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The Criminalisation of the Intentional Destruction of Cultural Heritage

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The Criminalisation of the Intentional Destruction of Cultural Heritage

Ana Filipa Vrdoljak*

Introduction

The Arch of Titus on the Via Sacra in Rome was erected in 82 AD to commemorate the sacking of Jerusalem by the Roman Emperor Titus. The south panel depicts the procession of spoils from the Temple with the Menorah being carried in the centre of the relief. Hugo Grotius in *De jure belli ac pacis* (1625) noted that Titus Flavius Josephus, who served Titus during the siege of Jerusalem, argued that the Temple's destruction was 'in accordance with the law of war'.¹ This relief which has survived two millennia remains a powerful symbol of the deliberate destruction and pillage of the cultural heritage and subjection of a people. As the ancients acknowledged such acts were integral to the conduct of war and belligerent occupation as a means of demoralising enemy and accelerating their conquest.² However, since the nineteenth century and the earliest efforts to codify the laws and customs of war, the international community has sought to condemn such acts and hold the perpetrators to account. This chapter examines how modern international law is protecting world heritage ('the cultural heritage of all humanity') by criminalising the intentional destruction of cultural heritage.

[insert Fig.1 Arch of Titus, Rome, Italy].

The permanent recording of the sacking on the Temple in Jerusalem, over and above the physical act of destruction itself, is telling. The intrinsic propaganda value was not lost on the conquered or the inhabitants of the conqueror. In the digital age of the twenty-first century, which has witnessed a proliferation of deliberate acts of destruction, damaging and pillaging of World Heritage sites and its broadcasting via social media and the Internet, this potential continues to be exploited. This chapter examines the evolving rationales for the intentional destruction of cultural heritage since the early twentieth century and international law's response to such acts. First, there is an analysis of its initial criminalisation with the codification of the laws and customs of war and their interpretation by the Nuremberg

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¹ H. Grotius, *De jure belli ac pacis. Libri tres*. J. B. Scott (ed.) and F. W. Kelsey (trans.) (Oxford: Clarendon Press, 1925), p.662.

² *Ibid.*, at pp.658-661.

Tribunal in 1945 through to the jurisprudence of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Court, The Hague. Next, I consider how these developments were extended to crimes against humanity and genocide which enabled deliberate, targeted destruction of cultural heritage to be viewed as intrinsic to gross violations of international humanitarian law and systematic abuses of human rights. Finally, I examine the transformative impact of the digital age on the deliberate destruction of world heritage and the efforts of the international community, through the UN Security Council and UNESCO, to cooperate in curbing incitement and holding perpetrators to account for crimes against the common heritage of humanity.

War crimes

Modern international law has prohibited the deliberate seizure, destruction or damaging of cultural property from the first codifications of the laws and customs of war in the nineteenth century. These earliest efforts made clear that although cultural and religious sites and monuments, and works of art and science, may be bounded to the territory of a state, they attracted international protection because of their importance to all humanity, such acts constituted war crimes, and perpetrators of such acts would be held to account. These basic tenets have been reiterated repeatedly in successive multilateral instruments for over 150 years.

Codification and the Nuremberg Judgment

The destruction of Strasbourg's cathedral and library during the Franco-Prussian War of 1870–71 and the ensuing public outcry led to an international conference in mid-1874, which adopted the International Regulations on the Laws and Customs of War (Brussels Declaration).³ Although it never entered into force, it contains the core elements of the protection of cultural property during armed conflict in place today.⁴ It provides that during belligerent occupation, 'all seizure or destruction of, or wilful damage to, institutions dedicated to religion, charity and education, the arts and sciences', historic monuments, works of art and science should be *made subject of legal proceedings by the competent authorities*' (Article 8 (emphasis added)).

³ 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.

⁴ International Declaration concerning the Laws and Customs of War, 27 August 1874, not ratified, 1 *American Journal of International Law* (1907) vol.1(supp.), p.96.

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 in 1899 and 1907.⁵ The Regulations annexed to the Convention (II) with Respect to the Laws and Customs of War on Land (1899 Hague II Convention) and Convention (IV) respecting the Laws and Customs of War on Land (1907 Hague IV Convention),⁶ were found to be customary international law and ‘recognized by all civilized nations’ by the International Military Tribunal (IMT) at Nuremberg in 1945.⁷ A decade earlier, jurist Charles de Visscher noted that this immunity was granted because these objects and sites were ‘dedicated to an ideal purpose’.⁸ He added that ‘international conventional law has established such acts as genuine violations of the law of nations, the perpetrators of which are marked out for collective repression by the signatory States’.⁹ Under the Hague Regulations, 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 have been notified to the enemy (Article 27). During occupation, the ‘property of the communes, that of religious, charitable, and educational institutions, and those of arts and science’ is protected as private property with no reference to military necessity. Seizure, destruction, or wilful damage to these institutions, historical monuments, works of art or science, ‘is forbidden’, with violations ‘*to be made subject to legal proceedings*’ (Article 56 (emphasis added)).

These prohibitions were tested with the widespread, deliberate destruction of cultural property during the First World War, especially on the Western Front including Louvain University’s library and Reims Cathedral.¹⁰ The Preliminary Peace Conference of Paris of 1919 established the Sub-Commission III of the Commission on Responsibilities, which was

⁵ See M. Huber, ‘La propriété publique en cas de guerre sur terre’, *Revue Générale de Droit International Public*, (1913), at 657.

⁶ Convention (II) with Respect to the Laws and Customs of War on Land and Annex, 29 July 1899, in force 4 September 1900, *American Journal of International Law* (1907), vol.1(supp.), p.129; and Convention (IV) respecting the Laws and Customs of War on Land, and Annex, 18 October 1907, in force 26 January 1910, *American Journal of International Law* (1907), vol.1(supp.), p.90.

⁷ International Military Tribunal, Nuremberg, ‘Judgment’, *American Journal of International Law* (1947) vol.41, p.172, at pp.248–249.

⁸ C. 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), p.821, at p.828.

⁹ Ibid.

¹⁰ See P. Clemen, *Protection of Art during War*, (Leipzig: E.A. Seeman, 1919).

instructed to investigate and make recommendations on the violation of the laws and customs of war perpetrated by Germany and her allies.¹¹ The draft list of war crimes it prepared included the ‘wanton destruction of religious, charitable, educational and historic buildings and monuments’.¹² Unable to secure trials before an inter-Allied criminal tribunal, affected countries pushed for extradition of suspects to stand trial before their own national courts.¹³ France sought extradition of several suspects for violations against cultural property;¹⁴ however, these requests proved fruitless and they were tried *in absentia*.

During the Second World War, Allied Powers made successive announcements stating their intention to hold Axis nationals who had violated the laws and customs of war to account at the end of the conflict.¹⁵ The Hague Regulations and work of the 1919 Commission proved vital in the indictment and prosecution of the Nazi and Axis war criminals. The jurisdiction of the International Military Tribunal (IMT) at Nuremberg covered 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’.¹⁶ The indictment of the major war criminals charged that part of their ‘plan of criminal exploitation’ the ‘destr[truction of] industrial cities, cultural monuments, scientific institutions, and property of all types in the occupied territories’.¹⁷ Alfred Rosenberg had headed ‘Einsatzstab Rosenberg’, a programme involving the confiscation of cultural objects from private German collections and occupied territories.¹⁸ The U.S. Prosecutor argued that: ‘[T]he forcing of this treasure-house by a horde of vandals bent on systematically removing to the Reich these treasures which are, in a sense, the heritage of all of us...’.¹⁹ The IMT found that Rosenberg had

¹¹ *American Journal of International Law* (1947) vol.14, p.95 at pp.114–115.

¹² *Ibid.*

¹³ J. Horne and A. Kramer, *German Atrocities. 1914: A History of Denial*, (New Haven: Yale University Press, 2001), Appendix, pp.448-50.

¹⁴ *Ibid.*

¹⁵ See in particular, Declaration of the Four Nations on General Security (Moscow Declaration), 30 October 1943, *American Journal of International Law* (1944) vol.38 (supp.), pp.7–8.

¹⁶ 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.

¹⁷ Count Three (War Crimes), Part E (Plunder of Public and Private Property), Indictment, in *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946*, (42 vols, Nuremberg: [s.n.], 1947–1949), vol.1, at pp.11–30.

¹⁸ L. Nicholas, *The Rape of Europa: The fate of Europe's treasures in the Third Reich and the Second World War* (London: Papermac, 1994).

¹⁹ *Trial of the Major War Criminals*, note 17, vol.IV, p.81.

directed that the Hague Regulations ‘were not applicable to the Occupied Eastern Territories’; and that he was ‘responsible for a system of organised plunder ... throughout the invaded countries of Europe’.²⁰ He was found guilty and sentenced to death. There were also examples covering the deliberate destruction of cultural property. For instance, the French Permanent Military Tribunal found a civilian guilty of a war crime for destroying a statue of Joan of Arc and a monument commemorating the First World War dead, on the order of a German official, in violation of Articles 46 and 56 Hague Regulations, the 1919 Commission List, and Article 257 of the French Penal Code.²¹

The Nuremberg Judgment proved influential in the codification efforts of UNESCO which led to the adoption of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention).²² Its *travaux* noted that the Nuremberg Tribunal has ‘introduced the principle of punishing attacks on the cultural heritage of a nation into positive international law’.²³ The Convention’s preamble speaks of the universal importance of the cultural heritage:

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 ...*²⁴

For the first time there is reference to ‘cultural heritage’ rather than ‘cultural property’ in a multilateral instrument,²⁵ which emphasises its intergenerational importance. This aspect was reaffirmed by a resolution adopted at the first meeting of the High Contracting Parties to the Convention which noted that ‘the purpose of the Convention ... is to protect the cultural

²⁰ Nuremberg Judgment, note 7, p.237.

²¹ Trial of Karl Lingens, French Permanent Military Tribunal, Metz (judgment of 11 March 1947), in UNWCC, *Law Reports of Trials of War Criminals* (London: HMSO, 1949), vol.9, p.67.

²² 14 May 1954, into force 7 August 1956, 249 UNTS 240.

²³ UNESCO Doc.7C/PRG/7, Annex I, at p.5.

²⁴ 1954 Hague Convention, PP2 and PP3.

²⁵ UNESCO Doc.7C/PRG/7, Annex II, at p.20.

heritage of all peoples for future generations'.²⁶ The 'importance' of the protected cultural site or object is not determined exclusively by the state where it is located; rather, it extends to 'people'.²⁷ Also, the Convention applies to international and non-international armed conflicts.²⁸ In respect of international armed conflict each of the parties to the conflict is bound to the Convention's obligations 'as a minimum' (Article 19(1)). If one of the parties is not a High Contracting Party, the treaty obligations remain binding on the High Contracting Parties and any other party which declares that it accepts and applies the obligations (Article 18(3)). The *travaux* indicates this is 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.'²⁹ Its application to non-international armed conflict is recognised in customary international law.³⁰ Also, the United Nations has stated that its peacekeeping forces observe the 1954 Hague Convention.³¹

The 1954 Hague Convention defines obligations for the safeguarding and respect of cultural property by the High Contracting Parties during peacetime, armed conflict, and belligerent occupation. The obligation to respect arising during hostilities,³² is engaged with the declaration of war or an armed conflict between two or more High Contracting Parties, even if not recognised as a state of war by one of them (Article 18). It applies to total or partial occupation of the territory of the High Contracting Party even if there is no resistance. The obligation to respect includes respect for cultural property situated within one's *own* territory as well as the territory of other High Contracting Parties, by not using the property and its immediate surroundings for purposes that could expose it to destruction or damage (Article

²⁶ UNESCO Doc.CUA/120, at p.22. The draft recital had read: 'Being convinced that damage to cultural property results in a spiritual impoverishment for the whole of humanity': UNESCO Doc.7C/PRG/7, Annex II, at p.20.

²⁷ This definition is applied to the two Protocols to the Convention: see Art.1, Protocol for the Protection of Cultural Property in the Event of Armed Conflict (First Hague Protocol), 14 May 1954, into force 7 August 1956, 249 UNTS 358; and Art.1(b), Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1999 Hague Protocol) 26 March 1999, into force 9 March 2004, 2253 UNTS 212.

²⁸ Art.19, 1954 Hague Convention; and Art 22, 1999 Second Hague Protocol.

²⁹ UNESCO Doc.7C/PRG/7, Annex I, at 5–6.

³⁰ Prosecutor v Duško Tadić, Interlocutory Appeal on Jurisdiction Judgment, No IT-94-1-A, Appeals Chamber, ICTY, (2 October 1995) at 98 and 127.

³¹ 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.

³² 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 p.8.

4(1). Second, they must not engage in any act of hostility against such property, with the obligation being waived if ‘military necessity imperatively requires’ (Article 4(2)). This qualifier was confirmed in the Second Protocol (Article 6).³³ During belligerent occupation, the High Contracting Party as occupying power must cooperate with and support the competent national authorities in protecting the cultural heritage (Article 5, 1954 Hague Convention). The provision extends to informing insurgent groups of their obligation to respect cultural property.³⁴ Article 9 of the Second Protocol provides that the State Party must prevent and prohibit any illicit export, other removal, or transfer of ownership of cultural property;³⁵ 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’. This protection afforded cultural heritage during occupation is augmented by the First Protocol concerning the removal and return of movable heritage.

The distinction made in the 1954 Hague Convention between general 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 the late twentieth century, only one site (the Vatican) was nominated. Reiterating the obligation contained in the 1907 Hague Regulations, the 1954 Hague Convention requires High Contracting Parties to ‘undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality’ who commit or order to commit violations of its obligations (Article 28).³⁶ The provision’s weak wording and subsequent failure of High Contracting Parties to enact enabling legislation was noted by a 1993 review of the 1954 Hague Convention.³⁷ Prepared

³³ P. J. Boylan, Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention of 1954), UNESCO Doc.CLT-93/WS/12 (1993), at p.17.

³⁴ See also Art.32, Part VI of the 1956 UNESCO Recommendation on International Principles Applicable to Archaeological Excavations, in UNESCO, *Records of the General Conference, Ninth Session, New Delhi 1956: Resolutions*, (Paris: UNESCO, 1957), at p.40.

³⁵ 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.

³⁶ The USSR had unsuccessfully proposed a more detailed provision borrowing from Article 146 of the Geneva Convention (IV) relative to the Treatment of Civilian Persons in Time of War of 1949: UNESCO Doc.CBC/DR/71, at p.390.

³⁷ Boylan, note 33 at p.93.

in the shadow of the Yugoslav conflicts, its recommendations to address this limitation were realised in the Second Hague Protocol adopted in 1999.

Bombing of Dubrovnik, ICTY and 1999 Hague Protocol

The jurisprudence of the International Criminal Tribunal for the former Yugoslavia established in 1993 picked up where the Nuremberg Tribunal had left off almost a half century before. During Yugoslav wars of the 1990s, the combatants deliberately targeted the cultural and religious property of the opposing side, including World Heritage listed sites.³⁸ In response, the United Nations indicated that it would investigate and prosecute those responsible. The adoption of the ICTY Statute during the Yugoslav wars was intended to have punitive and deterrent objectives.³⁹ The relevant provision covering crimes against cultural property reflect the wording of Article 56 of the 1907 Hague Regulations, and not the 1954 Hague Convention and its Protocol, even though all belligerents were parties.⁴⁰ Article 3(d) ICTY Statute covering war crimes including: '[S]eizure, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.' Under this provision, it must be shown that the international or internal armed conflict existed and had a close nexus with the alleged acts.⁴¹

The most significant cases on this count pertain to the bombardment of the fortified city of Dubrovnik in early October 1991.⁴² 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. When deciding which property falls within the protection afforded

³⁸ See 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); and 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, 66–68, at pp.285–297.

³⁹ M. 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', *Italian Yearbook of International Law* (2005) vol.15, p.195, at p.197.

⁴⁰ 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 Parties to the 1999 Second Protocol.

⁴¹ Prosecutor v Duško Tadić, Appeal Judgment, No IT-94-1-A, Appeals Chamber, ICTY (2 October 1995) at 66–70.

⁴² See C. Bories, *Les bombardements serbes sur la vieille ville de Dubrovnik: La protection internationale des biens culturels* (Paris: Pedone, 2005).

under Article 3(d), the tribunal has referenced definitions contained in conventions covering both during armed conflict and peacetime including the Convention concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention).⁴³ In *Strugar*, the Trial Chamber emphasised the Old Town's inscription on the World Heritage List. It noted that the List included '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 it came within the meaning of cultural property in Article 3(d).⁴⁴ With the *actus reus* element of Article 3(d), the ICTY considered customary law concerning attacks on cultural heritage. In *Strugar*, it emphasised that the cultural property's use rather than its location was determinative of loss of immunity.⁴⁵ The tribunal found it was presumed to enjoy the same general protection afforded to civilian objects, except where they had become military objectives because '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.'⁴⁶ For the *mens rea* requirement of this crime, it was necessary to show 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.⁴⁷ The perpetrator must act with the knowledge that the object is cultural property. In *Strugar* this was established because Dubrovnik was on the World Heritage List; and in *Jokić* the tribunal found that the 1954 Hague emblem was manifestly visible at the relevant time.⁴⁸ In the sentencing phase for war crimes against cultural property, the tribunal has stated that 'this crime represents a violation of values especially protected by the international

⁴³ 16 November 1972, into force 17 December 1975, 1037 UNTS 151.

⁴⁴ Prosecutor v Pavle Strugar, Rule 98bis Motion, No IT-01-42-T, Trial Chamber II, ICTY (21 June 2004), at 80–81; and Prosecutor v Miodrag Jokić, Trial Judgment, No IT-01-42/1-S, Trial Chamber I, ICTY (18 March 2004) at 49 and 51.

⁴⁵ Prosecutor v Pavle Strugar, Trial Judgment, Chamber II, ICTY, No IT-01-42-T, (31 January 2005) at 310.

⁴⁶ Prosecutor v Radoslav Brđanin, Trial Judgment, Case No IT-99-36-T, Trial Chamber II, ICTY (1 September 2004) at 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) 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, during the diplomatic conference called for the Second Hague Protocol in 1999: at footnote 1509.

⁴⁷ Ibid, at 599; and Prosecutor v Pavle Strugar, Appeals Judgment, No IT-01-42-A, Appeals Chamber, ICTY (17 July 2008) at 277–278.

⁴⁸ Jokić, Trial Judgment, note 44 at 23 and 49; and Strugar, Trial Judgment, note 45 at 22, 183, 279, 327 and 329.

community’.⁴⁹ In *Jokić*, the Trial Chamber 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’.⁵⁰ A site once destroyed could not be returned to its original status.⁵¹ *Jokić* was sentenced to seven years’ imprisonment,⁵² and Strugar for eight years.⁵³

The Second Protocol to the 1954 Hague Convention, adopted in 1999, provides further detail concerning the obligation to prosecute violations of the laws and customs of war relating to cultural property. 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 (Articles 15(2) and 16(1)).⁵⁴ 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 (Article 15(1)).⁵⁵ Universal jurisdiction must be established for the first three of these serious violations (Article 16(10)(c)). If a Party does not prosecute, it must extradite to a country that can and which meets minimum standards in international law (Articles 17 and 18).⁵⁶ Further, 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 (Article

⁴⁹ *Jokić*, Trial Judgment, note 44 at 46.

⁵⁰ *Ibid.*, at 53.

⁵¹ *Ibid.*, at 52.

⁵² Confirmed on appeal: Prosecutor v Miodrag Jokić, Judgment on Sentencing Appeal, No IT-01-42/1-A, Appeals Chamber, ICTY (30 August 2005).

⁵³ 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).

⁵⁴ See Report on the obligations of the Parties to implement Chapter 4 (Criminal Responsibility and Jurisdiction) of the Second Protocol, March 2012, <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Report-obligations-chapter4-en_20120306.pdf> (accessed 3 October 2015).

⁵⁵ The Summary Report of the 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 6, at 26 and 27 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.

⁵⁶ 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.

21). The Committee for the Protection of Cultural Property in the Event of Armed Conflict's Guidelines for the Implementation of the 1999 Protocol require Parties to report on the implementation of these obligations, but to date has not provided guidance on how this is to be done.⁵⁷

Sacking of Timbuktu and International Criminal Court

By the close of the twentieth-century, international legal obligations prohibiting the deliberate destruction and pillage of cultural property were broadly reaffirmed in the governing statutes of several international criminal tribunals. The Yugoslav wars and the ICTY Statute influenced the wording of the provisions relating to the war crime against cultural property in the Rome Statute for the International Criminal Court (ICC). It defines the war crime of 'intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes' and 'historical monuments'.⁵⁸ The first indictment by the ICC under these provisions arose in respect of the situation in Mali during 2012, under a warrant issued in September 2015.

In 2012, Mali requested that the ICC Prosecutor investigate and indict the perpetrators of attacks on religious and cultural sites including the World Heritage site in Timbuktu.⁵⁹ Pursuant to the principle of complementarity under the Rome Statute, Mali as a State Party has primary jurisdiction over war crimes committed on its territory or by its nationals; with the ICC exercising jurisdiction following a referral by a State Party which is not or cannot prosecute in its domestic courts or a referral from the UN Security Council (Article 13). Significantly, the Mali's referral was made by the transitional government against rebel forces. In the days leading up to the referral, the ICC Prosecutor and the Security Council had noted the destruction of monuments in the World Heritage site in northern Mali with alarm. The ICC Prosecutor advising: 'Those who are destroying religious buildings in Timbuktu

⁵⁷ 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, 22 March 2012, UNESCO Doc.CLT-09/CONF/219/3 REV.4, p.28. The ICRC has prepared a Model Law for common law countries, see ICRC, *The Domestic Implementation of International Humanitarian Law. A Manual*, (Geneva: ICRC, 2013), Annex XVIII.

⁵⁸ Arts 8(2)(b)(ix) (international armed conflict) and 8(2)(e)(iv) (non-international), Rome Statute of the International Criminal Court (Rome Statute), 17 July 1998, into force 1 July 2002, 2187 UNTS 90.

⁵⁹ M. Coulibaly, 'Referral under Article 14 ICC Statute from Malian Minister for Justice to ICC Prosecutor, 13 July 2012', <<http://www.icc-cpi.int/NR/rdonlyres/A245A47F-BFD1-45B6-891C-3BCB5B173F57/0/ReferralLetterMali130712.pdf>> (accessed 30 January 2014).

should do so in full knowledge that they will be held accountable and justice will prevail.⁶⁰ The Security Council adopted Resolution 2056(2012) under Chapter VII of the UN Charter which: ‘Condemn[ed] strongly the desecration, damage and destruction of sites of holy, historic and cultural significance, especially but not exclusively those designated UNESCO World Heritage sites, including the city of Timbuktu...’.⁶¹ It stressed that such attacks violated Additional Protocol II of the 1949 Geneva Conventions and the Rome Statute and that the perpetrators would be brought to justice.⁶² The UN Secretary-General called on the Security Council to impose sanctions on the perpetrators of attacks on sites that are designated as ‘part of the indivisible heritage of humanity’.⁶³ The ICC Prosecutor found a *prima facie* case of war crimes including intentionally directing attacks against protected objects (Article 8(2)(e)(iv) Rome Statute) whose ‘value transcends geographical boundaries, and which are unique in character and are intimately associated with the history and culture of the people’.⁶⁴ She noted that the series of intentional attacks against nine of the 16 mausoleums and two of three great mosques in Timbuktu, on the World Heritage List since 1988, ‘shocked the conscience of humanity’. The Prosecutor concluded that: ‘[T]he destruction of religious and historical sites in Timbuktu appears grave enough to justify further action by the Court.’⁶⁵ On 26 September 2015, following the issue of a warrant for war crimes committed in Timbuktu between 30 June and 10 July 2012, Ahmad Al Mahdi Al Faqi was surrendered by Niger to the ICC.⁶⁶

Subsequent Security Council resolutions on Mali affirmed the importance of justice and holding perpetrators to account for the peace process in the country through its cooperation

⁶⁰ ICC Prosecutor’s Statement on Mali, 1 July 2012, OTP Briefing, Issue#126, 20 June – 3 July 2012, <<http://www.icc-cpi.int/NR/rdonlyres/B8B506C8-E2DE-4FF5-A843-B0687C28AA6C/284735/OTPBriefing20June3July2012.pdf>> (viewed 4 October 2015).

⁶¹ SC Res.2056 on Peace and Security in Africa, 5 July 2012, UN Doc.S/RES/2056 (2012). This was reaffirmed in SC Res.2071 of 12 October 2012, UN Doc.S/RES/2071 (2012) and SC Res.2085 of 20 December 2012, UN Doc.S/RES/2085 (2012).

⁶² SC Res.2056(2012), paras 13 and 16.

⁶³ B. Ki-moon, Secretary-General’s Remarks to the Security Council on Mali. Speech delivered at the UN Security Council, 8 August 2012, <<http://www.un.org/sg/statements/index.asp?nid=6232>> (viewed 30 January 2014). See B. Ki-moon, Report of the Secretary-General on the situation in Mali, UN Doc. S/2012/894 (28 November 2012).

⁶⁴ International Criminal Court Prosecutor (ICCP), Situation in Mali Article 53(1), Report, 16 January 2013, pp.31 and 34.

⁶⁵ Ibid., pp.31-32.

⁶⁶ ICC, Press Release: Situation in Mali, Ahmad Al Faqi Al Mahdi surrendered to the ICC on charges of war crimes regarding the destruction of historical and religious monuments in Timbuktu, 26 September 2015, Doc.ICC-CPI-2015926-PR1154.

with the International Criminal Court.⁶⁷ A 2014 resolution extended the mandate of the UN Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) whose mandate included ‘assist[ing] the Malian authorities, as necessary and feasible, in protecting from attack the cultural and historical sites in Mali, in collaboration with UNESCO.’⁶⁸ An Agreement on Peace and Reconciliation was signed by the Malian government and several armed rebel groups in mid-2015.⁶⁹ The Security Council resolution, acknowledging this agreement, reiterated earlier calls for Malian authorities to cooperate with the International Criminal Court and extended MINUSMA’s mandate, including its support for cultural preservation.⁷⁰ Subsequently, the Security Council expressed alarm at ceasefire violations and the slow pace of MINUSMA’s work.⁷¹ Nonetheless, the Secretary-General also noted positively the work of UNESCO including the reconstruction of 14 mausoleums in Timbuktu.⁷²

Crimes against humanity, cultural landscapes and human rights

For millennia, combatants have deliberately targeted the cultural property affiliated with their enemy during armed conflict and belligerent occupation. The Nuremberg Trials highlighted that the cultural patrimony of targeted cultural, religious and ethnic communities was intentionally damaged, destroyed or seizure to persecute and ultimately eliminate them. Such acts were not confined to the theatre of war or occupation, but were perpetrated by States upon their own inhabitants. The extension of international criminal law to crimes against humanity and genocide has served as an important means of reinforcing that the targeted, intentional destruction of cultural property is intrinsic to gross and systematic abuses of human rights.

Crimes against humanity, persecution

In the mid-twentieth century, the atrocities of the Axis forces went beyond the established time and space parameters of existing international humanitarian law as defined by the Hague

⁶⁷ SC Res 2164 of 25 July 2014, UN Doc.S/RES/2164 (2014).

⁶⁸ SC Res 2164(2014), at para.14(b).

⁶⁹ SC Res 2227 of 29 June 2015, UN Doc.S/RES/2227 (2015).

⁷⁰ SC Res 2227(2015), at para.14(h).

⁷¹ Security Council Report, September 2015 Monthly Forecast: Mali, <http://www.securitycouncilreport.org/monthly-forecast/2015-09/mali_18.php?print=true> (viewed 5 October 2015).

⁷² Report of the Secretary-General on the situation in Mali, 22 September 2015, UN Doc.S/2015/732, at p.12.

Regulations. They had occurred prior to the commencement of war and were often perpetrated by states against their own nationals within their own territory. Allied declarations reflective of the Hague Conventions made no reference to such acts. However, Article 6(c) of the London Charter extended the IMT'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'.⁷³ 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'.⁷⁴ 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.⁷⁵ The prosecution of crimes against humanity without reference to 'time and place and national sovereignty' reflected the Charter's centrality in the promotion of human rights.⁷⁶ Rosenberg was found guilty of crimes against humanity including the persecution of the Jews through acts like the plunder of Jewish homes in the Occupied Eastern Territories.⁷⁷ Julius Streicher was also found guilty on Count Four for his role in the destruction of the Nuremberg synagogue in 1938 and incitement of the persecution and extermination of Jews as editor of the newspaper, *Der Stürmer*.⁷⁸

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.⁷⁹ The ICTY reopened the question of persecution as it related to cultural

⁷³ Agreement by the Governments of the United Kingdom, the United States of America, the Provisional Government of the French Republic and USSR for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed and entered into force 8 August 1945, 82 UNTS 279.

⁷⁴ Ibid.

⁷⁵ Nuremberg Judgment, note 7, at pp.243–247.

⁷⁶ E. Schwelb, 'Crimes against Humanity', *British Yearbook of International Law* (1946) vol.23, p.178 at p.181.

⁷⁷ Nuremberg Judgment, note 7, at pp.287–288.

⁷⁸ Nuremberg Judgment, note 7, at pp.294–295.

⁷⁹ See Art.3(h), Statute for the International Criminal Tribunal for Rwanda, SC Res.955 of 8 November 1994, UN Doc.S/RES/955(1994); Arts 7(1)(h) and 2(g), Rome Statute; Art.2(h) Statute of the Special Court for Sierra Leone, 16 January 2002, into force 12 April 2002, 2178 UNTS 138; Art.9 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; and Art.3 (Religious Persecution) and Art.5 (Crimes Against Humanity including persecution) Law on the Establishment of Extraordinary Chambers in the Court of Cambodia for the

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 ...’.⁸⁰ It observed that the systematic destruction of monuments, buildings, and sites of highly symbolic value for a specific social, religious, or cultural group was persecution.⁸¹ This definition included 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 nor does it define ‘persecution’. However, the ICTY has found the destruction or damaging of the institutions of a particular political, racial, or religious group is a crime against humanity of persecution under Article 5(h).⁸² Referring to the Nuremberg Judgment, the 1991 ILC Report and its own jurisprudence, the ICTY Trial Chamber in *Kordić and Čerkez* held: ‘[W]hen perpetrated with the requisite discriminatory intent...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...’.⁸³ The tribunal affirmed that the attacks must be directed against a civilian population, be widespread or systematic, and perpetrated on discriminatory grounds for damage inflicted to cultural property to qualify as persecution.⁸⁴ This requirement is intended to ensure that crimes of a collective nature are penalized because a person is ‘victimised not because of his individual attributes but rather because of his membership of a targeted civilian population’.⁸⁵ Similarly, cultural property is protected not for its own sake, but because it represents a particular group.

Prosecution of Crimes committed during the period of Democratic Kampuchea, with the inclusion of amendments as promulgated on 27 October 2004, Doc.NS/RKM/1004/006.

⁸⁰ Report of the International Law Commission on the Work of its Forty-Third Session, UN Doc.A/46/10/supp.10 (1991) at p.268.

⁸¹ Ibid.

⁸² Prosecutor v Dario Kordić and Mario Čerkez, Trial Judgment, No IT-95-14/2-T (26 February 2001) at 207.

⁸³ Ibid., at 206 and 207.

⁸⁴ Prosecutor v Zoran Kupreškić and Others, Trial Judgment, Case No IT-95-16-T, Trial Chamber, ICTY (14 January 2000) at 544; and Prosecutor v Tihomir Blaškić, Trial Judgment, Case No IT-95-14-T, Trial Chamber, ICTY (30 March 2000) at 207.

⁸⁵ Prosecutor v Duško Tadić, Opinion Trial Judgment, No IT-94-1-T, Trial Chamber, ICTY (7 May 1997) at 644.

The ICTY has held that a vital element of crimes under Article 5 is that they are part of ‘a widespread or systematic attack against a civilian population’.⁸⁶ Acts should not be examined in isolation but in terms of their cumulative effect.⁸⁷ 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 was 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.’⁸⁸ 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).⁸⁹ Although the *actus reus* of persecution may be identical to other crimes against humanity it was distinguishable because it was committed on discriminatory grounds.

Genocide

Several indictments brought before the ICTY for the deliberate destruction or damage of cultural property of religious or ethnic groups included counts of persecution and genocide. Such acts have been used to establish the *mens rea* of a defendant, that is, the discriminatory intent required for proving genocide and persecution. However, the targeting of cultural property may amount to *actus reus* in respect of the crime of persecution, but the ICTY has not included such acts per se within the definition of genocide under Article 4 of its Statute.

Two months after the Nuremberg Judgment, the UN General Assembly adopted the resolution on the Crime of Genocide (Genocide Resolution).⁹⁰ The Resolution states that genocide ‘is a crime under international law’, without reference to a nexus to armed conflict.⁹¹ Its 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’. Yet, it goes on to define genocide 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

⁸⁶ Prosecutor v Radislav Krstić, Trial Judgment, Case No IT-98-33, Trial Chamber, ICTY (2 August 2001) at 535.

⁸⁷ Kupreškić and Others, Trial Judgment, note 84, at 615.

⁸⁸ Krstić, Trial Judgment, note 86, at 535; and Prosecutor v Radoslav Brđanin, Appeals Judgment, Appeals Chamber, ICTY (3 April 2007) at 296–297.

⁸⁹ Blaškić, Trial Judgment, note 84, at 283; Krstić, Trial Judgment, note 86, at 480; and Kordić and Čerkez, Trial Judgment, note 82, at 211 and 212.

⁹⁰ GA Res.96(I) of 11 December 1946, in UN, *Yearbook of the United Nations* (1946–47), at p.255.

⁹¹ GA Res 96(I), para.1.

beings'. The *travaux* of the Genocide Convention show that early drafts included the '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' in the definition of genocide.⁹² However, the only 'cultural' element in the definition of genocide of the Convention on the Prevention and Punishment of Genocide was adopted by the General Assembly in 1948, is the reference to the removal of children from the group (Article II).⁹³ This narrower definition of genocide has been repeatedly reaffirmed by the international community.⁹⁴

Article 4 the ICTY Statute contains the same definition of genocide as Article II of the Genocide Convention and does not require that the acts occur during an armed conflict. The acts must have been perpetrated with a specific intent (*dolus specialis*), that is, 'to destroy, in whole or in part, a national, ethnic, racial or religious group as such...'.⁹⁵ The ICTY has emphasised that there are two elements to the special intent requirement of the crime of genocide: (a) the act or acts must target a national, ethnical, racial, or religious group;⁹⁶ and (b) the act or acts must seek to destroy all or part of that group. In the case of *Radoslav Krstić*, the defendant was charged with atrocities which took place during the fall of Srebrenica in 1995 and the ICTY Trial Chamber took the opportunity to re-examine the issue of whether acts directed at the cultural property of a group amounted to the international crime of genocide. It observed that: '[O]ne may ... 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.'⁹⁷ It added 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.'⁹⁸ The ICTY found that the drafters of the Genocide Convention expressly considered and

⁹² 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, draft Art.3(e)

⁹³ Art.2(e), 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.

⁹⁴ 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.

⁹⁵ *Krstić*, Trial Judgment, note 86, at 480.

⁹⁶ *Ibid*, at 551–553.

⁹⁷ *Ibid*, at 574.

⁹⁸ *Ibid*, at 575.

rejected the inclusion of the cultural elements in the list of acts constituting genocide.⁹⁹ 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 tribunal for Rwanda, the 1996 Draft ILC Code of Crimes Against Peace and Security of Mankind,¹⁰⁰ and Rome Statute. 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’.¹⁰¹ Yet, the Trial Chamber in the *Krstić* used evidence of the destruction of the cultural and religious property of Muslims to prove the specific intent element of genocide. It found that: ‘[W]here 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.’¹⁰² The Appeal Chamber pronounced that genocide was ‘crime against all humankind’ because the perpetrators ‘seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and religions provide.’¹⁰³

The *Genocide* case brought by Bosnia and Herzegovina against Yugoslavia (later Serbia and Montenegro) before the International Court of Justice in 1993 concerned Yugoslavia’s alleged violations of its obligations under the 1948 Genocide Convention. Unlike the cases before the ICTY which covered individual criminal responsibility, this action concerned the culpability of a State in respect of the international crime of genocide. Accepting that there was ‘conclusive evidence of the deliberate destruction of the historical, cultural and religious heritage of the protected group’,¹⁰⁴ the ICJ reaffirmed the ICTY’s interpretation in *Krstić* that the definition of genocide had not evolved beyond Article II. It concluded that the destruction

⁹⁹ Ibid, at 576.

¹⁰⁰ Art.17, Draft Code of Crimes Against the Peace and Security of Mankind, 51 UN GAOR Supp. (No 10) at p.14, UN Doc.A/CN.4/L.532, corr.1, corr.3 (1996).

¹⁰¹ Prosecutor v Radislav Krstić, Appeals Judgment, Case No IT-98-33-A (19 April 2004) at 25.

¹⁰² Krstić, Trial Judgment, note 86, at 580.

¹⁰³ Krstić, Appeals Judgment, note 101, at 36.

¹⁰⁴ Application of the Convention for the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ, Judgment of 26 February 2007, at p.344.

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*.¹⁰⁵ In early 2015, in the *Genocide* case between Croatia and Serbia, the International Court reiterated this interpretation by stating ‘that there was no compelling reason in the present case for it to depart from that approach.’¹⁰⁶

Crime against the common heritage of humanity

From the deliberate destruction of the monumental Buddhas in Bamiyan, Afghanistan by the Taliban in 2001 to the systematic and intentional destruction of successive World Heritage sites in Syria and Iraq in 2014-2015, the motivation for such acts by the perpetrators has evolved beyond solely demoralising the local populace of the territory where the sites are located. The digital age, and the Internet and social media with it, has proliferated and globalized the propaganda potential of such acts of destruction of cultural heritage. Often the monuments, sites and shrines are not directly related to the cultural and religious practices of present-day inhabitants; instead, they are evidence of the multi-layered history and diversity of these sites. It is this cultural and religious diversity which the perpetrators find abhorrent and seek to expunge through such acts. The recording of these acts of destruction and their circulation on social and traditional media is designed to demoralise not only the local populace but the international community as a whole. Accordingly, the acknowledged universal importance of these sites and monuments to all humanity has increasingly elicited a co-ordinated response by intergovernmental organisations like the United Nations and its agencies, including UNESCO, to hold the perpetrators to account.

Intentional destruction: UNESCO Declaration and SC Resolutions

The obligation to prosecute those engaged in acts of deliberate destruction of cultural property was reinforced in the twenty-first century with UN Security Council resolutions covering Iraq, Afghanistan and Syria, and UNESCO instrument covering the intentional destruction of cultural heritage. These resolutions take this obligation beyond the States Parties to the 1954 Hague Conventions and its Protocols, by articulating a legally binding obligation on all UN Member States to cooperate in preventing such acts and holding perpetrators to account.

¹⁰⁵ Ibid.

¹⁰⁶ Application of the Convention for the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), ICJ, Judgment of 3 February 2015, para.389.

The UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage was adopted in response to the deliberate destruction of the monumental Buddhas in the World Heritage listed site of Bamiyan, Afghanistan on 1 March 2001.¹⁰⁷ A month earlier, the Taliban had issued an edict requiring the destruction of all non-Islamic shrines in Afghanistan. Within days, the UN General Assembly denounced the ‘deliberate ongoing destruction of these relics and monuments which belong to the common heritage of humankind.’¹⁰⁸ The UNESCO General Conference in November 2001 adopted Resolution on Acts constituting a crime against the common heritage of humanity,¹⁰⁹ which called on Member States not party to the relevant conventions including the 1954 Hague Convention and its Protocols and the 1972 World Heritage Convention to do so ‘in order to maximize the protection of the cultural heritage of humanity, and in particular, destructive acts’.¹¹⁰ It reiterates that these obligations should guide ‘governments, authorities, institutions, organizations, associations and individual citizens’.¹¹¹ It requested the Director-General prepare a draft convention on intentional destruction for adoption by the General Conference. The rationale contained in the preamble of the 1954 Hague Convention was reaffirmed by the Declaration concerning the Intentional Destruction of Cultural Heritage adopted by the UNESCO General Conference in 2003. It states in part:

*The international community recognizes the importance of the protection of cultural heritage and reaffirms its commitment to fight against its intentional destruction in any form so that such cultural heritage may be transmitted to the succeeding generations.*¹¹²

The Declaration covers cultural heritage ‘linked to a natural site’; acts occurring outside the theatre of war; and within the territory of a State. In support it invokes, not only the 1954 Hague Convention, Additional Protocols I and II to the 1949 Geneva Conventions, 1899 Hague II and 1907 Hague IV Conventions, but the relevant provisions of the Rome Statute and the ICTY Statute and related jurisprudence.

¹⁰⁷ UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, adopted by the General Conference of UNESCO at its 31st session, 17 October 2003.

¹⁰⁸ GA Res.55/243 on the Destruction of Relics and Monuments in Afghanistan, 9 March 2001, UN Doc.A/RES/55/243. The UN General Assembly had previously adopted resolutions 54/189 of 17 December 1999, PP4 and OP30, and 55/174 of 19 December 2000, PP4 and OP30.

¹⁰⁹ 31C/Res.26 of 2 November 2001.

¹¹⁰ 31C/Res.26 of 2 November 2001, para.1.

¹¹¹ SC Res.26(2001), para.3.

¹¹² Intentional Destruction Declaration, para.1.

The deliberate destruction of cultural heritage again became the focus of international attention in 2014 with atrocities committed by extremist groups, including Al Nusrah Front (ANF) and Islamic State of Iraq and the Levant (ISIL), in Iraq and Syria. The Security Council had called ‘on all parties to immediately end all violence which has led to human suffering in Syria, save Syria’s rich societal mosaic and cultural heritage, and take appropriate steps to ensure the protection of Syria’s World Heritage Sites ...’.¹¹³ It stressed that there was a need to ‘end impunity for violations of international humanitarian law and abuse of human rights’ and that those responsible be brought to justice.¹¹⁴ The Human Rights Council likewise expressed deep concern for the ‘rampant destruction of monuments, shrines, churches, mosques, and other places of worship, archaeological sites and cultural heritage sites’.¹¹⁵ It called on the Iraq government to investigate all alleged violations of international humanitarian law and abuses of human rights and ‘prosecute the perpetrators of such attacks’.¹¹⁶ Likewise, UNESCO’s Executive Board, recalling the 2003 Declaration, noted that these acts ‘damage the cultural heritage of all humankind’ and could amount to war crimes under the Rome Statute.¹¹⁷

The Security Council adopted resolution 2199 of 12 February 2015 which condemned ‘the destruction of cultural heritage in Iraq and Syria particularly by ISIL and ANF, whether such destruction is incidental or deliberate, including targeted destruction of religious sites and objects’.¹¹⁸ The resolution was adopted pursuant to Chapter VII of the UN Charter and is therefore binding on UN Member States and takes precedence over any conflicting treaty obligations. In their Namur Call, the Committee of Ministers of the Council of Europe in April 2015 recorded that they ‘deplor[ed] the deliberate destruction of cultural heritage ... which constitute[d] an impoverishment of the common heritage and incur[red] our collective responsibility with regard to future generations.’¹¹⁹ It reinforced European cooperation on

¹¹³ SC Res.2139 of 22 February 2014, UN Doc.S/RES/2139(2014), PP8.

¹¹⁴ SC Res.2139(2014), para.13. See also SC Res.2170 of 15 August 2014, UN Doc.S/RES/2170(2014), OP2 and 5.

¹¹⁵ HRC Res.S-22/1 of 1 September 2014, UN Doc.A/HRC/RES/2-22/1, PP6.

¹¹⁶ HRC Res.S-22/1(2014), PP5.

¹¹⁷ UNESCO Executive Board Item 31 Protection of Iraqi Heritage, Explanatory Note, 1 October 2014, UNESCO Doc.195EX/31, paras 6 and 8.

¹¹⁸ SC Res.2199 of 14 November 2014, UN Doc.S/2014/815, OP15. See also UNESCO Executive Board decision 196EX/29 Culture in conflict areas. UNESCO’s role and responsibilities, 22 May 2015.

¹¹⁹ Committee of Ministers of the Council of Europe, The Namur Call, 23-24 April 2015.

legal instruments like those covering unlawful destruction of cultural heritage.¹²⁰ In a resolution on ‘Saving the cultural heritage of Iraq’ adopted in mid-2015, the General Assembly referencing the 1907 Hague Regulations, the 1949 Geneva Conventions, the 1954 Hague Convention and its Protocols, 1970 UNESCO Convention, 1972 World Heritage Convention, UN Convention against Transnational Organized Crime, and the UNESCO Declaration on the Intentional Destruction of Cultural Heritage and ‘resolved to stand up against attacks on the cultural heritage of any country as attacks on the common heritage of humanity as a whole’.¹²¹ Yet, the deliberate destruction continued. On 4 September 2015, the Committee for the Protection of Cultural Property in the Event of Armed Conflict condemned the destruction of the temples of Baal Shamin and Bel, in Palmyra built almost 2,000 years ago, and part of a World Heritage site.¹²² It advised that this ‘systematic destruction’ was a violation of international law and possibly a war crime. It urged the international community ‘to unite and intensify its efforts to confront this unprecedented situation, caused by terrorist groups, such as ISIS.’¹²³

Incitement in the digital age

Since ancient times, these acts of deliberate destruction of cultural heritage were designed to demoralise the enemy and civilian populations into submission. As noted earlier, is a strategy condemned and prohibited by the international community since the late nineteenth century. However, what distinguishes the intentional acts of destruction by groups from the Buddhas of Bamiyan to the various World Heritage listed sites in Syria is that they are not necessarily affiliated in a cultural or religious affiliation with local communities. Instead, they are sites which are defined as belonging to the cultural heritage of all humanity. Equally, their destruction is not simply directed to combatants in the conflict on the ground as was traditionally the case. Rather, the Security Council has acknowledged that cultural heritage has another significant potential for these groups. The deliberate destruction of historic sites for propaganda value had successfully garnered worldwide attention through social and

¹²⁰ See Recommendation No.R(96)R of the Committee of Ministers to Members States on the Protection of Cultural Heritage against Unlawful Acts, adopted 19 June 1996, references the Council of Europe’s European Convention on Offences relating to Cultural Property, 1954 Hague Convention, 1970 UNESCO Convention and 1972 World Heritage Convention.

¹²¹ GA Res.69.281 on Saving the Cultural Heritage of Iraq, 28 May 2015, UN Doc.A/RES/69/281, PP2 and 4.

¹²² Statement of the Chairperson on behalf of the Committee for the Protection of Cultural Heritage in the Event of Armed Conflict established by the Second Protocol to the 1954 Hague Convention, Statement, 4 September 2015.

¹²³ Ibid.

traditional media. The Parliamentary Assembly of the Council of Europe had noted in 2004 observed that culture and its manifestations was ‘increasingly the target of terrorism’. It maintained that globalisation and our information society not only enable unprecedented cultural interaction but ‘potentially foster terrorism and the ideologies that encourage it ...leading to a new form of international terrorism with an “a-territorial” and “a-cultural dimension”.’¹²⁴ A decade later the Security Council, in SC Res.2170(2014), defined the ‘need for Member States to act cooperatively to prevent terrorists from exploiting technology, communications and resources to incite support for terrorist acts, while respecting human rights and fundamental freedoms...’.¹²⁵

The deliberate destruction of cultural and religious monuments, including those listed as World Heritage in Syria and Iraq have been broadcast by ISIL through social media and the Internet. The General Assembly observed that: ‘[A]ttacks on cultural heritage are used as a tactic of war in order to spread terror and hatred’ and it called on ‘community leaders to stand up and reaffirm unambiguously that there is no justification for the destruction of humanity’s cultural heritage...’.¹²⁶ The UN Analytical Support and Sanctions Monitoring Team noted that ‘[t]he extremist, violent ideology of the Al-Qaida movement relies on propaganda’ but that the transnational nature of social media meant that any collective, multilateral response is complicated because ‘social media providers operate across borders.’¹²⁷ It noted that prosecutions for incitement in domestic jurisdictions where this is possible it serves as a deterrent.¹²⁸ In SC Res.2199(2015), the Security Council ‘express[ed] concern at the increased use...by terrorists and their supporters, of new information and communication technologies, in particular the Internet, to facilitate terrorist acts, as well as their use to incite, recruit, fund or plan terrorist acts.’ In mid-2015, the UN Analytical Support and Sanctions Monitoring Team against referred to the need to address the ‘growth of high-definition digital terror’, and recommended that Internet and social media provides brief the Team on their

¹²⁴ CE Parliamentary Assembly Recommendation 1687 (2004) Combating Terrorism through Culture.

¹²⁵ SC Res.2170(2014), PP12 and 13.

¹²⁶ GA Res.69/281(2015), paras 2 and 8.

¹²⁷ Sixteenth Report of the Analytical Support and Sanctions Monitoring Team submitted pursuant to resolution 2161 (2014) concerning Al-Qaida and associated individuals and entities, 29 October 2014, UN Doc.S/2014/770, paras 17 and 21.

¹²⁸ UN Doc.S/2014/770, para.22.

strategies in responding to the ‘exploitation of their services’ by these terrorist organisations.¹²⁹

Criminalisation and cooperation

These recent Security Council resolutions covering deliberate destruction of cultural heritage have repeatedly called on States to cooperate to ensure that perpetrators are held criminally responsible for such crimes. The 2003 UNESCO Declaration is an important reference point because it provides for State and individual responsibility for intentional destruction of cultural heritage (Articles VI and VII); and outlines the obligation to cooperate in respect of protecting cultural heritage against intentional destruction (Article VIII). It calls on States to establish jurisdiction and effective criminal sanctions against individuals who commit or order others to commit such acts. It requests States to cooperate with one another and UNESCO including through information sharing; consultation in cases of actual or impending destruction; assist in respect of educational, awareness-raising and capacity-building programmes for prevention and repression; and assist judicial and administrative processes. States are also encouraged to establish jurisdiction and effective criminal sanction against individuals ‘who have committed or have ordered to be committed acts referred to [individual criminal responsibility] and who are found present on its territory, regardless of their nationality and the place where such act occurred’ (para.VIII(2)). The Declaration requires states to recognise ‘international rules related to the criminalization of gross violations of human rights and international humanitarian law, in particular, when intentional destruction of cultural heritage is linked to those violations.’¹³⁰ Like the ICTY jurisprudence, this link had been highlighted by the Human Rights Council in 2007 recognised ‘intentional destruction of cultural heritage may constitute advocacy and incitement to national, racial or religious hatred and thereby violates fundamental principles of international human rights law’ and that States bore primary responsibility to ‘prohibit, prevent, stop and punish’ such acts.¹³¹

Intergovernmental bodies, like the Council of Europe and the United Nations, have instruments that cover unlawful acts against cultural heritage and provide guidance to States

¹²⁹ Seventeenth report of the Analytical Support and Sanctions Monitoring Team submitted pursuant to resolution 2161(2014) concerning Al-Qaida and associated individuals and entities, 16 June 2015, UN Doc.S/2015/441, para.44.

¹³⁰ Intentional Destruction Declaration, para.IX.

¹³¹ HRC Res.6/11 on Protection of cultural heritage as an important component of the promotion and protection of cultural rights, 28 September 2007.

Parties on how these obligations can be translated into domestic law and cooperation between them to achieving these objectives. The Council of Europe Recommendation No.R(96)6 on the protection of Cultural Heritage against unlawful acts emphasises that it is preventative in purpose and it is primarily focused on identifying and managing risks to cultural property through unlawful acts or negligence. Its preamble states: '[P]revention should primarily concerned with educating and informing owners, professionals and the public about conservation and respect for cultural heritage and with encouraging a multidisciplinary approach to prevention, using all available human, physical and electronic means'.¹³² The European Convention on Offences relating to Cultural Property adopted by the Council of Europe in 1985 is primarily geared towards curbing the illicit trade in cultural objects.¹³³ It covers acts including 'appropriating cultural property through violence or menace' and States Parties may choose to extend its application to 'destruction or damaging of cultural property of another person'.¹³⁴ States Parties are obliged to establish jurisdiction to prosecute offences committed on its territory, outside its territory by a national or resident, or outside its territory against its own property or that of a national or original located in its territory (Article 13). Likewise, the International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences, provide detailed strategies in respect of crime prevention, criminal justice policies, and international cooperation facilitate national and international efforts for the protection of cultural heritage but is largely centred on the illicit traffic of cultural objects.¹³⁵

Conclusion

The Arch of Triumph which formed part of the 2,000 year old Roman city of Palmyra was destroyed by ISIL forces in mid-2015 which circulated video and photographs of these acts on social media and the Internet. The organisation had already destroyed in Lion of Al-lāt, the Temple of Bel and Temple of Baal Shamin in the World Heritage listed Syrian city. Like the Taliban before it in 2001, it has ordered the deliberate destruction of Islamic and non-Islamic monuments, shrines and statues on Syrian and Iraqi territories under its control,

¹³² Recommendation No.R(96)6, PP12.

¹³³ European Convention on Offences relating to Cultural Property, 23 June 1985, not entered into force, CETS No.119.

¹³⁴ European Convention on Offences relating to Cultural Property, Appendix III, paras 1 and 2.

¹³⁵ International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences, GA Res.69/196 of 26 January 2015, UN Doc.A/RES/69/196.

justified on the basis on their interpretation of religious teachings. These monuments and sites which have been destroyed in Palmyra evidenced how cosmopolitan and cultural diversity this city has been throughout its long history. The intended impact of ISIL's visual recording of their acts of destruction and broadcasting globally via the Internet and social media goes beyond these occupied territories. Instead, it is addressed to a global audience. Both the perpetrators and the intended audience of these images understand these sites and monuments to be of universal significant to humanity as a whole. It is for this reason that it has repeatedly elicited international condemnation and calls in international fora like the Security Council and UNESCO for the perpetrators to be held criminally responsible.

[insert Fig.2, The destruction of the Temple of Baal Shamin, Palmyra, Syria in mid-2015.

Kyodo, AP Images].

In various multilateral instruments since the mid-nineteenth century, the international community had repeatedly and consistently confirmed its prohibition against the deliberate destruction of cultural and religious sites and the requirement that violations be subject to legal proceedings. The nature of international law has invariably meant that the obligation for holding perpetrators criminal responsible has primarily fallen to the territorial State where the acts occurred or the state of nationality of the offender. However, States have often been unable to fulfil these obligations for a variety of reasons including the lack of control over their territory and its inhabitants or the violation of international humanitarian law and human rights law by the government itself. The obligation then falls to the international community through intergovernmental organisations like the UN Security Council and international tribunals like the International Criminal Court. Recent acts of intentional destruction of monuments at World Heritage sites have engaged both the Security Council and the ICC which have called upon all Member States to cooperate in bringing the perpetrators of these international crimes to justice. New technologies will prove vital in the evidence gathering and reconstruction processes.¹³⁶ Yet history shows that such actions have met with limited success and are by definition reactive. Significantly, multilateral instruments which have included the criminalisation of deliberate acts of destruction against cultural property have consistently incorporate preventative and punitive obligations. Accordingly, existing preventative measures like those contained in the 1954 Hague Convention and its Protocols

¹³⁶ See for example, UNITAR/UNOSAT, *Satellite-based Damage Assessment to Cultural Heritage Sites in Syria*, (Geneva: UNITAR, 2015).

and the initiative to extend the mandate of UN peacekeepers so that they can be deployed to protect World Heritage have a potentially significant, proactive impact.¹³⁷

¹³⁷ Anon, 'UN to deploy peacekeepers to protect world heritage sites', *The Guardian* (18 October 2015), at <<http://www.theguardian.com/world/2015/oct/17/un-peacekeepers-protect-world-heritage-sites-isis>> (viewed 18 October 2015).