 65. II*, (1973), 35 at 69. Its inclusion was not effectively revived thereafter. In the Economic and Social Council: ECOSOC, UN Doc.E/SR.218 and 219; and J. Spiropolous, Genocide: Draft Convention and Report of the Economic and Social Council, Report of the Sixth Committee, December 3, 1948, UN Doc.A/760; and finally, the General Assembly: UN Doc.A/PV.178 and 179 (with the USSR effort to reintroduce a new Article III being defeated 14-31-10).

The Genocide Convention was adopted by the General Assembly on 9 December 1948. The only element of the cultural component contained in the Secretariat's definition of genocide that remains in final text is the reference to the removal of children from the group.³¹² As noted above, this provision ties in with protections included in the 1949 Geneva Conventions. Like the Genocide Resolution, the Genocide Convention defines genocide as a crime under international law independently of crimes against humanity and specifically affirms that it can be 'committed in time of peace or in time of war.' Freed of these strictures, the convention has been viewed as an important instrument for safeguarding human rights norms.

Despite successive opportunities to extend the definition of genocide to include acts which cover those eliminate cultural elements of the original draft – the international community has consistently refused to do so. The parameters demarcated by Article II of the Convention have been reaffirmed repeatedly by the international community and international courts.³¹³

2. *ICTY and individual criminal responsibility for genocide*

Following the 1948 Genocide Convention, Article 4 the ICTY Statute contains the same definition of genocide as Article II and does not require that the acts occur during an armed conflict to constitute the crime of genocide. The acts must have been perpetrated with a specific intent or *dolus specialis*, that is, with the intent 'to destroy, in whole or in part, a national, ethnic, racial or religious group as such...'.³¹⁴

The ICTY has emphasized that there are two elements to the special intent requirement of the crime of genocide: (i) the act or acts must target a national, ethnical, racial or religious group;³¹⁵ and (ii) the act or acts must seek to destroy all or part of that group. It has found that the *travaux préparatoires* of the Genocide Convention highlight that the list of groups contained in Article II 'was designed more

³¹² Article 2(e), Genocide Convention.

³¹³ See Art.2, ICTR Statute; Art.6, Rome Statute; Art.9, Statute of the Special Court for Cambodia; and Art.4, Law on the Establishment of Cambodian Extraordinary Chambers.

³¹⁴ Krstić, Trial Judgment, para.480.

³¹⁵ *Ibid.*, at paras.551-553.

to describe a single phenomenon, roughly corresponding to what was recognised, before the second world war, as “national minorities”, rather than to refer to several distinct prototypes of human groups.’³¹⁶ Furthermore, the Trial Chamber emphasised that it was not individual members of the group that were to be targeted but the group itself.³¹⁷

In the case of *Radoslav Krstić*, where the defendant was charged with atrocities related to the fall of Srebrenica in mid-1995, the ICTY Trial Chamber took the opportunity to re-examine the question of whether acts directed at the cultural aspects of a group constituted genocide as a crime in international law. It noted that:

*The physical destruction of a group is the most obvious method, but one may also conceive of destroying a group through purposeful eradication of its culture and identity resulting in the eventual extinction of the group as an entity distinct from the remainder of the community.*³¹⁸

The tribunal observed that, unlike genocide, persecution was not limited to the physical or biological destruction of a group but extended to include ‘all acts designed to destroy the social and/or cultural bases of a group.’³¹⁹ The tribunal noted that some recent declarations and case law interpreted the ‘intent to destroy clause in Article 4’ as relating to acts that involved cultural forms of destruction of the group.³²⁰

Nonetheless, the tribunal found that the drafters of the Genocide Convention expressly considered and rejected the inclusion of the cultural elements in the list of acts constituting genocide.³²¹ Indeed, it observed that despite numerous opportunities to recalibrate the definition of genocide, Article II of the Convention was replicated in the statutes of the two *ad hoc* tribunals for the former Yugoslavia and Rwanda, the 1996 Draft ILC Code of Crimes Against Peace and Security of Mankind,³²² and the

³¹⁶ *Ibid.*, at para.556. Cf. Crimes against humanity of persecution also includes political groups.

³¹⁷ *Ibid.*, at paras.551-553.

³¹⁸ *Ibid.*, at para.574.

³¹⁹ *Ibid.*, at para.575.

³²⁰ Including GA Res.47/121, 18 December 1992 defining ethnic cleansing as ‘genocide’.

³²¹ *Krstić*, Trial Judgment, para.576.

³²² Art.17, Draft Code of Crimes Against the Peace and Security of Mankind, 51 UN GAOR Supp. (No. 10) at 14, UN Doc. A/CN.4/L.532, corr.1, corr.3 (1996). During the 1951 session, Jean Spiropoulos prepared a revised draft code (UN Doc.A/CN.4/44) added the word ‘including’ at the end

Rome Statute for the establishment of the International Criminal Court.³²³ The Trial Chamber in *Krstić* found these developments had not altered the definition of genocidal acts in customary international law and felt confined by the principle of *nullum crime sine lege*. The Appeals Chamber in *Krstić* confirmed that the Genocide Convention and customary international law limited genocide to the physical or biological destruction of the group, noting with approval that ‘the Trial Chamber expressly acknowledged this limitation, and eschewed any broader definition.’³²⁴

Nonetheless, the Trial Chamber in the *Krstić* case used evidence of the destruction of mosques and the houses of Bosnian Muslims to prove the *mens rea* or the specific intent element of genocide. The Trial Chamber found that:

*[A]n 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.... [H]owever... where there is physical or biological destruction there are often simultaneous attacks on 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.*³²⁵

Judge Mohamed Shahabuddeen in the Appeals Chamber developed this reasoning further. In his partial dissenting decision, he argued that the *travaux* did not exclude

of the chapeau of the definition prior to the enumeration of the acts of genocide: 2 *YbILC*, (1951), at 136. Article II of the Genocide Convention was deliberately an exhaustive list of acts: UN Doc.A/C.6/SR.81. At the 1989 session, the ILC noted that Special Rapporteur Doudou Thiam’s definition of genocide which also included this wording was favourably received ‘because unlike that in the 1948 Genocide Convention, the enumeration of acts constituting the crime of genocide proposed by the Special Rapporteur was not exhaustive.’ Report of the ILC on the Work of Its Forty-First Session, GAOR, 41st session, Supp. No.10, UN Doc.A/44/10, (1989) at 59, para.159. The final draft however effectively reproduced the definition of acts contained in Article II, Genocide Convention.

³²³ The ILC, when drafting a code of crimes which it submitted to the ICC Preparatory Committee, concluded: “As clearly shown by the preparatory work of 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, cultural or other identity of a particular group.” Report of the ILC on the Work of its Forty-Eighth Session, GAOR, 51st session, Supp. No.10 UN Doc.A/51/10, (1996), 90-91. No suggestion to expand the list of acts contained in Article 2 of the Genocide Convention was raised during the deliberations for the Rome Statute.

³²⁴ Prosecutor v. Radislav Krstić, Appeals Judgment, Case No.IT-98-33-A, (19 April 2004), para.25.

³²⁵ Krstić, Trial Judgment, para.580.

‘an intent to destroy a group in a non-physical or non-biological way ... provided that that intent is attached to a listed act, this being of a physical or biological nature.’³²⁶

It is sobering to recount the words of the prosecution in the *Krstić* Trial Chamber detailing the impact of the atrocities on the Srebrenica survivors: ‘[W]hat remains of the Srebrenica community survives in many cases only in the biological sense, nothing more. ...[I]t’s a community that’s a shadow of what it once was.’³²⁷ Judge Shahabuddeen observed that the Genocide Convention protected the group which ‘is constituted by characteristics — often intangible — binding together a collection of people as a social unit.’ He argued that if these characteristics are destroyed with an intent that is accompanied by an enumerated ‘biological’ or physical’ act, it is not sustainable to argue that ‘is not genocide because the obliteration was not physical or biological.’³²⁸ The Appeal Chamber pronounced that genocide was ‘crime against all humankind’ because ‘those who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and religions provide.’³²⁹

Krstić was found guilty of genocide (and the crime of humanity of persecution and violation of the laws and customs of war) and was sentenced to forty six years imprisonment by the Trial Chamber. The Appeal Chamber reduced this sentence to thirty-five years when it found that he had aided and abetted these crimes rather than being a participant in a joint criminal enterprise.

3. *ICJ Genocide case and state responsibility for genocide*

The *Genocide* case filed by Bosnia and Herzegovina against Yugoslavia (later Serbia and Montenegro) with the International Court of Justice in 1993 was an action for interim measures and reparations for Yugoslavia’s violations of obligations under the 1948 Genocide Convention to which it was a state party. Unlike the actions before

³²⁶ Krstić, Appeals Judgment, dissenting judgment of Judge Mohamed Shahabuddeen, at para.50.

³²⁷ Krstić, Trial Judgment, para.592.

³²⁸ Krstić, Appeals Judgment, dissenting judgment of Judge Mohamed Shahabuddeen, at para.51.

³²⁹ Krstić, Appeals Judgment, para.36. It reaffirmed this sentiment again in *Prosecutor v. Milomir Stakić*, Appeals Judgment, Case No.IT-97-24-A, Appeals Chamber ICTY, (22 March 2006), paras.20-24.

the ICTY concerning individual criminal responsibility, the action went to the ‘criminal’ culpability of a state in respect of the international crime of genocide.

In its submission during the Merits phase, the applicant, Bosnia and Herzegovina presented only two witnesses to the Court. One of which was the expert testimony of András J. Riedlmayer in respect of the destruction of cultural, religious and architectural heritage of Bosnia and Herzegovina.³³⁰ Riedlmayer had previously given evidence before the ICTY in the *Milošević* case.³³¹ His evidence was used to prove the specific intent element of genocide, which distinguishes it from other international crimes especially those enumerated under crimes against humanity. The deployment of such evidence in this way reaffirmed an observation made by Lemkin more than a half-century ago, that the destruction of the cultural elements of a group is intimately tied to genocidal programs and often preceded the final – biological and physical – stage.

Accepting that there was ‘conclusive evidence of the deliberate destruction of the historical, cultural and religious heritage of the protected group’,³³² the ICJ, like the ICTY before it, turned its mind to the definition of genocide and the place if any of the cultural elements within it. It found that:

*[T]he 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.*³³³

³³⁰ In the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, CR 2006/22 Public sitting held on Friday 17 March 2006, at 10 a.m., at the Peace Palace, President Higgins presiding - Oral arguments on behalf of Bosnia and Herzegovina: András J. Riedlmayer (expert called by Bosnia and Herzegovina), at <<http://www.icj-cij.org/docket/files/91/10628.pdf>> (viewed on 24 March 2009).

³³¹ *Prosecutor v. Slobodan Milošević*, Trial Proceedings, Case No.IT-02-54, Trial Chamber, ICTY, (8 July 2003), at 23,785 (Reidlmayer).

³³² ICJ *Genocide* case, para.344. See also paras.335-344 generally.

³³³ ICJ *Genocide* case, paras.191-201, especially para.194.

The International Court embraced the ICTY's interpretation in *Krstić* that the definition of genocide had not evolved to include the cultural elements discarded in 1948. It reaffirmed the ICTY's position that the destruction of the historical, religious and cultural heritage of a group only goes to proving the *mens rea* of the crime of genocide and not the *actus reus*.³³⁴

The ICJ also affirmed the decision of the ICTY Appeals Chamber in *Stakić* delivered in 2006 which determined that the Convention requires that the targeted group be positively defined. Again, the International Court invoked the rejection of the cultural genocide during the drafting of the convention in support of its position.³³⁵ By contrast, the ICTY Appeals Chamber did not dismiss the debate concerning the cultural elements of genocide. Instead, the tribunal recalled that Lemkin had argued that genocide was a serious crime because humanity lost the “future contributions” that would be “based upon [the destroyed group’s] genuine culture, and ... well-developed national psychology”.³³⁶ It concluded that genocide was ‘conceived of as the destruction of a ... group with a particular positive identity – not as the destruction of various people lacking a distinct identity.’³³⁷ The tribunal conceded that debate over the prohibition of cultural genocide has continued among experts even after the Convention was adopted.³³⁸

As noted above, the original Secretariat draft of the Genocide Convention made reference to the targeting of the cultural heritage of a group including its cultural and religious sites, documents, practices and language. This ‘cultural’ component of the definition was deleted because of post-war resistance to the resuscitation of minority protections. However, it was no coincidence that the revival of efforts to draft and finalise an instrument on the protection of minorities in the 1990s was accompanied by increased jurisprudence on the crime of genocide. This litigation before international courts has not only revisited the debate concerning ‘cultural’ genocide. It has again exposed the internal inconsistency within the

³³⁴ ICJ *Genocide* case, para.344.

³³⁵ ICJ *Genocide* case, para.194.

³³⁶ *Stakić*, Appeals Judgment, para.21.

³³⁷ *Ibid.*

³³⁸ *Stakić*, Appeals Judgment, para.24.

Genocide Convention's definition of this international crime rendered by the deletion of those 'cultural' elements from Article II. That is, a group must have a distinct identity to attract the protection afforded by the convention but acts which target their cultural heritage (and which render the group distinctive) are not prohibited per se. Confining such acts to establishing the *mens reas* of genocide alone, serves only to highlight this inconsistency rather than remedy it.

Nevertheless, the evolution of international criminal law from war crimes to include crimes against humanity (including persecution) and genocide has encapsulated the shifting rationale for the protection of cultural heritage at the international level.

5. Concluding remarks

Whilst international humanitarian law was the first field in international law to bestowed exceptional treatment upon cultural heritage, in the last twenty years there has been a recapitulation of the interplay between international humanitarian law, human rights law and international criminal law in promoting its underlying rationale for protection: its importance to all humanity. As I have detailed in this chapter, with the rise of human rights from the mid-twentieth century, this rationale has undergone a significant recalibration. It was originally based on its importance for the advancement of the arts and sciences, and knowledge generally. This has now been eclipsed by an emphasis on the significance of cultural heritage in ensuring the contribution of all peoples to humankind. In conclusion, I wish to underscore three normative trends which consolidate this rationale and the internal shift that it has undergone.

First, the obligation to protection cultural heritage is not confined to states parties to the relevant human rights, humanitarian law nor specialist cultural heritage instruments but extends to all states. This development intrinsically arises from the notion that if the protection of cultural heritage at the international level is grounded in its importance to all humanity, and this is a 'value especially protected by the international community',³³⁹ then all states have 'a legal interest in [its] protection.'³⁴⁰

³³⁹ Jokić, Trial Judgment, para.46. See also 1932 ICIC Resolution, *supra* note 145.

Its nascent form is reflected in the 1972 World Heritage Convention and near universal uptake.³⁴¹ However, an early clear example of this type of obligation was contained in the 1943 London Declaration. It formally put persons on notice in neutral countries that transfer of property from territories occupied by Axis forces would be declared invalid by the Allied Powers.³⁴² More recently, as noted above, the obligations contained in the 1954 Hague Protocol were extended beyond states parties when they were summarily incorporated into SC Res.1483 of 2003. This resolution bound all UN member states to ‘facilitate the safe return’ and prohibit trade in cultural heritage illicitly removed from Iraq since August 1990.³⁴³ In 2003 and 2007, the UNESCO General Conference and the Human Rights Council respectively confirmed that all states may bear responsibility in respect of intentional destruction of cultural heritage ‘of great importance for humanity, to the extent provided for by international law.’³⁴⁴

Next, the progressive dissolution of the boundaries between protection of cultural heritage during armed conflict, belligerent occupation and peacetime is redefining the content of the obligation.³⁴⁵ This was highlighted in the aftermath of the destruction of the monumental Buddhas in Bamiyan, Afghanistan, with the adoption of the 2003 UNESCO Declaration on the Intentional Destruction of Cultural

³⁴⁰ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports (1996) 226, at 257; and *Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports (2004) 136, at 199 (in respect of obligations *erga omnes* generally).

³⁴¹ Convention concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972, in force 17 December 1975, 1037 UNTS 151. As at September 2009, there were 186 states parties to the Convention and 192 UN member states. See Francioni, ‘Introduction’, in F. Francioni and F. Lenzerini (eds) *The 1972 World Heritage Convention: A Commentary*, (2008), p.5. Cf. O’Keefe, ‘World Cultural Heritage: Obligations to the International Community as a Whole?’ 53 *ICLQ* (2004) 189.

³⁴² See also Agreement between the United States, the United Kingdom and France in respect of the Control of Looted Works of Art, 8 July 1946, 25 *Department of State Bulletin* (1951) 340, Swiss Decree of 10 December 1945 concerning Actions for the Recovery of Goods taken in Occupied Territories during the War, and Swedish Looted Objects Law of 29 June 1945.

³⁴³ SC Res.1468, para.7 (14-0-0), the United States and United Kingdom who are not states parties to the 1954 Hague Protocol voted in favour.

³⁴⁴ Part VI of the Declaration concerning the International Destruction of Cultural Heritage, adopted by the 32nd session of the UNESCO General Conference on 17 October 2003, in UNESCO, *Records of the General Conference, 32nd session, Paris, 29 September to 17 October 2003*, (2004) v.1; and HRC Res.6/11, 28 September 2007, Protection of cultural heritage as an important component of the promotion and protection of cultural rights, paragraph 5.

³⁴⁵ Article III, paragraph 1, Declaration on Intentional Destruction.

Heritage.³⁴⁶ Like the 1935 Washington Treaty and jurisprudence of the ICTY, the declaration marries references to war and peacetime protection. It provides that all states should act in accordance with customary international law and the ‘principles and objectives’ of international agreements and UNESCO recommendations during hostilities and peacetime.³⁴⁷ It replicates the tradition of multilateral efforts covering cultural heritage dating back to the early twentieth century which meld preventative, protective and punitive measures borne by states, foster international cooperation and strictly circumscribe the military objective proviso.

The customary international law prohibition against the international destruction of cultural heritage during peacetime is less clearly defined than during armed conflict and belligerent occupation. However, support can be gleaned not only from pronouncements by United Nations’ bodies, like the Human Rights Council,³⁴⁸ but the elevated uptake of relevant treaties over the past decade.³⁴⁹ Further, protection provided by international law during peacetime to cultural heritage of universal importance should necessarily be greater than that provided during armed conflict to which the military necessity proviso is attached.³⁵⁰ Also, as explained above, international criminal law prohibits international destruction during peacetime when it targets cultural heritage because of its affiliation to certain groups.

Thirdly, and complementing this trend, is the growing convergence between human rights and humanitarian law in the field of cultural heritage (and cultural rights).³⁵¹ This has been enhanced by the embrace of a holistic understanding of

³⁴⁶ See Francioni and Lenzerini, ‘The Destruction of the Buddhas of Bamiyan and International Law’ 14 *EJIL* (2003) 619; and Vrdoljak, ‘International Destruction of Cultural Heritage and International Law’, XXXV *Thesaurus Acroasium* (2007) 377-396.

³⁴⁷ Articles IV and V, Declaration on Intentional Destruction.

³⁴⁸ HRC Res.6/11, 28 September 2007, seventh, eighth and ninth preambular recitals and paras.4 and 5.

³⁴⁹ In addition to the 1972 World Heritage Convention, see Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, in force 24 April 1972, 823 UNTS 231. As at September 2009, the convention had 118 states parties.

³⁵⁰ See *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports (1996), paras.23-34 (the reasoning employed by the International Court to environmental protections can be applied similarly to those covering cultural heritage).

³⁵¹ Fifth preambular recital and Article IX, UNESCO Declaration on Intentional Destruction; and HRC Res.6/1, 27 September 2007 entitled Protection of cultural rights and property in situations of armed conflict.

cultural heritage through instruments for the protection of intangible heritage and endangered languages,³⁵² and the promotion of cultural diversity.³⁵³ Complementing the evolution of international criminal law, these developments have arisen with the emergence of human rights and the re-emergence of minority protection.³⁵⁴ Traditionally, the prosecution of crimes against humanity, in particular persecution, and genocide has almost exclusively relied on evidence of the damage or destruction of the physical manifestations of a targeted group's cultural heritage. However, as detailed above, the United Nations' War Crimes Commission in 1945 when interpreting existing humanitarian law provisions for the protection of tangible heritage extrapolated them to include its intangible aspects. Also, the definition of genocide contained in Secretariat's draft Convention incorporated tangible and intangible cultural elements. Understanding and acceptance of the need for protection of intangible heritage, including language, augments efforts to prevent and punish the crimes of humanity and genocide and promote human rights.

While cultural heritage has attracted protection since the earliest codifications of the laws of war in the nineteenth century, it was not until the mid-twentieth century that the rationale for its protection which is promoted today was formally articulated. The crimes the subject of the Nuremberg Judgment precipitated the adoption of the UDHR, the Genocide Convention and 1954 Hague Convention. Each of these instruments implicitly or explicitly reaffirms the special protection afforded cultural heritage because of its importance to all humanity. This protection is not provided to cultural heritage per se. Rather, it is because of its role in ensuring enjoyment of human rights and the contribution of all peoples to 'the culture of the world'.³⁵⁵ Half a century later, the crimes the subject of the ICTY's jurisprudence have served to alert the international community that such atrocities are not confined to the distant past

³⁵² Intangible Heritage Convention, *supra* note 207, as at 1 October 2009, there were 116 states parties to this convention; European Charter for Regional or Minority Languages, 5 November 1992, in force 1 March 1998, ETS No.148; and Preliminary Study of the Technical and Legal Aspects of a Possible International Standard-Setting Instrument for the Protection of Indigenous and Endangered Languages, 17 August 2009, UNESCO Doc.35C/14.

³⁵³ Universal Declaration on Cultural Diversity, *supra* note 207.

³⁵⁴ Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, *supra* note 208; and Framework Convention for the Protection of National Minorities, 1 February 1995, in force 1 February 1995, ETS No.157.

³⁵⁵ Second preambular recital, 1954 Hague Convention.

and thereby, precipitated a recommitment to this underlying rationale through a further consolidation of the protection afforded cultural heritage by international humanitarian law, human rights and international criminal law.