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# Intentional Destruction of Cultural Heritage and International Law

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# INTENTIONAL DESTRUCTION OF CULTURAL HERITAGE AND INTERNATIONAL LAW

*A F Vrdoljak<sup>1</sup>*

*For every image of the past that is not recognized by the present as one of its own concerns threatens to disappear irretrievably.<sup>2</sup>*

## 1. INTRODUCTION

At either side of the decade spanning the end of the Cold War and the attack on the World Trade Centre, New York, two acts of deliberate destruction of cultural heritage elicited global public outcry and highlighted the limitations of existing international law to prevent them. The destruction of the monumental Buddhas of Bamiyan, Afghanistan by the Taliban in 2001 eventually resulted in the adoption of the Declaration concerning the Intentional Destruction of Cultural Heritage by the UNESCO General Conference (2003 UNESCO Declaration). The bombardment of the historic city of Dubrovnik, Croatia in October 1991 led to the sentencing of the perpetrators by the International Criminal Tribunal for the former Yugoslavia (ICTY), fifteen years later. Both developments reflect the increasing recognition by the international community that it must act when forces hostile to a group seek the ‘irretrievable disappearance’ of its cultural manifestations.

This note considers the impact of the ICTY jurisprudence and the 2003 UNESCO Declaration upon two discernible trends in the international law concerning cultural heritage. First, the dissolving of the divide between the protection afforded during period of armed conflict and peacetime. Second, the recognition of the importance of cultural heritage to subjects beyond the State in which it may be located: namely, humanity generally (including future generations), and non-state groups. These trends are complementary and reflect the increasing significance of the protection and promotion of cultural diversity in international law. Yet, they are also being met with significant trepidation by States, as exemplified by their reluctance to create new legal obligations with the 2003 UNESCO Declaration. Nonetheless,

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<sup>2</sup> W. Benjamin, *Illuminations*, (London, 1999), p.256.

the events which triggered these developments highlight that the stakes are significant because the consequences of such acts are often irreversible.

## 2. PROTECTION DURING PEACETIME AND ARMED CONFLICT

### 2.1 Codification of the rules of war in international law

The earliest protection afforded cultural heritage in international law covered international armed conflicts (and belligerent occupation) only. This situation reflected the general development of modern public international law and the codification priorities of States and publicists. The ICTY when confirming that these rules form part of customary international law has traced the line back from Lieber Code,<sup>3</sup> 1874 Brussels Declaration,<sup>4</sup> 1880 Manual of the Institute of International Law,<sup>5</sup> to the 1899 Second Hague and 1907 Fourth Hague Conventions.<sup>6</sup>

The Regulations of the 1907 Hague IV Convention contain specific protection for ‘buildings dedicated to religion, art, science, or charitable purposes, historic monuments’ during hostilities (Article 27); and during occupation such protection also extends to ‘works of art and science’, that is, movable heritage (Article 56). The ICTY and the International

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<sup>3</sup> 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 Conflicts. A Collection of Conventions, Resolutions and Other Documents*, (3<sup>rd</sup> edn, Dordrecht, 1988), p.8.

<sup>4</sup> International Declaration concerning the Laws and Customs of War, Brussels, 27 August 1874, not ratified, (1907) 1 (supp.) AJIL 96.

<sup>5</sup> Oxford, 9 September 1880, in Schindler and Toman (eds.), *supra* note 3, at 36.

<sup>6</sup> Convention (II) with Respect to the Laws and Customs of War on Land, with Annex, The Hague, 29 July 1899, (1907) 1 (supp.) AJIL 129; and Convention (IV) Respecting the Laws and Customs of War on Land, and Annex, The Hague, 18 October 1907, (1908) 2 (supp.) AJIL 90. See *Prosecutor v. Pavle Strugar*, Trial Judgment, No.IT-01-42-T, (31 January 2005), para. 229; *Prosecutor v. Dario Kordić and Mario Cerkez*, Trial Judgment, No.IT-95-14/2-T, (26 February 2001), paras. 359-62; and *Prosecutor v. Miodrag Jokić*, Sentencing, No.IT-01-42/1-S, (18 March 2004), para. 48.

Court of Justice have reaffirmed that the 1907 Hague IV Convention and its Regulations are customary international law.<sup>7</sup>

Cultural heritage was damaged and destroyed by all parties during the Yugoslav wars of the 1990s.<sup>8</sup> In response, the international community under the auspices of the United Nations established the ICTY to investigate and prosecute individuals responsible for these acts, among other atrocities.<sup>9</sup> The articulation of the crimes relating to the confiscation and destruction of cultural property in the Statute of the ICTY replicates Article 56 of the 1907 Hague IV Convention. 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.

Article 3 is catch-all provision which encompasses customary international law relating to laws and customs of armed conflict.<sup>10</sup> It must be established that there is a close nexus between the armed conflict and alleged acts to prove crimes under this provision.<sup>11</sup> However, the conflict can be international or internal in character.

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<sup>7</sup> See *Kordić and Cerkez*, Trial Judgment, para. 206; *Strugar*, Trial Judgment, para. 227; *Prosecutor v. Tihomir Blaškić*, Trial Judgment, No.IT-1995-14-T, (3 March 2000), para. 168; and *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, I.C.J., No. 131, 9 July 2004, para. 89.

<sup>8</sup> 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 UNSC Resolution 780 (1992), UN Doc. S/1993/25274 (9 February 1993).

<sup>9</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia, GA Res. 827 (25 May 1993), amended by GA Res. 1166 (13 May 1998), 1329 (30 November 2000), 1411 (17 May 2002), 1431 (14 August 2002) and 1481 (19 May 2003).

<sup>10</sup> *Prosecutor v. Anto Furundžija*, Trial Judgment, No.IT-95-17/1-T, (10 December 1998), para. 133.

<sup>11</sup> *Prosecutor v. Pavle Strugar*, Rule 98bis Motion, No.IT-01-42-T, (21 June 2004), para. 24; *Strugar*, Trial Judgment, para. 228; and *Prosecutor v. Radislav Krstić*, Trial Judgment, No.IT-98-33-T, (2 August 2001), para. 480.

## 2.2 International and non-international armed conflict

The limitations of the positivist application of international law strictly to States, and therefore international armed conflict alone, became clear by the mid-twentieth century. During the inter-war period, the devastation visited on cultural heritage during the Spanish Civil War spurred two multilateral initiatives for its protection during non-international armed conflicts. First, the 1935 Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (1935 Washington Treaty) was a multilateral, American regional agreement giving conventional form to the Roerich Pact.<sup>12</sup> Second, the 1939 Declaration for the Protection of Historic Buildings and Works of Art in Time of War was an incompleting project of the League of Nations' International Committee for Intellectual Cooperation.<sup>13</sup> However, it was not until the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention), realised under the auspices of UNESCO, that a multilateral instrument covering cultural heritage during international and non-international armed conflict came into force.<sup>14</sup>

In 2005, the ICTY Trial Chamber held in the *Strugar* case that Article 3(d) is a rule of international humanitarian law which forms part of international customary law.<sup>15</sup> It found that it afforded protection to cultural heritage not just during international armed conflicts (encompassed by the 1907 Hague IV Regulations), but included internal conflicts as well. The Tribunal noted the trend of instruments in the intervening hundred years, including the 1935 Washington Pact, Article 53 of 1977 Additional Protocol I and Article 16 of the Additional

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<sup>12</sup> Washington, 15 April 1935, in force 26 August 1935, 167 LNTS 289; (1936) 30 (supp.) AJIL 195-98.

<sup>13</sup> See LN, LNOJ, 19<sup>th</sup> Year, No.11, (November 1938), 937; (1939) 20 RDILC 608.

<sup>14</sup> The Hague, 14 May 1954, in force 7 August 1956, 249 UNTS 240. See *Prosecutor v. Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, (20 October 1995), para. 127.

<sup>15</sup> *Strugar*, Trial Judgment, para. 230.

Protocol II to the 1949 Geneva Conventions, and 1954 Hague Convention.<sup>16</sup> Protection afforded under international criminal law has been restated by the 1996 International Law Commission Draft Code of Crimes against the Peace and Security of Mankind (1996 ILC Draft Code);<sup>17</sup> and the 1999 Rome Statute of the International Criminal Court (ICC Statute) which condemn such attacks as war crimes.<sup>18</sup>

The 2003 UNESCO Declaration affirms this interpretation of existing international law.<sup>19</sup> It refers to the preamble of the 1954 Hague Convention, Articles 27 and 56 of the 1907 Hague Regulations, relevant provisions of the ICC Statute, and Article 3(d) of the ICTY Statute.<sup>20</sup> The declaration notes that acts not covered by existing international instruments are ‘governed by the principles of international law, the principles of humanity and the dictates of public conscience.’<sup>21</sup> Under Article V of the 2003 UNESCO Declaration, States involved in an armed conflict, of an international or non-international character, or belligerent occupation ‘should take all appropriate measures to conduct their activities in such a manner as to protect cultural heritage’ in conformity with customary international law, international agreements and UNESCO recommendations.

### 2.3 Peacetime and armed conflict

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<sup>16</sup> *Strugar*, Trial Judgment, para. 229; *Kordić and Cerkez*, Trial Judgment, paras. 359-62; and *Jokić*, Sentencing, para. 48.

<sup>17</sup> Article 20(e)(iv), Draft Code of Crimes Against the Peace and Security of Mankind, adopted by the International Law Commission at its 48<sup>th</sup> session, in 1996, and submitted to the General Assembly, UN Doc. A/48/10, and Y.B. ILC, (1996), vol. II(2).

<sup>18</sup> Articles 8(2)(b)(ix) (International armed conflict) and 8(2)(e)(iv) (Non-international armed conflict), Statute of the International Criminal Court, Rome, 10 November 1998, in force 1 July 2002, UN Doc. A/CONF.183/9; and 37 *ILM* 999. See O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers’ Notes, Article by Article*, (Baden-Baden, 1999), p. 278.

<sup>19</sup> Adopted by the 32<sup>nd</sup> session of the UNESCO General Conference, Paris, 17 October 2003.

<sup>20</sup> There is no equivalent provision in the Statute of the International Criminal Tribunal for Rwanda, UNGA Res. 955 of 1994.

<sup>21</sup> Tenth recital, Preamble, 2003 UNESCO Declaration.

Difficulties in defining whether and when an armed conflict exists render initiatives to extend international protection of cultural heritage during peacetime especially pertinent.<sup>22</sup> The 1935 Washington Treaty, referred to in the preamble of the 1954 Hague Convention and the ICTY judgments covering Article 3(d), provides protection during armed conflict and peacetime.<sup>23</sup> Despite several aborted inter-war attempts by League organs to formulate multilateral instruments for the protection of cultural heritage during peacetime, it was not until after the Second World War under the auspices of UNESCO, that these initiatives were finally realised. When rendering its decisions on charges brought under Article 3(d), the ICTY has also referred to these instruments, including the Convention on Means of Prohibiting and Preventing Illicit Import, Export and Transfer of Cultural Property (1970 UNESCO Convention);<sup>24</sup> and the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention).<sup>25</sup>

The *travaux préparatoires* of the 2003 UNESCO Declaration stipulate that one of its purposes is ‘to prevent and prohibit the intentional destruction of cultural heritage, and when linked, natural heritage, in time of peace and in the event of armed conflict.’<sup>26</sup> However, the extension of customary international law protection to cultural heritage during peacetime has been a matter of much debate and controversy, as was evidenced during the drafting and negotiation of the declaration.<sup>27</sup> Significantly, the *travaux* noted that ‘uncertainties [are] still

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<sup>22</sup> F. Francioni, ‘War and Cultural Heritage’, unpublished paper, n.d., (copy on file with author), pp. 85-86.

<sup>23</sup> Fourth recital, Preamble, 1954 Hague Convention; and *Kordić and Cerkez*, Trial Judgment, para. 360.

<sup>24</sup> Paris, 14 November 1970, in force 24 April 1972, 823 UNTS 231. See UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Rome, 24 June 1995, in force 1 July 1998, 34 ILM 1322.

<sup>25</sup> Paris, 16 November 1972, in force 17 December 1975, 1037 UNTS 151.

<sup>26</sup> Draft UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, 17 July 2003, UNESCO Doc. 32C/25, para. 2; and Annex II: Meeting of Experts on the Draft Declaration concerning the Intentional Destruction of Cultural Heritage, Brussels, 9-13 December 2002, para. 5.

evident in customary international law on the existence of rules providing clear obligations to protect cultural heritage from intentional destruction both in time of peace and in time of armed conflict.’<sup>28</sup>

The original draft of Article II(1) stated that the 2003 UNESCO Declaration addressed ‘intentional destruction in peacetime as well as in the event of armed conflict.’<sup>29</sup> This provision is important because the experts explained: ‘[I]t sets forth [the declaration’s] scope, both in terms of its subject matter (*ratione materiae*) and its time framework (*ratione temporis*).’<sup>30</sup> The commentary noted that Article II required: ‘[T]he difficult assessment of the precise status and content of international law (both treaty and customary law) for the regimes, if any, currently applicable against the intentional destruction of cultural heritage in both time of peace and armed conflict.’<sup>31</sup> This explicit reference to peace and war time was eventually dropped from the final text.

Yet, the Preamble, and Articles III and IV of the Declaration do retain specific references to multilateral instruments in force covering cultural heritage during peacetime, armed conflict and belligerent occupation. The Preamble observes that the development of international customary law in this area ‘relate[s] to the protection of cultural heritage in peacetime as well as in the event of armed conflict.’<sup>32</sup> Article III calls on States to become parties to the 1954 Hague Convention, and its First and Second Protocols. Article IV goes further stipulating that States should conduct peacetime activities in conformity with various UNESCO Recommendations and the 1972 World Heritage Convention.

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<sup>27</sup> See F. Francioni and F. Lenzerini, ‘The Destruction of the Buddhas of Bamiyan and International Law’ (2003) 14 *EJIL* 619; F. Lenzerini, ‘The UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage: One Step Forward and Two Steps Back’ (2004) 14 *Italian YbIL* (forthcoming) (copy on file with author) (suggest that forms part of customary international law); and R. O’Keefe, *World Cultural Heritage Obligations to the International Community as a Whole?* (2004) 53 *ICLQ* 189 (argues that it is not customary international law).

<sup>28</sup> UNESCO 32C/25, Annex II, p. 3, para. 9.

<sup>29</sup> UNESCO 32C/25, Annex I, p. 2

<sup>30</sup> UNESCO 32C/25, Annex II, p. 4, para. 11.

<sup>31</sup> UNESCO 32C/25, Annex II, p. 4, para. 13.

While customary international law on the prohibition against intentional destruction of cultural heritage during peacetime is not as clearly defined as the prohibition during armed conflict, it can be inferred on three premises. First, there is the developing State practice of condemnation of deliberate acts of destruction of significant cultural heritage.<sup>33</sup> This is bolstered by increasing number of signatories to the instruments for the protection of cultural heritage during peacetime. As at 7 January 2005, the World Heritage Convention had 179 State parties and its List had 788 properties inscribed on it.<sup>34</sup> The 1970 UNESCO Convention had 106 State parties including the countries which host the major centres of the international art trade. Federico Lenzerini notes that this trend is augmented by the domestic legislative protection afforded cultural heritage by most States, even those not State parties to these instruments.<sup>35</sup> However, given the views of UNESCO Member States in the lead up to the 2003 UNESCO Declaration, Roger O’Keefe warns against discounting the ongoing importance of the principle of non-intervention and State sovereignty in international law.<sup>36</sup> Whilst O’Keefe’s point explains its ‘soft law’ language, its very adoption suggests a slow movement toward curbing the unfettered sovereignty of States in this area.

Second, Lenzerini observes that it would be illogical to provide greater protection during period of armed conflict than peacetime.<sup>37</sup> The advisory opinion of the International Court of Justice in the *Legality of the Threat or Use of Nuclear Weapons* (1996) is instructive in this respect.<sup>38</sup> Implicit in the Court’s reasoning is the understanding that the existing

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<sup>32</sup> Eighth recital, Preamble, 2003 UNESCO Declaration.

<sup>33</sup> See F. Francioni, ‘Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity’, (2004) 25 *Michigan Journal of International Law* 1209; and O’Keefe, *supra* note 27, at 202ff.

<sup>34</sup> Official UNESCO World Heritage Convention website, at <<http://whc.unesco.org/pg.cfm?cid=31>> (January 2005).

<sup>35</sup> Lenzerini, *supra* note 27.. Cf. J. Sax, *Playing Darts with Rembrandt: Public and Private Rights in Cultural Treasures*, (Ann Arbor, 1999).

<sup>36</sup> O’Keefe, *supra* note 27, at 208. See UNESCO, *Records of the General Conference, 31<sup>st</sup> Session*, (vol. 2, Paris, 2003), p. 558.

<sup>37</sup> Lenzerini, *supra* note 27.

international law for the protection of the environment during peacetime is applicable during armed conflict subject to certain provisos, including military necessity.<sup>39</sup> That is, protection provided by international law during peacetime is necessarily greater than that applicable during armed conflict. It is suggested similar reasoning can be extrapolated to cover the prohibition on the intentional destruction of cultural heritage.

Third, the recent decisions of the ICTY widening the protection afforded to cultural heritage in international law in war and peacetime may signal an evolution mirroring that which occurred in respect of crimes against humanity and genocide. There is a growing recognition that while destruction or damage of cultural property often occurs under the cloak of armed conflict, it is not confined to nor is it necessarily related to the hostilities. As noted previously, it is this awareness that drove the adoption of 2003 UNESCO Declaration. Furthermore, as explained below, international criminal law is increasingly prohibiting the intentional destruction of cultural heritage during periods of peacetime when it has been targeted because of its affiliation to a particular ethnic or religious group.

### 3. CULTURAL HERITAGE: BEYOND THE STATE

Reflecting the preoccupation of international law generally, most multilateral instruments for the protection of cultural heritage refer to the State as its primary subject. It is the State which defines what cultural heritage is to be protected and it is the State that must primarily fulfil obligations pertaining to its protection under, for example, the 1954 Hague Convention, 1970 UNESCO Convention and 1972 World Heritage Convention. Consequently, it is the importance of cultural heritage to the nation-state which has been privileged by international law.

While States remain primarily responsible for the protection of cultural heritage in international law,<sup>40</sup> it is clear that the interests of other subjects have gained significance (if not, precedence): namely, the international community, and non-state groups. It is suggested

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<sup>38</sup> *Legality of the Threat or Use of Nuclear Weapons*, I.C.J. Reports 1996, p. 226.

<sup>39</sup> I.C.J. Reports 1996, paras. 23-34.

<sup>40</sup> For a discussion of State responsibility for intentional destruction of cultural heritage see Francioni and Lenzerini, 'Destruction'; Lenzerini, 'UNESCO Declaration'; and O'Keefe, 'World Cultural Heritage', *supra* note 27.

that by acknowledging the interests of these subjects in cultural heritage, the decisions of the ICTY and the 2003 UNESCO Declaration are tapping into elements tacitly contained in long-established instruments in this field.

### 3.1 Cultural heritage of all mankind

Several multilateral instruments express the importance of protecting certain cultural heritage because of its significance to humanity. The preamble of the Roerich Pact stipulates that ‘the Institutions dedicated to the education of youth, to Arts and Science, constitute a common treasure of all the Nations of the World.’<sup>41</sup> The 1954 Hague Convention preamble reiterates this sentiment when it refers to ‘the cultural heritage of all mankind’, and adds:

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.<sup>42</sup>

The preamble of the 1972 World Heritage Convention provides a more extensive elaboration of this trend by recognising the need to ‘safeguard this unique and irreplaceable property ... for all the people of the world ... to whatever people it may belong.’ It states:

Considering that parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole.

The 1972 Convention makes it incumbent on the international community, that is, States in cooperation with each other to protect such cultural heritage.<sup>43</sup> It is important to bear in mind

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<sup>41</sup> Third recital, Preamble, Roerich Pact.

<sup>42</sup> Second and third recitals, Preamble, 1954 Hague Convention.

<sup>43</sup> Fifth, sixth and seventh recitals, Preamble, and Article 6, 1972 World Heritage Convention. See also fifth recital, Preamble, Convention for the Safeguarding of the Intangible Cultural Heritage, Paris, 17 October 2003, UNESCO Doc. MISC/2003/CLT/CH/14; and first recital, Preamble, Convention on the Protection of the Underwater Cultural Heritage, 2 November 2001, UNESCO Doc. MISC/2003/CLT/CH/4, and (2002) 41 *ILM* 37.

that these references to the ‘cultural heritage of all mankind’ do not correspond to the general principle of ‘common heritage of mankind’ in international law.<sup>44</sup>

The ICTY specifically relied on the 1972 World Heritage Convention in *Jokić Sentencing* and *Pavle Strugar Trial Judgment* concerning indictments arising from the bombing in late 1991 by the Yugoslav National Army of the Old Town of Dubrovnik. In *Strugar*, the Trial Chamber placed significant weight on the Old Town’s inscription on the World Heritage List. It observed that this 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 they come within the meaning of cultural property contained in Article 3(d).<sup>45</sup> Under the 1954 Hague Convention, 1972 World Heritage Convention and 2003 Intangible Heritage Convention, protection (or special protection) attaches to cultural heritage inscribed on a list prescribed by the relevant instrument. In the sentencing phase of *Strugar*, the tribunal replicated the findings in *Jokić* when it stated that: ‘[S]ince 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 ...’<sup>46</sup> Significantly, the 2003 UNESCO Declaration does not require the cultural heritage to be on a prescribed list to attract responsibility (Article IV).

In *Jokić Sentencing*, the ICTY stated that ‘this crime represents a violation of values especially protected by the international community.’<sup>47</sup> As noted above, the international community has repeatedly reaffirmed this sentiment in instruments covering international criminal law generally; and those for the protection of cultural heritage during armed conflict, specifically.<sup>48</sup> The 2003 UNESCO Declaration sanctions the importance of this value by

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<sup>44</sup> See M. Frigo, ‘Cultural property v. cultural heritage: A ‘battle of concepts’ in international law?’ (2004) 86(854) *IRRC* 377; M. Frigo, *La protezione dei beni culturali nel diritto internazionale*, Milan, 1986, p. 283; and J. Blake, ‘On Defining the Cultural Heritage’ (2000) 49 *ICLQ* 69-71.

<sup>45</sup> *Strugar*, Rule 98bis Motion, paras. 80-81. See *Jokić*, Sentencing, para. 51.

<sup>46</sup> *Strugar*, Trial Judgment, para. 232.

<sup>47</sup> *Jokić*, Sentencing, para. 46.

<sup>48</sup> See Article 28, Regulations of the 1907 Hague IV Convention; and Article 16(1), Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, The

‘encourag[ing]’ States to establish jurisdiction and effective criminal sanctions against individuals who have committed such acts and ‘are found present on [their] territory, regardless of their nationality and the place where such act[s] occurred’ (Article VIII(2)).

In its Preamble, the 2003 UNESCO Declaration reproduces a preambular recital of the 1954 Hague Convention: ‘[D]amage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind ...’. While multilateral instruments covering cultural heritage avoid the application of the notion of the ‘common heritage of mankind’, they do promote a principle familiar to international environmental law, namely, intergenerational equity. The UNESCO Executive Board in May 2002 ‘affirm[ed] the significance of transmitting [culturally important] monuments and sites to future generations.’<sup>49</sup> Article I of the 2003 UNESCO Declaration reaffirms the international community’s ‘commitment to fight against its intentional destruction in any form so that such cultural heritage may be transmitted to succeeding generations.’

### 3.2 Non-state groups

The preambular recitals of earlier instruments clearly emphasise that the international protection of certain cultural heritage was driven by its importance to universal knowledge and the advancement of the arts and sciences. While residual elements of this purpose linger today, the emphasis by the international community on protecting and promoting cultural diversity has created a decisive shift in the primary rationale fuelling contemporary international initiatives. Rather than protecting cultural heritage *per se*, they afford protection because of its importance to ‘peoples’, ‘groups’, ‘communities’ and ‘individuals.’ This acknowledgement of the interests of non-state groups in cultural heritage complements the extension of protection afford cultural heritage during non-international armed conflicts and peacetime.

Arguably, this interest of non-state groups is further recognised and reinforced by the widening definition of ‘cultural heritage’ in successive, recent multilateral instruments including the 2003 Intangible Heritage Convention. For example, indigenous peoples have

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Hague, 26 March 1999, in force 9 March 2004, (1999) 38 *ILM* 769. See J. Hladik, ‘UNESCO Declaration concerning Intentional Declaration of Cultural Heritage’ (2004) 9(3) *Art Antiquity and Law* 13-14.

<sup>49</sup> UNESCO Doc. 164EX/Decision 3.5.4.

stressed repeatedly the importance of a holistic understanding of culture heritage in any eventual international declaration for the protection of their rights and cultural heritage.<sup>50</sup> The *travaux* relating to Article II, which defines the scope of the 2003 UNESCO Declaration, note the term ‘cultural heritage’ ‘was not qualified but was left intentionally broad ... so as not to exclude expressly its “movable” or “immovable” natures, or its “tangible” or “intangible” forms.’<sup>51</sup> The provision also covers natural heritage when it relates to cultural heritage.

The full preambular recital contained in the 1954 Hague Convention, which is reproduced in its entirety in the preamble of the 2003 UNESCO Declaration states 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.*’<sup>52</sup> This recognition by the international community of the importance of protecting and promoting the interests of groups in their cultural heritage, and by extension cultural diversity, was a response to the atrocities committed during the 1930s and 40s. It forms part of a legacy in international law which encompasses the criminalisation of genocide and the establishment of the human rights framework.<sup>53</sup> This protection was reinforced by Article 53 of 1977 Protocol Additional I and Article 16 of Protocol Additional II of the 1949 Geneva Conventions.<sup>54</sup> These Protocols refer to the ‘cultural or spiritual heritage of peoples.’ An

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<sup>50</sup> See E.-I. Daes, Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples, 28 July 1993, UN Doc. E/CN.4/Sub.2/1993/28, paras. 21ff; E.-I. Daes, Final Report in conformity with Sub-Comm. Res. 1993/44 and CHR Dec. 1994/105, 21 June 1995, UN Doc. E/CN.4/Sub.2/1995/26, Annex: Revised Text of the Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples, at Guidelines 11 and 12; and T. Janke, *Our Culture Our Future, Report on Australian Indigenous Cultural and Intellectual Property Rights* (Canberra, 1998).

<sup>51</sup> UNESCO 32C/25, Annex II, p. 4, para. 12; and Hladik, *supra* note 48, at 16.

<sup>52</sup> Second recital, Preamble, 1954 Hague Convention; and sixth recital, Preamble, 2003 UNESCO Declaration (emphasis added).

<sup>53</sup> See A. F. Vrdoljak, *International Law, Museums and the Return of Cultural Objects*, (Cambridge, 2005), Chapters 5 and 6.

<sup>54</sup> Protocol Additional I to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict, Geneva, 8 June 1977, in force 7 December 1979; and Protocol Additional II to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict, Geneva, 8 June 1977, in force 7 December 1978, 1125 UNTS 3 and 609.

earlier draft reference to the ‘heritage of a country’ was rejected because it was acknowledged that ‘problems of intolerance could arise with respect to religions which do not belong to the country concerned, and with respect to places where such religions are practised.’<sup>55</sup>

During the recent Yugoslav wars, the combatants deliberately targeted the cultural (and religious) property of other ethnic or religious groups. The work of the ICTY has elaborated upon the interrelation between the protection of cultural property and the laws of war, and the criminalisation of persecution and genocide in international law. This jurisprudence reiterates the link increasingly being recognised in international law between cultural heritage and the enjoyment by a group or community of their human rights.

The Trial Chamber in *Kordić and Cerkez Trial Judgment* confirmed that the prohibition contained in Article 3(b) covering laws and customs of war prohibiting the targeting of civilian objects, in particular in respect of ‘institutions dedicated to religion’, is customary international law.<sup>56</sup> In that case, the defendants were found guilty of crimes against cultural property arising from deliberate armed attacks against historic mosques in Bosnia-Herzegovina. The tribunal has also noted the overlap between this provision and protection afforded civilian objects generally in international humanitarian law. The ICTY has repeatedly held that when the acts are specifically directed at the ‘cultural heritage of a certain population’, Article 3(d) is *lex specialis*.<sup>57</sup> In *Jokić Sentencing*, the Trial Chamber found that the Dubrovnik attack was exacerbated because it is a ‘living city’ and ‘the existence of the population was intimately intertwined with its ancient heritage.’<sup>58</sup> While the protection provided under Article 3(b) and (d) arises during armed conflict, there is not such requirement for the protection afforded cultural property in relation to the crimes of persecution and genocide.

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<sup>55</sup> Y. Sandoz, S. Swinarski and B. Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, (Geneva, 1987), p. 640.

<sup>56</sup> *Kordić and Cerkez*, Trial Judgment, para. 206.

<sup>57</sup> *Strugar*, Rule 98bis Motion, para. 64; *Jokić*, Sentencing, para. 50; and *Kordić and Cerkez*, para. 361.

<sup>58</sup> *Jokić*, Sentencing, para. 53.

The ICTY has held that the destruction or damaging of the institutions of a particular political, racial or religious group is clearly persecution, that is, a crime against humanity under Article 5(h) of the ICTY Statute.<sup>59</sup> In *Kordić and Cerkez Trial Judgment*, the Trial Chamber 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.*<sup>60</sup>

Article 5(h) of the ICTY Statute encompasses crimes against persons and crimes against property as long as it is accompanied by the requisite intent.<sup>61</sup> Under this provision, the tribunal has dealt with crimes against property in general and those specifically directed at cultural property.<sup>62</sup> 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.’<sup>63</sup> Similarly, in *Kordić and Cerkez*, the Tribunal 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.’<sup>64</sup>

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<sup>59</sup> *Kordić and Cerkez*, Trial Judgment, para. 207.

<sup>60</sup> *Ibid* (emphasis added).

<sup>61</sup> *Blaškić*, Trial Judgment, para. 233.

<sup>62</sup> *Prosecutor v. Zoran Kupreškić and Ors*, Trial Judgment, Case No.IT-95-16-T, (14 January 2000), para. 631.

<sup>63</sup> *Blaškić*, Trial Judgment, para. 227.

<sup>64</sup> *Kordić*, Trial Judgment, para. 422.

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.<sup>65</sup> This requirement is intended to ensure that it is crimes of a collective nature that are penalized because, a person is ‘victimised not because of his individual attributes but rather because of his membership of a targeted civilian population.’<sup>66</sup> Similarly, cultural property is protected not for its own sake, but because it represents a particular group. In *Kupreškić*, the 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.’<sup>67</sup> The test will only be met when there is a gross violation of a fundamental right.<sup>68</sup> The Trial Chamber found that an act must reach the same level of gravity as the other crimes against humanity enumerated in Article 5 of the Statute.<sup>69</sup> However, in *Krstić*, it 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.’ It noted further that ‘the critical element of a crime under Article 5’ is that it ‘form part of a widespread or systematic attack against a civilian population.’<sup>70</sup> 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.<sup>71</sup>

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<sup>65</sup> See *Kupreškić*, Trial Judgment, para. 544; and *Blaškić*, Trial Judgment, para. 207.

<sup>66</sup> *Tadić*, Trial Judgment, para. 644.

<sup>67</sup> *Kupreškić*, Trial Judgment, para. 618. See *Kordić and Cerdez*, Trial Judgment, para. 196.

<sup>68</sup> *Kupreškić*, Trial Judgment, para. 621.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Krstić*, Trial Judgment, para. 535.

<sup>71</sup> *Kordić and Cerdez* Trial Judgment, paras.196, 199, 205 and 207. See *Tadić* Trial Judgment, paras.707, 710; *Kupreškić* Trial Judgment, paras.622 and 631; *Blaškić* Trial Judgment, paras.227, 233 and 234; and *Kordić and Cerdez* Trial Judgment, paras.205 and 207.

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

Following the 1948 Genocide Convention, the ICTY Statute does not require that the acts occur during an armed conflict to constitute the crime of genocide. However, they 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...’.<sup>72</sup> The Tribunal has emphasised 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;<sup>73</sup> and (ii) the act or acts must seek to destroy all or part of that group. Furthermore, the Trial Chamber emphasised that it was not individual members of the group that were to be targeted but the group itself.<sup>74</sup>

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

[O]ne 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.<sup>75</sup>

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<sup>72</sup> *Krstic*, Trial Judgment, para. 480. See *Prosecutor v. Kambanda*, Trial Judgment, Case No. ICTR-97-23, (4 September 1998), para. 16.

<sup>73</sup> *Krstic*, Trial Judgment, paras. 555 and 556.

<sup>74</sup> *Ibid.*, paras. 551-553.

<sup>75</sup> *Ibid.*, para. 574.

It 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.’<sup>76</sup> 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.<sup>77</sup> Indeed, despite numerous opportunities to recalibrate the definition of genocide, the conventional definition was replicated in the statutes of the two *ad hoc* tribunals for the former Yugoslavia and Rwanda;<sup>78</sup> ILC Draft Code;<sup>79</sup> and ICC Statute.<sup>80</sup> The Trial Chamber in *Krstic* found these developments had not altered the definition of genocidal acts in customary international law and felt confined by the principle of *nullum crimen sine lege*.

Nonetheless, the Tribunal in the *Krstic Trial Judgment* 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.<sup>81</sup> In his partial dissenting opinion, Judge Mohamed Shahabuddeen in the *Krstic Appeals Judgment* argued that the *travaux* did not exclude ‘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.’<sup>82</sup> The *Krstic Appeals Chamber* noted that genocide was ‘crime against all humankind’ because ‘those who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities,

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<sup>76</sup> *Ibid.*, para. 575.

<sup>77</sup> *Ibid.*, para. 576.

<sup>78</sup> Article 2, Rwanda Statute.

<sup>79</sup> Article 17, Part II, ILC Draft Code.

<sup>80</sup> Article 6, ICC Statute.

<sup>81</sup> *Krstic*, Trial Judgment, para. 580.

<sup>82</sup> *Prosecutor v. Radislav Krstic*, Appeals Judgment, ICTY, Case No.IT-98-33-A, (19 April 2004), dissenting opinion of Judge Shahabuddeen, para. 50.

racism, ethnicities and religions provide.’<sup>83</sup> Indeed, several scholars have observed that the Genocide Convention is an important instrument for safeguarding human rights norms.<sup>84</sup>

The 2003 UNESCO Declaration reaffirms the central importance of cultural heritage to non-state groups, not only to ensure their contribution to the cultural heritage of all mankind but for the groups themselves. Its preamble states:

Mindful that cultural heritage is an important component of the cultural identity of communities, groups and individuals, and of social cohesion, so that its intentional destruction may have adverse consequences on human dignity and human rights.<sup>85</sup>

It deliberately defines non-state groups as the holders of these rights. It reflects a growing contemporary trend in international law encompassing the protection of the human rights, particularly cultural rights of minorities and indigenous peoples;<sup>86</sup> and UNESCO initiatives covering cultural diversity, intangible heritage and cultural rights.<sup>87</sup> Notably, earlier drafts of Articles VI (State responsibility) and VII (Individual criminal responsibility) which defined ‘cultural heritage of great importance for humanity’ as including ‘cultural heritage which is of special importance for the community directly affected by such destruction’ were dropped

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<sup>83</sup> *Krstic*, Appeals Judgment, para. 36.

<sup>84</sup> UN Doc. E/CN.4/Sub.2/1984/SR.3, para. 6 (Whitaker); and UN Doc. E/CN.4/SR.310, p. 5 (Cassin).

<sup>85</sup> Fifth recital, Preamble, 2003 UNESCO Declaration on Intentional Destruction.

<sup>86</sup> UNESCO Doc. 32C/25, Annex III, p. 4 (Hailemariam). See African Charter on Human and Peoples’ Rights adopted 27 June 1981, in force 21 October 1986, 1520 UNTS 217; Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UNGA Res. 47/135 (1993), 18 December 1992, UN Doc. A/Res/47/135; Draft UN Declaration on the Rights of Indigenous Peoples, approved 26 August 1994, UN Doc. E/CN.4/Sub.2/1994/56; ILO Convention (No. 169 of 1989) concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, in force 5 September 1991, 1650 UNTS 383; and Draft Inter-American Declaration on the Rights of Indigenous Peoples, approved by the Inter-American Commission on Human Rights on 26 February 1997.

<sup>87</sup> See UNESCO Universal Declaration on Cultural Diversity, Paris, 2 November 2001, UNESCO Doc. 31C/44/Rev.2, Annex; UNESCO Intangible Heritage Convention; and Preliminary draft of a convention on the protection of the diversity of cultural contents and artistic expressions, July 2004, UNESCO Doc. CLT/CPD/2004/CONF-201/2.

from the final text.<sup>88</sup> Instead, a concession was achieved. Cultural heritage does not need to be inscribed on a list to attract the operation of this provision. This is important because nomination invariably (although not exclusively) falls to State parties of existing regimes.

This is further reinforced by Article IX of the 2003 UNESCO Declaration which requires States to respect international law criminalising gross violations of human rights and international humanitarian law, particularly when it is linked to intentional destruction of cultural heritage. This provision clearly harks to the recent ICTY jurisprudence.<sup>89</sup>

#### 4. CONCLUSION

Certain episodes of intentional destruction of cultural heritage, like the 1991 bombardment of Dubrovnik and the 2001 destruction of the Bamiyan Buddhas, have spurred intense international public outcry. Not only do the various international responses to these incidents reflect a growing commitment to prohibit them and hold the perpetrators to account. They also highlight an underlying awareness that these acts undermine the contribution of peoples to the ‘cultural heritage of all mankind’ and their enjoyment of human rights.

It is this heightened emphasis on cultural diversity which has led the international community to tentatively address the twin issues of the differentiated protection of cultural heritage during armed conflict (international and non-international) and peacetime, and the interests of non-state groups in international law. Yet, as the language of the substantive paragraphs of the 2003 UNESCO Declaration and the ICTY’s reappraisal of the currently accepted definition of genocide expose, various States are taking these steps reticently and reluctantly. Nonetheless, they are steps which must be taken if the irretrievable disappearance of threatened cultural heritage is to be prevented in the future.

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<sup>88</sup> UNESCO Doc. 32C/25, Annex II, pp. 7-8. See dissenting reports of M. S. Amar, A. W. Gonzalez, and Z. Hailemariam, Annex III, pp. 2 and 3.

<sup>89</sup> *Ibid.* (Hailemariam). See UNESCO 32C/25, Annex II, p. 10, para. 35.