Oblivion or Prosecution? The Search for the International Legal Framework on Individual Criminal Responsibility for Cultural Heritage Crimes in Armed Conflict

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"The essential act of war is destruction, not necessarily of human lives, but of the products of human labour."

George Orwell, *1984*

ABSTRACT

This article answers the question whether there exists a consistent, clear, and effective international legal framework concerning individual criminal responsibility for acts against cultural heritage in armed conflict. It will first explore whether there are clear definitions of cultural property and cultural heritage and will decide which term is the most adequate for the purposes of international criminal law. Next, after a short examination of reasons and sources of the legal framework within the broader moral and political framework, the different legal bases to prosecute and criminalise will be studied in depth. Next to war crimes and crimes against humanity, other possible bases such as genocide will be examined. The enforcement of cultural heritage protection (as found in international humanitarian and cultural heritage law) will be evaluated. Particularly the International Criminal Court and the International Criminal Tribunal for the former Yugoslavia have dealt with cultural heritage crimes. As proceedings before the latter are closed since 31 December 2017, this article offers a chance to assess its case law.

1. INTRODUCTION

Cultural property and cultural heritage are important aspects of human life. The international community must not only safeguard the natural environment, but also human creations. They constitute the heritage of mankind or a society. As the prosecutor of the International Criminal Court (ICC) put it so nicely in the *Al-Mahdi* case: cultural heritage is the "*mirror of humanity*" and "*attacks [against cultural property/heritage] affect humanity as a whole*".[1]

According to Francioni, cultural heritage has been pivotal to the progressive development of international law. Next to the acknowledgment of State responsibility, two developments in international criminal law can be identified:

(i) the elevation of attacks against cultural property to the legal status of international crimes, especially war crimes and crimes against humanity; and (ii) the consolidation of the law of individual criminal responsibility under international law, not only under domestic law, for serious offences against cultural objects [...][2]

It is often difficult to track the international legal framework concerning cultural heritage crimes. Guidelines for prosecutors/judges are rare, except for those provided by the United Nations Educational, Scientific and Cultural Organisation (UNESCO).[3] However, the aim of a legal framework is to show what behaviour is (not) acceptable. In doing so, legal certainty arises, and the individual can choose her conduct (*cfr*. 653). Nevertheless, recently there has been a great development in this field. For example, United Nations Security Council (UNSC) Resolution 2347 condemned the destruction of cultural heritage and religious sites by terrorists and was the first of its kind.[4]

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[1] Office of the Prosecutor (OTP) 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the opening of the confirmation of charges hearing in the case against Mr Ahmad Al-Faqi *Al Mahdi*' (1 March 2016).

[22] Francesco Francioni, 'The Human Dimension of International Cultural Heritage Law: An Introduction' (2011) 22 European Journal of International Law 9, 10.

[3] Uzma S Bishop-Burney, 'International Decisions: Prosecutor v. Ahmad Al Faqi Al Mahdi' (2017) 111 The American Society of International Law 126, 130; Mohammed Elewa Badar and Noelle Higgins, 'Discussion Interrupted: The Destruction and Protection of Cultural Property under International Law and Islamic Law - the Case of Prosecutor v. Al Mahdi' (2017) 17 International Criminal Law Review 486, 487.

[4] UNSC Res 2347 (24 March 2017) UN Doc S/RES/2347. See also UNGA Res 69/196 (18 December 2014) UN Doc A/RES/69/196 (crime prevention and criminal justice responses with respect to trafficking in cultural property). Although noteworthy, the latter "*judicial framework of circulation*" falls outside this dissertation's scope, as well as "*other specific and intermediate judicial regimes*" between armed conflict and illicit trafficking, e.g. archaeological assets (European

Furthermore, following the intentional destruction of the mosque and mausoleums of Timbuktu (Mali), Al Mahdi pleaded guilty of the war crime consisting of intentionally directing attacks against religious and historic buildings as in Art. 8(2)(e)(iv) of the Rome Statute establishing the ICC[5] (RS) and sentenced to nine years imprisonment (*cfr.* 619).[6] This example shows the need for accountability and the prosecution of international crimes. The focus of this dissertation is international criminal law (ICL) as it will look at individual criminal responsibility for the destruction of cultural objects.

The destruction of cultural objects is closely interlinked with other areas of law, such as international humanitarian law (IHL), regulating the destruction of cultural objects and providing the basis for ICL.[7] Next, international human rights law (IHRL) is important for the human consequences of destruction.[8] Finally, a short introduction to the principles of cultural heritage law is necessary (*cfr.* part 2).

The Nuremberg International Military Tribunal (IMT) in the *Trial of German Major War Criminals*,[9] and the International Criminal Tribunal for the former Yugoslavia (ICTY) in for example *Strugar*[10], *Jokić*[11] and *Prlić*[12] both dealt with the war crime of the destruction of cultural property.[13] The case law of the

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Convention on The Protection of The Archaeological Heritage (adopted 6 May 1969) CETS 66 and European Convention on The Protection of The Archaeological Heritage (revised 16 January 1992) CETS 143). For this terminology, see: Stefano Manacorda, 'Criminal Law Protection of Cultural Heritage: An International Perspective' in Stefano Manacorda and Duncan Chappell (eds), *Crime in the Art and Antiquities World: Illegal Trafficking in Cultural Property* (Springer-Verlag 2011) 25, 30–36.

[5] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (hereinafter 'Rome Statute' or 'RS').

[6] International Criminal Court 'Al Mahdi Case' (27 September 2016) available at https://www.icc-cpi.int/mali/al-mahdi accessed 17 March 2017.

[7] Its main principles are those of distinction, proportionality and necessity: David Turns, 'The Law of Armed Conflict (International Humanitarian Law)' in Malcolm D Evans (ed), *International Law* (Oxford University Press 2010) 830–832.

[8] Especially the right to property: Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) Art. 17; American Convention of Human Rights (22 November 1969) 1144 UNTS 123 (Pact of San José; ACHR) Art. 21; Protocol I to the European Convention of Human Rights (20 March 1952) CETS 9 (ECHR Protocol I) Art. 1; African Charter on Human and Peoples' Rights (27 June 1981) 1520 UNTS (ACHPR) Art. 14. Also, the right to freedom of religion and the right to education are relevant here, as ICL criminalises the destruction of religious and educational buildings (*cfr.* part 3). However, IHRL is not the main subject of this dissertation, so these rights will not be discussed. For the impact of IHRL on ICL, see in particular: crimes against humanity and genocide (respectively sections 3.3.2. and 3.3.3).

[9] 'Judgment of the Nuremberg International Military Tribunal 1946' (1947) 41 American Journal of International Law 172.

[10] *Prosecutor v Strugar* (Judgment Trial Chamber) IT-01-42-T (2005).

[11] *Prosecutor v Jokić* (Sentencing Judgment ICTY Trial Chamber) IT-01-42/1-S (2004).

[12] *Prosecutor v Prlić et al.* (Judgment Trial Chamber Vol 1/6) IT-04-74-T (2013).

[13] Note that proceedings at the ICTY have been closed since 31 December 2017: ICTY 'ICTY marks official closure with moving Ceremony in The Hague' (Press release, 27 December 2017)

ICTY has given rise to an *evolution* of the interpretation of treaty law, by a broad interpretation of crimes against humanity in Art. 5 of its Statute , and a *revolution*, by linking the destruction of cultural property to the crimes of persecution and genocide.[14] In the *Al-Mahdi* case, the ICC dealt – for the first time – with the war crime of destroying cultural heritage as the principal subject matter, but not without criticisms.[15]

Yet, *prima facie* the IHL and ICL frameworks on cultural heritage seem quite chaotic, as there exist several instruments with different scopes and different possibilities to prosecute. The main aim of this dissertation therefore is to fill the knowledge gap that exists, which could be used by the accused to escape punishment. This gap mainly exists because of the ambiguity of some notions such as 'cultural heritage', the fragmentation of international law, and the application of different rules for international armed conflict (IAC) and non-international armed conflict (NIAC).[16] While touching upon aspects of IHL, IHRL, cultural heritage law, State responsibility and restitution, this dissertation will therefore try to provide an overview of international criminal law regarding cultural heritage *de lege lata* (the law as it is), and introduce a framework *de lege ferenda* (the law as it should be). A consistent, clear, and effective legal framework is not only necessary for the system *an sich*, but also for the trust that international actors such as States, organisations and individuals have in the international legal system.

This dissertation will answer the following research question:

Can it be said that the current international legal framework concerning individual criminal responsibility for the destruction of cultural property in

available at http://www.icty.org/en/press/icty-marks-official-closure-with-moving-ceremony-in-the-hague accessed 20 April 2018. This dissertation offers a chance to assess its legacy, at least in the area of cultural heritage protection.

[14] UNSC, Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (25 May 1993) UN Doc S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, UN Doc S/RES/827 (1993) (hereinafter 'ICTY Statute'); Marina Lostal Becerril, 'La Protección De Bienes Culturales En El Tribunal Penal Internacional Para La Ex Yugoslavia' (2012) 24 Revista Electrónica De Estudios Internacionales 1, 24–25.

[15] *Prosecutor v Al-Mahdi* (Judgment and Sentence Trial Chamber) ICC-01/12-01/15-171 (2016); Mark S Ellis, 'The ICC's Role in Combatting the Destruction of Cultural Heritage' (2017) 49 Case Western Reserve Journal of International Law 23, 25.

[16] Arguably, Mainetti says that there is no such framework in peacetime: "*a l'heure actuelle, dans le domaine considéré, une responsabilité pénale internationale des individus n'existe pas pour des actes commis en temps de paix*": V Mainetti, 'Existe-Il Des Crimes Contre La Culture? La Protection Des Biens Culturels et l'emergence de La Responsabilité Pénale Internationale de l'individu' in K Odendahl and PJ Weber (eds), *Kulturgüterschutz - Kunstrecht - Kulturrecht, Festschrift für Kurt Siehr zum 75. Geburtstag aus dem Kreise des Doktoranden- und Habilitandenseminars,Kunst und Recht* (Nomos 2010) 253 as cited in Sebastián A Green Martínez, 'Destruction of Cultural Heritage in Northern Mali: A Crime against Humanity?' (2015) 13 Journal of International Criminal Justice 1073, 1079.

(non-)international armed conflicts is consistent, clear, and effective? If not, which issues are the most problematic and how can they be cured?

To come to an overall conclusion, two sub-questions must be answered:

Sub-question 1: In terms of international criminal law, how can the concepts of 'cultural property' and 'cultural heritage' be defined and how do the definitions relate to each other? (Part 2)

Sub-question 2: What is the current international legal framework for the prosecution of the destruction of cultural property in (non-)international armed conflicts? Is it -or could it be- in accordance with moral considerations of the public opinion and political necessities of States? (Part 3)

This dissertation is structured as follows. Part 2 will introduce the notions of 'cultural property' and 'cultural heritage' and try to define them by going into the specifics of the different treaties and UNESCO declaration(s). The latter will prove to be very relevant as one of their main objectives is cultural cooperation: "*heritage serves as a bridge between generations and peoples*".[17] A choice for the most advantageous term – to use in this dissertation and in international law in general – will be made. Part 3 will be the core of this dissertation, starting with a discussion of the rationale of prosecuting cultural heritage crimes (chapter 1) and a summary of the relevant the relevant sources (chapter 2). Next, it will describe the current framework of international criminal law regarding destructions of cultural property and heritage and look at its (in)consistencies (chapter 3). Finally, next to the criterion of consistency, those of clarity and effectiveness will be used to assess this framework, and some recommendations *de lege lata* will be made (chapter 4).

2. THE SCOPE OF PROTECTED OBJECTS: CULTURAL PROPERTY OR CULTURAL HERITAGE?

Sub-question 1: *In terms of international criminal law, how can the concepts of 'cultural property' and 'cultural heritage' be defined and how do the definitions relate to each other?*

2.1 DEFINING CULTURAL PROPERTY AND CULTURAL HERITAGE

To examine the international criminal law regime regarding acts against cultural objects, one must first examine what those objects are (scope *ratione*

[17] UNESCO 'Introducing UNESCO' available at http://en.unesco.org/about-us/introducing-unesco accessed 9 February 2018.

materiae).[18] Not having precise definitions of crimes makes it difficult to set the boundaries of individual criminal responsibility and to prosecute those acts.[19] Specific provisions do not rule out the possibility to prosecute as different crimes, insofar the conduct falls within their sphere.[20]

The failure of IHL and ICL instruments to provide definitions of cultural property and/or heritage does not make their distinction easier.[21] Furthermore, there are dangers inherent to extending the definition of cultural property or heritage beyond its conventional scope of application.[22] However, because these notions are vital parts of this dissertation and will be used throughout, there will be an attempt to define them in a better way.[23] The existence of different definitions does not rule out the determination of common interests and values.[24]

The first time the term c*ultural property* was used,[25] was in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed

[18] In the words of Frigo: "*The scope of international legal protection cannot be determined without defining the scope of application of those rules.*" Manlio Frigo, 'Cultural Property v. Cultural Heritage: A "Battle of Concepts" in International Law?' (2004) 86 International Review of the Red Cross 367, 367.

[19] Micaela Frulli, 'The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency' (2011) 22 European Journal of International Law 203, 208. Specificity of the incriminating rule is a sub-requirement of the principle of legality and a general feature of ICL: Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law* (3rd edition, Oxford University Press 2013) 27–29. *Cfr.* footnote 587.

[20] Frulli, 'The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency' (n 19) 209.

[21] Janet Blake, 'On Defining the Cultural Heritage' (2001) 49 International & Comparative Law Quarterly 61, 66; Frulli, 'The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency' (n 19) 207.

[22] Blake (n 21) 63.

[23] Note that the definitions *infra* are the author's own and not used in IHL or ICL instruments.

[24] Frigo (n 18) 375–376.

[25] Andrea Cunning, 'The Safeguarding of Cultural Property in Times of War and Peace' (2003) 11 Tulsa Journal of Comparative and International Law 211, 223 as cited in Corrine Brenner, 'Cultural Property Law: Reflecting on the Bamiyan Buddha's Destruction' (2006) 29 Suffolk Transnational Law Review 237, 242.

Conflict (HC).[26] However, it has no universally accepted definition.[27] For the purposes of this dissertation, it can be described as movable and immovable objects produced through human knowledge and labour, whether religious, educational, artistic, historical, archaeological, or ethnographic in nature. It thus logically consists of material objects, as the word *property* shows.[28] The word *cultural* summarizes various criteria like their artistic or historical nature.[29]

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[26] Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240 (hereinafter 'Hague Convention' or 'HC'). Furthermore, it can be found in its two protocols: Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 358; Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (adopted 26 March 1999, entered into force 9 March 2004) 2253 UNTS 172 (hereinafter 'Second Protocol to the Hague Convention' or 'APHC II'). Also, UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted 14 November 1970, entered into force 24 April 1972) 823 UNTS 231 ('1970 UNESCO Convention') uses this term. Art. 1 of the Hague Convention defines cultural property as: "*(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above; (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a); (c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as 'centers containing monuments*", but this could be confusing due to the references to property and cultural heritage; Art. 1 UNESCO Recommendation for the Protection of Movable Cultural Property (28 November 1978). Blake (n 21) 62–63; Roger O'Keefe and others, 'Protection of Cultural Property: Military Manual' (UNESCO 2016) 13. The ICRC Dictionary defines cultural property as "*objects indispensable to the survival of the civilian population, the natural environment, works and installations containing dangerous forces, non-defended localities and demilitarized zones*", see Pietro Verri, *Dictionary of the International Law of Armed Conflict* (International Committee of the Red Cross 1992) 90.

[27] UNESCO 'Information Kit: Protect Cultural Property in the Event of Armed Conflict' 9 available at http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/1954Convention-InfoKit-EN-Fina-webl_03.pdf accessed 18 March 2018. For a definition applicable to the United Kingdom, see Jonathan Law, *Oxford Dictionary of Law* (7th edition, Oxford University Press 2013) 261.: "*Property that has been certified by HM Treasury as of national, scientific, historical or artistic interest. [...] Heritage property can include pictures, prints, manuscripts, works of art, or scientific collections. Certification can also be given for land of outstanding scenic or historic interest or land that is essential for the protection of the character or amenities of a building of outstanding historic or archaeological interest.*" Nevertheless, Frigo warns for the 'legal transplants' of domestic norms (*biens culturels, beni culturali, Kulturgut, patrimoine culturel, patrimonio culturale*) in international law as they not all cover the same objects. Especially the difference between 'national heritage' and 'national treasures' caused difficulties in the European context. See: Frigo (n 18) 370–375.

[28] Frigo (n 18) 376. Note that cultural property has been described as the fourth type of property, next to real property, personal property, and intangible property, see: Lyndel Prott, Note by the General Reporter on the Topic "The Protection of the Cultural Heritage" as cited in John Henry Merryman, 'The "Protection" of Cultural "Heritage"?' (1990) 38 American Journal of Comparative Law 513, 513.

[29] Frank G Fechner, 'The Fundamental Aims of Cultural Property Law' (1998) 7 International

While there is no universal definition of *cultural heritage* either,[30] it could be defined as the collection of buildings, objects and immaterial belongings which have a historical, social or political meaning for mankind and for which a specific protection exists.[31] It implies respect for and a resolve to protect the values that form part of that heritage.[32] This definition captures heritage of "*outstanding universal value*" from the UNESCO World heritage List (*cfr.* 586),[33] heritage important for a specific region or society, underwater heritage

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Journal of Cultural property 376, 378–381; Frigo (n 18) 376. Fechner said that the definition of cultural property consists of four criteria: its nature (conservatively only physical objects of a certain age), context (the relationship between the object and its surroundings), cultural value, and significance.

[30] The term 'cultural heritage' can be found in several Council of Europe Conventions, the 1972 World Heritage Convention, UNESCO Convention for the Protection of Underwater Cultural Heritage (adopted 2 November 2001, entered into force 2 January 2009) 41 ILM 37 (hereinafter '2001 UNESCO Convention'); Convention for the Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003, entered into force 20 April 2006) 1268 UNTS 1 (hereinafter '2003 UNESCO Convention'); and the UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage (17 October 2003). The World Heritage Convention illogically does not include works of art, but the definition used in this dissertation does (*cfr.* 586).

[31] It thus includes natural resources such as the basalt columns of Giant's Causeway in Northern Ireland. *Cfr.* Council of Europe Framework Convention on the Value of Cultural Heritage for Society (adopted 27 October 2005) CETS 199 (Faro Convention) Art. 2: "*[...] a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions. It includes all aspects of the environment resulting from the interaction between people and places through time*". X, 'International Criminal Law - Rome Statute - International Criminal Court Imposes First Sentence for War Crime of Attacking Cultural Heritage' (2017) 130 Harvard Law Review 1978, 1984; Manacorda (n 4) 19. Manacorda excludes immoveable property and natural resources from its scope, but he argues the latter "*certainly deserve to be protected under criminal law for the high value they embody within their social environment, being both unique and irreplaceable.*" As this reasoning seems rather odd, this dissertation will therefore include those sites.

[32] Jiri Toman, *The Protection of Cultural Property in the Event of Armed Conflict: Commentary in the Event of Armed Conflict: Commentary on the Convention and Protection of Cultural Property in the Event of Armed Conflict and Its Protocol, Signed on 14 May 1954 in the Hague and Other Instruments of International Law Concerning Such Protection* (UNESCO Publishing 1996) 40.

[33] Marina Lostal Becerril, 'Syria's World Cultural Heritage and Individual Criminal Responsibility' (2015) 3 International Review of Law 1, 2. To have 'outstanding universal value' (the required characteristic for possible inclusion in the World Heritage List) sites must meet at least one of the ten criteria defined by the World Heritage Committee: "*(i) represent a masterpiece of human creative genius; (ii) exhibit an important interchange of human values, over a span of time or within a cultural area of the world, on developments in architecture or technology, monumental arts, town-planning or landscape design; (iii) bear a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared; (iv) be an outstanding example of a type of building, architectural or technological ensemble or landscape which illustrates (a) significant stage(s) in human history; (v) be an outstanding example of a traditional human settlement, land-use, or sea-use which is representative of a culture (or cultures), or human interaction with the environment especially when it has become vulnerable under the impact of irreversible change; (vi) be directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance. (The Committee considers that this criterion should preferably be used in conjunction with other criteria); (vii) contain superlative natural phenomena or areas of exceptional natural beauty and*

and intangible heritage (*cfr*. 587).[34]

2.2. THE RETROGRESSION OF INTERNATIONAL CRIMINAL LAW

Before turning to the ICL framework on cultural heritage crimes, it seems useful to examine its underpinning principles from IHL and cultural heritage law.[35] Their common rationale is the progressive humanisation of warfare and the protection of non-renewable[36] civilian objects in armed conflict.[37] However, ICL has to follow developments in the areas of IHRL, IHL and cultural heritage law, so it is less fast to incorporate these developments in its protection.[38] Consequently, one could speak of a 'retrogression' in the statutes of international courts and tribunals.

2.2.1. The Hague Convention: Not Included in International Criminal Law

In general, the HC requires State parties to undertake to prohibit, prevent, and, put a stop to any form of theft, pillage, or misappropriation of cultural property, but these may be waived when military necessity *imperatively* requires (Art. 4). Furthermore, the HC has both a narrow and broad scope: it only protects

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aesthetic importance; (viii) be outstanding examples representing major stages of earth's history, including the record of life, significant on-going geological processes in the development of landforms, or significant geomorphic or physiographic features; (ix) be outstanding examples representing significant on-going ecological and biological processes in the evolution and development of terrestrial, fresh water, coastal and marine ecosystems and communities of plants and animals; (x) contain the most important and significant natural habitats for in-situ conservation of biological diversity, including those containing threatened species of Outstanding Universal Value from the point of view of science or conservation". See: UNESCO 'Operational Guidelines for the Implementation of the World Heritage Convention' (Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage) (12 July 2017) WHC.17/01 [77]. In the case of the destructions in Timbuktu, criteria (ii), (iv) and (v) were met: *Prosecutor v Al-Mahdi* (Second Expert Report) ICC-01/12-01/15-214-Conf-AnxII-Red (28 April 2017) [41].

[34] UNESCO 'Illicit Trafficking of Cultural Property: What is meant by Cultural Heritage?' available at http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/unesco-database-of-national-cultural-heritage-laws/frequently-asked-questions/definition-of-the-cultural-heritage/ accessed 18 March 2018.

[35] ICL is partly an extension of IHL, cultural heritage law, and other fields of international law. For this terminology, see: Manacorda (n 4) 25–27. This framework has to be contrasted with the ones falling outside the scope of this dissertation, discussed in footnote 4.

[36] For the irreplaceable character of losing cultural heritage, see: *Prosecutor v Jokić* (Sentencing Judgment ICTY Trial Chamber) IT-01-42/1-S (2004) [51]: "*Restoration of buildings of this kind, when possible, can never return the buildings to their state prior to the attack because a certain amount of original, historically authentic, material will have been destroyed, thus affecting the inherent value of the buildings*".

[37] Fechner (n 29) 378; Brenner (n 25) 239; Manacorda (n 4) 40; Badar and Higgins (n 3) 489–490. Manacorda calls this framework, only applicable to armed conflict, the "*judicial framework of exception*".

[38] Eliza Novic, *The Concept of Cultural Genocide: An International Law Perspective* (1st edition, Oxford University Press 2016) 132–133.

certain cultural property, listed in Art. 1,[39] and therefore has a more limited scope than customary international law (CIL),[40] while it protects this limited list of property on a universal level and acknowledges the world's interest in the latter.[41] This "*internationalist*" approach was already present in the earliest IHL instruments, including the Lieber Code,[42] the Brussels Declaration,[43] the 1899 and 1907 Hague Regulations,[44] and the Roerich Pact.[45] This criterion, combined with the emphasis on the artistic/historical/archaeological nature, makes this definition extremely innovative.[46] However, although the rationale

[3939] Art. 1 HC protects: "*(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above; (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a); (c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as `centers containing monuments'.*"

[40] Roger O'Keefe, 'Protection of Cultural Property under International Criminal Law' (2010) 11 Melbourne Journal of International Law 339, 359; Anna Maria Maugeri, *La Tutela Dei Beni Culturali Nel Diritto Internazionale Penale: Crimini Di Guerra e Crimini Contro l'Umanita* (Giuffrè Editore 2008) 29–30.

[41] See the preamble of the 1954 Hague Convention: "*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.*"

[42] Instructions for the Government of Armies of the United States in the Field, promulgated as General Order No. 100 by President Abraham Lincoln (24 April 1863) Arts. 34-36 and 44.

[43] Projet d'une Declaration Internationale concernant les Lois et Coutumes de la Guerre (24 October 1874) Supplement to the London Gazette 24144 : 5077, 3.42 ('Brussels Declaration').

[44] Hague Convention (ll) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (29 July 1899) 32 Stat. 1803 (hereinafter 'Hague Regulation II'); Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (18 October 1907) 36 Stat. 2277 (hereinafter 'Hague Regulation IV'). John Henry Merryman, 'Two Ways of Thinking about Cultural Property' (1986) 80 American Journal of International Law 831, 833–842; Ana Filipa Vrdoljak, 'The Criminalisation of the Intentional Destruction of Cultural Heritage' in Tiffany Bergin and Emanuela Orlando (eds), *Forging a Socio-Legal Approach to Environmental Harm: Global Perspectives* (Routledge 2017) 2. Manacorda (n 4) 25–26 notes that the first instruments *indirectly* protected cultural property in armed conflict by humanising conflicts (of which the Lieber Code is an example), while later instruments *directly* protected cultural property (because of the devastating capacity of modern weapons. This cannot be confused with the direct and indirect *criminalisation* of part 4.

[45] Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (15 April 1935) 167 LNTS 289 ('Roerich Pact').

[46] Merryman (n 44) 833–842; Manacorda (n 4) 26. Note that – outside this dissertation's scope – the Convention on the Means of Prohibiting and Preventing the Illicit Import and Export and Transfer of Ownership of Cultural Property (adopted 14 November 1970) 823 UNTS 231 (1970 UNESCO Convention) Art. 1 provided for following broad definition of cultural property: "*For the purposes of this Convention, the term `cultural property' means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories*"

underpinning the HC is 'importance for all humanity',[47] it only creates obligations for States. This is highly problematic when the link between the State and people has disappeared, e.g. in case of dissolution of States.[48] A corollary of this emphasis on State sovereignty is that the HC does not protect cultural heritage *against* the controlling State. Other drawbacks of the convention are that it (only) has 131 State Parties,[49] and does not apply in peacetime.[50] Anticipating the criminalisation of cultural heritage crimes, it can be argued that one can only refer to the HC in the statutes of international courts and tribunals *de lege ferenda* for *war crimes*, as they require a nexus with armed conflict (*cfr*. 608).[51]

(emphasis added) and then lists 10 categories; Brenner (n 25) 244. However, in Art. 5(b) it adopted a nationalist approach, as State parties have to included specific items in a national inventory, see Merryman (n 44) 842–849.

[47] Vrdoljak, 'The Criminalisation of the Intentional Destruction of Cultural Heritage' (n 44) 2.

[48] Sigrid Van der Auwera, 'International Law and the Protection of Cultural Property in the Event of Armed Conflict: Actual Problems and Challenge' (2013) 43 Journal of Arts Management, Law, and Society 175, 182: "*[C]ultural goods frequently are the remnants of people with whom the actual state is no longer affiliated.*"

[49] International Committee of the Red Cross, https://ihl-databases.icrc.org/ihl/INTRO/400 accessed 09 February 2018. Note that, since recently, the United Kingdom and Afghanistan are Parties to the Convention, which has to be applauded as both States have many cultural treasures. For the UK, see Cultural Property (Armed Conflicts) Act 2017, c. 16. 108 States ratified the First Protocol: International Committee of the Red Cross 'Protocol for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954: State Parties' available at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=79B801B4D23AEA95C12563CD002D6BE3&action=openDocument accessed 9 February 2018. Only 75 the Second Protocol: International Committee of the Red Cross 'Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict The Hague, 26 March 1999' available at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=F0628265ED4F2118412567BB003E0B0C&action=openDocument accessed 9 February 2018.

[50] Brenner (n 25) 257–258. This is clear from Manacorda's terminology: the protection of cultural heritage in armed conflict is "*the judicial framework of exception*" (cited *supra* 37).

[51] The HC has not been used as a legal basis for prosecution yet: Caitlin V Hill, 'Killing a Culture: The Intentional Destruction of Cultural Heritage in Iraq and Syria under International Law' (2016) 45 Georgia Journal of International & Comparative Law 191, 203–206. An exception to the lack of reference to the HC is the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (adopted 2001, amended 27 October 2004) NS/RKM/1004/006 (hereinafter 'ECCC Law') Art. 7, which states: "*The Extraordinary Chambers shall have the power to bring to trial all Suspects most responsible for the destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict, and which were committed during the period from 17 April 1975 to 6 January 1979.*"

2.2.2. New Developments in Cultural Heritage Law

There has been a "*recalibration*"[52] or "*humanisation*"[53] in the goal of protecting cultural heritage. Traditionally, cultural objects were only important for the advancement of arts and sciences (their *value* was key).[54] Later, their *function* became crucial: importance to individuals/peoples, their identity, and their human rights.[55] Although ICL should catch up on the developments in this section, it incorporated certain aspects of this humanisation through the crimes of persecution and genocide (*cfr*. sections 3.4.2.-3.).

a. The First Enlargement: 1972 World Heritage Convention

The 1972 World Heritage Convention enlarged the scope of protection to cultural and natural *heritage*.[56] However, its scope is (illogically) restricted to *immovable* cultural heritage.[57] Nevertheless, its protection of all possible immovables argues for an explicit referral in the ICL instruments.[58]

The protection of cultural property in armed conflict (HC) and in peacetime (WHC) have evolved through "*two parallel but separate contexts*".[59]

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[52] Ana Filipa Vrdoljak, 'Cultural Heritage in Human Rights and Humanitarian Law' in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (Oxford University Press 2011) 250–251.

[53] Novic (n 38) 122.

[54] Ana Filipa Vrdoljak, 'Cultural Heritage in Human Rights and Humanitarian Law' in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (Oxford University Press 2011) 250–251, 281 as cited in Novic (n 38) 122.

[55] *Ibid.* as cited in Novic (n 38) 122.

[56] Convention Concerning the Protection of the World Cultural and Natural Heritage (adopted 23 November 1972, entered into force 15 December 1975) 1037 UNTS 151 (hereinafter 'World Heritage Convention' or 'WHC') Arts. 1-2.

[57] Roger O'Keefe, 'Protection of Cultural Property' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014) 509. This in contrast to the definition used in this dissertation (*cfr*. 582). Other drawbacks are the lack of enforcement mechanisms, and the irrelevance of national heritage of non-member States: neither they nor UNESCO can recommend the inclusion in the list: Brenner (n 25) 259.

[58] The quasi-universal ratification of the WHC only reinforces this: at this moment it has 193 State parties: UNESCO 'States Parties Ratification Status' (as of 31 January 2017) available at http://whc.unesco.org/en/statesparties/ accessed 9 February 2018. Also note Lostal's argument to use the World Heritage Convention as the lowest common denominator for cultural heritage protection, because it has the most State parties, it uses 'cultural heritage' instead of cultural property, it is not subsidiary to other treaties, and people are aware of its symbols: Marina Lostal Becerril, 'Challenges and Opportunities of the Current Legal Design for the Protection of Cultural Heritage during Armed Conflict', *Conference Proceedings* (2012) 334.

[59] Federico Lenzerini, 'The Unesco Declaration Concerning the Intentional Destruction of Cultural Heritage: One Step Forward and Two Steps Back' (2003) 13 Italian Yearbook of International Law 131, 132. Note that the definition of 'armed conflict' or 'peacetime' is in itself a difficult task: Yaron Gottlieb, 'Criminalizing Destruction of Cultural Property: A Proposal for Defining New Crimes under the Rome Statute of the ICC' (2005) 23 Pennsylvania State International Law Review 857, n 2. Non-international armed conflict has been defined as "*protracted armed violence between*

Nevertheless, Lenzerini argues that the HC applies to peacetime as well: if the protection applies in wartime, it should *a fortiori* apply in peacetime when acts against cultural heritage cannot be justified through military necessity.[60] Furthermore, from Art. 11(4) WHC and the repeated requests by UNESCO during the war in Croatia, one can deduct that the obligations in Art. 4 (*inter alia* the duty to protect) and 6(3) WHC (abstaining from measures which damage heritage) are also applicable to armed conflict.[61] Indeed, the effective enforcement of this common interest is obstructed by having two different regimes.[62] Even when Lenzerini's argument is not accepted, the WHC could be useful to protect cultural heritage through the prosecution of other crimes than war crimes, such as crimes against humanity and (*de lege ferenda*) genocide, as they can be committed irrespective of its link with armed conflict (*cfr.* 637).[63]

b. The Second Enlargement: Including Intangible Cultural Heritage

It was only through the inclusion of intangible cultural heritage (21st century) the so-called "*humanisation*" of cultural heritage law started (*cfr.* 586, 650).[64] Intangible cultural heritage consists of a society's traditions and everything resulting from human interaction.[65] Examples are typical forms of musical or

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governmental authorities and organized armed groups or between such groups within a State", see: *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (1995) [70]. *Contra*: M Cherif Bassiouni, 'Reflections on Criminal Jurisdiction in International Protection of Cultural Property' (1983) 10 Syracuse Journal of International & Comparative Law 281, 287; Gottlieb 859. This is both on a pragmatic (the practical difficulties resulting from this distinction) and normative level (the difference in application) difficult to justify.

[60] *Ibid.* 139: A counterargument could be that there are different factions in wartime, while in peacetime only one State has the sovereignty to destroy its own heritage. However, this argument can be tackled by the *universal* nature of cultural heritage and the applicability of the wartime protection to NIAC.

[61] Art. 11(4) states: "*[...] The list may include only such property forming part of the cultural and natural heritage as is threatened by serious and specific dangers, such as [...] the outbreak or the threat of an armed conflict [...]. The Committee may at any time, in case of urgent need, make a new entry in the List of World Heritage in Danger and publicize such entry immediately.*"; O'Keefe, 'Protection of Cultural Property' (n 57) 510. The same result is reached when one sees the HC as *lex specialis* for armed conflict and the WHC as *lex specialis* for cultural heritage; as both treaties are *lex specialis* and have no other relationship, they have to be seen as general treaties regarding each other: Lostal Becerril, 'Syria's World Cultural Heritage and Individual Criminal Responsibility' (n 33) 9.

[62] Bassiouni (n 59) 318.

[63] For this distinction, see: Novic (n 38) 130.

[64] *Ibid.* 122. The WHC only referred to the importance of cultural heritage for humanity in its preamble and Art. 27: "*[...] to strengthen appreciation and respect by their peoples of the cultural and natural heritage [...]*".

[65] Theresa Papademetriou, 'International Aspects of Cultural Property: An Overview of Basic Instruments and Issues' (1996) 24 International Journal Legal Info 270, 271–273; Hirad Abtahi, 'The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia' (2001) 14 Harvard Human Rights Journal 1, 23; Francioni, 'The Human Dimension of International Cultural Heritage Law: An Introduction' (n 2)

literary expression, religious traditions and rituals, crafts and skills, and even social forms of dispute settlement.[66]

Their exclusion from the definition of cultural property is due to prevailing view in the West that human creativity must take a built, monumental, and tangible character, in contrast to other cultures.[67] Furthermore, intangible cultural heritage is protected irrespective of the existence of armed conflict, thus not included in the HC.[68] Nevertheless, continued intangible cultural heritage and IHRL thus provide for an argument to broaden the definition of cultural property, or – better – to use cultural heritage as the general term.[69] Here, Novic sees a role for the ECCC in determining the applicable CIL for intentional attacks against the intangible cultural heritage of the Cham and Vietnamese in peacetime (*cfr.* 640).[70]

c. The 2003 UNESCO Declaration

The 2003 UNESCO Declaration recalled "*the tragic destruction of the Buddhas of Bamiyan that affected the international community as a whole*".[71]

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[66] Francesco Francioni, 'Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity' (2004) 25 Michigan Journal of International Law 1209, 1223.

[67] Francesco Francioni, 'Cultural Heritage', *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2013) para 18. See also: Federico Lenzerini, 'Intangible Cultural Heritage: The Living Cultures of People' (2011) 22 European Journal of International Law 101, 109 as cited in Novic (n 38) 122, 125–126.

[68] Novic (n 38) 133.

[69] Convention for the Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003, entered into force 20 April 2006) UNESCO Doc MISC/2003/CLT/CH/14; Francioni, 'Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity' (n 66) 1223; Francioni, 'Cultural Heritage' (n 67) para 19. For responses to the disruption of indigenous intangible culture by the Inter-American Court of Human Rights, see: *Case of the Moiwana Community v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No 124, IHRL 1508 (15 June 2005) and *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No 146, IHRL 1530 (29 March 2006), both cited in Sophie Starrenburg, 'Who Is the Victim of Cultural Heritage Destruction? The Reparations Order in the Case of the Prosecutor v Ahmad Al Faqi Al Mahdi' (*EJIL: Talk!*, 25 August 2017) <https://www.ejiltalk.org/who-is-the-victim-of-cultural-heritage-destruction-the-reparations-order-in-the-case-of-the-prosecutor-v-ahmad-al-faqi-al-mahdi/> accessed 22 April 2018.

[70] *Case 002* (Closing Order) 002/19-09-2007-ECCC-OCIJ (2010) [745-789, 1336-1352]; Novic (n 38) 132. See also: Berenika Drazewska, 'The Human Dimension of the Protection of the Cultural Heritage from Destruction during Armed Conflicts' (2015) 22 International Journal of Cultural Property 205, 216–217.

[71] 2003 UNESCO Declaration (cited *supra* 30) preamble. The 'prequels' to this declaration were UNESCO Report of the XXI Session of the World Heritage Committee (27 February 1998) UNESCO Doc WHC-97/CONF.208/17.; UNGA Res 55/234 (2001) UN GAOR 55th Session UN Doc A/RES/55/234; and UNESCO Acts Constituting 'Crimes Against the Common Heritage of Humanity' (22 November 2001) UNESCO Doc WHC-01/CONF.208/23. For a more recent, non-binding resolution of UNGA, see: UNGA Res 69/281 (28 May 2015) UN Doc A/RES/69/281.

Although the Declaration could in theory be a means to criminalise attacks in peacetime (Art. IV) and establish jurisdiction (Art. VII),[72] the Declaration is not binding.[73]

d. Nicosia Convention 2017

Very recently, the Council of Europe adopted the 2017 Nicosia Convention on Offences relating to Cultural Property.[74] This is the first regional and detailed treaty on international criminal law regarding cultural heritage crimes, creating a comprehensive criminal law regime.[75] Based on the concept of common responsibility for cultural heritage protection, it is a tool in the fight against terrorism and provides for adequate sanctions.[76]

2.3. THE 'HERITAGE OF MANKIND'

Next to the internationalist approach (*cfr.* 583), the examined instruments and their emphasis on the 'heritage of mankind'[77] introduce another approach to

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[72] Art. VII *in fine* states that is irrelevant whether the destroyed property is inscribed on e.g. the World Heritage List. This has to be applauded, as inscription is politicised and biased towards certain heritage: Sophie Starrenburg, 'Who Is the Victim of Cultural Heritage Destruction? The Reparations Order in the Case of the Prosecutor v Ahmad Al Faqi Al Mahdi' https://www.ejiltalk.org/who-is-the-victim-of-cultural-heritage-destruction-the-reparations-order-in-the-case-of-the-prosecutor-v-ahmad-al-faqi-al-mahdi/ accessed 22 April 2018: worryingly, *Prosecutor v Al-Mahdi* (Reparations Order Trial Chamber) ICC-01/12-01/15 (17 August 2017) [15] notes that World Heritage status gives cultural heritage "higher cultural significance and a higher degree of international attention and concern". Furthermore, sometimes destroyed heritage is intangible or is just not listed at the time of its destruction: *ibid.*

[73] Moreover, it is a mere restatement of UNESCO's *droit acquis*, political consensus and intent: Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict* (Cambridge University Press 2010) 359; Novic (n 38) 124. Note that the destruction of the Bamiyan Buddhas by the Taliban in territory under its control was an act in peacetime, as there was no link with armed conflict. See also: Francesco Francioni and Federico Lenzerini, 'The Destruction of the Buddhas of Bamiyan and International Law' (2003) 2003 European Journal of International Law 619, 638.

[74] Council of Europe Convention on Offences relating to Cultural Property (adopted 19 May 2017) CETS 227 (Nicosia Convention).

[75] Note that there exists a European Convention on Offences relating to Cultural Property (adopted 23 June 1985) CETS 119 (Delphi Convention), but only four Mediterranean countries, Liechtenstein and Portugal have signed this convention (https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/119/signatures?p_auth=yDP99aN1); Karolina Wierczynska and Andrzej Jakubowski, 'Individual Responsibility for Deliberate Destruction of Cultural Heritage: Contextualizing the ICC Judgment in the Al-Mahdi Case' (2017) 16 Chinese Journal of international Law 695, 270.

[76] Art. 14, including disqualification from exercising commercial activity (Art. 14(2)).

[77] For an early case on this notion, see: *The Marquis de Somereules*, Stewart's Vice-Admiralty Reports (Nova Scotia) 482 (1813) (concerning the British seizure of Italian artworks on board of an American vessel), as cited in *Prosecutor v Al-Mahdi* (Second Expert Report) ICC-01/12-01/15-214-Conf-AnxII-Red (28 April 2017) [12] and O'Keefe, *The Protection of Cultural Property in Armed Conflict* (n 119) 16, 40: "*The arts and sciences are admitted amongst all civilized nations as forming an exception to the severe rights of warfare, and as entitled to favour and protection.*

cultural heritage: *cultural universalism*, as opposed to *relativism*.[78] The first sees cultural heritage as the heritage of humanity as a whole (the rationale of the three examined instruments), while the latter emphasises its importance for the particular community and immediate victims.[79]

As the Rome Statute does not seem to opt for the universalist approach, unless in its preamble,[80] it *a contrario* chooses for cultural relativism.[81] This is supported by the reference to "*peoples*" (not "*all peoples*") in the draft definition of war crimes related to cultural heritage.[82] Other expressions of the relativist approach are the 1907 Hague Regulations, and the two 1977 Additional Protocols to the Geneva Conventions (respectively AP I and II).[83] However, somehow confusingly, the ICTY in *Strugar* held that that these instruments, and the 1954 Hague Convention "*share a similar notion of 'cultural heritage'*".[84] Casaly therefore notes that it is unclear which approach

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They are considered not as the peculium *of this or that nation, but as the property of mankind at large, and as belonging to the common interests of the whole species*" (emphasis added).

[78] See, for example, the preamble to the Hague Convention: "*Being convinced that damage to the 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.*" In general, see: Paige Casaly, 'Al Mahdi before the ICC: Cultural Property and World Heritage in International Criminal Law' (2016) 14 Journal of International Criminal Justice 1199.

[79] *Ibid.* 1204. Note that the removal of the draft sentence in the 2003 UNESCO Declaration referring to the "*cultural heritage which is of special interest for the community directly affected*" is a serious step back to UNESCO's cultural diversity policy. Indeed, international importance of heritage is "*not only linked to its possible outstanding universal value, but also [to] its particular relevance for the people that created and maintained it* UNESCO Doc 32 C/25 (3 October 2003) as cited in Lenzerini (n 59) 142.

[80] The first preambular paragraph states: "*Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time*" (emphasis added); Novic (n 38) 126; Lars Berster, 'The Alleged Non-Existence of Cultural Genocide: A Response to the Croatia v. Serbia Judgment' (2015) 13 Journal of International Criminal Justice 677, 687. *Cfr.* 2003 UNESCO Convention; UNESCO Universal Declaration on Cultural Diversity (2 November 2001); Convention on the Protection and Promotion of the Diversity of Cultural Expression (adopted 20 October 2005, entered into force 18 March 2007) 2440 UNTS 311 ('2005 UNESCO Convention').

[81] Casaly (n 78) 1205.

[82] United Nations Preparatory Committee on the Establishment of an International Criminal Court, Decisions Taken by the Preparatory Committee at its Session Held From 11 TO 21 February 1997 (12 March 1997) UN Doc. A/AC.249/1997/L.5 as cited in *ibid.* Similarly, note that "*of every people*" in Art. 1 Hague Convention can be interpreted differently, that is as "*of all peoples jointly*" or "*of each respective people*", see: Roger O'Keefe, 'The Meaning of "Cultural Property" under the 1954 Hague Convention' (1999) 46 Netherlands International Law Review 26, 32–33.

[83] Casaly (n 78) nn 23, 26. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (hereinafter 'AP I'); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (hereinafter 'AP II').

[84] *Prosecutor v Strugar* (Judgment Trial Chamber) IT-01-42-T (2005) [307] as cited in Casaly (n 78) 1208.

the ICTY and ICC should take.[85] Both options have their drawbacks: where under the universalist approach only acts against World Heritage are criminalised, the relativist approach ignores objects which have no significance for a community anymore (*cfr*. 583). One could even argue that relativism refers to mere cultural property, rather than to cultural heritage (of mankind).

2.4. TOWARDS A HARMONISED DEFINITION

Frigo notes that the tendency in drafting conventions is to use or cultural property or heritage.[86] Consequently, each convention has its own scope of application and international courts and tribunals must apply their statute and applicable treaties to the situation under examination. Some authors have argued that a broad, harmonised definition and protection of cultural property/heritage *de lege ferenda* can be harmful as a broad protection means a less effective framework.[87] Nevertheless, this dissertation will show that that this is not necessarily the case, ICL statutes leave open how the envisaged objects need to be interpreted. Furthermore, the HC and the like do not appear to be enforced effectively, since States have never used them in (inter)national proceedings.[88] Consequently, a more harmonised definition of cultural property and/or cultural heritage would be advantageous, which could then be used to determine the scope of the relevant provisions in the different statutes of those courts and tribunals.[89]

There are several reasons to prefer the term 'cultural heritage' over 'cultural property'. *Property* has a very limited scope and is based on the (Western) concept of market value.[90] Furthermore, sometimes the control of and access to cultural objects are separated from their ownership,[91] and ownership is often

[85] Casaly (n 78) 1208. Indeed, they are not bound by their statutes as there is no clear choice for approach in the respective provisions. For the approach in the *Al-Mahdi* case, see Part 2.
[86] Frigo (n 18) 377.
[87] This is *a fortiori* true for unification of norms, see: Fechner (n 29) 377–378. He argues it would be unrealistic to expect that *every* cultural object has to be protected at an international level, yet he admits that some harmonisation is inevitable.
[88] Hill (n 51) 214.
[89] For example, contrary to the HC, Art. 3(d) of the ICTY Statute criminalises acts against religious and educational institutions, historic monuments and works of art *without* giving a definition of cultural property: Micaela 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' (2005) 15 Italian Yearbook of International Law 195, 196–197; Micaela Frulli, 'Distribuzione Dei Beni Culturali e Crimine Di Genocidio: L'Evoluzione Della Giurisprudenza Del Tribunale Penale Internazionale per La Ex-Jugoslavia', *La Tutela Internazionale dei Beni Culturali nei Conflitti Armati* (Giuffrè Editore 2007) 255, 273; Marina Lostal Becerril, Kristin Hausler and Pascal Bongard, 'Armed Non-State Actors and Cultural Heritage in Armed Conflict' (2017) 24 International Journal of Cultural property 407, 40.
[90] Blake (n 21) 65–66; Francioni, 'The Human Dimension of International Cultural Heritage Law: An Introduction' (n 2) 9; Manacorda (n 4) 17.
[91] Blake (n 21) 65–66.

disputed in armed conflict.[92] On the other hand, cultural heritage includes intangibles (*cfr.* 587),[93] and has been *inherited* from previous generations, thus having an important intergenerational aspect (as the word *heritage* implies).[94] Third, cultural heritage is possessed by mankind, i.e. the entire human race, and not by a selected group of people.[95] Cultural property, on the other hand, is bound to a nation-State. The threshold for the cultural heritage is thus higher: all cultural property is part of cultural heritage, while this is not always the case *vice versa*.[96] This *universality* requirement has been the criterion to differentiate the statutes of the *ad hoc* tribunal for Rwanda (ICTR)[97] and the Special Court of Sierra Leone (SCSL)[98] from Art. 3(d) ICTY Statute and Art. 7 of the Law on the Extraordinary Chambers of the Courts of Cambodia (ECCC Law).[99] The latter have incorporated cultural heritage crimes, because the heritage under attack was deemed to be of universal/international importance.[100]

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[92] Van der Auwera (n 48) 187.

[93] Jadranka Petrovic, *The Old Bridge of Mostar and Increasing Respect for Cultural Property in Armed Conflict* (Martinus Nijhoff Publishers 2013) 1.

[94] Craig Forrest, 'Defining Cultural Heritage in International Law', *International Law and the Protection of Cultural Heritage* (Routledge 2010) 1–3; Ana Filipa Vrdoljak, 'The Criminalisation of the Intentional Destruction of Cultural Heritage' in Tiffany Bergin and Emanuela Orlando (eds), *Forging a Socio-Legal Approach to Environmental Harm: Global Perspectives* (Routledge 2017) 5; Derek Fincham, 'The Distinctiveness of Property and Heritage' (2011) 115 Pennsylvania State Law Review 641, 668 as cited in Derek Fincham, 'The Intentional Destruction and Spoliation of Cultural Heritage under International Criminal Law' (2017) 23 University of California Davis Journal of International Law & Policy 149, 151. Fincham defines cultural heritage as "*the physical and intangible elements associated with a group of individuals which are created and passed from generation to generation.*" On this basis, Kornegay argues for a 'trusteeship' model for cultural heritage: protecting it throughout generations and across borders would best serve our common interest, see: Kevin D Kornegay, 'Destroying the Shrines of Unbelievers: The Challenge of Iconoclasm to the International Framework for the Protection of Cultural Property' (2014) 221 Military Law Review 153, 176.

[95] A corollary is that all members of the international community are responsible for its protection: Wierczynska and Jakubowski (n 75) 721.

[96] Lostal Becerril, 'Challenges and Opportunities of the Current Legal Design for the Protection of Cultural Heritage during Armed Conflict' (n 58) 330; Lostal Becerril, 'Syria's World Cultural Heritage and Individual Criminal Responsibility' (n 33) 10.

[97] UNSC, Statute of the International Criminal Tribunal for Rwanda (adopted 8 November 1994, as last amended on 13 October 2006) UNSC Res 955, UN SCOR 49th sess., 3453rd mtg., UN Doc S/Res/955 (hereinafter 'ICTR Statute').

[98] Statute of the Special Court for Sierra Leone (16 January 2002) 2178 UNTS 138 (hereinafter 'SCSL Statute').

[99] Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (adopted 2001, amended 27 October 2004) NS/RKM/1004/006 (hereinafter 'ECCC Law'); Francioni and Lenzerini (n 73) 645; Gottlieb (n 59) 863.

[100] Francioni and Lenzerini (n 73) 845; Gottlieb (n 59) 863. The universality of cultural heritage also has influenced the debate on the protection of cultural heritage as *erga omnes* obligations, i.e. obligations owed to the international community as a whole. See: *Barcelona Traction, Light and Power Co.* (Merits) [1970] ICJ Rep 3 [33-34]; Lenzerini (n 59) 144; Francioni, 'The Human Dimension of International Cultural Heritage Law: An Introduction' (n 2) 13; Vrdoljak, 'Cultural Heritage in Human Rights and Humanitarian Law' (n 52) 300; Drazewska (n 70) 219. *Contra*: Roger O'Keefe, 'World Cultural Heritage: Obligations to the International Community as a

In sum, the differences between cultural property and cultural heritage might be neglectable, as they are both incomplete.[101] Yet, cultural heritage is seen as a more abstract notion, while cultural property is the concretisation of it.[102] By using 'cultural heritage', all crimes against culture *sensu lato* could be prosecuted, which will prove to be particularly useful for crimes against humanity (*cfr*. section 3.3.2.).[103] It must be noted that the IMT could not use the at the time not existing terms and the ICTY has consistently used the term 'cultural property', excluding intangible heritage.[104] Hereinafter, this term shall be used were appropriate. Probably, the underlying rationale for this exclusion is that for tangible cultural heritage one attack can suffice, while attacks against intangible cultural heritage must be part of a long-term process, e.g. occupation,[105] or a widespread and systematic attack in peacetime (*cfr*. 637). This dissertation, however, will therefore use the term 'cultural heritage' consistently, as in the *Al-Mahdi* case and most of the 21st century literature.[106]

A broad, harmonised definition could thus protect and criminalise all cultural heritage, whether important for humanity or a particular society. The emphasis has to be on the *cultural* – and not on the universal/relativist – aspects.[107]

Whole?' (2004) 53 International & Comparative Law Quarterly 189, 208; Brenner (n 25) 263–264; Marina Lostal Becerril, *International Cultural Heritage Law in Armed Conflict: Case-Studies of Syria, Libya, Mali, the Invasion of Iraq, and the Buddhas of Bamiyan* (Cambridge University Press 2017) 42; Kirsten Schmalenbach, 'Ideological Warfare against Cultural Property: UN Strategies and Dilemmas' (2015) 19 Max Planck Yearbook of United Nations Law 3, 19. Lostal refers to the *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)* (Second Phase) [1966] ICJ Rep 6 [49] and its denial that the ICJ must examine mere moral considerations.

[101] Frigo (n 18) 376.

[102] *Ibid*. 377.

[103] Van der Auwera (n 48) 187–188 notes, however, that intangible cultural heritage is not targeted in the same way as tangible cultural heritage is destroyed and thus argues that more research on this topic is needed for a holistic cultural heritage approach.

[104] Note that this includes not only cultural property under Art. 1 Hague Convention, but "*'all institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science', in the words of Art 3(d) of ICTY, or, in the words of Art 8(2)(b)(ix) and (e)(iv) of the Statute of the International Criminal Court, all 'buildings dedicated to religion, education, art, science or charitable purposes, [and] historic monuments'*", see O'Keefe, 'Protection of Cultural Property' (n 57) n 124.

[105] Novic (n 38) 126.

[106] Schmalenbach (n 100) 7; Lyndel V Prott and Patrick J O'Keefe, '"Cultural Property" or "Cultural Heritage"?' (1992) 1 International Journal of Cultural property 307, 309–312 as cited in Blake (n 21) 67.

[107] Indeed, this has been the development in cultural heritage law: only protecting historic or artistic property undermines the importance of intangible cultural heritage and the value of heritage for society: Van der Auwera (n 48) 178. Analysing recent instruments of UNESCO, UNIDROIT and the Council of Europe, she argues: "*In this vein, a paradigm shift in heritage law is apparent. The emphasis has changed from a conservation-oriented (or object-oriented) approach towards a value-oriented (or subject-oriented) approach.*" Furthermore, according to the *principle of relative interest*, the international community always has some degree of interest in cultural items: Lostal Becerril, *International Cultural Heritage Law in Armed Conflict: Case-Studies of Syria, Libya, Mali, the Invasion of Iraq, and the Buddhas of Bamiyan* (n 100) 58–61.

However, as the ICTY Statute and RS follow the rationale of the 1907 Hague Regulations (*cfr*. 611), the *cultural-value* approach (i.e. protecting cultural heritage *per se*, not because it is of use for civilians) can only be seen in the HC's Second Protocol (APHC II) (*cfr*. 602).[108] The choice for the *civilian-use* rationale in the ICTY Statute and RS is disappointing, as civilian property, such as hospitals, is only protected because of its service, or because civilians are inside/around the building.[109] While they thus lose their protection when these civilians leave, cultural heritage needs to be protected abstractly and continuously.[110]

2.5. PROVISIONAL CONCLUSION

Returning to sub-question 1, the exact meaning of 'cultural property' depends on the instrument.[111] This can cause confusion or make the framework cacophonic/incoherent,[112] which leads to reluctance by States to define their obligations and adopt criminal sanctions.[113] Yet, the common aim and entwinement of all treaties argues for its existence. Furthermore, all

[108] Cited *supra* 26; Frulli, 'The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency' (n 19) 210–211. *Contra*: Van der Auwera (n 48) 178–179. She argues that emphasising the irreplaceableness of destroyed cultural heritage, the ICTY Trial Chamber in *Jokić* held that the provisions on war crimes have an intrinsic cultural-value approach, while persecution has a civilian-use approach.

[109] Gottlieb (n 59) 865–866.

[110] *Ibid*. It is important to keep this in mind when analysing the provisions on attacking civilian property (*cfr*. 622 *et seq*.).

[111] The HC and its Protocols provide a 'main' definition. The 1907 Hague Regulations provide an *over-inclusive* description, the WHC an *exclusive* definition, and AP I and II define it as mere "*cultural objects and places of worships*": Lostal Becerril, 'Challenges and Opportunities of the Current Legal Design for the Protection of Cultural Heritage during Armed Conflict' (n 58) 330–331; Lostal Becerril, *International Cultural Heritage Law in Armed Conflict: Case-Studies of Syria, Libya, Mali, the Invasion of Iraq, and the Buddhas of Bamiyan* (n 100) 37; O'Keefe, *The Protection of Cultural Property in Armed Conflict* (n 73) 3: "*Turning to terminology, the meaning of 'cultural property [...] depends on the context.*" A similar problem exists for the term 'protection' "*which can cease to exist if the site is used for military purposes (1907 IV Hague Convention), if it becomes a military objective (Additional Protocols I and II), in case of imperative military necessity (1954 Hague Convention and 1999 Second Protocol), or when the measures are not deliberate (World Heritage Convention)*", see: Lostal Becerril, 'Challenges and Opportunities of the Current Legal Design for the Protection of Cultural Heritage during Armed Conflict' (n 58) 331.

[112] Francioni, 'Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity' (n 66) 1210; Gottlieb (n 59) 880. Mainetti even argued that there is no international legal *framework* for the protection of cultural heritage, because there is no common concept of cultural property/heritage nor a treaty that can act as a basic structure: Vittorio Mainetti, 'De Nouvelles Perspectives Pour La Protection Des Biens Culturels En Cas de Conflit Armé: L'entrée En Vigueur Du Deuxième Protocole Relatif à La Convention de La Haye de 1954' (2004) 86 International Review of the Red Cross 337, 365; as cited in Lostal Becerril, 'Challenges and Opportunities of the Current Legal Design for the Protection of Cultural Heritage during Armed Conflict' (n 48) 331.

[113] Manacorda (n 4) 24–25. He calls the adoption of only the most manifest crimes "*penal minimalism*".

conventions complement each other, creating an interwoven structure.[114] Opting for the broader term 'cultural heritage' has the advantage that a wider spectrum of objects can be protected through IHL and ICL. The ICTY and ICC have not taken into consideration intangibles, but prosecuting crimes against humanity and even genocide offers a solution, as they are even criminalised in peacetime. Furthermore, the WHC emphasises the intergenerational and universal aspects of cultural heritage, which distinguishes it from cultural property. Nevertheless, international criminal courts and tribunals will still have to apply the law to the facts. Yet, opting for cultural heritage will not affect the *de lege lata* penal framework (*cfr.* part 3), as it includes cultural property. Hence, a definition of cultural heritage *de lege ferenda* should be broad. As such, the Rome Statute will adopt a clear cultural-value approach, in line with APHC II.

3. THE SCOPE OF ACTS AGAINST CULTURAL HERITAGE AND THEIR PROSECUTION THROUGH INTERNATIONAL CRIMINAL LAW

Sub-question 2: *What is the current international legal framework for the prosecution of the destruction of cultural property in (non-)international armed conflicts? Is it -or could it be- in accordance with moral considerations of the public opinion and political necessities of States?*

3.1. REASONING BEHIND PROSECUTING CULTURAL HERITAGE CRIMES

3.1.1. Reasons to Commit Cultural Heritage Crimes

Before introducing the international criminal legal framework, it is useful to examine what motivates international criminals to commit cultural heritage crimes.[115] The need to analyse and document the damaging, vandalization, destruction, or plunder of cultural heritage (hereinafter briefly 'acts') has become evident in the case law of the ICTY and ICC.[116] Understanding these

[114] As such, Art. 36 HC supplements Hague Regulation IV, Art. 53 AP I and Art. 16 AP II apply "without prejudice" to the 1954 Hague Convention, and Art. 2 APHC II complements the HC. See: Lostal Becerril, 'Challenges and Opportunities of the Current Legal Design for the Protection of Cultural Heritage during Armed Conflict' (n 58) 331.

[115] While this section does not examine the reasoning behind the theft or plunder of cultural heritage, its reasons are legion. They include the high personal status of possessing them and the huge profit margins, especially compared to the relatively modest penalties in domestic law. See: Manacorda (n 4) 22–23.

[116] Johan Brosché and others, 'Heritage under Attack: Motives for Targeting Cultural Property during Armed Conflict' (2016) International Journal of Heritage Studies 1, 2.

psychological factors provides insightful information why ICL can(not) offer a solution and how it can prevent such crimes in the future.

Strategically, perpetrators commit those offences because cultural heritage is a low risk target; to show the commitment of the aggressor; for pure tactical goals;[117] for historic claims;[118] or to provoke the enemy.[119] Stepping away from the perception that international criminals are rational calculators,[120] cultural heritage is attacked just for the sake of it. Most of them just follow orders or justify their actions through the 'lawless' character of war. More importantly, they commit crimes to wipe away symbols of the long history, cultural diversity and coexistence in a specific territory and/or to deny existing beliefs and impose their own ideology/religion ('cultural cleansing' or the "*deliberate targeting trend*").[121] Next, like rape, destroying the cultural heritage of occupied territories demoralises the adversary – even humanity as a whole – and can provide a psychological advantage.[122] The affected people are not directly hurt by the destruction of their culture, but it can hit them straight in the heart. In our digital age, this can be done through social media which provide new means for propaganda.[123] Finally, they want that future generations are hurt by these destructions and become orphans of their own culture, as they lose the understanding of who they are and where they come from.[124] This is where

[117] See the exception of military necessity (*cfr*. *infra* chapters 2 and 3).

[118] Van der Auwera (n 48) 175. In general, see: Brosché and others (n 116).

[119] Andreas Dittmann and Hussein Almohamad, 'Devastation of Cultural Heritage and Memory in Syria and Iraq: Component of a Multi-Level Provocation Strategy?' (2015) 5 International Journal of Humanities & Social Science 11, 28 as cited in Fincham, 'The Intentional Destruction and Spoliation of Cultural Heritage under International Criminal Law' (n 94) 190. They called this tactic, as applied by Islamic State, the "*comprehensive provocative strategy*".

[120] Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (3rd edition, Cambridge University Press 2014) 32. The same goes for cultural property law (*cfr*. part 3): as 'lawless' entities like the Taliban can ignore it easily, see: Brenner (n 25) 256–257.

[121] Lostal Becerril, Hausler and Bongard (n 89) 411–414; Serge Brammertz and others, 'Attacks against Cultural Heritage as a Weapon of War' (2016) 14 Journal of International Criminal Justice 1143, 1145. Note that many NSA's recognise, appreciate, and try to maintain cultural heritage ("*the other trend*"): Lostal Becerril, Hausler and Bongard (n 89) 414–421.

[122] Abtahi (n 65) 1; Vrdoljak, 'The Criminalisation of the Intentional Destruction of Cultural Heritage' (n 44) 19; Manacorda (n 4) 22. See, for example, As UNGA Res 69/281 (2015) para. 2.: "*[A]ttacks on cultural heritage are used as a tactic of war in order to spread terror and hatred.*"

[123] Vrdoljak, 'The Criminalisation of the Intentional Destruction of Cultural Heritage' (n 44) 19; Manacorda (n 4) 21. Manacorda even argues that e-commerce provides for a valid mechanism to dispose of stolen cultural heritage.

[124] Abtahi (n 65) 2. In the context of the destructions by ISIS, see: UNESCO 'Director-General Irina Bokova firmly condemns the destruction of Palmyra's ancient temple of Baalshamin, Syria' (8 September 2015) available at https://en.unesco.org/news/director-general-irina-bokova-firmly-condemns-destruction-palmyra-s-ancient-temple-baalshamin accessed 26 March 2018: "*The systematic destruction of cultural symbols embodying Syrian cultural diversity reveals the true intent of such attacks, which is to deprive the Syrian people of its knowledge, its identity and history. One week after the killing of Professor Khaled al-Assaad, the archaeologist who had looked after Palmyra's ruins for four decades, this destruction is a new war crime and an immense loss for the Syrian people and for humanity*" (emphasis added). See also: UNESCO 'UNESCO Director-

'property crimes' are distinguished from 'personal injury crimes'.

3.1.2. Critiques on Prosecuting the Destruction of Cultural Heritage[125]

Certain States, particularly the United States, have criticised a far-reaching criminalisation, as it abrogates the concept of military necessity (*cfr*. chapter 3) and gives the military less leeway in choosing and attacking their objectives.[126] A second critique is that the prosecution of cultural heritage crimes would be equated with personal injury cases. Allegedly, the *anthropocentric* character of ICL makes them more important.[127] Although crimes against cultural heritage are as visible as crimes against people, and change the landscape forever, they are thought to be less serious than crimes against people and thus do not meet the gravity requirement (*cfr*. 619).[128] Furthermore, cultural heritage crimes are not prosecuted *per se*, but because they harm a certain population (*ethnocentric* approach).[129] This last approach is clearly present in the crime of persecution (section 3.2.). However, even when crimes like torture are more serious than cultural heritage crimes, the latter cannot be ignored: perpetrators cannot be given a *carte blanche*.[130]

General condemns destruction of the Tetrapylon and severe damage to the Theatre in Palmyra, a UNESCO World Heritage site' (20 January 2017) available at https://en.unesco.org/news/unesco-director-general-condemns-destruction-tetrapylon-and-severe-damage-theatre-palmyra accessed 26 March 2018.

[125] Note that there are many critiques on ICL in general, including duration, costs and ICL as being imposed on the weak actors of the international community: Cryer and others (n 120) 42–44.

[126] Ian M Ralby, 'Prosecuting Cultural Property Crimes in Iraq' (2005) 37 Georgetown Jounal of International Law 165, n 15. Cautioned by President Eisenhower, the United States Congress has neither ratified the HC, nor its two protocols.

[127] *Ibid.* 3; Micaela Frulli, 'Distribuzione Dei Beni Culturali e Crimine Di Genocidio: L'Evoluzione Della Giurisprudenza Del Tribunale Penale Internazionale per La Ex-Jugoslavia', *La Tutela Internazionale dei Beni Culturali nei Conflitti Armati* (Giuffrè Editore 2007) 273. Note there has been a development away from this anthropocentric approach in cultural property protection, see: Fechner (n 29) 378–379.

[128] See for example: *Prosecutor v Katanga* (Decision on sentence pursuant to article 76 of the Statute) ICC-01/04-01/07 (2014) [43].; *Prosecutor v Al-Mahdi* (Judgment and Sentence) ICC Trial Chamber ICC-01/12-01/15-171 (2016) [77-81]. The ICC in *Al-Mahdi* thought that the destruction of ten cultural sites was of sufficient gravity to prosecute, as they had symbolic and emotional value, they were destroyed through a religious motive, and all mankind suffered from their loss. It should be underlined that, irrespective of the qualification of cultural heritage crimes (as war crimes, crimes against humanity or genocide), those crimes are of sufficient gravity to trigger the jurisdiction of the ICC. See Casaly (n 78) 1214–1219. For World Heritage status as a proxy for gravity, see in general *ibid.* 1216 (*cfr*. 620). Note that several non-governmental organisations have expressed their thoughts on neglecting murder, rape, and torture, but these assume international criminal justice as a zero-sum game, see: Brian I Daniels and Helen Walasek, 'Is the Destruction of Cultural Property a War Crime?' [2016] *Apollo Magazine* available at https://www.apollo-magazine.com/is-the-destruction-of-cultural-property-a-war-crime/ accessed 31 March 2018.

[129] Abtahi (n 65) 3, 28.

[130] *Ibid.* 4.

3.1.3 Justifying the Prosecution of Cultural Heritage Crimes

There are several arguments to prosecute cultural heritage crimes. First, criminal law is still based on retribution as it punishes perpetrators for what they have done.[131] Furthermore, protection regimes like UNESCO's World Heritage List, and the increasing attention for it by international tribunals (*cfr.* 614) serve to educate the public about the importance of (the protection of) cultural heritage.[132] More broadly, ICL restores the rule of law in a post-conflict society by restoring trust and the legitimacy of a unified cultural identity which are crucial for stability (*cfr.* 659).[133]

People rally around physical objects and intangible traditions to assert their identity.[134] Protecting cultural heritage safeguards the group's religious/cultural identity and the common heritage of mankind, next to its material and physical integrity in the case of crimes against humanity.[135] Although not all perpetrators are rational calculators, prosecuting cultural heritage crimes tries to prevent future barbarisms and therefore still has a deterrent purpose.[136] One cannot bring back the ancient sites of Palmyra or plundered heritage, one can only prevent other people from committing such crimes.

3.2. SOURCES OF INTERNATIONAL CRIMINAL LAW

Following Art. 38 of the Statute of the International Court of Justice (ICJ),[137] this chapter will give an overview of the most relevant sources for ICL: treaties, CIL and general principles.[138] Multilateral treaties play a significant role for IHL and its protection of cultural heritage and many of them are part of CIL. None of following provisions have been used directly, but they provide a theoretical base for domestic prosecution and foundation for the provisions of

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[131] For retribution in general, see: Cryer and others (n 120) 30–32.

[132] Brammertz and others (n 121) 1172; X (n 31) 1981. For education in general, see: Cryer and others (n 120) 36–37.

[133] Cryer and others (n 120) 40–41; Ralby (n 126) 166–167, 185; Fincham, 'The Intentional Destruction and Spoliation of Cultural Heritage under International Criminal Law' (n 94) 164; Schmalenbach (n 100) 22–23.

[134] Ralby (n 126) 166–167.

[135] Frulli, 'Distribuzione Dei Beni Culturali e Crimine Di Genocidio: L'Evoluzione Della Giurisprudenza Del Tribunale Penale Internazionale per La Ex-Jugoslavia' (n 89) 253, 273; Brammertz and others (n 121) 1162.

[136] O'Keefe, 'Protection of Cultural Property under International Criminal Law' (n 40) 392; Cryer and others (n 120) 32–34; Jan Klabbers, 'Just Revenge? The Deterrence Argument in International Criminal Law' (2001) 12 Finnish Yearbook of International Law 249, 253. However, whether ideologically motivated people or armed groups will be deterred from committing cultural heritage crimes is questionable: Schmalenbach (n 100) 22.

[137] UN Statute of the International Court of Justice (adopted 18 April 1946).

[138] The subsidiary sources, i.e. "*judicial decisions and the teachings of the most highly qualified publicists of the various nations*" (Art. 38(1)(d) ICJ Statute), will be examined in the next chapter where appropriate.

the statutes of international courts and tribunals.[139]

3.2.1. Treaty Law

a. Art. 28 Hague Convention

Art. 28 Hague Convention stipulates:

"The High Contracting Parties 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 be committed a breach of the present Convention" (emphasis added).

A narrow interpretation of Art. 19(1) would not lead to the application of Art. 28 in NIAC.[140] Another view sees Art. 28 as an application of Art. 19(1) indeed, as it is a secondary rule to the respect for cultural property in Art. 4, thus applying the obligation to prosecute and impose penal/disciplinary measures to NIAC.[141] There has been no authoritative view yet, as no State party has ever prosecuted for a breach of the HC.[142]

As to the difference between penal and disciplinary sanctions, States can take the former to prosecute the main provisions of Arts. 4(1-4) and 9 (concerning special protection), including destruction and other acts of hostility, pillage, and reprisals.[143] The latter can be used for other obligations under the treaty,

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[139] O'Keefe, 'Protection of Cultural Property' (n 57) 514; O'Keefe, 'Protection of Cultural Property under International Criminal Law' (n 40) 358, 364. Note that Art. 7 ECCC law gives the ECCC jurisdiction over Art. 28 Hague Convention crimes, but up till now no charges have been submitted.

[140] Art. 19(1) Hague Convention 1954 states: "*In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property*" (emphasis added); O'Keefe, 'Protection of Cultural Property under International Criminal Law' (n 40) 360.

[141] *Ibid.*; Theodor Meron, 'International Criminalization of Internal Atrocities' (1995) 89 American Journal of International Law 554, 574.

[142] O'Keefe, 'Protection of Cultural Property under International Criminal Law' (n 40) 360. It is noteworthy that the phrase "*within the framework of their ordinary criminal jurisdiction*" is very vague, as some States include military tribunals herein, see: *ibid.* 360–361; Manacorda (n 4) 27. There could be an argument that Art. 28 permits but does not oblige States to give their courts universal jurisdiction over cultural property crimes, but this is probably beyond the objects and purpose of the treaty: Jiri Toman, *The Protection of Cultural Property in the Event of Armed Conflict: Commentary in the Event of Armed Conflict: Commentary on the Convention and Protection of Cultural Property in the Event of Armed Conflict and Its Protocol, Signed on 14 May 1954 in the Hague and Other Instruments of International Law Concerning Such Protection* (UNESCO Publishing 1996) 294 as cited in O'Keefe, 'Protection of Cultural Property under International Criminal Law' (n 40) n 120.

[143] O'Keefe, 'Protection of Cultural Property under International Criminal Law' (n 40) 362–363.

such as dissemination of the HC's text.[144] To give States a margin of appreciation, the HC is very vague on the forms of responsibility, *mens rea*, the maximum/minimum penalty,[145] as well as defences and rules of procedure. Although UNESCO made several proposals, including a more up-to-date and precise definition of cultural property, these were not followed during the review process of the HC.[146]

b. Article 85(4)(d) Additional Protocol I 1977

Art. 85(4)(d) AP I, only relating to IAC, stipulates that attacking cultural property (Art. 53(a)) is a grave breach (unless it is located near a military objective).[147] The latter broadened the scope of the HC by prohibiting "*any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples.*"[148] Although O'Keefe argues that the meaning of 'cultural property' is the same as under the HC (i.e. objects of national importance),[149] generally the threshold of cultural relevance is unclear.[150] Including "*places of worship which constitute*

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[144] *Ibid.*

[145] *Ibid.* 363. Note the difference with the statutes of the ICTY and ICC and their jurisprudence.

[146] P Boylan, *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention of 1954)* (UNESCO 1993) 16–18, as cited in Thomas Desch, 'The Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict' (1999) 2 Yearbook of International Humanitarian Law 63, 65.

[147] Art. 85(4)(d) AP I reads: "*[...] making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, sub-paragraph (b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives*" Thus, the scope of the provision is about the same as the 1954 Hague Convention, see O'Keefe, *The Protection of Cultural Property in Armed Conflict* (n 73) 439–442. Also, not that, next to Art. 85(4)(d) also Art. 85(3)(b) (indiscriminate attacks against civilians), (d) (attacking non-defended places), and (f) (perfidious use of the emblem of the Red Cross) are *indirect* bases to prosecute cultural heritage crimes. This is a clear parallel with direct and indirect prosecution of war crimes against cultural heritage (*cfr.* section 3.1.).

[148] Art. 16 AP II has a similar provision for NIAC, but it does not have the same system for criminal repression of grave breaches; *Prosecutor v Jokić* (n 11) [50]; Gottlieb (n 59) 861.

[149] *Prosecutor v Kordić and Čerkez* (Judgment Appeals Chamber) IT-95-14/2-A (2004) [91]; *Prosecutor v Strugar* (n 10) [307]; O'Keefe, 'The Meaning of "Cultural Property" under the 1954 Hague Convention' (n 82) 32–33.

[150] Marina Lostal Becerril, 'Challenges and Opportunities of the Current Legal Design for the Protection of Cultural Heritage during Armed Conflict', *Conference Proceedings* (2012) 330; Marina Lostal Becerril, 'The Meaning and Protection of "Cultural Objects and Places of Worship" under the 1977 Additional Protocols' (2012) 59 Netherlands International Law Review 455, 457–458. citing *Central Front Eritrea's Claims 2, 4, 6,7, 8 and 22 (The State of Eritrea v. The Federal Democratic Republic of Ethiopia)* (Partial Award Eritrea-Ethiopia Claims Commission) 43(6) International Legal Materials 1249 (28 April 2004) [113]: "*[T]he applicability of Article 53 of Protocol I may be uncertain, given the negotiating history of that provision, which suggests that it*

the spiritual heritage of peoples" is not as neutral as it seems: under the HC these were only protected when they also represent a cultural value.[151] This cultural property must be subject to some sort of special arrangement including any *ad hoc* arrangement or multilateral treaty such as the Roerich Pact or World Heritage Convention.[152] Also the word "*clearly-recognized*" is ambiguous, as it can be interpreted as identification of a cultural site, but also as a cultural site constituting heritage of a people.[153] O'Keefe argues that the distinctive symbol of the 1954 Hague Convention or UNESCO World Heritage would meet this threshold.[154] In sum, also these grave breaches provisions *an sich* are insufficient to act as a criminal code: just as Art. 28 Hague Convention they lack provisions on the *mens rea*, modes of liability, defences, etc.[155]

c. Additional Protocol II to the Hague Convention 1999 (Chapter 4)

In the wake of the Yugoslavian conflict, Additional Protocol II to the 1954 Hague Convention was adopted, curing the weak enforcement of Art. 28 Hague Convention.[156] Contrary to the latter, the Protocol is applicable in both IAC and NIAC, and peacetime (Art. 5).[157] In Art. 15(1) the Protocol enumerates five 'serious breaches' "*intentionally*" committed by individuals and obliging States to provide penal measures *at a domestic level*.[158]

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was intended to cover only a few of the most famous monuments, such as the Acropolis in Athens and St. Peter's Basilica in Rome" (emphasis in original).

[151] Lostal Becerril, 'The Meaning and Protection of "Cultural Objects and Places of Worship" under the 1977 Additional Protocols' (n 150) 465. For the "*human dimension of the international law for the protection of cultural heritage*", see Part 2.

[152] O'Keefe, 'Protection of Cultural Property under International Criminal Law' (n 40) 367–368 *ibid*. However, it is unclear whether both the attacking and defending State, or just one of them, have to be party to this arrangement.

[153] O'Keefe, 'Protection of Cultural Property under International Criminal Law' (n 40) 368.

[154] *Ibid*. 368–369; *Prosecutor v Strugar* (n 10) [329].

[155] Marko Divac Oberg, 'The Absorption of Grave Breaches into War Crimes Law' (2009) 91 International Review of the Red Cross 163, 166.

[156] Desch (n 146) 63–64, 79; Francioni, 'Cultural Heritage' (n 67) para 7.

[157] Although, contrary to most IHL instruments, it does not define 'armed conflict', see Desch (n 146) 71.

[158] Three comments must be made here. First, the same ambiguity as to the intent and knowledge under Art. 28 Hague Convention applies here. APHC II does not preclude international criminal responsibility under international criminal law, for example under the RS, see: *ibid*. 80. Also note that that Chapter III of the Protocol (enhanced protection) is not *lex specialis* to Chapter I (definitions) and II (general provisions) (Art. 4(a)); both regimes are applicable under Art. 15(c). Art. 15(c) merely speaks of "*extensive destruction or appropriation of cultural property protected under the Convention and this Protocol*" (emphasis added). Finally, Art. 15(2) seems to suggest that command responsibility (Arts. 86(1) AP I and Arts. 25 and 28 RS) is applicable to APHC II. Art. 15(2) stipulates: "*With respect to the exercise of jurisdiction and without prejudice to Article 28 of the Convention: (a) this Protocol does not preclude the incurring of individual criminal responsibility or the exercise of jurisdiction under national and international law that may be applicable, or affect the exercise of jurisdiction under customary international law*". See: Manacorda (n 4) 29–30.

The first serious breach is *attacking* cultural property under 'enhanced protection' (Art. 15(1)(a)). This entails more serious consequences than cultural property under general protection, highlighting the cultural-value approach of APHC II.[159] It is also different from *directing acts of hostility* as in the HC or Art. 6(a) APHC II,[160] because attack is not defined. A broad interpretation would be violating the principle of legality (*cfr*. 653-655).[161] Under Art. 15(1)(b), using cultural property or its surroundings for military action, damage is not required. Other categories include extensive destruction or appropriation of cultural property [other than attack] (Art. 15(1)(c);[162] making cultural property the object of attack (Art. 15(d)); and theft, pillage, misappropriation of, and acts of vandalism against cultural property (Art. 15(e)).[163] However, differently from the 'serious violations' in Art. 15 (1) (a-c), the latter two do not benefit from universal jurisdiction.[164]

Art. 6(1)(a) APHC II defined the circumstances under which the more limited *imperative* military necessity exception (Art. 4(2) Hague Convention) can be invoked: only to direct an attack against cultural property as long as it is used for military purposes and there are no alternatives to realise the military advantage.[165]

Unlawful use of cultural property under enhanced protection (Art. 21(a)) and illicit export, removal or ownership transfer (Art. 21(b)) as 'other serious

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[159] Frulli, 'The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency' (n 19) 211.

[160] Art. 6(a) HC states: "*a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to direct an act of hostility against cultural property [...]*".

[161] O'Keefe, 'Protection of Cultural Property under International Criminal Law' (n 40) 373.

[162] The 'extensiveness' requirement is found in Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (hereinafter 'GC I') Art. 50; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (hereinafter 'GC II') Art. 51 GC II; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (hereinafter 'GC IV') Art. 147, and Art. 85(4)(d) AP I. For appropriation, this requirement is implied in Art. 4(3) Hague Convention and Art. 9(1)(a) APHC II. See *ibid*. 374–375.

[163] Desch (n 146) 80–81 divides this category in two different categories, namely Art. 15(1)(a-c) and Art. 15(1)(d-e). The first obliges States to establish their jurisdiction over such offences, when the perpetrator is found in their territory, even when he is not a national or when the crimes are not committed in the territory of that State. Art. 15(1)(e) must be seen as an exception to the rule that international law generally does not do more than prohibiting and actually provides a regime (for pillage) for jurisdiction and sanctions: Guido Carducci, 'Pillage', *Max Planck Encyclopedia of Public International Law* (online version, Oxford University Press 2009) 18.

[164] Carducci (n 163) 18.

[165] See also Art. 6(b-d) for the circumstances in which it may be invoked and the requirements to take the decision by a certain level of command and to give an effective advance warning.

violations' solely justify legislative/administrative/disciplinary measures but do not require domestic criminal law and universal jurisdiction.[166] Hence, there is a gap in the *penal* protection when the defender transforms cultural heritage into military objectives (*cfr.* 617 for the RS).[167]

Finally, the Protocol clarifies the HC's ambiguity on jurisdiction: States can establish jurisdiction based on territoriality (Art. 16(1)(a)), nationality for extraterritorial offences (Art. 16(1)(b)), or universality for the violations in Art. 15(1)(a-c) (Art. 16(1)(c)), without abrogating jurisdiction based on CIL or domestic law (Art. 16(2)(a)). Art. 17 obliges States to try or to extradite (*aut dedere aut iudicare*) and provides fundamental procedural rights. Art. 22(4) stipulates that a State asserting extraterritorial jurisdiction must give priority to the territorial State, if requested. (Re-)Establishing the rule of law and maintaining unity is a prerogative of the State (Art. 22(3)), as well as armed conflict within the State (Art. 22(5)).[168] APHC II thus preserves the principle of State sovereignty.

3.2.2. Customary International Law

The second source of international (criminal) law, CIL, consists of (i) established, widespread and consistent State practice (*usus*) and (ii) the belief to be bound (*opinio iuris*, psychological element).[169] While the first has to be found in the conduct of States (or exceptionally international organisations),[170] the latter can also be found in treaty provisions or the conduct in connection with adopting international organisation resolutions General Assembly Resolutions.[171] A detailed survey of State practice would be outside this scope.[172] It suffices to say that the Nuremberg IMT has legitimised itself by

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[166] O'Keefe, 'Protection of Cultural Property under International Criminal Law' (n 40) 380. Note that there is a case to include incidental damage by negligence under Art. 21(a), as this is explicitly excluded in the *chapeau* of Art. 15.

[167] This in contrast to Art. 4(1) HC, Arts. 53 and 85(4)(d) AP I, and Art. 16 AP II; Frulli, 'The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency' (n 19) 215–216.

[168] For the problematic aspects of this view, see: Van der Auwera (n 54) 182. (*cfr.* 583).

[169] *North Sea Continental Shelf (Federal Republic of Germany v Denmark and The Netherlands)* (Merits) [1969] ICJ Rep 3 [77]; Malcolm D Evans, *International Law* (Oxford University Press 2010) 102. The International Law Commission (ILC) has recently started to identify CIL norms. For the constituent elements of CIL, see: Draft Conclusion 2 of ILC, 'Identification of Customary International Law: Text of the Draft Conclusions Provisionally adopted by the Drafting Committee' (68th Session, 2 May–10 June 2016 and 4 July - 12 August 2016) UN Doc A/CN.4/L.872.

[170] *Ibid.*, Draft Conclusion 4.

[171] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 [184, 188]; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 [73]; *ibid.*, Draft Conclusion 10. An example of the existence of *opinio iuris* is UNGA Resolution 96(I) concerning genocide, see: Malcolm N Shaw, *International Law* (6th edition, Cambridge University Press 2008) 151 (*Cfr.* 650).

[172] See in general: Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International*

referring to CIL, the *ad hoc* tribunals have referred to CIL in many situations,[173] and the Rome Statute is mainly a codification of CIL.[174] Indeed, many IHL instruments key to ICL are part of CIL, such as the 1907 Hague Regulation IV (in particular Art. 27),[175] the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention),[176] the Nuremberg Charter,[177] Common Art. 3 GC,[178] and parts of AP I.[179] The Hague Convention has been cited as evidence of CIL by the ICTY.[180] This could be

Humanitarian Law (Cambridge University Press 2005). This study has been criticised heavily, for example in not providing a clear definition of pillage and assuming that such definition necessarily served as an uncontested reference for manifestations of *usus* and *opinio iuris*, see: Carducci (n 163) para 22.

[173] *Prosecutor v Tadić* (Judgment Appeals Chamber) IT-94-1-AR72 (1999) [287]: "*[...] in case of doubt and whenever the contrary is not apparent from the text of a statutory or treaty provision, such a provision must be interpreted in light of, and in conformity with, customary international law [...]*". It must be noted that the CIL status of the 1907 Hague Regulations has been taken for granted and never been questioned after its promulgation by the Nuremberg IMT: Theodor Meron, 'Revival of Customary International Law' (2005) 99 American Journal of International Law 817, 819.

[174] See, for example, the *chapeau* of Art. 8(2)(b) and (e): "*Other serious violations of the laws and customs applicable in international armed conflict [or: applicable in armed conflicts not of an international character], within the established framework of international law, [...]*" (emphasis added). Cassese argues this has to be explained as having CIL status, see: Antonio Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', (1999) 10 European Journal of International Law 144, 151.

[175] *Prosecutor v Tadić* (n 59) [98]. Regarding cultural heritage, see also Arts. 56 (occupation) and 28 and 47 (prohibition of pillage).

[176] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (hereinafter 'Genocide Convention').

[177] Charter of the International Military Tribunal (1945) 82 UNTS 279 (hereinafter 'Nuremberg Charter').

[178] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 [218]; *Prosecutor v Tadić* (n 59) [98]; *Prosecutor v Akayesu* (Judgment Trial Chamber) ICTR-96-4 (1998) [608]. Note that the ICTY can prosecute individuals for violations of Common Art. 3 next to the crimes in its Statute, see: Abtahi (n 65) 12.3 next to the crimes in its Statute, see: *ibid*.

[179] Theodor Meron, 'War Crimes in Yugoslavia and the Development of International Law' (1994) 88 American Journal of International Law 78, 79–80. Only a limited number of the AP II provisions have been held CIL, see: *Prosecutor v Tadić* (n 81) [98]; *Prosecutor v Akayesu* (Judgment Trial Chamber) ICTR-96-4 (1998) [608]; *Prosecutor v. Sam Hinga Norman* (Decision Special Court for Sierra Leone, on Preliminary Motion based on Lack of Jurisdiction) SCSL-2004-14-AR72(E) (2004) [17-18] (concerning the prohibition of child recruitment).

[180] An elaborate examination of State practice and *opinio iuris* would be outside the scope of this dissertation. For authorities, see: *Prosecutor v Kordić and Čerkez* (n 149) [92]; *Prosecutor v Prlić et al.* (n 12) [174]; David A Meyer, 'The 1954 Hague Cultural Property Convention and Its Emergence in Cutomary International Law' (1993) 11 Boston University International Law Journal 349, 387–388. Meyer concluded its CIL status from (i) the norm-creating character of the HC; (ii) the number of State parties; (iii) State practice, particularly those whose interests are most specifically affected (e.g. Egypt, Greece, and Italy); and (iv) the existence of *opinio iuris*, as also supported by non-parties such as the U.S. Henckaerts and Doswald-Beck (n 172) 178; Petrovic (n 93) 217; Fincham, 'The Intentional Destruction and Spoliation of Cultural Heritage under International Criminal Law' (n 94) 180. Fincham refers to the *chapeau* of Art. 3 ICTY Statute: "*[...] violating the laws or customs of war [...]*" and the concept of universal jurisdiction, which thus

contested, as the ICTY case law requires actual damage (*cfr*. 611). Furthermore, the use for military purposes (*cfr*. 0) is a criterion from the 1907 Hague Regulations, not the HC.[181] In any case, international courts and tribunals should undertake a thorough examination of relevant state practice and *opinio iuris*, as this has not been done by yet.[182]

The major advantage of using CIL is that also non-state actors (such as armed opposition groups) are bound by it.[183] Islamic State (IS), and its (stateless) members can thus be prosecuted through CIL before an *ad hoc* tribunal, even if Iraq and Syria do not ratify the RS or APHC II.[184] As CIL will be discussed throughout the next chapter, this section will briefly look at some general aspects.

Several ICTY Trial Chambers held that attacks against tangible cultural heritage entail individual criminal responsibility under CIL.[185] This is *lex specialis* to the offence of unlawfully attacking civilians (also found in CIL).[186] Indeed, CIL follows both the cultural-value and civilian-use approach.[187] Treaty law is not clear whether and when cultural heritage may be a lawful military

indirectly refer to the 1954 Hague Convention. Roger O'Keefe, 'Protection of Cultural Property' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edition, Oxford University Press 2013) 426, 434–461. O'Keefe states: "*[The Hague Convention] remains the centrepiece of the international legal protection of cultural property in armed conflict, although some of its provisions now need to be read in the light of subsequent customary international law and, for parties to it, the Second Protocol to [the Hague Convention]*" (emphasis added). He then examines all provisions and their CIL status. For example, in IAC, Art. 4(1-2) HC (respect for cultural property during occupation) amounts to CIL.

[181] Lostal Becerril, *International Cultural Heritage Law in Armed Conflict: Case-Studies of Syria, Libya, Mali, the Invasion of Iraq, and the Buddhas of Bamiyan* (n 100) 40–41. See also: UN Secretary-General 'Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808' (3 May 1993) UN Doc S/25704, particularly the list in Art. 35, as cited in Gottlieb (n 59) 869. This report does not list the Hague Convention as part of CIL, but it seems to be rather out of date.

[182] Patty Gerstenblith, 'From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century' (2006) 37 Georgetown Jounal of International Law 245, 272.

[183] Francioni and Lenzerini (n 73) 644.

[184] *A contrario*: IS members who are nationals of States party to the Rome Statute can be prosecuted for the ICC, see: Hill (n 51) 214–215.

[185] *Prosecutor v Kordić and Čerkez* (Judgment Trial Chamber) IT-95-14/2-T (2001) [206]; *Prosecutor v Strugar* (n 10) [229–230]; *Prosecutor v Prlić et al.* (n 12) [171–178]; Gottlieb (n 59) 870–871. Gottlieb deducts CIL status from the substantive character of Art. 28 HC, the case law of the ICTY, APHC II, and the aspiration to achieve world-wide consensus with the adoption of the RS.

[186] *Prosecutor v Kordić and Čerkez* (n 149) [40–42]; Brammertz and others (n 121) 1162.

[187] Henckaerts and Doswald-Beck (n 172) 127; Badar and Higgins (n 3) 491. Rule 38 states: "*a) Special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives; b) Property of great importance to the cultural heritage of every people must not be the object of attack unless imperatively required by military necessity.*"

objective,[188] but under CIL this is undoubtfully the case.[189] In other words, attacking cultural heritage is not unlawful when it is a military objective.[190] Art. 52(2) AP I (part of CIL) provides for a definition of military objective: "*those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage*".[191]

Furthermore, it can be anticipated that CIL states that war crimes have to be committed with intent and knowledge, i.e. awareness that the circumstance exists (Art. 30 RS).[192] Contrary to ICTY judgments (*cfr.* 614), it is unclear whether mere recklessness can constitute this *mens rea*.[193] Furthermore, it is not clear whether this has to be interpreted as being aware of the cultural, architectural, historic, religious character of cultural heritage or as the factual circumstances which established its protection (as under the GC).[194]

3.2.3. General Principles of International Criminal Law[195]

International criminal courts and tribunals also take into consideration general principles of international criminal law if treaties or CIL do not provide an adequate answer.[196] The most important among these are the principle of

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[188] Brammertz and others (n 121) 1155.

[189] O'Keefe, 'Protection of Cultural Property under International Criminal Law' (n 40) 346.

[190] See also Arts. 8(2)(b)(ix) and (e)(iv) RS, *cfr.* chapter 3.

[191] See footnote 179. O'Keefe lists four categories of military objectives: (a) buildings used for military purposes; (b) buildings which have an effective contribution to military action; (c) old barracks, fortresses, and the like; and (d) cultural property which is in the line of sight of the enemy. See: O'Keefe, 'Protection of Cultural Property under International Criminal Law' (n 40) 350–351; O'Keefe, 'Protection of Cultural Property' (n 57) 500.

[192] O'Keefe, 'Protection of Cultural Property under International Criminal Law' (n 40) 363–364.

[193] *Ibid.* 352.

[194] For the use of distinctive symbols and its impact on intent: *cfr.* 614.

[195] Although more applicable to State responsibility, Francioni identified following general principles for the protection of cultural heritage: the principle to abstain from acts of wilful destruction of and damage to cultural heritage; the principle of the obligation to respect cultural heritage; and the prohibition of pillage (*cfr.* UNSC Resolution 1483). For the former, see: Central Front Eritrea's Claims 2, 4, 6,7, 8 and 22 (The State of Eritrea v. The Federal Democratic Republic of Ethiopia) (Partial Award Eritrea-Ethiopia Claims Commission) 43(6) International Legal Materials 1249 (28 April 2004). This case concerned the destruction of the Stela of Matera, which had great historical and cultural importance for Eritrea, see Francioni, 'The Human Dimension of International Cultural Heritage Law: An Introduction' (n 2) 13; O'Keefe, 'Protection of Cultural Property' (n 61) 502–503. See also the 2003 UNESCO Declaration (cited *supra* 30). For the latter, see: UNSC Res 1483 (2003) UN Doc S/RES/1483; Francioni, 'The Human Dimension of International Cultural Heritage Law: An Introduction' (n 2) 12–14.

[196] Art. 21(1)(c) RS and 38 ICJ Statute. These exist next to general principles of public international law as the respect for human rights, see: Cassese and Gaeta (n 19) 15. The difference between CIL and general principles is that State practice (CIL) is in a permanent flux, while general principles are (somehow more) permanent, see: Gerhard Werle and Florian Jessberger, *Völkerstrafrecht* (4th edition, Mohr Siebeck 2016) 186. When such principles are lacking, the ICTY looks to "*general*

legality (*cfr.* 653-655), the presumption of innocence, the principle of equality of arms, and the principle of command responsibility (*cfr.* Art. 15(2) APHC II and Arts. 22, 25 and 28 RS).[197] Other principles are imprisonment as the only appropriate penalty,[198] and the (recent) principle of liability to remedy harm.[199] Note that Art. 15(2) APHC II explicitly refers to complying with general principles of international law, including individual criminal responsibility for others than the direct perpetrators, when States criminalise the offences of Art. 15(1).[200]

3.3. THE INTERNATIONAL CRIMINAL LAW FRAMEWORK FOR CULTURAL HERITAGE CRIMES AND ITS (IN)CONSISTENCY

3.3.1 Prosecuting Cultural Heritage Crimes as War Crimes

a. Introduction

The most evident choice to prosecute crimes against cultural heritage is as war crimes. This can be done *directly*, through provisions which condemn and criminalise the destruction of cultural heritage (Arts. 3(d) ICTY Statute, and 8(2)(b)(ix) and 8(2)(e)(iv) RS). There are also *indirect* provisions which do not mention cultural property/heritage explicitly.[201] This category is further divided in articles based on the Hague Regulations (such as Art. 8(2)(b)(xiii) RS) and articles based on the 'grave breaches' system of the Geneva Conventions (such as Art. 2(d) ICTY Statute and Art. 8(2)(a)(iv) RS).[202] The difference between

principles of criminal law common to the major legal systems of the world", and subsidiary to "*general principles of law consonant with the basic requirements of international justice*": *Prosecutor v Kupreškić et al.* (Judgment Trial Chamber) IT-95-16 (2000) [591]. 'General principles of law' (thus not those specific for ICL) are found in the major legal systems. These are usually referred to as the common and civil law systems, but the terminology Romano-Germanic system has to be preferred as it takes into account the socio-geographic origins, see: Werle and Jessberger 185.

[197] Cassese and Gaeta (n 19) 15; Desch (n 146) n 109.

[198] E.g. Art. 24 ICTY Statute and Art. 77 RS; O'Keefe, 'Protection of Cultural Property under International Criminal Law' (n 40) 376. Other principles regarding the imposition of penalties for war crimes are too "*embryonic*". Fines can always be an additional sentence.

[199] This principle is grounded in the principle of accountability of the convicted person towards victims. See: *Prosecutor v Thomas Lubanga Dyilo* (Judgment ICC Appeals Chamber on the Decision establishing the principles and procedures to be applied to reparations) ICC-01/04-01/06 (3 March 2015) [69, 101]; Carsten Stahn, 'Reparative Justice after the Lubanga Appeals Judgment on Principles and Procedures of Reparation' https://www.ejiltalk.org/reparative-justice-after-the-lubanga-appeals-judgment-on-principles-and-procedures-of-reparation/ accessed 22 April 2018.

[200] Art. 15(2): "*Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences punishable by appropriate penalties. When doing so, Parties shall comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act*" (emphasis added).

[201] For this terminology, see: Abtahi (n 65) 10, 13; Maugeri (n 40) 123, 146, 157, 259, 272.

[202] Cryer and others (n 120) 297.

these two regimes is that the first protects property from the point of the rules of warfare, while the GC protect property from the perspective of people's rights, including their property.[203] Accordingly, they require a different level of assessment, respectively of military necessity and of additional elements like 'excessive' and 'wanton'.[204] Overall, there are differences in (i) rationale (Hague or Geneva system);[205] (ii) type of armed conflict (IAC/NIAC);[206] (iii) manner of criminalisation (direct/indirect);[207] (iv) type of attack;[208] and (v) type of property protected.[209] These differences make this part of international criminal law a complex one, but there will be an attempt to analyse the framework on war crimes in a holistic manner.

b. Conditions for War Crimes and Scope of Armed Conflict

The main requirement for war crimes is that the act must have been committed in, and have a close relationship with, armed conflict (*nexus* requirement).[210] Regarding the scope of armed conflict, the *Tadić* Appeal on Jurisdiction Decision extended armed conflict until a general conclusion of peace or, for NIAC, a peace settlement is reached.[211] However not all crimes amount to a war crime, even if accidentally committed during armed conflict.[212] Therefore, the Appeals Chamber in *Kunarac* held that the existence of armed conflict must play "*a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed*" (emphasis added).[213] Indeed, a second requirement is that the perpetrator was aware of the factual circumstances of the armed conflict.[214] Third, victims have to be neutral,[215] or – in some cases –

[203] *Ibid.*
[204] *Ibid.*
[205] *Ibid.*
[206] Art. 8(2)(b) criminalises acts against cultural heritage in IAC, while Art.8(2)(e) does the same for NIAC.
[207] Abtahi (n 65) 10, 13; Maugeri (n 40) 123, 146, 157, 259, 272.
[208] O'Keefe, 'Protection of Cultural Property under International Criminal Law' (n 40) 346–357.
[209] O'Keefe, 'Protection of Cultural Property' (n 57) nn 112–115.
[210] *Prosecutor v Delalić et al. ("Čelebići")* (Judgment Trial Chamber) IT-96-21-T (1998) [193–198]; *Prosecutor v Blaškić* (Judgment Trial Chamber) IT-95-14-A (2000) [65]; *Prosecutor v Stakić* (Judgment Appeals Chamber) IT-97-24-A (2006) [342]; *Prosecutor v Akayesu* (Judgment Appeals Chamber) ICTR-96-4-A (2001) [444].
[211] *Prosecutor v Tadić* (n 59) [70].
[212] Cryer and others (n 120) 281–282.
[213] *Prosecutor v Kunarac et al.* (Judgment Appeals Chamber) IT-96-23 and IT-96-23/1-A (2002) [58].
[214] *Prosecutor v Kordić and Čerkez* (n 149) [311]; e.g. ICC Elements of Crimes, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.B (hereinafter 'ICC Elements of Crimes') Art. 8(2)(a)(i) para. 5.
[215] *Prosecutor v Delalić et al. ("Čelebići")* (Judgment Appeals Chamber) IT-96-21-A (2001) [420].

have a special status.[216]

Although certain fundamental humanitarian standards are applicable to both IAC and NIAC (Common Art. 3 GC),[217] there exists no agreement on a common list of war crimes.[218] The main reason for this discrepancy between IAC and NIAC is most likely State sovereignty, which gives States the power to intervene within their own borders.[219]

c. Unlawful Acts that Constitute War Crimes against Cultural Heritage

c.1. Unlawful Attacks against Cultural Heritage

c.1.1 Direct Criminalisation

- Art. 3(d) ICTY Statute

The first, most straightforward, category is attacking cultural heritage *per se*, not mere civilian property. Criminal under CIL (*cfr.* 605), the Nuremberg Charter did include this crime in its (illustrative) list of war crimes (Art. 6(b)). Almost half a century later, Art. 3(d) ICTY Statute criminalised the "seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science".[220]

The prosecution's preference for the use of Art. 3(d) (and the equivalent RS provisions) to tackle cultural heritage crimes, reflects the alleged gravity of such acts.[221] Art. 3(d) ICTY Statute is (like the other categories of Art. 3) applicable to both IAC and NIAC and is therefore broader than common Art. 3 GC which applies only to NIAC.[222] However, it does not use the term 'cultural property' – only its major components – because of disagreement within the international community; as such it follows Art. 27 and 56 Hague Regulation IV.[223]

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[216] Cryer and others (n 120) 283–284. For example, Art. 8(2)(b)(ii) RS protects civilian objects.
[217] *Prosecutor v Martić* (Judgment Trial Chamber) IT-95-11-T (2007) [42].
[218] See for example Art. 8 RS.
[219] William J Fenrick, 'Humanitarian Law and Criminal Trials' (1997) 7 Transnational Law and Contemporary Problems 23, 25 as cited in Abtahi (n 65) 5.
[220] Note that there is no such category in the ICTR Statute. Cultural property crimes have only been dealt with through the crime of persecution (*cfr.* Section 2). See: Abtahi (n 65) 21; Ralby (n 126) 188–189.
[221] Frulli, 'The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency' (n 19) 210.
[222] *Prosecutor v Strugar* (n 10) [230]; *Prosecutor v Hadžihasanović and Kubura* (Judgment Appeals Chamber on Interlocutory Appeal) IT-01-47-AR73.3 (2005) [44–48]; *Prosecutor v Martić* (n 217) [42].
[223] Abtahi (n 65) 12; Frulli, 'Advancing the Protection of Cultural Property through the

Following the destruction of the Sovići Mosque, the ICTY in *Naletilić and Martinović* held that Art. 3(d) has been violated when (i) the general requirements of Art. 3 are met; (ii) a religious [or educational institution] has been destroyed; (iii) the property was not used for military purposes; and (iv) the perpetrator acted with the intent to destroy.[224] The *Martić* case held that even reckless disregard could fulfil this last requirement.[225] Hereinafter, these requirements will be further examined.

1) General Requirements Art. 3 ICTY Statute

In its interpretation of "*violating the laws or customs of war*" (*chapeau* Art. 3), the Appeals Chamber in *Tadić* noted that not every violation of IHL involves individual criminal responsibility.[226] Indeed, all war crimes are derived from grave breaches (*cfr.* 622), but this is not the case *vice versa*.[227] Consequently, the Appeals Chamber developed a '*Tadić* test' to determine whether acts are within the jurisdiction of the Tribunal, and thus international crimes and not mere grave breaches:

(i) the violation must constitute an infringement of a rule of international humanitarian law;
(ii) the rule must be *customary* in nature or, if it belongs to *treaty law*, the required conditions must be met [...];
(iii) the violation must be "*serious*", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. [...];
(iv) the violation of the rule *must entail*, under customary or conventional law, *the individual criminal responsibility of the person* breaching the rule[228]

Implementation of Individual Criminal Responsibility: The Case-Law of the International Criminal Tribunal for the Former Yugoslavia' (n 89) 196–197; Frulli, 'Distribuzione Dei Beni Culturali e Crimine Di Genocidio: L'Evoluzione Della Giurisprudenza Del Tribunale Penale Internazionale per La Ex-Jugoslavia' (n 89) 255.

[224] *Prosecutor v Naletilić and Martinović* (Judgment Trial Chamber) IT-98-34-T (2003) [605].

[225] *Prosecutor v Martić* (n 217) [96]; *Prosecutor v Strugar* (n 10) [312].

[226] *Prosecutor v Tadić* (n 59) [94]; Cryer and others (n 120) 268. For example, the unavailability of soap or tobacco in a specially established canteen for prisoners-of-war (POWs) is a non-criminalised breach of Arts. 28 and 60 Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (hereinafter 'GC III').

[227] Oberg (n 155) 164, 169. Oberg calls the first 'substantive grave breaches', while he calls non-criminalised grave breaches 'procedural grave breaches' (legislation, search and investigation and *aut dedere aut iudicare*). According to Oberg, only the latter really justify their existence apart from war crimes.

[228] *Prosecutor v Tadić* (n 12) [94]; Art. 1 ICTY Statute stipulates that it "*shall have the power to prosecute persons responsible for serious violations of international humanitarian law*". See also Caroline Ehlert, *Prosecuting the Destruction of Cultural Property in International Criminal Law: With a Case Study on the Khmer Rouge's Destruction of Cambodia's Heritage* (Martinus Nijhoff Publishers 2014) 7, as cited in Fincham, 'The Intentional Destruction and Spoliation of Cultural

(emphasis added).

Applying this to Art. 3(d), this provision has its roots in several norms of international humanitarian law (*cfr*. chapter 2),[229] so the first and second requirements of this test are met.[230] Attacking civilian property is already a serious violation of IH (third requirement), so an attack on a protected site, especially when one is aware of its World Heritage status (*cfr*. 615) – is *a fortiori* a violation.[231] Art. 3(d) also meets the fourth *Tadić* requirement, as the individual criminal responsibility has its source in Art. 27 Hague Regulation IV and CIL.[232]

2) Destruction of or Damage to Religious/Educational Building (*actus reus*)

While it is prohibited to attack cultural heritage, several ICTY Trial Chambers held that this is only criminal when there is actual damage or destruction as result.[233] In *Hadžihasanović* mere vandalising religious institutions, including writing graffiti and damaging paintings and the like was held to be sufficient.[234] Although the ICTY has not specified whether there is a material difference between destruction and damage, the requirement of destruction should be a relatively low one, in view of the nature of the protected objects and the object and purpose of the prohibition.[235]

Although *Blaškić*[236] and *Naletilić*[237] dealt mainly with destruction of religious or educational sites, its reasoning can easily be applied to other sites, like charitable and scientific institutions or historic monuments.[238] Furthermore, one can spot a clear evolution in the ICTY case law regarding the definition of

Heritage under International Criminal Law' (n 94) 179:"*First, it must entail individual responsibility and be subject to punishment. Second, the norm must be part of the body of international law. Third, the offense must be punishable regardless of whether it has been incorporated into domestic law.*"

[229] *Prosecutor v Strugar* (n 10) [233]; Maugeri (n 40) 140.

[230] Art. 27 and 56 of the 1907 Hague Regulations IV; Art. 19 of the 1954 Hague Convention; Art. 53 of the 1977 AP I and Art. 16 of the 1977 AP II. See: Maugeri (n 40) 137.

[231] *Prosecutor v Jokić* (n 11) [23, 45, 53]; *Prosecutor v Strugar* (n 10) [232].

[232] 'Judgment of the Nuremberg International Military Tribunal 1946' (n 9) paras 248–249; Maugeri (n 40) 140.

[233] *Prosecutor v Strugar* (n 10) [308]; *Prosecutor v Hadžihasanović and Kubura* (Judgment Trial Chamber) IT-01-47-T (2006) [58]; *Prosecutor v Prlić et al.* (n 12) 175.

[234] *Prosecutor v Hadžihasanović and Kubura* (n 233) [1998–2005, 2012–2014].

[235] Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford University Press 2005) 95; Ellis (n 15) 51.

[236] *Prosecutor v Blaškić* (n 210) [185].

[237] *Prosecutor v Naletilić and Martinović* (n 224) [605].

[238] *Prosecutor v Hadžihasanović and Kubura* (n 233) [58]; Abtahi (n 65) 13. As discussed in part 2, it is difficult to extend this reasoning to other cultural property under Art. I Hague Convention.

cultural property.[239] First, the *Kordić and Čerkez* Trial Chamber held that all educational institutions are property of 'great importance'.[240] The Appeals Chamber adopted the AP I definition of cultural property, not limited to objects of 'great importance': "*historic monuments, works of art, and places of worship, provided they constitute the cultural or spiritual heritage of peoples*".[241] It thus encompasses attacks (recognised by CIL) against any cultural heritage.[242] However, not all educational buildings are cultural property.[243] Next, in *Hadžihasanović*, the ICTY returned to a literal interpretation of Art. 3(d) and held that sites do not have to represent cultural *heritage*.[244] Indeed, in contrast to the HC and AP I and II,[245] the 'cultural relevance' criterion is neither included in the ICTY or Rome Statute, as they are both based on the outdated 1907 Hague Regulations.[246] Finally, in *Martić*, the ICTY throttled down and said that all religious and educational buildings are automatically protected, also the less important ones.[247] This judgment – and the awareness of World Heritage status (*cfr*. 614) – thus seem to reinstate the 'cultural relevance' criterion (cultural-value approach) of the HC and APHC II, ignoring the civilian-use rationale of the ICTY Statute.[248] In any case, the blur between cultural-value and civilian-use causes a clear inconsistency

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[239] Lostal Becerril, 'La Protección De Bienes Culturales En El Tribunal Penal Internacional Para La Ex Yugoslavia' (n 14) 23. "*Es decir, la jurisprudencia del TPIY también ha dado lugar a una evolución dentro de su propio entendimiento de la protección de bienes culturales. Esto ha ocurrido sobre todo en el ámbito nominal de la protección, es decir, en lo que respecta a las definiciones y contenido de la noción de bienes culturales*" (original emphasis). (Own translation: That is, the jurisprudence of the ICTY has given rise to an evolution in its own understanding of the protection of cultural heritage. This was above all in the nominal scope of the protection, in respect of the definitions and content of the notion 'cultural heritage.) For the involution and revolutions, see Part 2.

[240] *Prosecutor v Kordić and Čerkez* (n 185) [360]; Brammertz and others (n 121) 1153. See also: *Prosecutor v Strugar* (n 10) [307, 312].

[241] *Prosecutor v Kordić and Čerkez* (n 149) [89–92].

[242] *Ibid.* 92; Brammertz and others (n 121) 1153.

[243] *Prosecutor v Kordić and Čerkez* (n 149) [92].

[244] *Prosecutor v Hadžihasanović and Kubura* (n 233) [60]. "*The Chamber notes that it is sufficient for the damaged or destroyed institution to be an institution dedicated to religion, and that there is no need to establish whether it represented the cultural heritage of a people.*"

[245] *Prosecutor v Kordić and Čerkez* (n 149) [91]; O'Keefe, *The Protection of Cultural Property in Armed Conflict* (n 73) 105.

[246] Frulli, 'The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency' (n 19) 110–111; Lostal Becerril, *International Cultural Heritage Law in Armed Conflict: Case-Studies of Syria, Libya, Mali, the Invasion of Iraq, and the Buddhas of Bamiyan* (n 100) 39.

[247] *Prosecutor v Martić* (n 217) [97].

[248] Lostal Becerril, 'La Protección De Bienes Culturales En El Tribunal Penal Internacional Para La Ex Yugoslavia' (n 18) 23: "*En el fondo esta decisión estaba suscribiendo a la lógica de la Convención de La Haya de 1954 y de su Segundo Protocolo que, como se ha explicado antes, destinan distintos tipos de régimen de protección según el valor cultural.*" (Own translation: Essentially, this decision was being embedded in the logic of the HC and its Second Protocol which, like explained before, allocate different types of protection regimes according to the cultural value.)

between IHL and ICL: while IHL recognizes two categories of protected objects, namely civilian objects and cultural property/heritage, ICL tends to recognise two categories within the latter: 'normal' religious, educational, artistic, scientific and historic sites, and cultural heritage of 'great importance'.[249] Although the cultural-value development in *Al-Mahdi* has to be applauded (*cfr.* 620), the ICC has failed to clarify these distinctions.[250]

As such, this – and other – statute(s) did not consider Arts. 53 and 85(d) AP I and Art. 16 AP II (*cfr.* 0).[251] These protect "*historic monuments, works of art and places of worship that constitute the cultural or spiritual heritage of peoples*". Thus Art. 3(d) and the case law have been an 'involution': they do not provide a definition of cultural property/heritage, ignoring the innovations of the 1954 HC compared to the 1907 Hague Regulations.[252] The latter has several flaws and did not prevent the atrocities of the 20th century.[253] The failure to include the HC in the ICTY Statute or to amend the latter with the much more advanced APHC II are a lost chance.[254]

3) Not Used for Military Purposes

According to *Blaškić*, the third requirement for criminalisation of attacks against cultural heritage is twofold: (i) it cannot be used for military purposes at the time of the acts; and (ii) it cannot be in the immediate vicinity of military objectives.[255] "*Military purposes*" (drawn from Art. 27 Hague Regulations) provides greater protection than the 'military objective' standard (RS).[256] The

[249] Brammertz and others (n 121) 1154; Badar and Higgins (n 3) 492–493; Frulli, 'The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency' (n 19) 210–211. Another example of this blurring distinction is the recalibration of cultural heritage law and its emphasis on the link people-culture, Badar and Higgins (n 3) 492. They cite the examples of *Prosecutor v Kordić and Čerkez* (n 149) [207]; *Prosecutor v Krstić IT-98-33-T (2001),* ([Judgment Trial Chamber)) [508].

[250] Badar and Higgins (n 3) 493.

[251] Frulli, 'The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency' (n 19) n 11.

[252] For the evolution and revolution in the ICTY case law, see Part 2.

[253] Lostal Becerril, 'La Protección De Bienes Culturales En El Tribunal Penal Internacional Para La Ex Yugoslavia' (n 14) 21–22.

[254] *Ibid.* 22. Note that this could be done easily, as Croatia and Slovenia are party to the HC since 1992, Bosnia-Herzegovina since 1993, and Serbia since 2001. They are all four parties to APHC II as well, respectively since 2006, 2004, 2009, and 2002. International Committee of the Red Cross 'Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954: State Parties' available at https://ihl-databases.icrc.org/ihl/INTRO/400 accessed 9 February 2018; International Committee of the Red Cross 'Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict The Hague, 26 March 1999' available at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=F0628265ED4F2118412567BB003E0B0C&action=openDocument accessed 9 February 2018.

[255] *Prosecutor v Blaškić* (n 210) [185].

[256] Brammertz and others (n 121) 1156.

latter also justifies attacks when the defender does not use a site. Unfortunately, the second condition has been left in *Naletilić*: "*the mere fact that an institution is in the 'immediate vicinity of military objective' justifies its destruction.*"[257]

It can be argued that subjecting protection to "*uncertain parameters of military necessity*", in combination with the required nexus between the crimes and armed conflict, is a high threshold.[258] Yet, in *Hadžihasanović*, the ICTY explicitly distinguished its case law from AP I, which does not include such a military necessity waiver.[259]

4) Intent to Destroy (*mens rea*)

Next to its applicability in both IAC and NIAC, another advantage of Art. 3(d) is that it uses a broad definition of intent.[260] Although *Blaškić* had said that the *mens rea* of Art. 3(d) requires an intentional attack,[261] other judgments held that it should be equivalent to Art. 3(b) and include mere recklessness (also – and especially – for commanders) (*cfr.* 624).[262] However, this departure from CIL is unclear regarding (customary) Art. 30(2)(a) RS, stipulating that the perpetrator "*means to engage in the conduct*".[263] It must be underlined that individual criminal responsibility not only exists for physical perpetrators, but also for everyone who participates (either by aiding, abetting or otherwise assisting), or contributes to a common plan.[264]

Strugar (concerning the shelling of Dubrovnik's Old Town) held that being aware of the distinctive UNESCO World Heritage emblem on protected buildings was held to constitute intent and knowledge, and World Heritage status can in theory influence a sentence.[265] World Heritage status is not only significant for establishing a war crime, it also influences the gravity of the case (*cfr.* 619).[266] Yet, this impact on gravity should be questioned as inscription in

[257] *Prosecutor v Naletilić and Martinović* (n 224) [604–605]; *Prosecutor v Martić* (n 217) [98].
[258] Abtahi (n 65) 13.
[259] *Prosecutor v Hadžihasanović and Kubura* (n 233) [61]. Note that the HC goes further: attacks are only possible when *imperatively* required, see 583. O'Keefe, 'Protection of Cultural Property under International Criminal Law' (n 40) 349.
[260] Abtahi (n 65) 12.
[261] *Prosecutor v Blaškić* (n 210) [185].
[262] *Prosecutor v Brdanin* (Judgment Trial Chamber II) IT-99-36-T (2004) [599]; *Prosecutor v Strugar* (Judgment Appeals Chamber) IT-01-42-A (2008) [277]; O'Keefe and others (n 26) 5.
[263] O'Keefe, 'Protection of Cultural Property under International Criminal Law' (n 40) 352. This must be kept in mind for the discussion of the *mens rea* of other categories too.
[264] Art. 7(1) ICTY Statute, Art. 6(1) ICTR Statute, and Art. 25(3) RS; O'Keefe and others (n 26) 5–6.
[265] *Prosecutor v Strugar* (n 27) [329]: "*As a further evidentiary issue regarding this last factor, the Chamber accepts the evidence that protective UNESCO emblems were visible, from the JNA [Yugoslav People's Army] positions at Žarkovica and elsewhere, above the Old Town on 6 December 1991.*" See also: *Prosecutor v Strugar* (n 262) 279.
[266] *Prosecutor v Jokić* (n 11) [23, 49, 59–62, 66–68]; Ana Filipa Vrdoljak, 'Introductory Note to

the World Heritage List is not a good indicator for individual criminal responsibility.[267] In *Prlić*, the Trial Chamber held that buildings must be protected, even when the defender fails to provide the distinctive symbol of Art. 27 Hague Regulations 1907,[268] which is accepted as CIL.[269]

- Direct Criminalisation at the International Criminal Court

1) Arts. 8(2)(b)(ix) and 8(2)(e)(iv) Rome Statute

Arts. 8(2)(b)(ix) and (e)(iv) RS criminalise "*intentionally directing attacks*" against certain buildings and hospitals "*provided they are not military objectives*". Having the same provisions for IAC and NIAC, the RS follows the rationale of the HC and APHC II.[270] Still, they are based on Art. 27 Hague Regulation IV. Note that they are *verbatim* reproduced in Regulation 2000/15 for the United Nations Transitional Administration in East Timor (UNTAET Regulation) and the Iraqi Special Tribunal Statute (ISTS).[271]

There are clear differences with Art. 3(d) ICTY Statute. First, from a *prima facie* examination of these provisions one understands that the threshold for attacks against cultural heritage is, consistent with CIL, lower than under the ICTY Statute: mere *directing* attacks is sufficient.[272] Thus, also here the RS aligns with APHC II.[273] Even lesser attacks (e.g. vandalism) can reach the

Prosecutor v. Ahmad Al Faqi Al Mahdi: Judgment and Sentence & Reparations Order (International Criminal Court)' (2018) 57 International Legal Materials 17, 18. However, the Trial Chamber held *in casu* that Jokić's leadership position constituted the only aggravating circumstance.

[267] *Cfr.* Art. VII UNESCO Declaration 2003.

[268] *Prosecutor v Prlić et al.* (n 12) [177]; Lostal Becerril, *International Cultural Heritage Law in Armed Conflict: Case-Studies of Syria, Libya, Mali, the Invasion of Iraq, and the Buddhas of Bamiyan* (n 100) 21. The argument by Slobodan Praljak that the Hague Regulations and Hague Convention require the use of signs was accepted by the Trial Chamber, but on the failure of the Bosnian Muslims to attach a sign to the Old Mostar Bridge it noted: "*[...] not using such a sign does not in any event withdraw protection from the property provided that the property has not been transformed into a military objective.*"

[269] 'Judgment of the Nuremberg International Military Tribunal 1946' (1947) 41 American Journal of International Law 172, 248–249; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 [75].

[270] Frulli, 'The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency' (n 19) 210.

[271] Regulation No 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences (adopted 6 June 2000) UN Doc UNTAET/REG/2000/15 (UNTAET Regulation 2000/15) S. 6.1(b(ix) and S. 6.1(e)(iv); Coalition Provisional Authority: Statute of the Iraqi Special Tribunal (2003) 43 ILM 231 (Iraqi Special Tribunal Statute) Art. 13(b)(10) and Art. 13(d)(4) (now replaced by the Supreme Iraqi Criminal Tribunal); O'Keefe, 'Protection of Cultural Property' (n 57) 345–346.

[272] O'Keefe, *The Protection of Cultural Property in Armed Conflict* (n 73) 318–326.

[273] Frulli, 'The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency' (n 19) 212.

degree of a war crime,[274] but acts which do not constitute attacks are not included (*cfr.* c.3).[275] The RS does not clearly distinguish the types or scales of attacks.[276] Hence, the attack does not have to result in damage/destruction, as long the attack is launched in a certain direction; this is a merit as it steps away from Art. 3(d) ICTY Statute.[277] Note that the abundant ICTY case law regarding cultural property is of limited use for the interpretation of Art. 8 RS, as the drafters thus rejected it.[278] By doing this for attacks against cultural heritage, the Preparatory Commission for the ICC has opted for a higher threshold, in line with Arts. 51-52 AP I.[279] The same approach has been adopted for civilian property, as this crime is *lex specialis* with respect to attacking civilian objects (Art. 8(2)(b)(ii), *cfr.* 628)[280]

Second, regarding the protected cultural heritage, the provisions stipulate that one of the following categories must be targeted: (a) religious buildings; (b) educational buildings; (c) artistic, scientific, or charitable institutions; (d) historic monuments; or (e) places for collection of those in need. A clear difference with the ICTY Statute is that they equate cultural heritage with hospitals, which highlights the importance of cultural heritage in today's world.[281] Still, the Rome Statute follows the civilian-use rationale of the 1907 Hague Regulations, despite the efforts and cultural-value approach of the (late) ICTY case law.[282] This lack of the international community's interest in the provisions could be a reason why the ICC and ICTY have been reluctant to

[274] Wierczynska and Jakubowski (n 75) 703.

[275] The line between 'lesser attacks' and 'acts other than attacks' is indeed difficult to draw, but while the first are included in Art. 8(2)(b)(ix) and (e)(iv), the latter are not included (*cfr.* c.3).

[276] Emma Cunliffe, Nibal Muhesen and Marina Lostal Becerril, 'The Destruction of Cultural Property in the Syrian Conflict: Legal Implications and Obligations' (2016) 23 International Journal of Cultural Property 1, 17.

[277] Roberta Arnold and Stefan Wehrenberg, 'War Crimes, Par. 2(b)(Ix)' in Otto Triffterer and Kai Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court* (3rd edition, Beck-Hart-Nomos 2016) 419, citing Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (Cambridge University Press 2003) 215.

[278] William A Schabas, 'Al Mahdi Has Been Convicted of a Crime He Did Not Commit' (2017) 49 Case Western Reserve Journal of International Law 75, 89.

[279] *Cfr. Prosecutor v Kordić and Čerkez* (n 149) [62]: "*Thus, it could be argued that the drafters of Articles 51 and 52 of Additional Protocol I intended that one did not have to show a particular result in order for a breach (not a grave breach) to be found, when considered in the context of other separate offences proscribed under Additional Protocol I [...]. In that case, punishment of an unlawful attack on civilians or civilian objects itself, regardless of the result, would be based on the concrete endangerment of civilian life and/or property, as the perpetrator can no longer control the result of an unlawful attack once launched [...]*".

[280] Maugeri (n 40) 260.

[281] Frulli, 'Distribuzione Dei Beni Culturali e Crimine Di Genocidio: L'Evoluzione Della Giurisprudenza Del Tribunale Penale Internazionale per La Ex-Jugoslavia' (n 89) 255; Maugeri (n 40) 260.

[282] Badar and Higgins (n 3) 493; Frulli, 'The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency' (n 19) 210, 213.

develop criminalisation under CIL.[283]

The RS does not protect moveable works of art explicitly, in contrast to AP I-II and the ICTY Statute (*cfr.* Respectively 600, 609) and Art. 1 HC (*cfr.* 583).[284] Yet, it is through artistic or scientific work the culture of a people is created and its destruction results in a great loss to all humanity.[285] The only explanation for this is that the drafters meant that the use of force for military purposes is always directed against buildings and monuments.[286] However, one could easily think of endangered works of art, such as statues.[287] Neither do the other legal bases *infra* necessarily protect moveable property. Furthermore, they are not applicable to both IAC and NIAC, and they are subject to military necessity.[288] Only the provisions on pillage will prove to be more useful (*cfr.* c.4).

Third, regarding the military necessity waiver, these provisions use the narrower exclusion of "*military objectives*". However, they do not refer to Art. 52 AP I ("*by their nature, location, purpose or use*") and thus seem to follow the ICTY in this regard.[289] Yet, the exclusion is far from perfect: the same act can be prosecuted as another crime which provides for a broader military necessity exclusion, and there is no definition of military necessity in the RS.[290]

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[283] Schmalenbach (n 100) 23.

[284] Arnold and Wehrenberg (n 277) 419; Fincham, 'The Intentional Destruction and Spoliation of Cultural Heritage under International Criminal Law' (n 94) 177, 179; Frulli, 'The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency' (n 19) 212–213.

[285] Maugeri (n 40) 139–140. "*É assolutamente apprezzabile tale estensione della tutela perché vi sono delle opere d'arte o di carattere scientifico uniche e irripetibili, che segnano la cultura di un popolo e la cui distruzione risulterebbe come una grava perdita per il patrimonio culturale di tutta l'umanità.*" (Own translation: Such extension of protection is absolutely understandable because there are unique and irreplaceable works of art or of scientific nature that define the culture of a population and whose destruction would result in a grave loss for the cultural heritage of all of humanity.)

[286] Umberto Leanza, 'Conflitti Simmetrici, Conflitti Asimmetrici e Protezione Dei Beni Culturali' in Paolo Benvenuti and Rosario Sapienza (eds), *La Tutela Internazionale dei Beni Culturali nei Conflitti Armati* (Giuffrè Editore 2007) 50; Maugeri (n 40) 264, 266. Leanza calls the protection of cultural property, consisting of buildings, monuments and works of art the 'complete category' ("*categoria complessiva*").

[287] When they are categorised as 'historic monuments'. Note, however, that the international community does not reject every ideology-based destruction of historic monuments, see: Schmalenbach (n 100) 21. She gives the examples of the (19m high) statue of Lenin in East-Berlin and Saddam Hussein's statue in Baghdad.

[288] Frulli, 'The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency' (n 19) 213; Arnold and Wehrenberg (n 277) 219.

[289] Maugeri (n 40) 269.

[290] Frulli, 'The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency' (n 19) 214. Art. 31(1)(c) (modes of liability) is rather vague: "*[t]he person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a*

In any case, the ICC should interpret its Art. 8(2)(b)(ix) in line with "*the established framework of international law*" and the ICTY case law (cfr. 613).[291] Furthermore, the adversary is indirectly in a better position: while the attacker can only justify its actions when cultural heritage is a military objective, the defender is not punished for transforming that site into a military objective.[292] This is clearly inconsistent with Art. 8(2)(b)(xiii), which criminalises the use of 'human shields' (only in IAC).[293] No such provision exists for cultural heritage. Yet, the latter can be used as a shield too, as in the Gulf War.[294] 'Cultural shields' and the duty to respect in the HC are thus exploited by the defending forces.[295] In contrast, the ICTY in *Prlić* stepped away from the possibility to become a military objective by its use (not location).[296]

Fourth, regarding the mental element, "*intentionally*" refers not only to attempt an attack, but also to aim it at the object of the attack.[297] This finds support in the *lex specialis* character of Art. 3(d) and Art. 8(2)(b)(ix) with respect to attacking civilian objects (*cfr.* 615).[298] This has been interpreted as including recklessness.[299] Maugeri argues that although recklessness excludes constructive intent (*dolus eventualis*) it should be included to guarantee a broader protection of cultural heritage.[300]

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manner proportionate to the degree of danger to the person or the other person or property protected" and Frulli notes the disagreement between academics.

[291] See the *chapeau* of Art. 8(2)(b). Brammertz and others (n 121) n 74.

[292] Frulli, 'The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency' (n 19) 215; Gottlieb (n 59) 880–881. A recent example is the use of the Ancient Citadel of Aleppo by Syrian government forces, whether they are attacker or defender: Abigail Hauslohner and Ahmed Ramadan, 'Ancient Syrian Castles Serve Again as Fighting Positions' [2013] *The Washington Post* <https://www.washingtonpost.com/world/middle_east/ancient-syrian-castles-serve-again-as-fighting-positions/2013/05/04/5d2bb176-b3f8-11e2-9a98-4be1688d7d84_story.html?utm_term=.a26cd0285198>.

[293] Art. 8(2)(b)(xiii) RS reads: "*Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations*". Similar provisions can be found in Arts. 23 GC III, 28 GC IV, and 51(7) AP I. It can also be found in CIL: Henckaerts and Doswald-Beck (n 172) 337–340.

[294] Drazewska (n 70) 217. She gives the examples of the anti-aircraft defences on top of the ancient Ninevah fortifications, the presence of two fighter jets near the Temple of Ur, and the presence of Iraqi military vehicles near the Arch of Ctesiphon.

[295] *Ibid.* 218.

[296] *Ibid.* 217.

[297] ICC Elements of Crimes, Art. 8(2)(b)(ix) para. 3.

[298] *Prosecutor v Strugar* (n 262) [277].

[299] Maugeri (n 40) 271.

[300] *Ibid.* Manacorda, however, notes that – notwithstanding the first cases before the ICC deciding in its favour – many of the offences are a result of the negligence, inexperience or rashness of soldiers. It thus has to be questioned whether the international community wants to criminalise such conduct, see: Manacorda (n 4) 42.

2) Al-Mahdi: Perpetrator and Victim?

In the *Al-Mahdi* case, crimes against cultural heritage – in particular the mosque and several mausoleums in Timbuktu – were the principal charge. Moreover, the accused pleaded guilty of intentionally directing attacks against religious and historic buildings in NIAC (Art. 8(e)(iv) RS) and sentenced to nine years imprisonment.[301] *Prima facie*, the prosecution of his crimes seem to contradict the principle of gravity (Art. 17(1)(d) RS). This has been defined in a twofold way: (i) the individuals/group likely to be the object of an investigation must be those/that who bear the greatest responsibility for the alleged crimes committed; and (ii) the gravity of the crimes committed.[302] It is uncertain whether such 'non-anthropological' crimes did indeed meet these requirements. Nevertheless, the OTP and Trial Chamber followed a universalist and cultural-value approach to assess this gravity, respectively by emphasising the universal significance and World Heritage status of most sites,[303] and the impact on the cultural identity and people to which the culture belongs.[304] This development has to be applauded, as the Rome Statute is originally based on the limited civilian-use approach (*cfr*: 616). The Trial Chamber thus accepted the gravity of the case, basing itself on (i) the extent of damage caused; (ii) the nature of the unlawful behaviour; and (iii) the circumstances of the time, place and manner of Al Mahdi's actions.[305] Note that gravity is based on efficiency, i.e. the case's outcome in terms of the available time and effort of international courts and tribunals. In future cultural

[301] International Criminal Court, 'Al Mahdi Case' (ICC, 27 September 2016) available at https://www.icc-cpi.int/mali/al-mahdi accessed 17 March 2017. *In casu*, the accused had demolished he mosque and mausoleums of Timbuktu (Mali).

[302] Office of the Prosecutor (OTP), 'Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report' (ICC, 6 November 2014) available at https://www.icc-cpi.int/iccdocs/otp/otp-com-article_53(1)-report-06nov2014eng.pdf as cited in Milena Sterio, 'Individual Criminal Responsibility for the Destruction of Religious and Historic Buildings: The Al-Mahdi Case' (2017) 49 Case Western Reserve Journal of International Law 63, 70–72. The critique of complementarity, however, can easily be ignored as there was no national prosecution, the ICC should not intervene, unless the State is unable or unwilling (Art. 17(1)(a) RS). See in general: Wierczynska and Jakubowski (n 75) 709.

[303] *Prosecutor v Al-Mahdi* (Judgment and Sentence ICC Trial Chamber) ICC-01/12-01/15-171 (2016) [20, 80]; Badar and Higgins (n 3) 510; Casaly (n 78) 1200, 1213–1214, 1219. For an overview of the OTP's arguments to meet the gravity requirement, see: Wierczynska and Jakubowski (n 75) 710. The OTP noted *inter alia* that nine destroyed mausoleums were on the World Heritage List and their destruction had on impact on humanity as a whole, see: Office of the Prosecutor (OTP) 'Art. 53(1) Report, Situation in Mali' (16 January 2013) ICC-01/12, 31.

[304] Badar and Higgins (n 3) 509–510. *Cfr*. Casaly (n 88) 1217–1219, referring *inter alia* to the *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia* (Pre-Trial Chamber Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation) ICC-01/13-34 (16 July 2015) [15]: "*the significant impact of such crimes on the lives of the victims and their families is, as such, an indicator of sufficient gravity*".

[305] *Prosecutor v Al-Mahdi* (Judgment and Sentence ICC Trial Chamber) ICC-01/12-01/15-171 (2016) [76].

heritage cases,[306] the OTP will have to decide if and what cultural heritage cases will be prioritised, based on proportionality, feasibility, and subsidiarity.[307]

However, the practical consequences of *Al-Mahdi* are rather hollow as it only provides minimum guidance for future cases.[308] This is due to its "*slam-dunk*" character: the accused pleaded guilty – as Al-Mahdi himself made comments in the media – so the controversial questions regarding Art. 8(2)(e)(iv) RS could not be clarified.[309] These include substituting the four protected categories by their lowest common denominator, i.e. *cultural* significance. and the interpretation of other terms in the provision, such as 'intentionally directing' (*cfr.* 618).[310] Nevertheless, probably the OTP would have followed the ICTY jurisprudence on *actus reus* and *mens rea* had the case gone to trial.[311]

Third, the ICC did not clarify what led to the inclusion of one non-UNESCO site in its judgment.[312] The universalist approach taken by the ICC did not recognise objective criteria to identify cultural heritage, next to World Heritage.[313] Also in Syria the international community is focusing on World Heritage: this could create an accountability gap between crimes against World Heritage and other heritage important for humanity.[314] As such, when the status of such heritage is disputed/ambiguous, perpetrators could escape international criminal justice.[315] The emphasis on *cultural* (not: universal) heritage would clear the way to include non-religious and non-educational sites,[316] as well as non-UNESCO sites.

Fourth, the Court stepped away from the definition of 'attack' in ICTY case law (i.e. acts of violence committed *during combat* using armed force in a *military operation*).[317] However, interpreting the acts of Al-Mahdi (far behind

[306] The OTP intends to prosecute more of those cases, see: Schabas (n 278) 101–102. Schabas argues that the shortcomings of Art. 8 RS will then become apparent.
[307] For the latter, see the alternatives to international criminal justice (*cfr.* 659).
[308] X (n 31) 1978.
[309] *Ibid.* 1982; Bishop-Burney (n 3) 131.
[310] X (n 31) 1983–1984. citing Professor Frances Raday and his view of culture as a macro-concept, encompassing religion and education. This also follows UNSC Res 2100 (25 April 2013) UN Doc S/RES/2100.
[311] Ellis (n 15) 52.
[312] X (n 31) 1984.
[313] Bishop-Burney (n 3) 132.
[314] See for example UNSC Res 2139 (22 February 2014) UN Doc S/RES/2139 [8], which called on all parties to "*save Syria's rich societal mosaic and cultural heritage, and take appropriate steps to ensure the protection of Syria's World Heritage Sites*", as cited in Lostal Becerril, 'Syria's World Cultural Heritage and Individual Criminal Responsibility' (n 33) 2, 16.
[315] Bishop-Burney (n 3) 132.
[316] X (n 31) 1984. He gives the example of the towering basalt columns of Giant's Causeway in Northern Ireland.
[317] See for example *Prosecutor v Galić* (Judgment Appeals Chamber) IT-98-29-A (2006) [52]; *Prosecutor v Kordić and Čerkez* (n 149) [47], as cited in Schabas (n 278) n 16.

the enemy lines) as 'attacks' too, the ICC ignored this case law, the doctrinal interpretation of attack,[318] its own case law,[319] and the difference between Arts. 27 and 56 Hague Convention IV.[320] These all require that the essential element of war crimes is that they "*must be committed during the conduct of hostilities*".[321] Although the ICC was fast to hold that there was an occupation, this is impossible in NIAC, as there is no foreign aggressor.[322] The ICC's small case load and prosecutorial discretion make it doubtful that a cultural heritage crime will be tried again, so it could take a long time to clarify these issues.[323]

These lost chances, however, do not deny that the acts *in casu* were brutal acts violating international law, within the territory of a State party.[324] The ICC emphasised the value of cultural heritage and the gravity of attacks against it, and is thus a victory for the ICC and cultural heritage law.[325] Furthermore, the *Al-Mahdi* case has been pivotal to the ICC's legitimacy which has been very low due to cases as Omar al-Bashir (Sudan) and Joseph Kony (Uganda).[326] The actual conviction of an accused could change the ICC's image and, together with the possibility of a guilty plea, could enhance its efficiency.[327]

c.1.2. Indirect Criminalisation

Next to direct criminalisation, cultural heritage crimes can be prosecuted

[318] Dörmann (n 277) 134, 150–151, 156, 169, 178–179, 216, 350–351; Knut Dörmann, 'War Crimes, Par. 2(a)(Iv)' in Otto Triffterer and Kai Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court* (3rd edition, Beck-Hart-Nomos 2016) 355. as cited in Schabas (n 278) 80. Dörmann writes: "*The term 'attack' [...] refers to <u>any combat action</u>, thus offensive and defensive acts [...]*" (emphasis added).
[319] See for example *Prosecutor v Katanga et al.* (Decision on the confirmation of the charges) ICC-01/04-01/07 (30 September 2008) [267] as cited in Schabas (n 278) 82.
[320] Art. 27 is applicable to "sieges and bombardments", while Art. 56 is applicable to 'seizure or destruction or wilful damage' during occupation. *Ibid.* 83–88. Schabas notes sharply: "*As a general rule, when there are two distinct provisions dealing with an issue in a legal instrument, there is a reason.*" While Art. 56 was actively considered by the Preparatory Committee, and the ILC in its 1996 Draft Code of Crimes, it chose for the rationale of Art. 27.
[321] *Ibid.* 83–89. This makes Arts. 8(2)(b)(ix) and (e)(iv) *lex specialis* to the war crime of attacking civilians (*cfr. infra* 2.d).
[322] Art. 27 is applicable to "sieges and bombardments", while Art. 56 is applicable to 'seizure or destruction or wilful damage' during occupation. *Ibid.* 83–88. Schabas notes sharply: "*As a general rule, when there are two distinct provisions dealing with an issue in a legal instrument, there is a reason.*" While Art. 56 was actively considered by the Preparatory Committee, and the ILC in its 1996 Draft Code of Crimes, it chose for the rationale of Art. 27.
[323] X (n 31) 1983 citing Professor Alex Whiting.
[324] Fincham, 'The Intentional Destruction and Spoliation of Cultural Heritage under International Criminal Law' (n 94) 188. There was thus a "*reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed*" (Art. 53(1) RS).
[325] Novic (n 38) 130.
[326] Sterio (n 302) 67. See in general: Sarah MH Nouwen, 'Justifying Justice' in Martti Koskenniemi (ed), *The Cambridge Companion to International Law* (Cambridge University Press 2012).
[327] Sterio (n 302) 67–68.

indirectly, through provisions protecting civilian property in general. These can be a choice when the crimes above cannot be proven or are not applicable, for example when (under the ICTY Statute) one cannot really speak of a clear result/destruction or when (under the Rome Statute) mere works of art are attacked.

- Grave Breaches (Art. 2(d) ICTY Statute and Art. 8(2)(a)(iv) RS)[328]

Art. 2(d) ICTY Statute criminalises the "*extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly*". This provision, as found *verbatim* in Art. 8(2)(a)(iv) RS, constitutes a grave breach of the Geneva Conventions.[329] A brief introduction to this intersection of IHL and ICL is required.[330] Although they overlap, the ultimate distinction between grave breaches and war crimes is the following: the first are primary rules of international law with potential domestic penal consequences, whereas the latter are secondary rules (decisions and opinions) with international courts and tribunals as the competent organs.[331] However, relying on war crimes rather than grave breaches has several advantages: they are applicable to IAC *and* NIAC,[332] and do not require prove of the knowledge that the victim was an adverse party and the damaged property was protected under the GC.[333] On the other hand, the major advantage of grave breaches is their clarity and transparency, also key to ICL.[334] Nevertheless, they lead to categorisation of IHL, as the acknowledgment of grave breaches logically creates "other breaches".[335]

To trigger the jurisdiction of the ICTY, four conditions must be met, beginning with the general requirements of Art. 2 (i.e. the existence of an IAC and the nexus between the crime and armed conflict).[336] Second, there must be

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[328] See also *chapeau* Art. 4 ICTR Statute and Art. 6 ECCC Law.

[329] More precisely, Arts. 50 GC I, 51 GC II and 147 GC IV; Dörmann (n 318) 339. For example, Art. 147 GC IV lists: "*[...] wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly*" (emphasis added).

[330] For the intersection between ICL and IHRL, see section 2 (persecution).

[331] Oberg (n 155) 165–166; Cryer and others (n 120) 269: "*IHL and war crimes have similar aims but somewhat different scopes and consequences.*"

[332] *Prosecutor v Tadić* (n 59) [79–84].

[333] Oberg (n 155) 178. Substantive grave breaches of the GC have the advantage that they are accepted by all States in the world. However, this does not hold for the 1977 Additional Protocol.

[334] Meron, 'International Criminalization of Internal Atrocities' (n 141) 564.

[335] *Ibid.*

[336] In *Prosecutor v Naletilić and Martinović* (Judgment Appeals Chamber) IT-98-34-A (2006) [116, 118, 120], the ICTY held that the existence of armed conflict is not a mere "*jurisdictional*

extensive destruction or appropriation,[337] but a single attack may in exceptional circumstances fulfil the extensiveness requirement.[338] However, contrary to Arts. 8(2)(b)(ix) and (e)(iv), it is not clear whether the destruction of cultural heritage can be equated with a hospital.[339] Abtahi argues that Art. 2(d) ICTY Statute should at least be applicable to cultural heritage regarding the scale of destruction, because "*each piece of cultural property is unique*": people are affected by the destruction of even one single piece.[340] Third, the targeted object must be property protected by the Geneva Conventions in general (whether or not in occupied territory), *or* real/personal property in occupied territory protected under Art. 53 GC IV.[341] For cultural heritage, only the latter category is applicable, as the first one only covers hospitals and the like.[342] Finally, the act has to be committed with intent or in reckless disregard.[343]

Art. 2(d) provides for an exception: when 'military necessity' requires, one can still destroy civilian property. In other words, such attacks are not unlawful if the targeted object is a military objective.[344] It suffices to say here that Art. 2(d) has a limited scope and applicability, as it remains subject to military necessity.[345]

Although it requires a 'State policy' (Art. 8(1) RS), Art. 8(2)(a)(iv) RS has similar conditions. The Elements of Crime (EoC) require that the destruction was extensive and carried out wantonly, while the property was protected under the Geneva Conventions.[346] As the EoC are quiet on the mental element, it has to be interpreted in conformity with Art. 30 RS: intent and knowledge of the crime.[347]

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prerequisite", but also a "*substantive element of crime*"; Maugeri (n 40) 148–149.

[337] *Prosecutor v Naletilić and Martinović* (n 224) [576]; Jean Pictet, *Commentaire Sur La Convention de Genève Relative à La Protection Des Personnes Civiles En Temps de Guerre*, vol IV (International Committee of the Red Cross 1956) 643–644.

[338] *Prosecutor v Naletilić and Martinović* (n 224) [576].

[339] Abtahi (n 65) 16; Maugeri (n 40) 152–153.

[340] Abtahi (n 65) 17. He is not sure whether the territorial (i.e. application beyond occupied territories) and temporal aspect (i.e. application regardless of military necessity) of the general protection are also applicable.

[341] *Prosecutor v Naletilić and Martinović* (n 224) [575]. For guidelines to determine whether occupation has been established, see *ibid.*, para. 217 (the authority of the occupying power, the surrender enemy forces, the presence of sufficient force by the occupying power (or ability to send troops), the presence of a temporary administration, the issuance of directions to civilian population under control).

[342] *Ibid.*

[343] *Ibid.* 577; *Prosecutor v Kordić and Čerkez* (n 185) [341].

[344] O'Keefe, 'Protection of Cultural Property under International Criminal Law' (n 40) 348. For a detailed discussion of military necessity, see *b.*

[345] Abtahi (n 65) 17.

[346] ICC Elements of Crimes, Art. 8(2)(a)(iv) paras. 3-4.

[347] Dörmann (n 318) 342.

- Absence of Military Necessity (Art. 3(b) ICTY Statute and Arts. 8(2)(b)(xiii) and 8(2)(e)(xii) RS)

The Nuremberg Charter included the "*wanton destruction of cities, towns or villages, or devastation not justified by military necessity*" in the list of Art. 6(b), as it was part of CIL.[348] However, massive destruction was only touched upon in the *Ohlendorf* trial, which found that the bombardment of London and other cities was "*an act of legitimate warfare*".[349] Most of those crimes were dealt with through the crime of plunder (*cfr.* c.4).[350]

Although criticised,[351] this terminology comes back *verbatim* under Art. 3(b) ICTY Statute. While there are two separate – but similar – crimes, the ICTY in *Strugar* equated them.[352] The advantage of Arts. 3(b-e) over the grave breaches system under Art. 2(d) is threefold: they have a wider scope because they apply to both IAC *and* NIAC, they provide a non-exhaustive list of crimes,[353] and they do not require proof of the existence of occupation.[354]

As summarised in *Kordić*, three conditions must be met: (i) destruction on a large scale; (ii) not justified by military necessity; and (iii) the perpetrator acted with the intent to destroy the property, or in reckless disregard of the likelihood of it.[355] Regarding the first requirement, the result must be sufficiently

[348] Art. 23(g) of the 1907 Hague Regulations IV, Arts. 51, 52 and 54 AP I were held to be CIL: *Prosecutor v Tadić* (n 59) [90]; *Prosecutor v Strugar* (n 10) [228]; Maugeri (n 40) 159–160.

[349] *The United States of America v Ohlendorf et al. ("Einsatzgruppen")* (Judgment United States Military Tribunal Nuremberg) 4 TWC 411 (1947) 467. The rationale for this is probably that the Allies were culpable of doing the same (e.g. Dresden); both sides saw bombings on cities as part of the total war, see: Brammertz and others (n 121) 1148.

[350] Note that the United Nations War Crimes Commission (UNWCC), facilitating the investigation and prosecution of war criminals after World War II, interpreted the 1899 and 1907 Hague Regulations broadly and thus included spiritual values and intellectual life (intangible heritage) in the protection of Art. 56 Hague Regulations 1907: UNWCC, Draft Report of Committee III on the Criminality of 'Attempts to Denationalise the Inhabitants of Occupied Territory', III/17, 24 Sept. 1945, at paras. 8-9, as cited in Ana Filipa Vrdoljak, 'Genocide and Restitution: Ensuring Each Group's Contribution to Humanity' (2011) 22 European Journal of International Law 17, 23.

[351] Merryman (n 44) 838–841. These critiques include the vagueness of 'military necessity' and the fluidness of its use, the subordinate character of cultural preservation in comparison with other values, the obsolete character of military necessity, and its inconsistence with the Hague Convention and the preservation of cultural property belonging to mankind.

[352] *Prosecutor v Strugar* (n 10) [291]. However, it left a wider application to devastation in other cases, e.g. laying waste to crops or forests.

[353] Abtahi (n 65) 18; Frulli, 'Distribuzione Dei Beni Culturali e Crimine Di Genocidio: L'Evoluzione Della Giurisprudenza Del Tribunale Penale Internazionale per La Ex-Jugoslavia' (n 89) n 23.

[354] *Prosecutor v Naletilić and Martinović* (n 224) [588–589]; Dörmann (n 318) 342.

[355] *Prosecutor v Kordić and Čerkez* (n 185) [346]; *Prosecutor v Kordić and Čerkez* (n 149) [74–76]. Note that one must keep the *Tadić* criteria, Art. 1 ICTY Statute, and their 'seriousness' requirement in mind.

significant.[356] The word "*wanton*" of the third requirement has been interpreted as including recklessness.[357]

'Military necessity' has been defined as "*the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war*".[358] It acknowledges that legitimate military operations evidently entail unavoidable civilian death and injury.[359] The term has evolved through ICTY case law. First, in *Blaškić*, the ICTY adopted a broad interpretation of 'military necessity', including institutions in the immediate vicinity of military objectives.[360] The *Galić* case clarified that attacks are only unlawful "*when it would be unreasonable to believe that [...] the object is being used to make an effective contribution to military action*", taking into account personal circumstances, such as the available information.[361] However, this seems to be a very subjective and vague criterion.[362] This, combined with the fact that the prosecution has to prove (the moment and manner of) the destruction and the absence of military necessity,[363] makes it very hard to prosecute cultural heritage crimes under this category. A more restricted approach – in favour of cultural heritage – was adopted in *Strugar*: even when they are close to, but are not military objectives, they cannot be attacked.[364] The Trial Chamber in *Prlić* thought that next to a military lifeline, Mostar's Old Bridge was "*real property normally used by civilians*".[365] It used a *proportionality* test: a cultural object that is a military objective may lose its immunity from attack when the latter is proportional; this was held not to be the case.[366] Recently, the *Prlić* Appeals Chamber went even

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[356] O'Keefe, *The Protection of Cultural Property in Armed Conflict* (n 73) 92; Maugeri (n 40) 161–162.

[357] See, for example, *Prosecutor v Blaškić* (n 210) [183]: *"[...] So as to be punishable, the devastation must have been perpetrated intentionally or have been the foreseeable consequence of the acts of the accused*" (emphasis added).

[358] *Prosecutor v Kordić and Čerkez* (n 178) [686], quoting Art. 14 Lieber Code.

[359] *Prosecutor v Galić* (n 317) 76; Maugeri (n 40) 151; Frulli, 'Distribuzione Dei Beni Culturali e Crimine Di Genocidio: L'Evoluzione Della Giurisprudenza Del Tribunale Penale Internazionale per La Ex-Jugoslavia' (n 89) 352.

[360] *Prosecutor v Blaškić* (n 210) [185]; Cryer and others (n 120) 298.

[361] *Prosecutor v Galić* (Judgment Trial Chamber) IT-98-29-T (2003) [51].

[362] Maugeri (n 40) 163.

[363] *Prosecutor v Kordić and Čerkez* (n 149) [495].

[364] *Prosecutor v Strugar* (n 26) [310]: "*[...] the preferable view appears to be that it is the use of cultural property and not its location that determines whether and when the cultural property would lose its protection.*"; Cryer and others (n 120) 298.

[365] *Prosecutor v Prlić et al.* (Judgment Trial Chamber Vol 3/6) IT-04-74-T (2013) [1582]. For its examination of the war crime of unlawful infliction of terror on civilians and the crime of persecution, see below.

[366] The Trial Chamber held that its dual-use character was a circumstance precluding the destruction of the Old Bridge of Mostar, see: *ibid.* 1582–1584; Drazewska (n 70) 215. This reasoning has been criticised by Judge Antonetti: "*If the Old Bridge was a military objective, it quite simply had to be destroyed*", see: *Prosecutor v Prlić et al.* (Separate and Partially Dissenting Opinion of President Antonetti) IT-04-74-T (2013) [325]; Schmalenbach (n 100) 24.

further in holding that (regarding the Old Bridge) no property not justified by military necessity (Art. 3(b)) was destroyed.[367] Dissenting Judge Fausto Pocar argued this reasoning is disappointing as proportionality and 'military objectives' are less stringent criteria than the classic military necessity exception and thus favours attackers.[368] Indeed, disproportionate attacks are *per se* unlawful (*cfr.* 628).[369] While the Prosecution's choice for Art. 3(b) in *Prlić* is thus unsuccessful and the ICTY Statute does not have a provision like Art. 8(2)(b)(iv) RS (*cfr.* 0 and c.2), it could still have prosecuted through the *chapeau* of Art. 3.[370]

Turning to the ICC, Art. 8(2)(b)(xiii) RS stipulates that destroying or seizing the enemy's property is criminal unless "*imperatively demanded by the necessities of war*".[371] The term *imperatively* means that there are no other means to secure military safety; broad national security arguments are thus not sufficient.[372] *Prima facie*, this provision has a broader scope than the grave breaches above as it does not require that the destruction/seizure is extensive and wanton. Another difference is the reference to seizure, instead of appropriation, thus including destruction of property during combat, destruction, or seizure of alien property in a belligerent state, and destruction or seizure in occupied territories.[373] Regarding *mens rea*, the EoC says that it is sufficient that the perpetrator was aware of the status of the property (and of armed conflict).[374]

A further comparison between Art. 8(2)(b)(xiii) and (e)(xii) RS must be made.[375] They both have been inspired by Arts. 23(g) Hague Regulations 1907 and Art. 53 GC IV, but no such provisions are included in AP II.[376] However,

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[367] *Prosecutor v Prlić et al.* (Judgment Appeals Chamber Vol 1/6) IT-04-74-A (2017) [411].
[368] *Prosecutor v Prlić et al.* (Dissenting Opinion of Judge Fausto Pocar) IT-04-74-A (2017) [8].
[369] *Ibid.* [9]. Furthermore, he argued that prosecuting under Art. 3(d) ICTY Statute would be more appropriate, as the Old Bridge is cultural property: *ibid.* [12–17].
[370] Indeed, this crime and the proportionality test can be found in CIL: *Prosecutor v Blaškić* (Judgment Appeals Chamber) IT-95-14-A (2004) [157]; *Prosecutor v Galić* (n 317) [57–58]; O'Keefe, 'Protection of Cultural Property under International Criminal Law' (n 40) 353. Likewise, the ICTY created the new category of 'inflicting terror on the civilian population' (*cfr.* 629).
[371] This article is also based on Art. 23(g) of the 1907 Hague Regulations IV. *Verbatim* in S.6.1(b)(xiii) UNTAET Regulation 2000/15 and Art. 13(b)(14) ISTS.
[372] Andreas Zimmermann and Robin Geiβ, 'War Crimes, Par. 2(b)(Xiii)' in Otto Triffterer and Kai Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court* (3rd edition, Beck-Hart-Nomos 2016) 443. However, it has to be noted it is difficult to see how seizure can ever be legitimate, even under this narrower exception: O'Keefe, 'Protection of Cultural Property under International Criminal Law' (n 40) 358.
[373] Zimmermann and Geiβ (n 372).
[374] ICC Elements of Crimes, Art. 8(2)(b)(xiii) para. 4.
[375] *Verbatim* in S.6.1(e)(xii) UNTAET Regulation 2000/15 and Art. 13(d)(12) ISTS.
[376] Andreas Zimmermann and Robin Geiβ, 'War Crimes, Par. 2(e)(Xii)' in Otto Triffterer and Kai Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court* (3rd edition, Beck-Hart-Nomos 2016) 568.

the NIAC provision talks about property of the "*adversary*" and necessities of the "*conflict*", but this does not necessarily make the scope of application different than Art. 8(2)(b)(xiii).[377] In conclusion, the 'military necessity' protection applies to (i) both IAC and NIAC;[378] and (ii) both occupied territories and unoccupied territories of the enemy.[379] Even when the wording of the two provisions is different, Art. 8(2)(e)(xii) criminalises the same conduct for NIAC. It is noteworthy to say that, according to the Trial Chamber, the prosecution did not invoke Art. 8(2)(e)(xii) RS in the *Al-Mahdi* case.[380] This is probably because for this provision, ownership must be established, which was difficult *in casu*.[381]

- Attacks on Undefended Towns/Buildings (Art. 3(c) ICTY Statute and Arts. 8(2)(b)(v) RS)

The third indirect category to prosecute cultural heritage crimes is that of attacks against undefended towns which are not military objectives. This is based on the premise that they have integrated some sort of cultural heritage. Also this category persists under the *Tadić* test: both Arts. 3(c) ICTY Statute and 8(2)(b)(v) RS have their source in customary Art. 25 Hague Regulation IV and Art. 52 AP I.[382] This opens the door for its applicability in NIAC. As to the third *Tadić* requirement, the risk endured by civilians is in itself a grave consequence of an unlawful attack, even when they survive.[383] The requirement of individual criminal responsibility is unclear for acts *without* causing death or damage. This requirement is distinct from that of Art. 3(d) and thus depends on State practice regarding Art. 85 AP I.[384] For now, damage is also required here, in line with Art. 3(d).[385] As to *mens rea*, the ICTY in *Blaškić* held that such an attack must have been conducted with the intent to target civilians or their property, exceeding military necessity or when it was impossible not to

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[377] *Ibid.* This is merely because the words "*enemies*" and "*war*" in the latter cannot be used in the same technical sense as NIAC is a conflict between nationals

[378] *Prosecutor v Brdanin* (n 262) [592]; *Prosecutor v Strugar* (n 10) [228]. The latter refers to *Prosecutor v Hadžihasanović* (98bis Decision) IT-01-47-T (2004) [102, 105]: "*The physical characteristics of exercises of violence and their effects upon people and resources are of course the same, assuming violence of comparable proportions, in an internal as in an international conflict. It would thus seem fairly obvious that [...] a fundamental policy of minimum unnecessary destruction is equally vital and applicable in one as in the other type of conflict.*"

[379] *Prosecutor v Kordić and Čerkez* (n 185) [347].

[380] *Prosecutor v Al-Mahdi* (Judgment and Sentence) ICC Trial Chamber ICC-01/12-01/15-171 (2016) [12].

[381] Schabas (n 278) 90–91. The same can be said of Art. 8(2)(b)(xii) as it "*was indeed meant to address the fate of any enemy property located in territories which have come under the de facto control of a belligerent*", see: Zimmermann and Geiβ (n 372) 436–444, *ibid.* 440.

[382] Maugeri (n 40) 168–169; *Prosecutor v Strugar* (n 10) [224]; *Prosecutor v Tadić* (n 59) [111], citing UNGA Res 2675 (1970) GAOR 25th Session UN Doc A/C.3/SR.1785.

[383] *Prosecutor v Strugar* (n 10) [221].

[384] *Prosecutor v Kordić and Čerkez* (n 149) [59–66].

[385] *Ibid.* 67.

know that the property was not a military objective.[386]

Art. 59 AP I clarifies what must be understood under "*undefended*": (i) all combatants and their weaponry must have been evacuated; (ii) there shall be no use of fixed military installations or establishments; (iii) the population will not act hostile; and (iv) no activities in support of military operations shall be undertaken.[387]

What constitutes a "*military objective*" (Art. 8(2)(b)(v) RS and implicitly in Art. 3(c) ICTY Statute)? Abtahi notes that Art. 18 GC IV refers to this term, without defining it, while Art. 8/1 HC provides a partial definition, based on examples.[388] Furthermore, as seen above, protecting cultural heritage under civilian property only offers little protection, as civilian property can become a military objective because of its nature, location, scope or use, with its destruction offering a military advantage to the enemy (Art. 52(2) AP I).[389] Thus, cultural heritage can become a military objective for other reasons than being effectively used for military purposes.

- Attacks on Prohibited Targets

1) Civilian Property without any Military Purpose (*chapeau* Art. 3 ICTY Statute and Art. 8(2)(b)(ii) RS)

It deserves to be mentioned that Art. 3 ICTY does not provide an exhaustive list of violations of the laws or customs of war.[390] Consequently, the ICTY in *Galić* held that indiscriminate attacks against civilian property, which violate the principle of proportionality, are prohibited under customary Art. 51(4) AP I.[391] This entails a distinct responsibility than attacking non-military objectives *supra*.[392] However, this legal basis should be used as an *ultimum remedium*, as

[386] *Prosecutor v Blaškić* (n 210) [180].

[387] Note that the additional requirement in the RS Elements of Crime, being aware of the city's undefended character, has been left for the general intent and knowledge (Art. 30 RS): Maugeri (n 40) 294–295.

[388] Abtahi (n 65) 19. Art. 8/1 of the 1954 Hague Convention: "*[...] (a) are situated at an adequate distance from any large industrial centre or from any important military objective constituting a vulnerable point, such as, for example, an aerodrome, [...]; (b) are not used for military purposes.*"

[389] Maugeri (n 40) 172–173. She notes that the defence of military necessity is not mentioned in the provision, because attacking civilian property is absolutely prohibited (unless it has become a legitimate military objective). On the other hand, the same provision reaffirms the fundamental principle of distinction.

[390] *Cfr. chapeau* Art. 3: "*The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to [...]*". No such possibility exists under the exhaustive list of Art. 8(2)(b) and (e) RS.

[391] *Prosecutor v Galić* (n 361) [57–58]. "*[...] The basic obligation to spare civilians and civilian objects as much as possible must guide the attacking party when considering the proportionality of an attack [...]*".

[392] *Prosecutor v Strugar* (n 262); Cryer and others (n 120) 298.

there is a huge grey area between legality and illegality in IHL.[393] Also, the prosecution must prove that the attack was launched wilfully (including recklessness) and in the knowledge of the possibility of excessive civilian casualties.[394] It can be argued that this is an extremely high burden of proof which truly makes this a provision of last resort. Furthermore, as for attacking undefended towns, the Art. 8(2)(b)(ii) RS offers a low protection for cultural heritage. Although damage is not required,[395] the EoC require that the perpetrator was aware of the civilian nature of the property.[396]

2) Inflicting terror on the civilian population (*chapeau* Art. 3 ICTY Statute)

Although reversed by the Appeals Chamber on other grounds,[397] the Trial Chamber in *Prlić* held, that the destruction of Mostar's Old Bridge was an "*act of violence, the main aim of which was to inflict terror on the population*",[398] found in AP I and II.[399] In *Galić* (successfully convicted for this crime), this was held to be a specific category of the general (customary) prohibition of attacks on civilians above.[400] It is not terrorism *per se* (*cfr.* subsection c of the third section), but rather "*extensive trauma and psychological damage*" caused by attacks "*designed to keep the inhabitants in a constant state of terror*".[401] Those acts or threats (*actus reus*) have to be accompanied by the specific intent to

[393] This is not the case for repeated attacks, see: *Prosecutor v Kupreškić et al.* (Judgment Trial Chamber) IT-95-16 (2000) [526]: "*However, in case of repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law. Indeed, this pattern of military conduct may turn out to jeopardise excessively the lives and assets of civilians, contrary to the demands of humanity.*"

[394] *Prosecutor v Galić* (n 361) [54, 59].

[395] Michael Cottier and Elisabeth Baumgartner, 'War Crimes, Par. 2(b)(Ii)' in Otto Triffterer and Kai Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court* (3rd edition, Beck-Hart-Nomos 2016) 365. This is contrary to the ICTY case law on attacks against civilian towns and buildings, which classifies as Art. 8(2)(b)(v) RS. See, for example: *Prosecutor v Kordić and Čerkez* (n 149) [67].

[396] Maugeri (n 40) 282; ICC Elements of Crimes, Art. 8(2)(b)(ii) para. 3.

[397] *Prosecutor v Prlić et al.* (n 368) [425]. The Appeals Chamber held that the HVO could not have the specific intent to commit terror, as it had a military interest in destroying the Bridge. Judge Liu dissented, as he argues that the ICTY does not have jurisdiction over this crime and the elements of the offence do not define a criminal charge: *ibid.* footnote 1292.

[398] *Prosecutor v Prlić et al.* (n 365) [1690, 1692]. The Trial Chamber emphasised (the HVO's awareness of) the impact of the destruction on the population.

[399] Arts. 51 (2) AP I and 13(2) AP II read: "The civilian population as such, as well as individual civilians, shall not be the object of attack. *Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited*" (emphasis added). They were found to be part of customary international law: *Prosecutor v Galić* (n 317) [87–90].

[400] *Prosecutor v Galić* (n 361) [98]. The Trial Chamber had found that *Galić*'s campaign to snipe and shell civilians in Sarajevo ('Sniper Alley') were acts of violence and constituted the crime of inflicting terror on the civilian population: *ibid.* 596.

[401] *Prosecutor v Galić* (n 317) [102].

spread terror among the civilian population (*mens rea*).[402]

c.2. Indirect Criminalisation: Disproportionate Attacks with Incidental Damage (chapeau Art. 3 ICTY Statute and Art. 8(2)(b)(iv) RS)

All indirect legal bases above do not change the possibility to prosecute cultural heritage crimes under the generic provision of Art. 8(2)(b)(iv) RS.[403] This provision criminalises attacks in the knowledge of possible incidental damage to civilians, their objects and their environment which is clearly excessive vis-à-vis the military advantage.[404] It is grounded on the idea that civilian property should be clearly distinguished from military objectives, i.e. the principles of distinction and proportionality (Arts. 48, and 51-52 AP I). While the Preparatory Committee of the ICC thus created a separate category for disproportionate attacks, the ICTY discussed both this category and the above – as found in Art. 51(4-5) AP I – at the same time in *Galić*.[405] Also here, the RS does not require damage as a result, insofar it "*was such that it would cause*" disproportionate incidental damage.[406]

The ICTY in *Blaškić* and *Galić* held that CIL prevents unlawful attacks in the knowledge that it will cause incidental and *excessive* damage, both in IAC and NIAC.[407] The Rome Statute, however, requires that this can only be the case in IAC – making its CIL status unclear – and that such damage is "*clearly excessive*".[408] Furthermore, this requirement cannot be found in Art. 85(3)(b)

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[402] *Prosecutor v Dragomir Milošević* (Judgment Appeals Chamber) IT-98-29/1-A (2009) [32–33, 37]; *Prosecutor v Galić* (n 317) [69, 102, 104]; *Prosecutor v Prlić et al.* (n 368) [424]. This intent can be coexistent with other aims, but has to be the principal one and can be inferred from the "*nature, manner, timing and duration*" of the acts or threats: *Prosecutor v Galić* (n 317) [37]; *Prosecutor v Dragomir Milošević* [104]; *Prosecutor v Prlić et al.* (n 368) [424].

[403] *Verbatim* in S. 6.1(b)(iv) UNTAET Regulation 2000/15 and Art. 13(b)(iv) ISTS.

[404] ICC Elements of Crimes, Art. 8(2)(b)(iv) footnote 36: "*The expression 'concrete and direct overall military advantage' refers to a military advantage that is foreseeable by the perpetrator at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack. The fact that this crime admits the possibility of lawful incidental injury and collateral damage does not in any way justify any violation of the law applicable in armed conflict. It does not address justifications for war or other rules related to jus ad bellum. It reflects the proportionality requirement inherent in determining the legality of any military activity undertaken in the context of an armed conflict*" (emphasis added).

[405] *Prosecutor v Galić* (n 361) [190–192].

[406] ICC Elements of Crimes, Art. 8(2)(b)(iv) para. 2; O'Keefe, 'Protection of Cultural Property under International Criminal Law' (n 40) 354.

[407] *Prosecutor v Blaškić* (n 370) [157]; *Prosecutor v Galić* (n 317) [57–58]; O'Keefe, 'Protection of Cultural Property under International Criminal Law' (n 40) 353.

[408] O'Keefe, 'Protection of Cultural Property under International Criminal Law' (n 40) 353–354. This high threshold was adopted through fear by the United States that the lower CIL threshold could impede their military actions. This is disappointing as the United States are not a party to the Rome Statute. Yet, cultural sites near a military objective will statistically have more damage than a concrete building situated at the same distance of the military objective: Abtahi (n 65) n 181.

AP I. In sum, it is not difficult to see that this provision does not truly assures the protection of cultural heritage and is a mere fall-back option.[409]

Regarding the *mens rea* of the crime ("*intentionally launching*"), awareness of the civilian character suffices, but unawareness of the object's cultural value will change the proportionality calculus.[410] This may include intent (*dolus directus*) or constructive intent (*dolus eventualis*).[411] Maugeri argues that "*intentionally*" should be used here to exclude mere recklessness, contrary to the articles above, and follow the basic intent requirement of Art. 30 RS.[412]

c.3. Indirect Criminalisation: Unlawful Acts of Hostility against Cultural Heritage other than Attacks (Art. 3(d) ICTY Statute)

After examining attacks against cultural heritage per se and civilian property in general, there are still some gaps in the legal framework, which are called 'other acts of hostility'. These include the use of explosives, bulldozers, jackhammers, and the like.[413] The ICTY dealt with these crimes under Art. 3(d). For example, the accused in *Blaškić, Kordić, Naletilić* and *Brđanin* were explicitly convicted for these crimes.[414] Despite the ICTY's case law, they are not included in Art. 8(2)(b)(ix),[415] because Art. 15 APHC II and the principle of legality exclude other "attacks" than the ones mentioned.[416] Furthermore, the *Milošević* trial (concerning the siege of Sarajevo) defined 'attack' as "*a specific military operation limited in time and place, and covers attacks carried*

[409] Maugeri (n 40) 285–286: "*Si tratta chiaramente di una valutazione assolutamente elastica e discrezionale che fa prevalere le esigenze militari sulla tutela dei civili e degli obiettivi civile, e che difficilmente potrebbe garantire un'adeguata tutela ai beni culturali.*" (Own translation: It is clearly a flexible and discretionary assessment that allows the military requirements to prevail over the protection of civilians and civilian objectives, and thus this would be difficult to guarantee an adequate protection to cultural heritage.)

[410] O'Keefe, 'Protection of Cultural Property under International Criminal Law' (n 40) 354.

[411] Roberta Arnold and Stefan Wehrenberg, 'War Crimes, Par. 2(b)(Iv)' in Otto Triffterer and Kai Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court* (3rd edition, Beck-Hart-Nomos 2016) 380.

[412] Maugeri (n 40) 287–290. She refers, among others, to the *chapeau* of Art. 85(3) AP I which requires that the act in (b) has to be committed "*wilfully*". As this is generally interpreted as including recklessness, explicitly stepping away from this terminology in the Rome Statute should be seen as excluding recklessness.

[413] O'Keefe, 'Protection of Cultural Property under International Criminal Law' (n 40) 355. See, e.g. the destruction of the Assyrian Lion statues in Raqqa by Islamic State: Cunliffe, Muhesen and Lostal Becerril (n 276) 19.

[414] O'Keefe, 'Protection of Cultural Property under International Criminal Law' (n 40) 355; O'Keefe, 'Protection of Cultural Property' (n 57) 513. These were all cases of acts of hostility against religious buildings, typical for the conflict in ex-Yugoslavia, see: Frulli, 'Distribuzione Dei Beni Culturali e Crimine Di Genocidio: L'Evoluzione Della Giurisprudenza Del Tribunale Penale Internazionale per La Ex-Jugoslavia' (n 89) 256.

[415] O'Keefe, 'Protection of Cultural Property under International Criminal Law' (n 40) 355; Maugeri (n 40) 267.

[416] O'Keefe, *The Protection of Cultural Property in Armed Conflict* (n 73) 277.

out both in offence and defence".[417]

The ICTY and ICC case law also differ on *mens rea*. They both require intent and knowledge,[418] but the ICTY requires that the perpetrator knew it was a religious, educational, historic building or work of art, while the Rome Statute requires knowledge of its civilian character.[419]

c.4. Indirect Criminalisation: Unlawful Plunder/Pillage (Art. 3(e) ICTY Statute, Art. 4(f) ICTR Statute, and Arts. 8(2)(b)(xvi) and 8(2)(e)(v) RS)

c.4.1. Ambiguous Definition

Although plunder/pillage seems closely related to the appropriation of cultural heritage, it is a distinct category of crimes. Where appropriation keeps cultural heritage in its original state, damage often accompanies plunder. Contrary to the ambiguity of plunder as crime against humanity under the ICTY Statute (*cfr.* 643), international law is clear on the criminalisation of pillage as a war crime.[420] The term 'pillage' is a synonym for 'plunder', 'spoliation', or 'sacking', these terms are used alternately and criminalise the same conduct,.[421] However, international law does neither provide its definition nor its elements, while there are definitions of pillage in domestic law. However, the latter risk creating different understandings and scopes of application.[422]

Art. 6(b) Nuremberg Charter included "*plunder of public or private property*" in its list of war crimes. This was not a surprise, as the illegality of plunder was long-established under international law, both in IAC and NIAC.[423] In *Trial of*

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[417] *Prosecutor v Dragomir Milošević* (Judgment Trial Chamber) IT-98-29/1-T (2007) [943].

[418] *Prosecutor v Blaškić* (n 11) [185] and Art. 30(1) RS as cited in O'Keefe, 'Protection of Cultural Property under International Criminal Law' (n 40) 356.

[419] O'Keefe, 'Protection of Cultural Property under International Criminal Law' (n 40) 356.

[420] Art. 28 Hague Regulations 1899 and 1907; Art. 33 GC IV; Art. 3(e) ICTY Statute; Art. 4(f) ICTR Statute; and Arts. 8(2)(b)(xvi) and 8(2)(e)(v) RS.

[421] Manacorda (n 4) 40. The ICRC considers plunder to be the same as pillage, i.e. "*The systematic and violent appropriation by members of the armed forces of movable public or private property belonging to the enemy State, to wounded, sick or shipwrecked persons, or to prisoners of war. [...] When movable property belongs to wounded, sick or shipwrecked persons, prisoners of war or the dead on the battlefield is removed by non-violent means, the term 'spoliation' is sometimes used.*" See: Verri (n 26) 85.

[422] Carducci (n 163) para 2; Manacorda (n 4) 40. What is clear is that both pillage and plunder must be distinguished from war booty (i.e. the taking of public property by the State to use for its benefit, including weaponry on the battlefield). See Carducci (n 163) para 3. In Latin *spolia* ("*arms and armo[u]r initially captured from the enemy*", i.e. war booty) has to be distinguished from *spoliatio* ("*illegal removal of art and architectural decoration*"). See: Fincham, 'The Intentional Destruction and Spoliation of Cultural Heritage under International Criminal Law' (n 94) 156; Gerstenblith (n 182) 350.

[423] Destruction, appropriation and seizure are only criminalised for IAC: Cryer and others (n 120) 297. For the CIL status of plunder, see, among others: Art. 44 of the 1863 Lieber Code; Arts. 18 and 39 of the 1874 Brussels Declaration; Art. 28 (and 47) of the 1899 and 1907 Hague Regulations;

German Major War Criminals, the Nuremberg Tribunal held Rosenberg responsible for the organised plunder of both public and private property.[424] The IMT justified its jurisdiction through Art. 56 Hague Regulation IV which made plunder a war crime.[425] The main achievement of the IMT regarding plunder is that it extended the narrow definition, i.e. the unauthorised theft and sacking by individual soldiers, also to official authorizations and orders (broad definition).[426] The United States military tribunals after Nuremberg (pursuant Control Council Law n° 10[427]) even extended plunder to the "*organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory*" (here called 'the broadest definition').[428]

Art. 3(e) ICTY Statute and Art. 4(f) ICTR Statute criminalise plunder, while Arts. 8(2)(b)(xvi) and (e)(v) use the term pillaging, respectively for IAC and NIAC. Yet, they have the same source: Art. 28 Hague Regulation IV.[429] Indeed, the Trial Chamber in *Čelebići* (concerning the infamous Bosniak prison camp) acknowledged the customary character of Arts. 46-56 Hague Regulation IV and further invoked Arts. 15 GC I, 18 GC II and III, and 33

Carducci (n 163) paras 9–16.

[424] 'Judgment of the Nuremberg International Military Tribunal 1946' (n 9) 286–288. Also note the alternate use of plunder and pillage: "*[...] Acting under Hitler's orders of January, 1940, to set up the 'Hohe Schule', he organized and directed the 'Einsatzstab Rosenberg', which plundered museums and libraries, confiscated art treasures and collections, and pillaged private houses*" (emphasis added).

[425] It states: "*The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.*"; *ibid.* 248; Suzanne L Schairer, 'The Intersection of Human Rights and Cultural Property Issues under International Law' (2001) XI Italian Yearbook of International Law 80.

[426] For this terminology, see: Carducci (n 190) paras 3, 7. referring to Charles Rousseau, *Le Droit Des Conflits Armés* (Pedone 1983) 164 (narrow definition) and Georg Schwarzenberger, *The Law of Armed Conflict*, vol II: International Law as Applied by International Courts and Tribunals (Stevens 1968) 244 (broad definition).

[427] Law adopted by the Allied Control Council in Germany providing for the punishment of persons guilty of war crimes, crimes against peace and against humanity, to give effect to the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945, and the IMT Charter, and to establish a uniform legal basis to prosecute war criminals and other similar offenders other than those dealt with by the International Military Tribunal (1945) XV TWC 23 (hereinafter 'Control Council Law n° 10').

[428] *The United States of America v Oswald Pohl et al.* (Judgment United States Military Tribunal Nuremberg) 5 TWC 958 (1947); *The United States of America v Krauch et al. ("IG Farben")* (Judgment United States Military Tribunal Nuremberg) X LRTWC 1 (1948); *The United States of America v Krupp et al.* (Judgment United States Military Tribunal Nuremberg) X LRTWC 69 (1948); *The United States of America v Flick* (Judgment United States Military Tribunal Nuremberg) IX LRTWC 1 (1947) as (alternatively) cited in *Prosecutor v Delalić et al. ("Čelebići")* (n 210) [590].

[429] *Verbatim* in Ss. 6.1(b)(xvi) and 6.1(e)(v) UNTAET Regulation 2000/15 and Arts. 13(b)(17) and 13(d)(5) ISTS.

GC IV to demonstrate the prohibition of plunder.[430]

The ICTY has tried to clarify the notions of 'plunder' and 'pillaging'. In *Jelisić*, it defined plunder as "*the fraudulent appropriation of public or private funds belonging to the enemy or the opposing party perpetrated during an armed conflict and related thereto.*"[431] Contrary to CIL and earlier case law,[432] *Čelebići* held that plunder under Art. 3(e) embraces all forms of individual criminal responsibility for the unlawful appropriation of property in armed conflict, including acts traditionally described as 'pillage'."[433] The difference between plunder and pillage seems thus to be that pillage needs to have a violent character, while plunder is broader and includes any unlawful appropriation.[434] However, the same Trial Chamber noted that it is not necessary to determine whether those terms are synonyms, as plunder in Art. 3(e) includes pillage.[435] This logical conclusion of the ICTY cannot be applied for the RS, where the term 'pillaging' is used. Therefore, there should be a clear definition of pillage in the Rome Statute, preferably delineating it from plunder.

Next to a clear definition, 'pillaging' in the RS must be distinguished from confiscation/appropriation (*cfr.* 623, 626-627 for respectively Art. 8(2)(a)(iv), and Art. 8(2)(b)(xiii) and (e)(xii)). While the first is possibly never justifiable, the latter two could be justified through military necessity.[436] The ICC certainly has a possibility to clarify this issue in the *Harun* case.[437]

b.2.2. Requirements

The EoC (insufficiently) clarify the war crime of pillage using five requirements: (i) appropriation of property; (ii) with the intention to deprive

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[430] *Ibid.*, paras. 587-588.

[431] *Prosecutor v Jelisić* (Judgment Trial Chamber) IT-95-10-T (1998) [48].

[432] *Prosecutor v Kunarac et al.* (Decision on Motion for Acquittal) IT-96-23-T and IT-96-23/1-T (2000) [15]; *Prosecutor v Blaškić* (n 210) [184].

[433] *Prosecutor v Delalić et al. ("Čelebići")* (n 210) [591]; *Prosecutor v Kordić and Čerkez* (n 149) [79].

[434] *Prosecutor v Delalić et al. ("Čelebići")* (n 210) [591]; *Prosecutor v Kunarac et al.* (n 432) [1].

[435] *Ibid.*

[436] Maugeri (n 56) 300–301: "*Un interpretazione possibili sarebbe quella per cui mentre la confisca o l'appropriazione di bene è consentita nei limiti della necessità militare e sono vietate solo le condotte che eccedono tale necessità, la condotta di saccheggio, in quanto esprime un concetto di depredazione violenta, sarebbe sempre vietate e non potrebbe essere in alcun modo giustificata [...]*" (emphasis in original). (Own translation: A possible interpretation could be that while the confiscation or appropriation of goods is agreed within the limits of military necessity and only acts exceeding that necessity are forbidden, pillage – which expresses the violent taking of something – should always be prohibited and could in no way be justified [...].)

[437] *Prosecutor v Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")* (Decision Pre-Trial Chamber on the Prosecution Application under Article 58 (7) of the Statute) ICC-02/05-01/07 (2007) as cited in Carducci (n 163) para 26.

the owner of the property and to appropriate it for private or personal use (thus excluding appropriations justified by military necessity);[438] (iii) without the consent of the owner; (iv) in the context of (non-) international armed conflict; and (v) with the awareness of factual circumstances establishing the armed conflict.[439] Although these are only applicable to the RS, the ICTY has developed similar criteria. In *Kordić* and *Naletilić* it specified that, next to the general *Tadić* requirements (cfr. 610),[440] private or public property must have been appropriated unlawfully and wilfully.[441] Contrary to the third EoC requirement, the ICTY in *Simić* provides some guidelines on how property may be lawfully requisitioned, such as through taxes within the existing laws and requisitions for the needs of the occupying army, proportional to the needs of the country.[442]

Both public and private property are protected, as there is no distinction between them in GC IV.[443] Both widespread and systematic acts and isolated acts of plunder/theft are prohibited,[444] and one plunderer suffices.[445] Furthermore, plundered goods do not need to have a large economic value.[446] However, plunder must meet a 'seriousness' threshold, namely have grave consequences for the victim, which translates into a "*sufficient monetary value*".[447] In sum, while plunder meets the first, second and fourth condition of the *Tadić* test, this is not always the case for the third requirement. Seriousness must be assessed on a case-by-case basis, taking into consideration consequences for the victim and the size of the victim group.[448] Logically, this requirement also applies to the Rome Statute, to distinguish pillage from mere domestic theft, albeit in the form of the gravity requirement.

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[438] ICC Elements of Crimes, Art. 8(2)(b)(xvi), footnote 47. Indeed, because it is closer to domestic theft, there is never a balancing test like for military necessity: Cryer and others (n 120) 298.
[439] ICC Elements of Crimes, Arts. 8(2)(b)(xvi) and 8(2)(e)(v).
[440] *Prosecutor v Tadić* (n 59) [94].
[441] *Prosecutor v Naletilić and Martinović* (n 224) [617]; *Prosecutor v Kordić and Čerkez* (n 149) [84].
[442] *Prosecutor v Simić* (Judgment Trial Chamber) IT-95-9-T (2003) [100]. On the required consensus of the owner, see: *The United States of America v Flick* (Judgment United States Military Tribunal Nuremberg) IX LRTWC 1 (1947); *The United States of America v Krauch et al. ("IG Farben")* (Judgment United States Military Tribunal Nuremberg) X LRTWC 1 (1948).
[443] *Prosecutor v Kordić and Čerkez* (n 149) [79].
[444] *Prosecutor v Kordić and Čerkez* (n 185) [352]; *Prosecutor v Blaškić* (n 210) [184]; O'Keefe, *The Protection of Cultural Property in Armed Conflict* (n 73) 357.
[445] *Prosecutor v Kunarac et al.* (n 432) [15–16].
[446] *Prosecutor v Naletilić and Martinović* (n 240) [612], referring to the case law of several French Military Tribunals and other cases. The ICTY also cited the Commentary on the Additional Protocols to the Geneva Conventions which clarified that "*isolated acts of indiscipline*" are also included in the prohibition of pillage: Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987) n 4542.
[447] *Prosecutor v Delalić et al. ("Čelebići")* (n 210) [1154].
[448] *Prosecutor v Martić* (n 217) [42]; *Prosecutor v Naletilić and Martinović* (n 224) [614].

The ICTY acknowledged that intent is a necessary subjective element of plunder.[449] Logically, the words 'wilfully', 'wanton', 'intentionally' exclude mere recklessness. However, another interpretation is possible, establishing the *mens rea* of plunder when the consequences of actions are foreseeable.[450] Although plunder implies intent, Maugeri argues that, in line with the crimes above, recklessness might be applicable when the perpetrator is not sure about the gravity of his acts, or when there are multiple perpetrators in an extensive and systematic activity.[451]

In conclusion, the strength of the prohibition of pillage is threefold: it applies to (i) both IAC and NIAC; (ii) both occupied territories and unoccupied territories of the enemy;[452] and (iii) both isolated acts for private gain and "*organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory*".[453]

3.3.2. Prosecuting Cultural Heritage Crimes as Crimes against Humanity

a. Definitions and Conditions

a.1. Crimes against Humanity in General

Cultural heritage crimes, directly categorised as war crimes, have also been declared to be crimes against humanity indirectly. As cultural heritage has never been mentioned in the list of crimes nor in the definition of persecution, cultural heritage crimes are thus criminalised indirectly.[454] This section will focus on the crime of persecution, which proves to be particularly strong in protecting cultural heritage.[455] However, also "*other inhumane acts*" (e.g. in

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[449] *Prosecutor v Naletilić and Martinović* (n 28) 1498. It referred to the criteria "*wanton appropriation*", "*wilfully*" and "*fraudulent*" of respectively *Prosecutor v Blaškić* (n 210) [184]; *Prosecutor v Kordić and Čerkez* (n 149) [394]; *Prosecutor v Jelisić* (n 431) [48].

[450] *Prosecutor v Hadžihasanović and Kubura* (n 233) [50]; *Prosecutor v Martić* (n 217) [104]; Maugeri (n 40) 193. Maugeri argues: "*La recklessness potrebbe essere compatibile, allora, con la fattispecie in esame nell'ipotesi in cui il soggetto non è certo della gravità della propria condotta o, nell'ipotesi di concorso di persone, dell'inserimento die essa in una più ampia e sistematica attività che comporta quelle gravi conseguenze necessarie affinché la fattispecie rientra nella competenza del Tribunale, ma prevede ciò e ne accetta il rischio.*" (Own translation: Recklessness could then be compatible with the hypotheses in which the perpetrator is not sure about the gravity of his acts or in the hypotheses in which there are multiple perpetrators who all take part in a widespread and systematic activity (but foresee this and thus accept the risk) that entail such grave consequences so that the jurisdiction of the ICTY is triggered.).

[451] *Ibid.* 193.

[452] *Ibid.* 186, 193. This can be deducted from Art. 33 GC IV which is situated in 'Section III: Occupied territories'.

[453] *Prosecutor v Jelisić* (n 431) [48]; *Prosecutor v Blaškić* (n 210) [184].

[454] For this terminology, see: Abtahi (n 65) 13; Maugeri (n 40) 194.

[455] *Prosecutor v Blaškić* (n 35) [233]: "*[...] the crime of 'persecution' encompasses not only bodily and mental harm and infringements upon individual freedom but also acts which appear less*

Art. 5(i) ICTY Statute) could provide a legal basis. This category has been used for more 'anthropocentric' crimes with cultural elements falling outside the scope of this dissertation.[456] Recently, the ICTY in *Prlić* held that several acts against Muslims (such as burning down Gracˆanica Mosque) constituted "*other inhumane acts*".[457] This is a welcome development to prosecute the crimes not caught by persecution (or war crimes).

The crime of persecution is one of those areas where ICL and IHRL intersect. Having the same origins (the atrocities during the Second World War) there is considerable overlap between them.[458] This overlap constitutes of 'serious violations' of human rights treaties. In fact, if States do not implement their human rights obligations and violate them, ICL provides a useful alternative to prosecute those responsible for the violation.[459] Both provide a minimum standard of human treatment and have a direct impact on individuals.[460] Yet, ICL does not prosecute every violation of IHRL, because the latter consists primarily of obligations for States.[461] Furthermore, IHRL can be broadly construed to achieve the object and purpose of the treaty, whereas individuals in ICL have to be protected through the principle of legality (*nullum crimen sine lege, cfr.* 653-654)[462] and the principle stating that ambiguity must be resolved in favour of the accused (*in dubio pro reo*).[463] Nevertheless, as this section will show, prosecuting cultural heritage crimes because of human rights considerations may be better done through crimes against humanity than through war crimes.[464]

In short, crimes against humanity consist of four requirements: (i) a widespread

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serious, such as those targeting property, so long as the victimised persons were specially selected on grounds linked to their belonging to a particular community". Maugeri (n 1) 237 says persecution has an "*alto valore simbolico*" (a high symbolic value) for the destruction of cultural heritage.

[456] Novic (n 38) 143. She gives the example of the criminalisation of forced marriage by the Special Court for Sierra Leone: *Prosecutor v Brima, Kamara, and Kanu Case* (Trial Chamber) SCSL-04-16-T (2007); *Prosecutor v Brima, Kamara, and Kanu Case* (Appeals Chamber) SCSL-04-16-T (2008).

[457] *Prosecutor v Prlić et al.* (n 12) [1212]; Schabas (n 278) 100.

[458] For an overview of the relationship between the Genocide Convention and the Universal Declaration of Human Rights and the role of Lemkin and Lauterpacht, see: Ana Filipa Vrdoljak, 'Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law' (2009) 20 European Journal of International Law 1163.

[459] Cryer and others (n 120) 13.

[460] *Ibid.*

[461] *Ibid.* 14–15.

[462] For this concern regarding the crime of persecution, see: *Prosecutor v Kupreškić et al.* (n 196) [618].

[463] *Ibid.* 15.

[464] Frulli, 'The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency' (n 19) 217; Vrdoljak, 'The Criminalisation of the Intentional Destruction of Cultural Heritage' (n 44) 13.

or systematic; (ii) attack; (iii) against a civilian population; (iv) with the specific intent to target that group; and under the Rome Statute (v) through an underlying State policy.[465] The Nuremberg IMT, IMT for the Far East and ICTY also require that those acts have to be committed in armed conflict, but this has been left by the ICTR and ICC.[466] Crimes against humanity thus differ from war crimes against cultural heritage in that they have to be widespread and systematic, severe, and always must result in damage.[467] The rationale behind this *indirect* criminalisation is thus that cultural heritage represents a particular group (civilian-use) and is not protected for its own sake (cultural-value).[468]

a.2. Persecution

From an examination of dictionaries of several legal systems, Bassiouni concluded that persecution has come to acquire a universally accepted meaning: a State policy leading to physical/mental/economic harm because of the victim's beliefs, views, or membership of a group.[469] Regarding the attack, the destruction or damage to cultural heritage must have resulted from an act directed against it, and not have been justified by military necessity.[470] Under

[465] See *chapeau* Art. 5(1) ICTY Statute and *chapeau* Art. 7(1) RS. For example: *Prosecutor v Stanišić and Župljanin* (Judgment Trial Chamber) IT-08-91-T (2013) [88], as cited in Ellis (n 15) 53. It has to be noted that also here reckless disregard suffices. For an overview of these *chapeau* requirements and the case law, see: Maugeri (n 40) 195–217; Cryer and others (n 120) 233–244; M Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (1st edition, Cambridge University Press 2011) 1–50; Antonio Cassese, 'International Criminal Law' in Malcolm D Evans (ed), *International Law* (Oxford University Press 2010) 759–762; Guénaël Mettraux, 'Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda' (2002) 43 Harvard International Law Review 237, 244–282; Fincham, 'The Intentional Destruction and Spoliation of Cultural Heritage under International Criminal Law' (n 94) 167. For an application of these requirements on the Mali situation, see: Green Martínez (n 16) 1089–1092.

[466] *Ibid.*; Meron, 'War Crimes in Yugoslavia and the Development of International Law' (n 179) 84–87. Citing the 'wider definition' of the Secretary-General, he argues there should be no link with armed conflict; The ICTY explicitly denied the State policy requirement in *Prosecutor v Kunarac et al.* (n 213) [98].

[467] Gottlieb (n 59) 888–889.

[468] Vrdoljak, 'Genocide and Restitution: Ensuring Each Group's Contribution to Humanity' (n 350) 36.

[469] Bassiouni (n 465) 396. He describes persecution as: "*State policy leading to the infliction upon an individual of harassment, torment, oppression, or discriminatory measures, designed to or likely to produce physical or mental suffering or economic harm, because of the victim's beliefs, views, or membership in a given identifiable group (religious, social, ethnic, linguistic, etc.) or simply because the perpetrator sought to single out a given category of victims for reasons peculiar to the perpetrator.*" Possibly this is an accepted crime as customary international law, but one should examine the relevant State practice and *opinio iuris*. It seems difficult to claim that it also constitutes a general principle, as most criminal justice systems do not use 'persecution' explicitly: *ibid.*

[470] *Prosecutor v Milutinović* (Judgment Trial Chamber) IT-05-87-T (2009) [208–209]; see also: *Prosecutor v Sainović et al.* (Judgment Trial Chamber) IT-05-87-T (2009) [206], which specified the *actus reus* as "*(a) the religious or cultural property must be destroyed or damaged extensively; (b)*

the Rome Statute, Art. 8(2)(b)(iv) (attack with knowledge of disproportionate incidental damage to cultural property) is – theoretically – another legal basis for persecution, provided that the other requirements are fulfilled.[471]

Five conditions need to be fulfilled for persecution:[472] (i) a severe deprivation of fundamental rights; (ii) with a certain gravity/severity; (iii) on discriminatory grounds; (iv) with connection to other acts; and (v) with specific intent to commit the underlying act, and with intent to discriminate on political, racial, or religious grounds.[473]

a.2.1. Persecution and Cultural Heritage at the Nuremberg Tribunal

Next to other 'personal injury crimes', Art. 6(c) Nuremberg Charter gave the IMT jurisdiction over: 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.

Novic calls this the "*non-identical twin of genocide at Nuremberg*", as the Statute criminalised those acts which would have fallen within the scope of the Genocide Convention if it had existed at that time (*cfr.* 647).[474] The IMT in *Rosenberg* and *Streicher* held that the destruction of synagogues was part of the persecution of the Jews.[475] While the IMT has categorised sacking – sometimes confusingly – as both a war crime and a crime against humanity,[476] it only condemned appropriation when on a national scale.[477] The Nuremberg Tribunal thus focused on the *dimension* of persecution.[478]

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the religious or cultural property must not be used for a military purpose at the time of the act; and (c) the destruction or damage must be the result of an act directed against this property."

[471] O'Keefe, 'Protection of Cultural Property under International Criminal Law' (n 40) 382.

[472] For an overview of all requirements and the case law, see: Maugeri (n 40) 217–229; Cryer and others (n 120) 256–258.

[473] *Prosecutor v Stakić* (Judgment Trial Chamber) IT-97-24-T (2003) [738]. This special intent is required next to the special intent to target the group as a general requirement for crimes against humanity. See also *Prosecutor v Sainović et al.* (n 16) [206]: "*The mens rea required for the offence is that the physical perpetrator, intermediary perpetrator, or accused acted with the intent to destroy or extensively damage the property in question, or in reckless disregard of the likelihood of its destruction or damage.*"

[474] Novic (n 38) 143.

[475] 'Judgment of the Nuremberg International Military Tribunal 1946' (n 9) 286–288, 293–296. For Rosenberg: see section 1. Streicher was the publisher of *Der Stürmer*, an anti-Jewish newspaper inciting people to persecute the Jews. He was also responsible for the demolition of the synagogue of Nuremberg. See also *Attorney-General v Adolf Eichmann* (Judgment District Court of Jerusalem) 36 ILR 5 (1968) [57]. Note that art. II(c) of the Control Council Law n° 10, establishing domestic allied tribunals, also had a broad definition of crimes against humanity.

[476] *Ibid.*

[477] Maugeri (n 40) 231.

[478] *Ibid.*

The United States Military Tribunal in *Flick* on the other hand focused on the *impact on the victim*.[479] It held that economic appropriation did not fall within the definition of persecution:

Under the doctrine of *ejusdem generis* the catch-all words 'other persecutions' must be deemed to include only such as to affect the life and liberty of the oppressed peoples. Compulsory taking of industrial property, however reprehensible, is not in that category.[480]

a.2.2. Persecution and Cultural Heritage at the *ad hoc* Tribunals (Arts. 5(h) ICTY Statute and 3(h) ICTR Statute)

- Cultural Objects Falling within the Scope of Persecution

The requirement of targeting a group is particularly interesting for the question which goods to protect: cultural property or cultural heritage? Although the ICTY Trial Chamber in *Prlić* seemed to focus on the religious value for a group, it contends that destroying cultural heritage as a crime against humanity is based on the idea that every group contributes to the cultural heritage of mankind (universalist approach).[481] However, in his separate opinion, Judge Antonetti argued that those attacks could only be categorised as persecution if the destroyed property had cultural value to the specified population (relativist approach).[482] This seems to be the *conditio sine qua non* for culture-based crimes against humanity: when cultural heritage does not have a special value for the population it represents, then it cannot have a special value, and be a crime against humanity.

Additionally, the ICTY has only used the crime of persecution (Art. 5(h) ICTY Statute) for tangible cultural heritage, whereas the ECCC are also focusing on intangible cultural heritage.[483] Although human rights more concerned with

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[479] *The United States of America v Flick* (Judgment United States Military Tribunal Nuremberg) IX LRTWC 1 (1947); *ibid.*

[480] *Ibid.*

[481] *Prosecutor v Prlić et al.* (n 12) [1705]. See also *Prosecutor v Kordić and Čerkez* (Judgment Trial Chamber) IT-95-14/2-T (2001) [207]: "*[...] all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects*"; Lostal Becerril, 'The Meaning and Protection of "Cultural Objects and Places of Worship" under the 1977 Additional Protocols' (n 150) 464–465. She notes that although 'spiritual' and 'cultural' property are connected, they each keep their own sphere of autonomy. Note that the Trial Chamber's finding that the HVO committed the crime of persecution was left by the Appeals Chamber, but this was on another ground, namely that the destruction of Mostar's Old Bridge was justified military necessity, see 625 and *Prosecutor v Prlić et al.* (n 367) [422–426].

[482] *Prosecutor v Prlić et al.* (n 366) 374; Green Martínez (n 16) 1086. See for example the destruction of mausoleums in in Timbuktu and its relevance for the Muslim population: *ibid.* 1094.

[483] Novic (n 38) 143. However, at the date of writing no judgment has been rendered in the most relevant case, Case 002/2, concerning, the treatment of the Cham and their common language, culture and religion.

intangible cultural rights, the ICTY has used customary IHRL to develop the crime of persecution regarding tangibles.[484] For example, in *Blaškić*, it held that the specific intent to harm a human being because of his group membership was key to criminalise acts that do not directly infringe upon elementary human rights, such as attacks on property.[485] This development, and the close connection between IHRL and intangible cultural heritage, could justify the introduction of the latter in the definition of persecution.[486] Thus, the attractiveness of categorising the destruction of cultural heritage as persecution lies in the fact that it can include intangible cultural property, as distinguished from war crimes which are necessarily focusing on buildings (RS) and/or works of art (ICTY Statute).[487] An additional reason is the application of persecution in peacetime, but this falls outside the scope of this dissertation (*cfr.* 588).[488]

- Acts Falling Within the Scope of Persecution

While the statutes of the ad hoc tribunals include persecution, they do not provide a definition.[489] The ICTY did this in *Stakić*, referring to *Kupreškić*: persecution needs to discriminate in fact and deny or infringe upon a fundamental right laid down in CIL or treaty law, and must to be carried out deliberately with the intent to discriminate on political, racial and religious grounds.[490]

Kupreškić only considered 'general' persecution on political, social and economic grounds. It was in *Blaškić* (concerning, among others, the HVO attack on the Bosnian-Muslim town of Ahmići) that the ICTY affirmed that targeted property from a selected group can also constitute the crime of persecution.[491] Examples are the destruction of private dwellings, businesses, and symbolic buildings (including religious, but also general cultural

[484] *Ibid.* 157–158.
[485] *Prosecutor v Blaškić* (n 210) [235].
[486] Novic (n 38) 158–159; Frulli, 'The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency' (n 19) 217. Note the difference between *Prosecutor v Kupreškić et al.* (n 196) [619] and *Prosecutor v Brdanin* (n 262) [1031]. While the former used gravity as criterion to protect some cultural rights, while excluding others, the latter rejected the idea of constructing a list of fundamental rights.
[487] Note that the idea of only protecting historic/artistic property would undermine the value of heritage of society, see: Van der Auwera (n 48) 179.
[488] 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' (n 89) 196; Badar and Higgins (n 3) 512.
[489] See also Art. 5 ECCC Law.
[490] *Prosecutor v Kupreškić et al.* (n 196) [621]; *Prosecutor v Stakić* (n 473) [732]. For confirmation of *Stakić*, see among others: *Prosecutor v Blaškić* (n 370) [131].
[491] *Prosecutor v Kupreškić et al.* (n 196) [615]; *Prosecutor v Blaškić* (n 210) [220–233].

heritage).[492] The ICTY mentioned the International Law Commission Report which included "*systematic destruction of monuments or buildings representative of a particular social, religious, cultural or other group*" in its broad definition of persecution.[493] Several Trial Chambers have affirmed this judgment, basing their judgments on CIL.[494] More broadly, *Gotovina* even held that attacks against civilians and their objects can constitute persecution.[495]

The Trial Chamber in *Kordić* summarised what crimes against cultural heritage may constitute the crime of persecution (hereinafter called cultural persecution).[496] They include the acts prohibited by Art. 3(b-e) (*cfr.* section 1).[497] While war crimes were used to prosecute clear destructions during battle, like Dubrovnik or Sarajevo, persecution was more pertinent to deal with the atrocities against Muslim cultural heritage in Bosnia.[498] It captures the ideological intention.[499] For example, as the destruction of Mostar Bridge by the Croat Defence Council (HVO) was first categorised as a war crime, the Trial Chamber in *Prlić* thought its religious/ethnic dimension was more important than its (multi)cultural value, thus shifting to the discriminatory intent of persecution.[500]

While discriminatory intent is still required, the ICTY has consistently affirmed that such destruction is *de facto* discriminatory when the targeted property is valuable for a specific population.[501] It could be argued, however, that this 'crime against humanity approach' diminishes the importance of protecting cultural heritage per se, because it sees these attacks as direct attacks on individuals.[502] Yet, according to Meron, the prosecution as crimes against humanity is the "*recognition of the importance of these institutions to the*

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[492] *Ibid.*

[493] ILC, 'Report of the International Law Commission on the Work of its 43rd Session' (1991) UN Doc. A/46/10/ suppl. 10, 268.

[494] For example, in Stakić, the ICTY held that the destruction of Bosnian religious property amounted to persecution: *Prosecutor v Stakić* (n 473) [768].

[495] *Prosecutor v Gotovina et al.* (Judgment Trial Chamber) IT-06-90 (2011) [1842].

[496] *Prosecutor v Kordić and Čerkez* (n 185) [202].

[497] *Ibid.* 202–207.

[498] *Cfr.* Riedlmayer's testimony in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia)* (Verbatim Record) [2006] [38] as cited in Novic (n 38) 151.

[499] Schmalenbach (n 100) 25.

[500] *Prosecutor v Prlić et al.* (n 12) [1713]; Novic (n 38) 152. Lostal calls this the "*human dimension of the international law for the protection of cultural heritage*": Lostal Becerril, 'The Meaning and Protection of "Cultural Objects and Places of Worship" under the 1977 Additional Protocols' (n 150) 465. However, recently the Appeals Chamber found that the HVO had a military interest and therefore no specific intent to discriminate: *Prosecutor v Prlić et al.* (n 367) [423].

[501] Green Martínez (n 16) 1087.

[502] Theodor Meron, 'The Protection of Cultural Property in the Event of Armed Conflict within the Case-Law of the International Criminal Tribunal for the Former Yugoslavia' (2005) 57 Museum International 41, 56.

identity and the development of an individual": without its protection the link with our heritage and identity is disconnected.[503] Indeed, it must be recalled that the HC protects individual autonomy and the diversity of humankind.[504]

As summarised in *Milutinović*, the *actus reus* of cultural persecution consists of (i) extensive destruction of or damage to religious or cultural property; (ii) which is not used for military purposes; and (iii) the destruction or damage must be the result of an act directed against this property.[505] The ICTY seems to suggest that the destruction of *one* site is sufficient to constitute persecution.[506] If this is true, this case law reduces the importance of the 'widespread and systematic' requirement and could be called revolutionary.[507] Still, the attack must be from a certain type and severe enough to destroy the economic livelihood of a population.[508]

It might seem unclear,[509] but – in theory – there is a clear division between acts against property that constitute persecution, and those that do not. *Tadić* concluded that economic measures with personal effects could suffice.[510] Thus, this could include private property and even the expropriation without compensation.[511] As such, all attacks on cultural heritage for economic measures but with a negative impact on a specific group, could fall within the definition of prosecution. Whether plunder falls within the definition of persecution is another question.[512] The Trial Chambers in *Tadić*[513] and

[503] *Ibid.*
[504] *Ibid.*
[505] *Prosecutor v Milutinović* (n 488) [206], as confirmed in *Prosecutor v Dordević* IT-05-87/1-T (2011) (Judgment Trial Chamber) [1773(a)].
[506] *Prosecutor v Deronjić* (Sentencing Judgment) IT-02-61-S (2004) [disposition], as cited in Roger O'Keefe, 'Protection of Cultural Property under International Law' (2010) 11 Melbourne Journal of International Law 339, 384; *Prosecutor v Vasiljević* (Judgment Appeals Chamber) IT-98-32(2004) [113].
[507] Lostal Becerril, 'La Protección De Bienes Culturales En El Tribunal Penal Internacional Para La Ex Yugoslavia' (n 14) 19, 24: "*La gran innovación de este caso reside en sugerir que la destrucción de un único edificio de esta naturaleza puede acarrear graves consecuencias para la víctima (el grupo) y, por tanto, constituye un acto de persecución*" (original emphasis). (Own translation: The great innovation of this case is that it seems to suggest that the destruction of *one* unique building of that nature may have grave consequences for the victim (the group) and therefore constitute the act of persecution.). For the other revolutionary aspect of the ICTY case law, *cfr.* 648.
[508] *Prosecutor v Kupreškić et al.* (n 196) [631]; *Prosecutor v Tadić* (Judgment Trial Chamber) IT-94-1-T (1997) [707]; Werle and Jessberger (n 196) 483.
[509] Werle and Jessberger (n 196) 483.
[510] *Prosecutor v Tadić* (n 508) [707]. See also *Attorney-General v Adolf Eichmann* (Judgment District Court of Jerusalem) 36 ILR 5 (1968).
[511] Werle and Jessberger (n 196) 843.
[512] Maugeri (n 40) 235–236. These are Art. 33 GC IV, Art. 4(2)(g) AP II, and Arts. 28 and 47 Hague Regulations 1907.
[513] *Prosecutor v Tadić* (n 508) [707].

Krajišnik[514] held that persecution includes plunder, while the Appeals Chamber in *Blaškić* denied this.[515]

No cases of destruction of cultural heritage as persecution without connection to other crimes of humanity were submitted to the ICTY.[516] The ICTY has thus not resolved the question whether the latter are constitutive for cultural persecution (for the ICC: *cfr.* a.2.3).[517] For persecution in general, the ICTY rejected such a requirement.[518] For cultural persecution the requirement seemed to be true for less-grave infringements on cultural heritage than destruction, including appropriation and plunder.[519]

a.2.3. Persecution and Cultural Heritage at the International Criminal Court

Art. 7(1)(h) RS criminalises persecution in its own way:

Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court (emphasis added).

While following CIL,[520] this definition both extends and narrows the scope of the crime, respectively in acknowledging other groups than political, racial and religious 'collectivities' (requirement 1) and restricting it through the requirement that it should be connected in connection with another act (requirement 2).[521] Although the definition is criticised for its ambiguousness,[522]

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[514] *Prosecutor v Krajišnik* (Judgment Trial Chamber) IT-00-39-T (2006) [771].

[515] *Prosecutor v Blaškić* (n 370) [148]. Note that the Rome Statute has a more expansive definition of persecution, including plunder, see 645 and *ibid.*: The Appeals Chamber referred to the expansive scope of persecution in Art. 7(1)(h)(4) RS: "*The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.*"

[516] Novic (n 38) 164; Bassiouni (n 465) 405.

[517] Novic (n 38) 164; Bassiouni (n 465) 405.

[518] See for example: *Prosecutor v Kupreškić et al.* (n 196) [573–581]. The Trial Chamber rejected the argument of the defence that Art. 7(1)(h) RS required this. In its view, Art. 7(1)(h) is not only an indication of *opinio iuris*, but not consonant with customary international law.

[519] *Prosecutor v Krajišnik* (n 514) [772].

[520] O'Keefe, 'Protection of Cultural Property under International Criminal Law' (n 40) 383.

[521] Caroline Fournet and Clotilde Pégorier, 'Only One Step Away From Genocide: The Crime of Persecution in International Criminal Law' (2010) 10 International Criminal Law Review 713, 715–716.

[522] Bassiouni (n 3) 404 has questions on the words "*severe*", "*intentional*", "*fundamental rights*"; for "*discrimination*", see: Yann Jurovics, 'Article 7: Crimes Contre l'Humanité' in Julian Fernandez and Xavier Pacreau (eds), *Statut de Rome de La Cour Pénale Internationale: Commentaire Article par Article*, vol I (Editions A Pedone 2012) 447. According to Yurovics, the Statute means to say

it leaves the case law of the ICTY on discriminatory intent unaffected.[523]

The third requirement, "*intentional and severe deprivation of fundamental rights contrary to international law*" in the definition clause of Art. 7(2)(g) RS, has to be traced back to the *Tadić* case.[524] There is no question whether attacks on cultural heritage fall within this definition: they are a denial of a fundamental right established through CIL and treaty law.[525] However, there is a limit: they can only constitute a violation of fundamental rights if the destroyed property has cultural value for the specified civilian population (*cfr.* 640).[526]

On the other hand, other acts are easier to accept than under the ICTY Statute: seizure and pillage clearly fall within this definition.[527] In this regard, the Rome Statute follows CIL, and broadens the ICTY's interpretation (limited to political, racial or religious discrimination).[528] For example, the Pre-Trial Chamber in *Harun* held that persecution includes plunder, even of private property.[529]

The *Al-Mahdi* case is also relevant here to examine whether persecution – and *a fortiori* cultural persecution – exist *per se*, i.e. whether other personal-injury based acts are necessary under the RS.[530] The OTP concluded *in casu* that there was a lack of sufficient evidence, but there could be a possibility in the future to prosecute cultural persecution in relationship with, for example, enforced disappearances of soldiers.[531] This conclusion would have been

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that only discriminatory attacks have the aim to attack civilians, and other attacks not (territorial, strategical, etc.). This would make the crime of persecution almost useless.

[523] O'Keefe, 'Protection of Cultural Property under International Criminal Law' (n 40) 382.

[524] *Prosecutor v Tadić* (n 508) [697]: "*It is the violation of the right to equality in some serious fashion that infringes on the enjoyment of a basic or fundamental right that constitutes persecution, although that discrimination must be on one of the listed grounds to constitute persecution under the Statute,*" as cited in Novic (n 38) 156.

[525] See for instance: *Prosecutor v Prlić et al.* (n 12) [1711–1712].

[526] J Petrovic, *The Old Bridge of Mostar and Increasing Respect for Cultural Property in Armed Conflict* (Martinus Nijhoff Publishers 2013) 268 as cited in Green Martínez (n 16) 1081. This seems to be in line with the opinion of Judge Antonetti in *Prosecutor v Prlić et al.* (n 366) [374].

[527] O'Keefe, 'Protection of Cultural Property under International Criminal Law' (n 40) 383; Maugeri (n 40) 301.

[528] O'Keefe, 'Protection of Cultural Property under International Criminal Law' (n 40) 383.

[529] *Prosecutor v Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")* (Judgment Pre-Trial Chamber) ICC-02/05-01/07 (2007) [74] (an arrest warrant has been issued, but the accused have not been arrested yet at the time of writing). On the plunder of private property, this seems to be in line with *Prosecutor v Krajišnik* (n 514) [770–771], as long it has a 'severe impact' on the population.

[530] Novic (n 38) 166.

[531] OTP, 'Situation in Mali: Article 53(1) Report' (16 January 2013) paras. 128-132, as cited in *ibid.* 166–167 and Green Martínez (n 11) 1077, 1097–1098. Novic also argues that this could be done at the domestic level through the principle of complementarity. Green Martinez argues, based on the OTP Report, that the OTP should have prosecuted for persecution, as there was a reasonable basis to believe other physical crimes had been committed.

different had the OTP emphasised the religious motives behind the destructions.[532] Nevertheless, this raises a problem of interpretation regarding Art. 7(1)(h) which needs to be resolved by the ICC. According to Maugeri, two solutions are possible: (i) or this connection is just an element of context (which leads to the futility of persecution in international law), or – preferably – (ii) it has indeed to be read in conjunction with other crimes (requirement 2).[533] Boot and Hall claim that a connection with a single act is sufficient.[534] At this moment, prosecuting the destruction of cultural heritage only as a crime against humanity has not been dealt with yet by the ICC.[535] Maybe the explicit inclusion of cultural persecution in the list of crimes against humanity will advance this matter.[536]

a.2.4. Prosecution through War Crimes *and* Crimes Against Humanity?

One can see the advantages of the prosecution through both war crimes and crimes against humanity: the contextual requirements of one crime could be met when those of another are not.[537] Moreover, conduct could be both a crime against humanity and a war crime.[538] The ICTY has affirmed this, insofar as offences contain different elements, protect different values, or when it is necessary to record a conviction for both offences.[539] For example, murder could constitute both an autonomous crime against humanity or persecution.[540] This issue is embedded in the debate on whether cumulative charges are possible. The ICTY answered positively, as it is not certain which of the charges will be proven.[541] The ICC held that the RS prevented this.[542]

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[532] Badar and Higgins (n 3) 511.
[533] Maugeri (n 40) 302.
[534] Machteld Boot and Christopher K Hall, 'Article 7.1.H' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (CH Beck 2008) 221.
[535] Wierczynska and Jakubowski (n 75) 716.
[536] For example, European Parliament Resolution on the Destruction of Cultural Sites Perpetrated in Syria and Iraq 2015/2649(RSP) point 12 as cited in *ibid.*; Green Martínez (n 16) 1086–1097.
[537] Frulli, 'Distribuzione Dei Beni Culturali e Crimine Di Genocidio: L'Evoluzione Della Giurisprudenza Del Tribunale Penale Internazionale per La Ex-Jugoslavia' (n 89) 261; Brammertz and others (n 121) 1086.
[538] See, for example, *Prosecutor v Tadić* (Judgment Appeals Chamber) IT-94-1-AR72 (1999) [286]. For the ICC, see: *Prosecutor v Katanga et al.* (Decision on the confirmation of the charges) ICC-01/04-01/07 (30 September 2008) [388-391]. Both cited in Brammertz and others (n 121) 1087. Although the facts of the *Al-Mahdi* case could also justify prosecution as crimes against humanity, the OTP decided not to do so: Office of the Prosecutor (OTP), 'Art. 53(1) Report, Situation in Mali' (16 January 2013) ICC-01/12 [129-132].
[539] *Prosecutor v Kupreškić et al.* (n 196) [638]; Maugeri (n 40) 238. For an example in which the ICTY held that cumulative convictions were impossible, see: *Prosecutor v Prlić et al.* (Judgment Trial Chamber Vol 4/6) IT-04-74-T (2013) [1254, 1264–1266]. It held that the crime of Art. 3(b) ICTY Statute does not contain a materially distinct element from the crime of Art. 2(d).
[540] *Prosecutor v Kupreškić et al.* (n 196) [642].
[541] *Prosecutor v Delalić et al. ("Čelebići")* (n 215) [400]; Brammertz and others (n 121) 1088.
[542] *Prosecutor v Bemba Gombo* (Decision Pursuant to Art. 61(7)(a) and (b) of the Rome Statute,

However, the doctrine of cumulative charges and convictions risks violating the *non-bis-in-idem* principle: someone cannot be tried for the same act (Art. 10 ICTY Statute, Art. 20 RS).[543] A correct application of the doctrine should thus be made e.g. through absorption[544] or proportionality of sanctions.[545]

3.3.3. Other Possible Indirect Legal Bases

a. Prosecuting Cultural Heritage Crimes as Genocide?

While prosecuting the acts against cultural heritage as war crimes and crimes against humanity is undeniable, the international community has difficulties with accepting its prosecution as genocide. Yet, the ICTY noted that persecution belongs to the same *genus* as genocide and can thus aggravate into genocide if genocidal intent can be proven.[546] The difference between them is that genocide requires that the underlying act is criminal, whereas even seemingly unharmful acts can constitute persecution if they are committed with discriminatory intent.[547]

Art. II Genocide Convention stipulates:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial

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Pre-Trial Chamber II) ICC-01/05-01/08-424 (15 June 2009) [203]. *Contra*: Brammertz and others (n 152) 1087–1088.: under Art. 54(1)(a) RS, the OTP has a duty to "*extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute*".

[543] *Non-bis-in-idem* also has consequences for the prosecution at the international and domestic level. For the different approach between the ICTY and ICC, see Part 2. See, for example: *Prosecutor v Tadić* (Decision Trial Chamber on the Defence Motion on the Principle of Non-bis-in-idem) IT-94-1-T (1995), where the Trial Chamber held that proceedings in Germany did not violate the principle, as the German tribunal did issue a final judgment yet [10-12] and the accused cannot be tried in Germany after the ICTY judgment [13-16]. Furthermore, the principle of *non-bis-in-idem* in Art. 14(7) of the International Covenant on Civil and Political Rights, Art. 35 of the European Convention on the Transfer of Proceedings in Criminal Matters, and the Draft Statute of the International Criminal Court has not been violated [17-24].

[544] *Prosecutor v Vasiljević* (n 506) [146]; Maugeri (n 40) 239–240, 312. It held that the crime of persecution subsumes inhumane acts and murder, as persecution adds a requirement: discriminatory intent.

[545] *Prosecutor v Tadić* (n 508) [9, 29]; Maugeri (n 40) 239–240, 312. The Trial Chamber held that crimes against humanity are more serious than war crimes and this was taken into account in determining the appropriate sentence.

[546] *Prosecutor v Kupreškić et al.* (n 196) [636]. Furthermore, genocide also catches acts in peacetime or in crises which have not yet attained the level of armed conflict: Frulli, 'Distribuzione Dei Beni Culturali e Crimine Di Genocidio: L'Evoluzione Della Giurisprudenza Del Tribunale Penale Internazionale per La Ex-Jugoslavia' (n 89) 274.

[547] *Prosecutor v Kvočka* (Judgment Trial Chamber) IT-98-30/1-T (2001) [186]; *contra*: Fournet and Pégorier (n 43) 728–729 note that the distinctive feature between genocide and persecution is not inasmuch the criminal character of the underlying act, but the specific intent to discriminate.

or religious group, as such:
(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.[548]

The Genocide Convention thus does not include *cultural genocide*, i.e. the suppression of ethnic groups through the destruction of their culture and the assimilation of their original identity in the culture of the hegemonic group.[549] Still, there is a case for its introduction.

The Art. 3 Draft Convention included "*[d]estroying, or preventing the use of, libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the groups.*"[550] This was based on Raphael Lemkin's theory that genocide consists of both barbarity and vandalism.[551] Yet, Art. 3 was left out the final convention for several political reasons.[552] Furthermore, criminals who 'merely' destroy cultural heritage in a systematic way and thereby occasionally kill people could then have fallen within the definition, while this was not the ambition of the Genocide Convention.[553]

Also the lack of intent to destroy, in whole or in part, directed to the group's

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[548] Art. II Genocide Convention has been incorporated in Art. 4 of the ICTY Statute, Art. 2 of the ICTR Statute, and Art. 5 of the Rome Statute.

[549] Francesca Cerulli, 'Il Genocidio Culturale Nel Diritto Internazionale' (2017) 5 Science & Philosophy 109, 111: "*[...] un processo capace di determinare la soppressione di particolari gruppi etnici, attraverso una distruzione mirata della cultura degli stessi e attraverso un'assimilazione coercitiva del loro sistema identitario originario all'interno della cultura del gruppo egemone*". (Own translation: [...] a process able to determine the suppression of particular ethnic groups, through a destruction focused on their culture and through a coercive assimilation of their original identity within the culture of the hegemonic group.).

[550] United Nations Economic and Social Council, 'Draft Convention on Prevention and Punishment of the Crime of Genocide', UN Doc. E/AC.25/12, 1948.

[551] Raphaël Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation; Analysis of Government; Proposals for Redress* (first published 1944, The Lawbook Exchange 2005) 81. He defined barbarity as "*oppressive and destructive actions directed against individuals as members of a national, religious, or racial group*" and vandalism as "*malicious destruction of works of art and culture, because they represent the specific creations of the genius of such groups*". He was the inventor of the word 'genocide' and one of the drafters of the Genocide Convention.

[552] Mainly because of resistance by Western States: William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edition, Cambridge University Press 2009) 212. These States were hostile to the idea of cultural genocide, allegedly for their past treatment of immigrants and indigenous people; For a detailed history of the preparatory works, see: Cerulli (n 549); Johannes Morsink, 'Cultural Genocide, the Universal Declaration, and Minority Rights' (1999) 21 Human Rights Quarterly 1009, 1028–1043; Novic (n 38) 22–30.

[553] Claus Kreβ, 'The Crime of Genocide under International Law' (2006) 6 International Criminal Law Review 461, 487, as cited in Berster (n 80) 681–682.

physical or biological annihilation, makes it difficult to accept the existence of cultural genocide.[554] Yet, the ICTY, particularly in *Krstić* and *Jelisić*, affirmed that the destruction of cultural property can constitute specific intent (the *mens rea* of genocide).[555] For example, the Rule 61 hearing of *Karadžić and Mladić* held that the destruction of the monuments in Mostar and other Bosnian towns were an attempt to change the *physical* environment, and could be evidence of this intent.[556]Moreover, as Judge Shahabuddeen (dissenting) argued in *Krstić*, one can see this intent as the aspiration of the perpetrator after the group's *socio-cultural* destruction:

The destruction of a culture may serve evidentially to confirm an intent, to be gathered from other circumstances, to destroy the group as such. In this case the razing of the principal mosque confirms an intent to destroy the Srebrenica part of the Bosnian Muslim group."[557]

This is truly revolutionary.[558] He further argued that the protected groups in the Convention are bound together by certain (often intangible) characteristics,[559] but he added that he did not argue for the recognition of cultural genocide as an international crime.[560] His argument thus entails that the acknowledgment of cultural genocide *per se* is unnecessary as the high burden to prove genocide could be lowered by including socio-cultural destruction.

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[554] *Prosecutor v Krstić* (Judgment Trial Chamber) IT-98-33-T (2001) [580]; Vrdoljak, 'Genocide and Restitution: Ensuring Each Group's Contribution to Humanity' (n 350) 18; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Judgment) [2015] ICJ Rep 2015 [190, 328]; Berster (n 80) 677–678.

[555] *Prosecutor v Krstić* (n 554) [580]; *Prosecutor v Jelisić* (Judgment Appeals Chamber) IT-95-10-A (2001) [57]; Maugeri (n 40) 240. See also: *Prosecutor v Blagojević and Jokić* (Judgment Trial Chamber) IT-02-60-T (2005) [666], where the ICTY emphasised this intent to destroy the group (by forcible transfer) but denied the existence of cultural genocide.

[556] *Prosecutor v Karadžić et al.* (Consideration of the Indictment within the Framework of Rule 61 of the Rules of Procedure and Evidence) IT-95-5-R61 and IT-95-18-R61 (1996) [94]. Rule 61 of the Rules of Procedure and Evidence outlines the procedure in case of failure to execute a warrant. In short, the Prosecutor is invited to submit the indictment and evidence to the Trial Chamber, which will issue an international arrest warrant.

[557] *Prosecutor v Krstić* (Partially Dissenting Opinion of Judge Shahabuddeen in Appeals Chamber) IT-98-33-A (2004), [50].

[558] Lostal Becerril, 'La Protección De Bienes Culturales En El Tribunal Penal Internacional Para La Ex Yugoslavia' (n 14) 24: "*Quizá la revolución doctrinal más inesperada es la afirmación de que, [...], el mens rea o dolor específico del crimen puede manifestarse a través de la destrucción o menoscabo causado a los símbolos culturales y religiosos del grupo que se encuentra bajo amenaza.*" (Own translation: Perhaps the most unexpected academic revolution is the affirmation that [...] the *mens rea* or specific intent of the crime can be seen in the destruction or damage caused to cultural and religious symbols of the group, which is under threat.). For the first revolutionary aspect of the ICTY case law on cultural heritage, *cfr.* 643.

[559] *Prosecutor v Krstić* (n 557) [50].

[560] *Ibid.*

The principle of legality still requires that genocide takes one of the forms in Art. II Genocide Convention. Only physical (Art. II(a-c) Genocide Convention) or biological genocide (Art. II(d-e)) is possible *de lege lata*.[561] Yet, the position on cultural genocide is not always that straightforward. Without arguing for the existence of cultural genocide, the ICTY in *Blagojević* held that forcible transfer (Art. II(e), the closest form to cultural genocide) could lead to the destruction of the group.[562] Furthermore, ignoring the spiritual pillar of the crime of genocide ("*the deprivation of the contribution of the group to world culture*") in the Genocide Convention seems inconsistent with the 1946 United Nations General Assembly (UNGA) Genocide Resolution.[563] Here, problematic is the incoherence between the criminalisation of persecution and genocide ("*reactive element*"), and IHRL and remedies/restitution ("*proactive element*"),[564] while they have to same aim: ensuring the contribution of groups to cultural heritage (as in the HC, *cfr*. 583).[565] Moreover, the humanisation of cultural heritage law has widened this gap between ICL and the (cultural-value) rationale of IHL instruments.[566] Yet, sometimes cultural heritage must be protected *per se*, not because there is a clear anthropocentric reason for it (*cfr*. 597). Placing too much emphasis on these human aspects of cultural heritage crimes could otherwise justify the destruction of heritage which have lost the link with its people (*cfr*. 583).[567] A pure application of this recalibration could

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[561] *Prosecutor v Krstić* (n 554) [580]; Maugeri (n 40) 241. The Trial Chamber in *Krstić* noted that the acknowledgment of cultural genocide would be contrary to the *nullum crimen sine lege* principle: *Prosecutor v Krstić* (n 554) [577–597]; Schairer (n 425) 92.

[562] *Prosecutor v Blagojević and Jokić* (n 10) [666]; Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (3rd edition, Cambridge University Press 2014) 225: "*but this looks like an attempt to square the circle.*"

[563] UNGA Res 96(1) (11 December 1946) UN Doc A/RES/96(I). The preamble of the UNGA Resolution states: "*[...] such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups and is contrary to moral law and to the spirit and aims of the United Nations*" (emphasis added). The compromise between States is reflected in the preamble of the Genocide Convention: "*resulted in great losses to humanity*", leaving the words "*cultural and other contributions represented by these groups*".

[564] For the latter, see the acknowledgment of the human dimension of reparations in the *Al-Mahdi* Reparations Order (*cfr*. 659): *Prosecutor v Al-Mahdi* (Reparations Order Trial Chamber) ICC-01/12-01/15 (17 August 2017) [11]; Vrdoljak, 'Introductory Note to Prosecutor v. Ahmad Al Faqi Al Mahdi: Judgment and Sentence & Reparations Order (International Criminal Court)' (n 266) 18.

[565] Vrdoljak, 'Genocide and Restitution: Ensuring Each Group's Contribution to Humanity' (n 350) 18, 39; Stefania Negri, 'Cultural Genocide in International Law: Is the Time Ripe for a Change?' (2013) 10 Transnational Dispute Management 1, 8. As seen in part 2, this common aim is also present in the internationalist and cultural-value instruments. See, for example, the preamble of the 1954 Hague Convention: "*Being convinced that damage to the 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*" (emphasis added).

[566] Lostal Becerril, *International Cultural Heritage Law in Armed Conflict: Case-Studies of Syria, Libya, Mali, the Invasion of Iraq, and the Buddhas of Bamiyan* (n 100) 44.

[567] *Ibid*. She gives the example of the Bamiyan Buddhas: in that case they could have been destroyed because there was no thriving Buddhist community anymore.

thus lead to the adverse effect.

The acceptance of cultural genocide *per se* through an *effet utile* approach of the Genocide Convention (upholding the cultural, spiritual and genetic multiplicity of mankind) could close the gaps between ICL on the one hand, and IHRL and cultural heritage law on the other.[568] Although one can see the value of this last approach, this interpretation leaves the political consensus and would thus be a very progressive development of customary international law. For now, the ICJ in *Croatia v Serbia* (regarding State responsibility) has halted this development.[569] The introduction of cultural genocide is a dead letter.[570]

Yet, one clearly realises that distinguishing physical and biological genocide from cultural genocide (as the 6th Committee did) is artificial, because they are often committed together.[571] The aim of destroying cultural heritage is not always the rout of an opposing army, but "*the pursuit of ethnic cleansing or genocide by other means*".[572] Indeed, a campaign of purely social destruction could be the 'perfect crime': first one dissolves the quality of a group (not criminalised), which makes it possible to kill the remnants of the group (not in the scope of the Genocide Convention).[573]

There are several solutions *de lege lata*.[574] First, one can always prosecute cultural heritage crimes as specific crimes against humanity, as they are often realised together with genocide.[575] This has two advantages: not only does it

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[568] This would truly align ICL with its ambition in the preamble of the Rome Statute: "*Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time.*"; see: *ibid.* 686–687 and Vrdoljak, 'Genocide and Restitution: Ensuring Each Group's Contribution to Humanity' (n 350) 47.

[569] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Judgment) [2015] ICJ Rep 2015 [136]; Berster (n 80) 679–680.

[570] Schabas (n 552) 220.

[571] Schairer (n 425) 92.

[572] Robert Bevan, *The Destruction of Memory: Architecture at War* (2nd Edition, Reaktion Books 2016) 18.

[573] Berster (n 80) 687–688. Yet, these crimes could be categorised as war crimes or crimes against humanity. See also: Lawrence Davidson, *Cultural Genocide* (Rutgers University Press 2012) 131, as cited in Fincham, 'The Intentional Destruction and Spoliation of Cultural Heritage under International Criminal Law' (n 94) 171: "*[...] But [cultural genocide] is doing so under the radar, so to speak, for there are no laws against it. And, as yet, it is not perceived to have reached the level of international scandal that makes for new laws and regulations. [...]*".

[574] For solutions *de lege ferenda*, see 144.

[575] Maugeri (n 40) 242. "*[...] Tale approccio sembra corretto, salvo a vagliare la possibilità di introdurre, in una prospettiva de iure condendo, una distinta fattispecie di genocidio culturale come crimine contro l'umanità, che presenti un minor disvalore rispetto al genocidio fisico e che possa essere assorbita in quest'ultima, più grave, fattispecie, laddove, come avviene nella prassi, i due fenomeni si realizzino contemporáneamente [...]*". (Own translation: This approach [not criminalising cultural genocide] seems correct, except for opting for the possibility to introduce, in a perspective *de iure condendo* [the law being established], a distinct type of cultural genocide

avoid the high threshold of genocidal intent, it also makes it possible to protect groups deliberately left out from the Genocide Convention, such as political groups. Second, one can always prosecute as genocide *if* they fall within one of the five categories of Art. II.[576] Third, one could also argue that cultural genocide has always existed, albeit disguised as biological genocide (Art. II(d)), because those groups are neither physically destroyed, nor inhibited to have children at all.[577]

b. Prosecuting Cultural Heritage Crimes as Aggression?

Neither international courts and tribunals nor academics have paid attention to it, but also the crime of aggression in Art.8*bis* RS (following CIL) could be a legal basis to prosecute cultural heritage crimes.[578] The second paragraph includes a non-exhaustive list of acts of aggression. The most relevant category is the "*[b]ombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State*".[579] However, as it focuses on the leadership of a State for 'Rosenberg-type crimes' (*cfr*. 632), this crime is quite limited. Moreover, it excludes non-State actors from its scope and thus ignores the tendencies of modern war and ICL.[580]

c. Prosecuting Cultural Heritage Crimes as Terrorism?

A last consideration is prosecution as terrorism. This (domestic) crime consists of a criminal offence (*actus reus*) with the purpose of coercion and/or causing alarm among the population (*mens rea*).[581] Although the international

such as a crime against humanity that presents a minor value with respect to physical genocide and that may be absorbed in the more grave (worse) type [of genocide], as they are often committed together.). The broad definition of 'persecution' in Art. 5(h) of the ICTY Statute could catch these crimes: *ibid*. 242–243 (*cfr*. 641 and 644). However, there has been a shift from the Genocide Convention: 'cultural' in Art. 7(1)(h) RS seems to have a broader meaning than 'biological', more something like 'ethnic(al)': Novic (n 38) 146.

[576] Berster (n 80) 682.

[577] *Ibid*. 686–691; Cryer and others (n 120) 218 say that also Art. II(e) (forcibly transferring children) was included in the Genocide Convention as a compromise for cultural genocide.

[578] Cassese and Gaeta (n 19) 27–36. Art. 8*bis*(1) defines the crime of aggression as: "*the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations*" (emphasis added).

[579] This provision follows Art. 1 UNGA Res. 3314 (XXIX) (14 December 1974); Cryer and others (n 120) 316.

[580] Especially because the RS prosecutes leaders of NSA's for *ius in bello* crimes, see: Mauro Politi, 'The ICC and the Crime of Aggression: A Dream That Came Through and the Reality Ahead" (2012) 10 Journal of International Criminal Justice 267, 286–287.

[581] Cassese and Gaeta (n 19) 149–152; Cryer and others (n 120) 338.

community cannot agree on a definition of the crime,[582] let alone its criminalisation in the ICTY Statute and RS,[583] terrorism can fall within the definition of war crimes or crimes against humanity.[584] If not, acts of terrorism can still influence the sentence.[585]

3.4. ASSESSMENT OF THE INTERNATIONAL LEGAL FRAMEWORK IN TERMS OF CLARITY AND EFFECTIVENESS

3.4.1 Clarity and Nullum Crimen Sine Lege

The legal framework above determines *how* perpetrators can be prosecuted to uphold the protection of cultural heritage. A more fundamental issue concerns if perpetrators can *überhaupt* be prosecuted for their conduct. In other words, the law must be sufficiently *clear* such as to enable individuals to regulate their conduct, and to reasonably foresee its consequences.[586] This finds expression in the principle of legality or *nullum crimen sine lege*: a person can only be held criminally liable when at the time of commission, the act was regarded as a criminal offence.[587] This principle can be found in Art. 22(1) RS, but no such provision exists in the ICTY Statute.[588]

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[582] Cassese and Gaeta (n 19) 146–148; Cryer and others (n 120) 336, 343. The main issue here is that there is no agreement on whether or not freedom fighters are terrorists. The notable exception is the International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197 (Terrorist Financing Convention) Art. 2(1)(b): "*any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.*" However, this definition is only for secondary purposes.

[583] However, Art. 4(d) ICTR Statute and Art. 3(d) SCSL Statute include terrorism in the list of violations of Common Art. 3 GC. Note that the Special Tribunal for Lebanon held that a definition of terrorism *in peacetime* is found in CIL, but this has been the only occasion: *Ayyash et al.* (Interlocutory Decision On The Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging) STL-11-01 (2011) [85]; Cassese and Gaeta (n 19) 148–149; Cryer and others (n 120) 341. In any case, CIL status does not entail individual criminal responsibility: *ibid.* [103] referring to the test in *Prosecutor v Tadić* (n 59) [94].

[583] *Ibid.* [103] referring to the test in *ibid.*

[584]'Judgment of the Nuremberg International Military Tribunal 1946' (n 9) 229, 231, 289, 319; Cassese and Gaeta (n 19) 153–158; Cryer and others (n 120) 343–346. For the (war) "*crime of spreading terror*", see: *Prosecutor v Galić* (n 361) [113–129].

[585] Cryer and others (n 120) 344.

[586] (Only) the phraseology is drawn from European human rights law: *Sunday Times v United Kingdom* (1979-80) 2 EHRR 245 [49].

[587] Cassese and Gaeta (n 19) 22. Corollaries are the principles of specificity, non-retroactivity, prohibition of analogous interpretation, and *in dubio pro reo* (interpretation in favour of the accused if in doubt), see: *ibid.* 27–35.

[588] Nevertheless, the due process rights of Art. 21 ICTY Statute exceed those of the IMT and IMTFE. Art. 21 provides for several rights of the accused, such as a fair and public hearing. See: Meron, 'War Crimes in Yugoslavia and the Development of International Law' (n 179) 83–84.

CIL will undoubtedly be the main obstacle vis-à-vis the principle of legality, as the latter requires – among others – that 'punishability' and punishment must be determined by statute/treaty law.[589] However, for some crimes, in particular cultural persecution (*cfr*: 641), it was only through case law these CIL rules are identified. Yet, it was not unforeseeable that at the time of its destruction, all *cultural* heritage could fall within the scope of persecution: the destruction of *religious* property could already constitute persecution (*cfr*: 641).[590] Moreover, the requirement that cultural prosecution must be committed in connection with other crimes (Art. 7(1)(h) RS, *cfr*: 644) upholds the legality principle.[591] Note that applying the legality principle "*always involves some element of legal fiction*".[592] Although the ICTY's consideration of CIL has occasionally been brief, Meron concludes its approach of relying on existing sources has been consistent with the legality principle.[593]

For genocide, *Krstić* held that the acknowledgment of cultural genocide would be contrary to the *nullum crimen sine lege* principle, since none of the

[589] For the four sub-requirements of the principle, as contained in Art. 103(2) of the German Basic Law (*Grundgesetz*) (adopted 23 May 1949), see: Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Intersentia 2002) 94–102. The principle includes: *nullum crimen sine lege praevia* (the crime's punishability and punishment have to be determined in advance), *nullum crimen sine lege stricta* (the prohibition of analogous interpretation), *nullum crimen sine lege scripta* (those determinations have to be done through statute law), and *nullum crimen sine lege certa* (those statutes have to be definite in order to promote legal certainty). Especially the latter two will be of particular interest in this section.

[590] Green Martínez (n 16) 1081–1082.

[591] Maugeri (n 40) 302. She argues that, contrary to the practice of the ICTY, facts that are not crimes according to the RS, should not constitute persecution. "*[...] la disposizione in esame attribuisce carattere ausiliario a tale fattispecie nel senso che essa non rappresenta un autonomo crimine ma comporta l'imputazione a diverso titolo di fatti che già contituiscono reato ai sensi dell'art. 7 o ai sensi dell'art. 8 come crimini di guerra, in tal modo garantendo il rispetto del principio dei legalità e il divieto di interpretazione analogica. In pratica mentre il [Tribunale per la Ex-Yugoslavia] consente di far rientrare nella definizione di persecuzione fatti che non costituiscono un crimine in base allo [Statuto del Tribunale per la Ex-Yugoslavia] [...], la fattispecie di persecuzione prevista dall'art. 7 [Statuto della Corte Penale Internazionale] includerebbe solo crimini previsti dallo [Statuto della Corte Penale Internazionale] [...]*". (Own translation: [...] the provision under examination assigns an auxiliary function in the sense that it does not represent an autonomous crime but involves the imputation through diverse conducts that already constitute crimes in the sense of Art. 7 or Art. 8, that in this way guarantee the respect for the principle of legality and the prohibition of analogous interpretation. In practice, while the ICTY consents to reintroduce in the definition of persecution conducts that do not constitute a crime under the ICTY Statute [...] [Thus,] the type of persecution in Art. 7 RS would only include crimes from the RS.).

[592] Meron, 'Revival of Customary International Law' (n 173) 821. This was particularly the case for the IMT, which used the doctrine of *substantive legality* (i.e. the punishment of acts that harm society deeply and are abhorrent for all members of society) to justify its existence. See: 'Judgment of the Nuremberg International Military Tribunal 1946' (n 13) [219], as cited in Cassese and Gaeta (n 19) 25. This has to be contrasted with the *strict* principle of legality as pronounced in the modern ICL Statutes: *ibid*. 26–27.

[593] Meron, 'Revival of Customary International Law' (n 173) 829.

instruments provide for its criminalisation (*cfr.* 648).[594] Finally, for war crimes, the extensive lists in Art. 8(2) RS are beneficial for upholding the legality principle.[595] The ICC has been applying the legality principle strictly, as it has not convicted for 'acts other than attacks' (not included in Art. 8(2)(b)(ix) RS, in contrast to the ICTY (*cfr.* 631)). Furthermore, the EoC always clarify the crimes for the perpetrator. For example, he needs to be aware of the factual circumstances constituting armed conflict,[596] or of the site's civilian character.[597]

Overall, the examined legal framework is quite clear,[598] although there is some ambiguity on the awareness of the *status* of cultural heritage (for World Heritage, *cfr.* 614). The main remaining issue is that of the ambiguous military necessity/objectives waiver, but this is only in the advantage of the accused: a broad interpretation of the waiver will probably lead to his acquittal. Note that this dissertation suggested that deriving a crime from Art. 4 HC – as in the ECCC Law – would be more consistent with the rationale of IHL (*cfr.* 583). Yet, *de lege lata* this would be contrary to the legality principle.

3.4.2. Effectiveness and Ways Forward

Next to *efficiency* (*cfr.* 619), also *effectiveness* is an important factor, i.e. the degree to which ICL is successful in reaching its aim: *in casu* the protection of cultural heritage and the group's identity (*cfr.* 598). Although elaborate, the IHL and ICL instruments did not deter Al-Mahdi or IS to destroy cultural sites. Therefore, to protect as much cultural heritage as possible, the ineffective *revisionist* approach, i.e. reacting with more treaties to fill gaps in the legal framework, should be left behind.[599] Instead of creating more treaties to fill gaps in the framework, one should focus on ratification and implementation, and consolidate the existent cultural heritage/property regime, perhaps by amending the existing legal framework.

a. Implementation and Ratification

The main "*gaping hole*" in the international legal framework for cultural

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[594] *Prosecutor v Krstić* (n 554) [577–597]; Schairer (n 425) 92. *Prosecutor v Krstić* (n 554) [577–597]; Schairer (n 425) 92.

[595] Cryer and others (n 120) 271, 275. However, one common list for IAC and NIAC – possibly combined with a shorter list for additional war crimes in IAC – would be an improvement in terms of clarity.

[596] E.g. ICC Elements of Crimes Art. 8(2)(a)(i) para. 5 (*cfr.* 608).

[597] E.g. ICC Elements of Crimes, Art. 8(2)(b)(ii) para. 3 (*cfr.* 628).

[598] Note that it is uncertain whether cultural defences, "*i.e. claims that certain aspects of a defendant's cultural background*" should be taken into consideration. As domestic tribunals have been answering these questions, it is only a matter of time before such defences are also raised at the international level. See: Badar and Higgins (n 3) 512–515.

[599] Lostal Becerril, *International Cultural Heritage Law in Armed Conflict: Case-Studies of Syria, Libya, Mali, the Invasion of Iraq, and the Buddhas of Bamiyan* (n 100) 19–37.

heritage crimes is the absence of jurisdiction and enforcement when States have not ratified the relevant treaties/statutes.[600] Neither Art. 28 HC, nor Art.85(4)(d) AP I, nor APHC II have been used as basis for prosecution. This proves their ineffectiveness.[601] Nevertheless, APHC II could provide a *domestic* alternative for the civilian-use and universalist approach of the ICC on the criteria in its Art. 16 (*cfr.* 603).[602] It is too early to assess the Nicosia Convention, but it offers a solution, as fewer like-minded States have ratified it.

b. Consolidation of the Existing Framework through Amendments

With the UNSC and 123 State parties who can all refer cases, and the possibility to initiate an independent investigation by the OTP (Art. 13 RS), a great part of international crimes will reach the ICC.[603] Therefore, the crimes in the RS should be amended on several levels. In theory, amending the RS has several advantages over using domestic law (APHC II) as the basis for prosecution (*cfr.* *sub* d), including the narrower justification of 'military objectives', more State parties, and the possibility to trial others than the direct perpetrators.[604] However, note that this solution as a whole is quite unlikely in practice, considering the threshold in Art. 121 and the lengthy proceedings to amend the crime of aggression.[605]

First, to protect all cultural heritage, at a minimum Arts. 8(2)(b)(ix) and (e)(iv) need to include works of art. Merely referring to the WHC in the RS would be an overkill. Other more 'relative' heritage would be ignored, while movable property and property which has not attained the status of cultural heritage would not be protected. The best solution therefore is to refer to the HC, as in the ECCC Law, and include intangible cultural heritage. Furthermore, also targeting the immediate surroundings of the cultural sites should be banned, to be in line with the HC and APHC II.[606]

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[600] Hill (n 51) 214.
[601] *Ibid.*
[602] Frulli, 'The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency' (n 19) 216.
[603] Art. 12 requires that for the last two bases (State referral and the investigation by the OTP) this is only possible when the territorial State or the State of whom the accused has the nationality is a State party or has accepted jurisdiction.
[604] Art. 25 extends individual criminal responsibility to people who (jointly) commit, order, solicit, induce, aid, abet, and assist in the commission of a crime. Art. 28 RS sets out the doctrine of command responsibility. See: Gottlieb (n 59) 881–882.
[605] Art. 121 requires a two-thirds majority to amend the Rome Statute, along with seven-eighths of the ratifying/accepting States to let the amendments enter into force. On the Kampala Conference and the crime of aggression, see: Stefan Barriga and Leena Grover, 'A Historic Breakthrough on the Crime of Aggression' (2011) 105 American Journal of International Law 517.
[606] Gottlieb (n 59) 884–885.

Second, next to criminalising the use of cultural shields (*cfr*. 617), also acts of hostility other than attacks should be included in the RS (*cfr*. 631-632).[607] A separate category, closer to the ordinary meaning of 'attack' would be more adequate to deal with situations like the *Al-Mahdi* case, where non-military equipment was used and armed adversaries could not be found within kilometres.[608] The choice for 'destruction' rather than 'attack' in the ECCC Law shows to be more appropriate, as most acts were not committed in battle.[609]

Third, the indirect legal bases all have in common that they protect civilian property, not cultural heritage *per se*. These, and particularly crimes against humanity, are an expression of the anthropocentric/ethnocentric nature of ICL (*cfr*. 597) and thus of the human rights approach. Entwining IHRL, IHL and ICL strengthens the international legal framework as a whole. However, those provisions should be explicitly rather than implicitly derived to stress the seriousness of cultural heritage crimes.[610] By ignoring the civilian-use approach of these provisions, it will be easier to meet the gravity requirement (*cfr*. 620), as it does not have to be proven that they had an impact on civilians. Furthermore, a separate crime against humanity could lower the high threshold of persecution, prohibiting acts as soon as they target cultural heritage. Another way to circumvent this threshold (discriminatory intent and connection with other crimes) lies in the category of "*other inhumane acts*" (*cfr*. 636).[611]

Finally, the Genocide Convention (and the relevant ICL provisions) will not be amended in the near future to include cultural genocide.[612] The options are a separate treaty or additional protocol to the Genocide Convention, or – leaving the judgments of the *ad hoc* tribunals unaffected[613] – including cultural genocide in Art. 6 RS (genocide) or 7 (as aggravated crimes against humanity).[614] Another option could be the inclusion of 'cultural cleansing' (*cfr*.

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[607] Maugeri (n 40) 265; O'Keefe, *The Protection of Cultural Property in Armed Conflict* (n 73) 126.
[608] Schabas (n 278) 78.
[609] *Ibid*. 93. *Cfr*. footnote 51.
[610] Ralby (n 126) 188.
[611] Gottlieb (n 59) 876.
[612] Approval by the General Assembly seems unlikely: Negri (n 565) 8.
[613] *Ibid*. 9.
[614] *Ibid*. Concerning the latter, the ICTY in *Kupreškić* and *Krstić* noted that there may be an escalation from persecution to genocide, but this leads bizarre situation in which persecution is needed to prove genocide. See: *Prosecutor v Kupreškić et al.* (Judgment Trial Chamber) IT-95-16 (2000) [636]: "*To put it differently, when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide.*"; *Prosecutor v Krstić* (n 554) [543]; *Prosecutor v Krajišnik* (n 514) [867]; Fournet and Pégorier (n 521) 734. Furthermore, this 'doctrine of escalation' only works for crimes whose *actus reus* overlaps with other crimes (while the *mens rea* differs), including cultural heritage crimes: Novic (n 38) 154. The question is whether this will suffice to meet the principle of legality: Caroline Fournet and Clotilde Pégorier, 'Only One Step Away From Genocide: The Crime of

596).[615] The latter is then an indicator for "*increased risk of genocide, ethnic cleansing and crimes against humanity when combined with other risk factors*".[616] This would catch situations such as Northern Cyprus or Tibet, where people remain as a body, but their cultural distinctiveness as a group is vanishing.[617]

c. The Preserved Relevance of Ad Hoc Tribunals

The Rome Statute's lack of ratifications and many inconsistencies with the IHL instruments, asks whether other mechanisms could be more appropriate. For example, an *ad hoc* tribunal could prosecute the cultural heritage crimes in Syria (only signed, not ratified, the RS).[618] In the case of Yugoslavia, this has been proven fruitful for the development of the framework on cultural heritage crimes.[619] Furthermore, the statute of such tribunal could incorporate the provisions of the HC and APHC II, as the ECCC demonstrates.[620] However, both a UNSC referral to the ICC, and the establishment of a 'Special Tribunal for Syria' is very unlikely, due to the *realpolitik* of the permanent UNSC members.[621] Still, the development of 'cultural persecution',[622] along with the doctrines of military necessity and recklessness regarding the use of barrel bombs, would be interesting.[623]

Persecution in International Criminal Law' (2010) 10 International Criminal Law Review 713, 719 as cited in Novic (n 5) 154.

[615] For a definition, see: Lostal Becerril, Hausler and Bongard (n 89) 114: "*Cultural cleansing aims to eradicate cultural diversity and replace it with a single, homogeneous cultural and religious perspective.*"

[616] UNESCO used this term to describe the acts of IS in Syria: UNESCO 'Heritage and Cultural Diversity at Risk in Iraq and Syria' (3 December 2014) 3 available at http://www.unesco.org/culture/pdf/iraq-syria/IraqSyriaReport-en.pdf accessed 20 April 2018, as cited in Hill (n 16) 216. The Report defines cultural cleansing as: "*an intentional strategy that seeks to destroy cultural diversity through the deliberate targeting of individuals identified on the basis of their cultural, ethnic or religious background, combined with deliberate attacks on their places of worship, memory and learning*".

[617] Bevan (n 572) 269.

[618] Assembly of State Parties 'The State Parties to the Rome Statute' available at https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx accessed 20 April 2018.

[619] Note that Syria has only six *listed* World Heritage sites and therefore fewer than the States succeeding Yugoslavia, but its cultural treasures cannot be underestimated. See: UNESCO 'Syrian Arab Republic: Properties inscribed on the World Heritage List' available at https://whc.unesco.org/en/statesparties/sy accessed 20 April 2018.

[620] It must be noted that the ECCC were created through an agreement between the United Nations and the State of Cambodia, see: Cryer and others (n 120) 185–188.

[621] A UNSC referral under Chapter VII of the UN Charter (Art. 13(b) RS) has recently been vetoed by Russia and China, see: UNSC Draft Res (22 May 2014) UN SCOR 69th Session, 7180th meeting UN Doc S/PV.7180 as cited in Fincham, 'The Intentional Destruction and Spoliation of Cultural Heritage under International Criminal Law' (n 94) 189.

[622] Hill (n 51) 218–219.

[623] Mark V Vlasic and Helga Turku, '"Blood Antiquities": Protecting Cultural Heritage beyond Criminalization' (2016) 14 Journal of International Criminal Justice 1175, 1187.

d. Beyond International Criminal Justice

d.1. Other Mechanisms

International criminal justice has its weaknesses, especially when one questions whether prosecutions at the (inter)national level can reflect the loss of a World Heritage site.[624] Furthermore, its enduring focus on punishment (*cfr.* 598), its inability to cope with traditional legality requirements (*cfr.* section 1) and its lack of State support (*cfr. sub* a) make it difficult to justify.[625] Therefore, other mechanisms could offer a solution – particularly in the Malian and Syrian conflicts – such as truth-seeking bodies, institutional reforms, and reparations for victims.[626]

The latter is an important corollary of transitional justice (*cfr.* 598).[627] However, even when Art. 24(3) ICTY Statute (return of property) is interpreted broadly as to include reconstruction,[628] this provision is not that relevant when property is substantially damaged.[629] UNESCO-led initiatives, such as the reconstruction of the Old Mostar Bridge and the sites in Timbuktu, seem more suitable.[630] An interesting development regarding Art. 75 RS (reparations for victims) is the *Al-Mahdi* Reparations Order: the ICC Trial Chamber identified the citizens of Timbuktu, the population of Mali, and the international community

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[624] Marina Lostal Becerril and Emma Cunliffe, 'Cultural Heritage That Heals: Factoring in Cultural Heritage Discourses in the Syrian Peacebuilding Process' (2016) 7 The Historic Environment: Policy and Practice 248, 252.

[625] Manacorda (n 4) 18.

[626] Lostal Becerril and Cunliffe (n 624) 252. For stolen cultural objects, there are other possibilities including the production of Red Lists, see: Vlasic and Turku (n 623) 1192–1196. Finally, the power of inter-State cooperation cannot be underestimated, see: UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage (17 October 2003); Delphi Convention (cited *supra* 75); Vrdoljak, 'The Criminalisation of the Intentional Destruction of Cultural Heritage' (n 44) 24–25.

[627] Furthermore, international criminal law can offer reparations for victims including restitution and compensation, see: Art. 75 Rome Statute. See also Art. 85(b) Rules of Procedure ICC which sees victims as including organisations or institutions that have sustained direct harm to any of their property (which is dedicated to religion, education, art or science) and to their historic monuments. See: O'Keefe, 'Protection of Cultural Property under International Criminal Law' (n 40) 392; Vrdoljak, 'Genocide and Restitution: Ensuring Each Group's Contribution to Humanity' (n 350) 42.

[628] This provision has to be combined with Art. 98ter(b) of the ICTY Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, UN Doc IT/32/Rev.50 (2015), stating "*If the Trial Chamber finds the accused guilty of a crime and concludes from the evidence that unlawful taking of property by the accused was associated with it, it shall make a specific finding to that effect in its judgement. The Trial Chamber may order restitution as provided in Rule 105.*" Art. 105 sets out the procedure for the restitution of property.

[629] Abtahi (n 65) 31.

[630] For the reconstruction of Old Mostar Bridge, for example, original Ottoman building techniques were used. For a detailed account, see: Maja Popovac, 'Reconstruction of the Old Bridge of Mostar' (2006) 46 Acta Polytechnica 50.

as victims.[631] Probably fearing backlash for merely focusing on cultural heritage, it continued that addressing the harm suffered by the first group, would address that of the latter.[632] Consequently, a substantial part of the damages are to address the moral harm suffered by the people of Timbuktu.[633] Nevertheless, the Judgment and Reparations Order are clearly not aligned. The first refers to the IHL instruments, while the latter only refers to human

[631] *Prosecutor v Al-Mahdi* (Reparations Order Trial Chamber) ICC-01/12-01/15 (17 August 2017) [53]. Although also the IMT and ICTY have awarded reparations, this is the first time this was done by the same Trial Chamber: Vrdoljak, 'Introductory Note to Prosecutor v. Ahmad Al Faqi Al Mahdi: Judgment and Sentence & Reparations Order (International Criminal Court)' (n 266) 17. Earlier, *Prosecutor v Thomas Lubanga Dyilo* (Judgment ICC Appeals Chamber on the Decision establishing the principles and procedures to be applied to reparations) ICC-01/04-01/06 (3 March 2015) [1] summarised the five essential elements of judicial reparation: "*(i) it must be directed against the convicted person; (ii) it must establish and inform the convicted person of his or her liability with respect to the reparations awarded in the order; (iii) it must specify, and provide reasons for, the type of reparations ordered, either collective, individual or both, pursuant to rules 97 (1) and 98 of the Rules of Procedure and Evidence; (iv) it must define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted, as well as identify the modalities of reparations that the Trial Chamber considers appropriate based on the circumstances of the specific case before it; and (v) it must identify the victims eligible to benefit from the awards for reparations or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted.*" However, these principles entail some risks, e.g. capacity questions and causing further harm and societal division, see: Carsten Stahn, 'Reparative Justice after the Lubanga Appeals Judgment on Principles and Procedures of Reparation' https://www.ejiltalk.org/reparative-justice-after-the-lubanga-appeals-judgment-on-principles-and-procedures-of-reparation/ accessed 22 April 2018.

[632] *Ibid.* [56]; Sophie Starrenburg, 'Who Is the Victim of Cultural Heritage Destruction? The Reparations Order in the Case of the Prosecutor v Ahmad Al Faqi Al Mahdi' https://www.ejiltalk.org/who-is-the-victim-of-cultural-heritage-destruction-the-reparations-order-in-the-case-of-the-prosecutor-v-ahmad-al-faqi-al-mahdi/ accessed 22 April 2018. The Trial Chamber also suggested several symbolic reparations: the publication of Al-Mahdi's apology on the ICC's website [71], a possible monument or forgiveness ceremony [90], and a symbolic euro for Mali and UNESCO [106-107]. For the first, see: International Criminal Court 'Al Mahdi Case: Accused Makes an Admission of Guilt at Trial Opening' (ICC, 22 August 2016) available at https://www.youtube.com/watch?v=Regsy114ovI&feature=youtu.be accessed 22 April 2018.

[633] *Ibid.* [116-134]. The total amount of damages includes 97,000 euros to recuperate the costs of UNESCO, 2.12 million euros for consequential economic loss, and 483,000 euros for moral harm. The latter was based upon the reward of 23,000 USD for the damaged Stela of Matera by the Eritrea Ethiopia Claims Commission, see: *Prosecutor v Al-Mahdi* (Second Expert Report) ICC-01/12-01/15-214-Conf-AnxII-Red (28 April 2017) [66-67], (alternatively) citing *Eritrea's Damages Claims (The State of Eritrea v. The Federal Democratic Republic of Ethiopia)* (Final Award Eritrea-Ethiopia Claims Commission) XXVI Reports of International Arbitral Awards 505 (17 August 2009) [217-223]. The Appeals Chamber slightly amended this decision: individuals should be able to contest the decision by the Trust Fund for Victims (TFV) regarding their eligibility for individual reparations and they should be able to remain anonymous for Mr. Al-Mahdi, see: *Prosecutor v Al-Mahdi* (Reparations Order Appeals Chamber) ICC-01/12-01/15 (8 March 2018). The TFV has the task to implement the reparation orders and to provide physical, psychological, and material support to victims and their families (https://www.icc-cpi.int/tfv). At the time of writing, after two extensions of the deadline, the TFV has not issued a draft implementation plan yet, see: *Prosecutor v Al-Mahdi* (Request for an extension to submit the Draft Implementation Plan) ICC-01/12-01/15 (12 February 2018) and *Prosecutor v Al-Mahdi* (Request for an extension to submit the Draft Implementation Plan) ICC-01/12-01/15 (5 April 2018).

rights considerations (*cfr.* footnote 564).[634] The ICC's focus on war crimes against cultural heritage is a logical first step,[635] but exacerbates this division.[636]

d.2. Domestic Prosecution

Another possibility to avoid these pitfalls is prosecuting cultural heritage crimes at the domestic level.[637] While the *ad hoc* tribunals had primacy over domestic courts,[638] the ICC is built on the principle of complementarity.[639] Indeed, ICL enforcement cannot solely depend on international courts and tribunals.[640] The same is true for jurisdiction. Possible bases are the territoriality principle, the active personality principle, the passive personality principle, and – arguably – the universality and protective principles.[641] Art. 16 APHC II makes the prosecution of cultural heritage crimes on the first two bases possible,[642] but this is problematic regarding the low number of States who ratified it. Whether States will assert jurisdiction based on universality (Art. 16(c)) is highly unlikely regarding developments in that field.[643] Yet, the acceptance of

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[634] Vrdoljak, 'Introductory Note to Prosecutor v. Ahmad Al Faqi Al Mahdi: Judgment and Sentence & Reparations Order (International Criminal Court)' (n 266) 17–19.

[635] Similarly, the ICTY used the war crimes approach before it developed the doctrine of 'cultural persecution' (*cfr.* chapter 3).

[636] Vrdoljak, 'Introductory Note to Prosecutor v. Ahmad Al Faqi Al Mahdi: Judgment and Sentence & Reparations Order (International Criminal Court)' (n 266) 17–19.

[637] This sub-paragraph focuses on the *domestic* prosecution of cultural heritage crimes under *international* law. It is noteworthy that also the prosecution under *domestic* law is possible. For example, cultural heritage crimes in Syria could be prosecuted through Antiquities Law, Legislative Decree N. 222 (26 October 1963) as amended by Legislative Decree n° 295 (2 December 1969) and Law n° 1 (28 February 1999) as cited in Lostal Becerril, 'Syria's World Cultural Heritage and Individual Criminal Responsibility' (n 33) 12–14. 1. A welcome development has been the integration of domestic law in Art. 5 SCSL Statute, giving the SCSL jurisdiction over violations of the 1861 Malicious Damage Act (setting fire to houses, public and other buildings), cited *supra* 98.

[638] Art. 9 ICTY Statute; Art. 8 ICTR Statute.

[639] Preambular paragraph 10 RS: "*Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions*", see also: Art. 1 RS. The principle of complementarity entails that States lose their jurisdiction when: "*(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court*" (Art. 17, emphasis added).

[640] Meron, 'International Criminalization of Internal Atrocities' (n 141) 555; Gottlieb (n 59) 877.

[641] Cryer and others (n 120) 52–56.

[642] With a priority for the territorial State (Art. 22(4) APHC II).

[643] See, for instance: *Arrest Warrant Case (Democratic Republic of Congo v Belgium)* (Dissenting Opinion Judge Oda) [2002] ICJ Rep 3 [12]: "*I believe, however, that the Court has shown wisdom in refraining from taking a definitive stance in this respect as the law is not sufficiently developed and, in fact, the Court is not requested in the present case to take a decision on this point.*" The

the 'cultural heritage of mankind' and the prohibition of its destruction as part of CIL would support this base.[644]

3.5. PROVISIONAL CONCLUSION

In summary, part 3 has examined the several possibilities to prosecute perpetrators for cultural heritage crimes. Those offered by treaty law and CIL could be used to prosecute at a national level or could justify a future *ad hoc* tribunal. Furthermore, the ICTY and Rome Statutes offer several legal bases, from the straightforward 'destruction of cultural heritage' to the category of 'other inhumane acts'. For war crimes, one could summarise them in their lowest common denominator: the destruction/seizure/plunder of cultural heritage not used for military purposes (*actus reus*) with (in)direct intent (*mens rea*) in armed conflict (*nexus*). Broader, this is true for all civilian property. Although they have a lot in common, ICL still protects cultural heritage in a different, more stringent manner by adding distinct provisions.

Furthermore, the humanisation of cultural heritage law has reached ICL through the development of 'cultural crimes against humanity', starting with the *Kordić and Čerkez* case. Also the (academic) development of the prove for the *mens rea* of genocide emphasises that it is often people who are targeted, not cultural heritage *per se*. Cultural heritage is now not only protected in armed conflict for its intrinsic value, but also because of its value for the identity of the enemy. *Jokić* extended this to the interest of humanity as a whole. Thus, although the discussion on its relationship with more anthropological crimes continues, the ICTY's case law "*blurred the traditional distinction between crimes against persons and crimes against property*".[645] Moreover, this recalibration has opened the path for effective enforcement in peacetime.

The second limb of sub-question 2 asks whether this framework is in

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Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, however, implied that universal jurisdiction for certain international crimes was not unlawful ([45-46]). Although some judges did thus address the problem of universal jurisdiction, this case was decided on grounds of immunity. This case and pressure by the United States caused the amendments to Belgium's Law Relating to the Repression of Grave Breaches of the Geneva Conventions of 12 August 1949 and their Protocols I and II of 8 June 1977 (adopted 16 June 1993) *Moniteur Belge* 5 August 1993, which initially provided for universal jurisdiction. In general, see: Evans (n 169) 326–327; Cryer and others (n 120) 61–63. Further problems with universal jurisdiction include but are not limited to: the lack of duties for States to assist, provide evidence, and extradite suspects; inter-cultural issues such as the credibility of witnesses testifying through interpreters; and forum-shopping. See: *ibid.* 66–68. Note that Art. 8 ILC, 'Draft Code of Crimes against the Peace and Security of Mankind with commentaries' (1996) UN Doc A/CN.4/L.532, corr.1, corr.3 acknowledges the possibility of universal jurisdiction for genocide, crimes against humanity, war crimes, and crimes against the United Nations and its personnel.

[644] Gottlieb (n 59) 879–880.

[645] Abtahi (n 65) 31.

accordance with moral and political considerations. The humanisation also demonstrates that criminal law regimes "*promote and enforce the standards of societies that created them*".[646] The local and/or international community desires to enforce cultural heritage protection (part 2) through ICL (part 3). However, to achieve this, ICL should fully align with the rationale of IHL and cultural heritage law. The development of cultural persecution is only the beginning.

Logically, the legal framework is also in accordance with the political necessities of States, at least those who want to be bound. The multilateral and customary nature of the examined instruments prevents States with a different military/political practice from ratifying. This is the case for the United States and has long been so for the United Kingdom regarding the HC. Furthermore, one concludes that the gaps and inconsistencies of the framework (*cfr.* chapter 3) are not the main issue, although it is far from perfect. The core problem is the enduring emphasis on sovereignty, as expressed in immunities, the discrepancy between IAC and NIAC, and resistance by certain State to sign/ratify the RS, the HC and its protocols. Indeed, the solutions proposed in chapter 4 are all dependent on the will of States.

4. GENERAL CONCLUSION

Research question: *Can it be said that the current international legal framework concerning individual criminal responsibility for the destruction of cultural property in (non-)international armed conflicts is consistent, clear, and effective? If not, which issues are the most problematic and how can they be cured?*

The *fil rouge* between all examined treaties and case law is the protection of cultural heritage and individual criminal responsibility in case of violation. The statutes of the ICTY and ICC have their merits, such as having different legal bases to prosecute cultural heritage crimes. The same is true for the (r)evolutionary ICTY case law, specifically the elevation of several IHL norms as CIL, and the recognition of cultural persecution. If one were to assess this "*idealist*" legal framework, the examination of its field of application and boundaries would reveal several gaps and inconsistencies.[647] The latter are *external* (i.e. in between the rationale of the IHL instruments on the one hand,

[646] Cunliffe, Muhesen and Lostal Becerril (n 276) 17.
[647] The idealist approach to cultural heritage protection sees the IHL and ICL regime as *the* catalysator for progress, see: Lostal Becerril, *International Cultural Heritage Law in Armed Conflict: Case-Studies of Syria, Libya, Mali, the Invasion of Iraq, and the Buddhas of Bamiyan* (n 100) 19. This idealist approach has to be contrasted with the revisionist approach (*cfr.* 655); see: *ibid.* 19–37.

and ICL statutes and case law on the other), and *internal* (i.e. in between the statutes and case law of the ICTY and/or ICC).

Starting with the most problematic issue, there are several *gaps* in the framework which are used by perpetrators to escape through the nets of international criminal justice. The absence of clear guidelines to determine which heritage to protect, leads to an accountability gap (*cfr*. 620). The internationalist and universalist approaches of respectively the IHL instruments and international courts and tribunals make sure that ICL protects World Heritage, i.e. those sites that are of outstanding universal value and constitute the heritage of mankind. The *Al-Mahdi* case did not clarify how other cultural heritage comes within the scope of Art. 3(d) ICTY Statute or Art. 8(2)(b)(ix) RS. The several possibilities to prosecute different acts (destruction, damage, plunder) have to compensate these gaps and *de facto* inapplicability (e.g. a procedural obstacle such as immunity).

Moving to *external* inconsistencies, there is a clear involution in the definition of cultural property/heritage: neither the statute nor the case law of the ICTY provides for a definition of cultural property/heritage, disregarding the HC. The opposite approach of the ECCC Law has to be applauded, as it broadens the scope of protected objects. The ICTY and Rome Statutes also differ from the HC and its protocols in that they return to the civilian-use rationale of the 1907 Hague Regulations and create a third category of protection: religious/educational/historic/scientific buildings (*cfr*. 611). Furthermore, the ICTY case law requires resulting damage and puts military necessity on a pedestal, in contrast to the rationale of the HC. Fortunately, the RS eliminated the first requirement and weakened the second. Next, while ICL tends to follow IHL and cultural heritage law, it only followed its humanisation by developing cultural persecution and (perhaps) in providing for the prove of genocidal intent. The emphasis on the human nature of cultural heritage must be celebrated, but this anthropocentric approach led ICL to distance it further from IHL, its cultural-value origin. Finally, one should revisit the issue of cultural genocide in light of the contribution of groups to world culture.

The Rome Statute tried to cope with the problematic parts of the ICTY's legacy. Logically, several *internal* inconsistencies (i.e. within ICL) came to the surface. First, aligning itself with CIL, the RS left the high ICTY threshold of resulting damage: mere directing attacks is sufficient to constitute the crime of Art. 8(2)(b)(ix). Second, certain types of cultural heritage are not protected: despite its ICTY equivalent, Art. 8(2)(b)(ix) RS does not include works of art, creating a new gap in the framework. Third, the ICTY's determination of plunder cannot be applied for the RS which uses the term 'pillaging'. Therefore, the ICC should define the crime and set guidelines on how cultural objects may be requisitioned.

Other internal inconsistencies are those within the RS itself. One of the remaining concerns is the difference between IAC and NIAC (*cfr.* 609). Intentionally directing attacks against certain buildings and hospitals and pillage are both criminalised in IAC and NIAC, but this is not the case for most crimes. The list of NIAC war crimes is quite limited compared to IAC, but it is unlikely this gap will disappear in the near future due to the concept of State sovereignty.[648] Next, the failure of the ICTY to protect the *use* of cultural sites as military installations was not cured by the RS. Using human shields is prohibited (Art. 8(2)(b)(xiii) RS) but no such provision exists for its cultural equivalent. As such, there is a clear discrepancy between the criminalisation of the attacker's acts and the irrelevance of those of the defender.[649]

In conclusion, a consistent international legal *framework* is difficult to find.[650] Yet, there is one, although very weak in some respects. Every international court or tribunal has a different instrument with scope of application, but most of them protect cultural heritage through criminalising its violation. As proceedings before the ICTY are closed now, the RS remains the principal statute to enforce cultural heritage protection. In order to further consolidate ICL (*cfr.* 576), the international community should try to fill its gaps and remove its inconsistencies by using the HC and WHC. On the other hand, judges have the task to clarify CIL – especially regarding the HC and WHC – and to develop guidelines on which heritage to protect, preferably on grounds of a combined universalist-relativist and cultural-value approach. That way, those provisions will be as clear as possible, upholding the legality principle.

ICL cannot bring back (original) cultural heritage, but cases like *Prlić* and *Al-Mahdi* have shown that ICL can enforce cultural heritage law and deter people from the commission of cultural heritage crimes. They provide a precedent for the prosecution of armed groups such as IS (when nationals of a State party). Still, as the ICC lacks power in terms of jurisdiction, one has to look at other more effective solutions, such as UNSC Resolution 2357, the instruments of the Council of Europe, national prosecutions, or a new *ad hoc* tribunal.

[648] Art. 8(2)(b) RS includes 26 crimes, while Art. 8(2)(e) only includes 12 crimes.
[649] Note that this also constitutes an external inconsistency, as Arts. 4(1) HC, 53 and 85(4)(d) AP I, and 16 AP II all criminalise such conduct.
[650] For the same argument regarding the lack of a harmonised definition of cultural heritage, see: Mainetti (n 112) 365 (cited *supra* 112).