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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

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1. INTRODUCTION

As often happens when a conflict results in a high number of victims, the appalling crimes committed during the long war in the Former Yugoslavia led public opinion - and scholars - to overlook the very serious damage caused to the cultural heritage of the region. However, the gravity of cultural loss should not be underestimated, especially given that protection of cultural property is a crucial element in safeguarding a peoples' or group's identity and, in many cases, in preserving the common heritage of mankind.

International law provides for the imposition of individual criminal liability for the destruction of cultural property in the event of armed conflict, whether international or internal in character. In this respect, some of the most important provisions are contained in the *Second Protocol to the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict*,[1] which, however, leaves with State-Parties the responsibility to adopt the measures necessary to establish as domestic criminal offences the offences contained in the Protocol.[2] Other relevant provisions are included in the Statutes of international criminal tribunals, namely in Article 3, d of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and in Articles 8,2,b,ix and 8,2,e,iv of the Statute of the International Criminal Court.

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[1] Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, adopted on 29 March 1999 and entered into force on 9 March 2004.

[2] See "Article 15 Serious violations of this Protocol. 1. Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts: a. making cultural property under enhanced protection the object of attack; b. using cultural property under enhanced protection or its immediate surroundings in support of military action; c. extensive destruction or appropriation of cultural property protected under the Convention and this Protocol; d. making cultural property protected under the Convention and this Protocol the object of attack; e. theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention. 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. See also the following Articles included in Chapter 4 Criminal responsibility and jurisdiction."

At present, ICTY case-law serves as an unprecedented example of how individual criminal responsibility for acts against cultural property may be implemented at the international level. The Tribunal has already delivered a number of judgements condemning those accused of acts against cultural property, charged both as war crimes and as crimes against humanity. Given the characteristics of the Yugoslav conflict, it is not surprising that the vast majority of cases involved acts against institutions dedicated to religion. However, there are also a few cases in which the accused were sentenced for the destruction of internationally protected, secular historic monuments, such as the shelling of the Old Town of Dubrovnik.

This article attempts to appraise the contribution of ICTY jurisprudence to the development of law in this field and to draw some useful lessons and/or hints as to possible future evolution.

2. ARTICLE 3 d) OF THE ICTY STATUTE: INDICTMENTS AND PROCEEDINGS

Article 3, d) is the crucial provision for the protection of cultural property. According to Article 3, the Tribunal shall have jurisdiction over some of the most serious violations of the laws and customs of war, including, under paragraph d): "*seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science*."[3]

One may observe that this paragraph does not mention the general expression "cultural property", but simply enumerates its most important components. In this respect, it reflects the lack of a universally accepted definition of the concept of "cultural property" and follows the example set by other relevant documents of international humanitarian law. The formula contained in Article 3 d) is clearly inspired by Articles 27 and 56 of the Regulations annexed to the *Hague Convention (IV) Respecting the Laws and Customs of War on Land of 18 October 1907*.[4]

[3] Article 3, ICTY Statute: "Violations of the Laws and Customs of war. 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: (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) 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; (e) plunder of public or private property."

[4] Article 27: "In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes. It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand"; Article 56: "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". The first international instrument to use the term "cultural property" *per se* was the *Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict (1954)*, in Article 1.

By providing for the possibility of trying those responsible for serious attacks against religious and cultural property, Article 3 d) offers "direct protection" to such property.[5] It is important to bear in mind that the ICTY Statute was adopted by the UN Security Council in 1993,[6] while the conflict was unfolding in the former Yugoslavia. The drafters of the Statute had a two-fold purpose in mind: on the one hand, the establishment of a tribunal competent to prosecute and punish those responsible for atrocities already committed, but also, on the other, the deterrence of future crimes.[7]

There have been a number of indictments in which serious attacks against institutions dedicated to religion or education were charged under Article 3 d) of the Statute. Relevant examples are indictments against *Karaždić* and *Mladić*,[8] *Brđanin*,[9] *Blaskić*,[10] *Naletilić*[11], and also against the former President of the Federal Republic of Yugoslavia, *Milošević*.[12] The accused have most often been charged with "destruction or willful damage to

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[5] See ABTAHI, "The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia", Harvard Human Rights Journal, 2001, *passim.*

[6] SC Resolution 827 (1993).

[7] It should also be recalled that the ICTY judges have interpreted Article 3 d) – as well as other paragraphs of Article 3 - as applicable to conflicts of both an international and an internal character. As is recognized by many authors, ICTY case-law had a strong impact on the drafting of the ICC Statute. Article 3 d), for instance, surely influenced the formulation of two different paragraphs in the ICC Statute: Article 8 (2) (b) (ix) concerning acts against cultural property committed in an international armed conflict, and Article 8 (2) (e) (iv) concerning acts committed in an armed conflict not of an international character. (Article 8 (2) (b) (ix): "(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following (…) (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives". Article 8 (2) (e) (iv) is identical as to the components of cultural property enumerated. Article 8, as a whole, is divided into different sections relating to crimes committed during international or internal armed conflict. For commentaries on Article 8 of the ICC Statute see COTTIER; FENRICK and ZIMMERMAN, "Article 8", in TRIFFTERER, (ed.), *Commentary on the Rome Statute of the International Criminal Court. Observer's Notes, Article by Article*, Baden-Baden, 1999 and BOTHE, "War Crimes", in CASSESE, GAETA, JONES, *The Rome Statute of The International Criminal Court. A Commentary*, Oxford, 2002. The components of cultural property contained in Article 8 are, as one may quickly notice, very similar to those contained in Article 3 d). The only relevant difference is that Article 8 of the ICC Statute includes hospitals and places where the sick and wounded are collected in the same list as cultural property. (This fact alone underlines the importance attached to the protection of buildings dedicated to religion, education, art, science or charitable purposes, and historic monuments.) It is the same approach chosen in Article 27 of the Hague Regulations, mentioned above. In sum, notwithstanding the lack of a universal definition for cultural property, various instruments furnish sufficient guidelines to identify protected sites and property.

[8] *Prosecutor v. Karadžić and Mladić,* Indictment, July 1995, Count 6. This document is available at: http://www.un.org/icty/indictment/english/kar-ii950724e.htm (visited January 2006). The Indictments were later amended and separated, so that attacks against buildings dedicated to religion were charged under the count of persecution, as crimes against humanity. See *Prosecutor v. Karadžić*, Amended Indictment, 31 July 2000, Count 7 (available at http://www.un.org/icty/indictment/english/kar-ai000428e.htm, visited January 2006). The accused was never surrendered to the ICTY.

[9] *Prosecutor v. Brđanin*, Sixth Amended Indictment, 9 December 2003, Count 12 (available at http://www.un.org/icty/indictment/english/brd-6ai031209e.htm, visited January 2006).

[10] *Prosecutor v. Blaškić*, Second Amended Indictment, 25 April 1997, Count 14 (available at http://www.un.org/icty/indictment/english/bla-2ai970425e.htm, visited January 2006).

[11] *Prosecutor v. Naletilić*, Second Amended Indictment, 16 October 2001, Count 22 (available http://www.un.org/icty/indictment/english/nal-2ai010928.htm, visited January 2006).

[12] *Prosecutor v. Milošević*, Amended Indictment (Bosnia), 21 April 2004, Count 21 (available at http://www.un.org/icty/indictment/english/mil-ai040421-e.htm, visited January 2006).

institutions dedicated to religion or education," (*Blaskić*, *Kordić*), and "seizure, destruction or willful damage done to institutions dedicated to religion" (*Naletilić*): the predominance of attacks against buildings and institutions dedicated to religion is obviously related the characteristics of the Yugoslav conflict.

However, a few indictments refer to the destruction of secular components of cultural heritage. One may mention the *Milošević* Indictment charging "willful destruction or willful damage done to historic monuments and institutions dedicated to education or religion".[13] The most relevant cases refer to the destruction of historic monuments in the Old Town of Dubrovnik: an initial indictment against *Strugar*, *Jokić*, *Zeć* and *Kovacević* was issued on 22 February 2001,[14] but remained sealed until October 2001. The indictments relating to this case these were later amended and separated.[15]

Most of those indicted under Article 3 d) of the Statute were tried and found guilty[16] of the destruction of cultural property, besides having been sentenced for other serious crimes charged under different counts.

3. THE EVOLVING INTERPRETATION OF ARTICLE 3 d) OF THE ICTY STATUTE

Initially, the ICTY was rather cautious in establishing individual criminal responsibility for violations of the laws of war falling under Article 3 d). In the first place, the judges always ascertained the existence of the general conditions of applicability of Article 3 d) very carefully – in other words, they verified that the attacks were committed during the armed conflict and that there was a nexus between the alleged crimes and the armed conflict.[17] Secondly, the judges affirmed that it was essential to prove that the destruction of or damage caused to institutions dedicated to religion or education were intentionally directed against said institutions, which in any case should not have been used

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[13] See preceding footnote.

[14] *Prosecutor v. Strugar, Jokić, Zec, Kovacević*, Initial Indictment, 22 February 2001, (Counts 10-12, in particular Count 12**: "**Destruction or willful damage done to institutions dedicated to religion and to historic monuments, a violation of the laws or customs of war**,** punishable under Articles 3(d) and 7(1) and 7(3) of the Statute of the Tribunal", for, among others, the following attacks: "1) The shelling on 23-24 October 1991 of the city of Dubrovnik, during which the Old Town area was targeted for the first time. 2) The shelling on 8-13 November 1991 of the entire city of Dubrovnik, during which the Old Town, Lapad, and Gruz were targeted. A number of buildings in the Old Town were damaged as were hotels housing refugees and other civilian structures in other parts of the city. 3) The shelling on 6 December 1991 of the entire city of Dubrovnik, but during which the Old Town area was specifically targeted. At least six buildings in the Old Town were destroyed in their entirety and hundreds more suffered damage. Hotels housing refugees and other civilian structures were severely damaged or destroyed in other parts of Dubrovnik, but specifically in the Lapad and Babin Kuk areas." The Indictment is available at http://www.un.org/icty/indictment/english/str-ii010227e.htm, visited January 2006).

[15] See, for instance, *Prosecutor v. Jokić*, Second Amended Indictment, 27 August 2003, Counts 4-6 (available at http://www.un.org/icty/indictment/english/jok-2ai030827e.htm, visited January 2006).

[16] Unfortunately, as it is well known, some of the indictess (notably Karaždić and Mladić) have not yet been arrested.

[17] *Prosecutor v. Delalić*, Judgement, Trial Chamber, 16 November 1998, paragraphs 193-1988 (available at http://www.un.org/icty/celebici/trialc2/judgement/index.htm, visited January 2006). See also *Prosecutor v. Blaškić*, Judgement, Trial Chamber, 3 March 2000, paragraph 65 (available at http://www.un.org/icty/blaskic/trialc1/judgement/index.htm, visited January 2006).

for military purposes at the time of the acts, nor have been located in the immediate proximity of military objectives.[18]

Making the protection of cultural property contingent upon "military necessity" in such wide terms is a major restriction that adds up to the general condition of a necessary nexus between the crimes and the armed conflict. However, the ICTY gradually moved away from this extremely prudent position, taken in *Blaškić.* In the *Naletilić* judgement, Trial Chamber I rejected the idea that it is necessary to establish that institutions or buildings dedicated to religion or education were not in the immediate vicinity of military objectives. On the contrary, the judges declared that the mere fact of being located next to a military objective does not justify the destruction of protected sites and buildings.[19]

In one of the most recent judgments concerning the application of Article 3 d) (*Brđanin*) the Trial Chamber confirmed that the destruction of or willful damage to institutions dedicated to religion partially overlaps with the offence of unlawful attacks on civilian objects, it being understood that the object of the offence of destruction of or willful damage to institutions dedicated to religion is more specific. In general, institutions dedicated to religion are presumed to have a civilian character and enjoy the general protection to which these objects are entitled under Article 52 of the 1977 First Additional Protocol to the Geneva Conventions,[20] except when they become, *per se*, military

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[18] *Prosecutor v. Blaškić,* Judgement, Trial Chamber, *supra* note 18, paragraph 185: "The damage or destruction must have been committed intentionally to institutions which may clearly be identified as dedicated to religion or education and which were not being used for military purposes at the time of the acts. In addition, the institutions must not have been in the immediate vicinity of military objectives". See also paragraphs 419-423, in particular paragraph 421: "The Trial Chamber notes at the outset that according to the witness Stewart, it was barely plausible that soldiers would have taken refuge in the mosque since it was impossible to defend. Furthermore, the mosque in Donji Ahmici was destroyed by explosives laid around the base of its minaret. According to the witness Kaiser, this was 'an expert job' which could only have been carried out by persons who knew exactly where to place the explosives. The witness Zec stated that he had heard a Croatian soldier speaking on his radio asking for explosives 'for the lower mosque in Ahmici'. The destruction of the minaret was therefore premeditated and could not be justified by any military purpose whatsoever. The only reasons to explain such an act were reasons of discrimination."

[19] *Prosecutor v. Naletilić,* Judgement, Trial Chamber, 31 March 2003, paragraphs 604-605: "The Chamber respectfully rejects that protected institutions "must not have been in the vicinity of military objectives". The Chamber does not concur with the view that the mere fact that an institution is in the "immediate vicinity of military objective" justifies its destruction. The Chamber considers that a crime under Article 3(d) of the Statute has been committed when: i) the general requirements of Article 3 of the Statute are fulfilled; ii) the destruction regards an institution dedicated to religion; iii) the property was not used for military purposes; iv) the perpetrator acted with the intent to destroy the property.", paragraphs 604-605. The Chamber maintained this position even when, as in the case at hand, there was insufficient evidence that the accused had willfully destroyed institutions dedicated to religion: See paragraphs 606-608: "The Prosecution alleges that, following the capture of the villages Sovići and Doljani in the municipality of Jablanica on 17 April 1993, Mladen Naletilić ordered the destruction of the mosque in Sovići. There is no dispute that the mosque in Sovići was blown up and destroyed. The date of the destruction of the mosque is unclear; from the evidence presented at trial, however, the Chamber is satisfied that the mosque was destroyed between 18 and 20 April 1993. Both the mosque in Sovići and the one in Doljani were destroyed. The Chamber has not heard sufficient evidence in order to be satisfied as to who the perpetrators were. (….) In the absence of further evidence of the involvement of Mladen Naletilić, the KB, or the HVO in the destruction of the mosque in Sovići, the Chamber is not satisfied that the Prosecution has proved the responsibility of Mladen Naletilić in this instance." The full text of the judgement is available at the following web address: http://www.un.org/icty/naletilic/trialc/judgement/index.htm (visited January 2006).

[20] Article 52 (1) describes civilian objects as "all objects which are not military objectives as defined in paragraph 2". Paragraph 3 states: " In case of doubt whether an object which is normally dedicated to

objectives.[21] As to the mental element, the *Brđanin* judgement confirmed that *dolus directus* is required: the perpetrator must have acted with knowledge and will to cause the proscribed result or with reckless disregard for the substantial likelihood of the destruction of a specific protected site or building.[22] In the case at hand, the accused was sentenced for aiding and abetting the deliberate devastation of Muslim and Roman Catholic Sacral buildings in the municipalities of Bosanski Novi, Donji Vakuf, Kljuc, Kotor Varoć, Prijedor and Sanski Most.[23]

The *Jokić* case, in which the accused was sentenced for the shelling of the Old town of Dubrovnik, is probably the most interesting case as far as protection of cultural property is directly concerned. In establishing the facts of the case, the Trial chamber maintained that "Jokić was aware of the Old Town's status, in its entirety, as a United Nations Educational, Scientific and Cultural Organization (UNESCO) World Cultural Heritage site pursuant to the 1972 Convention for the Protection of the World Cultural and Natural Heritage. He was further aware that a number of buildings in the Old Town and the towers of the Old Town's Walls were marked with the symbols mandated by the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict."[24]

Throughout the judgment, express reference is made to all the most important international conventions on the protection of cultural property; and the *Jokić* Chamber did not miss the opportunity to dwell at length on the issue. The judges underlined that: "The whole of the Old Town of Dubrovnik was considered, at the time of the events contained in the Indictment, an especially important part of the world cultural heritage. It was, among other things, an outstanding architectural ensemble illustrating a significant stage in human history. The shelling attack on the Old Town was an attack not only against the history and heritage of the region, but also against the cultural heritage of humankind."[25]

In fact, this was the first time the ICTY judges had to pronounce themselves on a very serious attack on an internationally protected town full of historic monuments, rather than "only" attacks on single institutions or buildings dedicated to religion or education. In grounding their sentencing decision, the judges took into account the gravity of such crimes and stressed at length the reasons why these kinds of attacks against cultural heritage bear

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civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed no to be so used."

[21] *Prosecutor v. Brđanin*, Judgement, Trial Chamber, 1 September 2004, paragraphs 594-598, available at http://www.un.org/icty/naletilic/trialc/judgement/index.htm (visited January 2006).

[22] *Ibidem*, paragraph 599: "With respect to the *mens rea* requisite of destruction or devastation of property under Article 3 (d), the jurisprudence of this Tribunal is consistent by stating that the *mens rea* requirement is intent (*dolus directus*). The Trial Chamber holds that as religious institutions enjoy the minimum protection afforded to civilian objects the *mens rea* requisite for this offence should be equivalent to that required for the destruction or devastation of property under Article 3 (b). The Trial Chamber, therefore, is of the opinion that the destruction or wilful damage done to institutions dedicated to religion must have been either perpetrated intentionally, with the knowledge and will of the proscribed result or in reckless disregard of the substantial likelihood of the destruction or damage."

[23] *Ibidem*, paragraphs 640-658, and also paragraph 678.

[24] See *Prosecutor v. Jokić*, Judgement, Trial Chamber, 18 March 2004, paragraph 23, available at http://www.un.org/icty/jokic/trialc/judgement/jok-sj040318e.pdf (visited January 2006).

[25] *Ibidem*, paragraph 51.

an inherent gravity.[26] They also underlined the fact that restoration is possible but that it can never return the buildings to their original status.[27]

However, since the accused entered a guilty plea on all counts, including the charges under Article 3 d), and also expressed remorse and cooperated with the Office of the Prosecutor, there was room for the mitigation of his sentence: Jokić was finally condemned to a single sentence of seven years of imprisonment.[28]

More recently, Pavle Strugar was sentenced for the shelling of the Old Town of Dubrovnik.[29] The *Strugar* Chamber built on previous cases mentioned above - especially on the *Jokić* case – when condemning the accused to eight years of imprisonment. As in *Jokić*, the gravity of the crime was tempered in the sentence by a few mitigating circumstances accepted by the judges.

4. Destruction of Cultural Property Charged under Article 2, d) ICTY Statute (*Grave Breaches*), or under Article 3 (b), (c) and (e)

A number of indictments charged acts against religious and cultural property under other Articles of the ICTY Statute. In some cases a grave breach to the Geneva Conventions was alleged under Article 2 d)[30], whereas less serious acts were charged as alleged violations of Article 3 b), c) or e).[31]

The Prosecution has used various formulas to charge acts under 2(d) in indictments, since this Article does not mention either cultural property or its various components

[26] " (..) the Old Town was a "living city" (as submitted by the Prosecution) and the existence of its population was intimately intertwined with its ancient heritage. Residential buildings within the city also formed part of the World Cultural Heritage site, and were thus protected. (...). The Trial Chamber finds that, since it is a serious violation of international humanitarian law to attack civilian buildings, it is a crime of even greater seriousness to direct an attack on an especially protected site, such as the Old Town, constituted of civilian buildings and resulting in extensive destruction within the site. Moreover, the attack on the Old Town was particularly destructive. Damage was caused to more than 100 buildings, including various segments of the Old Town's walls, ranging from complete destruction to damage to non-structural parts. The unlawful attack on the Old Town must therefore be viewed as especially wrongful conduct. In determining an appropriate sentence to reflect the full extent of Miodrag's culpability, the Trial Chamber has taken into consideration the fact that some of the crimes to which he pleaded guilty contain identical legal elements, proof of which depends on the same set of facts, and were committed as part of one and the same attack on the Old Town of Dubrovnik.", *Ibidem*, paragraphs 51-54. See also the preceding paragraphs.

[27] "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", *Ibidem*, paragraph 51.

[28] The appeals judgment, delivered on 30 August 2005, rejected all grounds of appeal and confirmed the 7 year sentence for *Jokić*. See *Prosecutor v. Jokić*, Judgement on Sentencing Appeal, Appeals Chamber, 30 August 2005, available at http://www.un.org/icty/jokic/appeal/judgement/jok-aj050830e.pdf (visited January 2006).

[29] *Prosecutor v. Strugar*, Judgement, Trial Chamber, 31 January 2005, available at http://www.un.org/icty/strugar/trialc1/judgement/str-tj050131e.pdf (visited January 2006).

[30] Article 2 (d): "The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (…) (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly".

[31] See *supra* note 1.

explicitly.[32] In many indictments charges under Article 2 d) include "destruction of property," (*Karadžić*) "extensive destruction of property," (*Blaškić, Kordić, Naletilić*) "appropriation of property," (*Karadžić*) and "unlawful and wanton extensive destruction and appropriation of property not justified by military necessity" (*Brđanin*).[33]

It may be easily noticed that most of the cases just mentioned coincide with those already analyzed in the preceding paragraph: in other words, the same facts have been charged under multiple counts. This should not come as a surprise, since the ICTY has adopted the practice of cumulative charges and cumulative convictions in light of the varied features of different crimes provided for under the ICTY Statute.[34] Thanks to this practice, the judges may evaluate the applicability of different articles to the same set of facts: where conditions for the applicability of Article 3 d) are not met, for instance, it is possible to verify the applicability of Article 2 d) or other articles.[35]

Finally, it is worth mentioning that acts against cultural or religious property have also been charged under paragraphs b) c) and e) of Article 3.[36] The scope of these paragraphs is far more general than that of paragraph d), but they may well include crimes against cultural property. In particular, plunder refers to stolen and illegally exported cultural property, whether public and private.[37]

Notwithstanding the variety of charges, ICTY judges have used only Article 3, d) to punish those responsible for acts against cultural property as war crimes. Until now, neither article 2 d) nor article 3 b), c) or d) has served as the statutory basis in the above-mentioned cases. This may be due to a number of reasons. First of all, Article 3, d) is a specific provision listing the most important components of cultural property, while the other provisions mentioned above refer to other kinds of property more generally. It must also be recalled that Article 3 has been interpreted as applying to both international and internal armed conflicts; article 2, d), on the contrary, may apply only to international conflicts.

The decision to give preference to article 3 d) where the conditions for its applicability are satisfied is surely to be commended. This provision is expressly shaped to punish the destruction of cultural property - the choice to use it as the statutory basis to punish attacks against cultural property has the indisputable merit of stressing the gravity of such attacks.

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[32] See also ABTAHI, cit, *supra* note 5.

[33] See the Indictments quoted *supra* in footnotes 9, 10 and 11.

[34] In this manner, ICTY judges naturally have greater chances to punish the crimes that have been committed. The ICTY stated on several occasions that cumulative charges and cumulative convictions based on the same facts are lawful. On this issue see CASSESE, *International Criminal Law*, Oxford, 2003, p. 212 ff..

[35] Of course, conditions for the applicability of Article 2 (d) differ from those of Article 3 d): grave breaches may be committed only in an international armed conflict and a nexus between the alleged crimes and the armed conflict must be established. In addition, protection of property provided for under Article 2 d) is limited to property located in occupied territory: this provision is actually drafted in language similar to that used in some of the Articles of Geneva Convention n. IV. The application of Article 2 d) is also subject to "military necessity" and the alleged destruction must be "extensive, unlawful and wanton".

[36] Article 3, par. b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (…) (e) plunder of public or private property.

[37] In *Blaškić*, the Trial Chamber held that the prohibition of the wanton appropriation of enemy public or private property provided for in Article 3 e) extends to both isolated acts of plunder for private interest and "the organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory." See *Prosecutor v. Blaškić*, *supra* note18, paragraph 184.

5. ATTACKS AGAINST CULTURAL PROPERTY CHARGED AS CRIMES OF PERSECUTION UNDER ARTICLE 5 (h) OF THE ICTY STATUTE

Another important development in the jurisprudence of the ICTY concerns indictments and proceedings in which acts against cultural or religious property have been charged as crimes against humanity, more specifically under article 5 (h) of the Statute as acts of persecution.[38] As is well known, crimes against humanity are acts directed against the civilian population in the framework of a widespread or systematic practice.[39] Under Article 5 of the ICTY Statute, crimes against humanity include murder, extermination, enslavement, deportation, imprisonment, torture, rape and other inhumane acts. These are clearly acts directed against persons rather than property, which is not even mentioned in the provision. Nevertheless, the judges reached the conclusion that acts against institutions dedicated to religion or education may be included within the "anthropocentric"[40] notion of crimes against humanity.[41]

The ICTY Statute does not contain a definition of the crime of persecution: article 5 just enumerates persecution among the crimes against humanity. Nor can a definition be found in the Nuremberg Charter or in other international documents.[42] However, ICTY judges found a few precedents to build on, the most relevant of which were the Nuremberg judgements.

The Nuremberg International Military Tribunal sentenced Alfred Rosenberg, under the charge of crimes against humanity, for having organized the systematic plunder of public and private property in countries invaded by Germany, including the seizure of art treasures and collections from museums and libraries and the pillage of private houses.[43] Similarly, Julius Streicher was sentenced for crimes against humanity on the basis of

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[38] Article 5 (h): "The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (…) (h) persecutions on political, racial and religious grounds".

[39] The ICTY may exercise its jurisdiction over crimes against humanity only if they were committed during an armed conflict, but this is not generally the case for crimes against humanity punishable also when they are committed in times of peace.

[40] This expression is used by ABTAHI, cit. *supra*, note 5, *passim.*

[41] Crimes against humanity are considered by many as more serious than war crimes. The issue of the relative degree of gravity of the crimes under the jurisdiction of the Tribunal has divided the judges of the ICTY several times. The International Criminal Tribunal for Rwanda (ICTR), on the contrary, has drawn a clear hierarchy among these crimes: genocide is considered the gravest of all crimes, followed by crimes against humanity and, lastly, by war crimes. On this issue see M.FRULLI, "Are Crimes against Humanity more Serious than War Crimes?", in *European Journal of International Law*, 2001, 329-350.

[42] States never undertook the effort to negotiate an international Convention on crimes against humanity, nor was this task entrusted to the ILC. One may, however, refer to the preparatory works of the *Draft code of crimes against peace and security of mankind* and to the preparatory works of the ICC Statute.

[43] "Rosenberg is responsible for a system of organized plunder of both public and private property throughout the invaded countries of Europe. 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. (…). As of 14th July, 1944, more than 21,903 art objects including famous paintings and museum pieces, had been seized by the Einsatzstab in the West". The full text of the judgment is available at the following address: http://www.nizkor.org/hweb/imt/tgmwc/judgment (visited January 2006).

having ordered the destruction of the Nuremberg Synagogue in 1938, in addition to being responsible for other terrible acts of persecution against Jews.[44]

At a later stage, in 1960, Israeli judges sentenced Adolf Eichmann for war crimes and crimes against humanity affirming, *inter alia*, that the destruction of synagogues and other buildings dedicated to religion may amount to persecution.[45]

Finally, the International Law Commission (ILC) dealt with this issue during the preparatory works of the *Draft Code of Crimes against Peace and Security of Mankind*. In its 1991 Report, the ILC underlined that the systematic destruction of monuments, buildings or sites bearing a highly symbolic value for a specific social, religious or cultural group must be included among acts of persecution.[46]

The ICTY built on these precedents while simultaneously endeavoring to elaborate its own definition of persecution as a crime against humanity. In the *Kupreskić* case, the Trial Chamber - while drawing on the *Tadić* case - propounded the view that an act of persecution may take different forms and does not necessarily require a physical or material element.[47] The characteristic feature of an act of persecution is actually its discriminatory nature. An act of persecution must be committed with a discriminatory intent, on a religious, racial or political (but not *per se* cultural) basis: the discriminatory nature renders the act inhumane. Hence, acts of persecution need not be committed directly against persons, but may equally target a group of individuals indirectly. The *Kupreskić* Chamber concluded that "persecution is the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5."[48]

As to the material element of the crime of persecution - the *actus reus* -, this may include various kinds of acts against persons but also against property, if they reach a certain degree of seriousness. For instance, the destruction of institutions and buildings

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[44] Von Schirach was also sentenced under the charge of crimes against humanity for having ordered the destruction of an "English cultural town". ("In the summer of 1942 Von Schirach telegraphed Bormann urging that a bombing attack on an English cultural town be carried out in retaliation for the assassination of Heydrich which, he claimed, had been planned by the British") The text of the judgements delivered against Streicher and Von Schirach are available at http://www.nizkor.org/hweb/imt/tgmwc/judgment. In opposition, some scholars have quoted the *Flick* and *Farben* cases (decided by the US Military Tribunal, created to apply Control Council Law n. 10) where the American judges said crimes against property could not be considered crimes against humanity.

[45] Attorney-General of the Government of Israel v. Adolf Eichmann (District Court of Jerusalem, 1961, paragraph 57). The judgement may be found in 136 *International Law Reports*, at 5.

[46] See *Report of the International Law Commission on the Work of its Forty-Third Session,* UN doc. A/46/10/suppl.10 (1991), at 268.

[47] "It is clear that persecution may take diverse forms, and does not necessarily require a physical element." *Prosecutor v. Kupreskić*, Judgement, Trial Chamber, 14 January 2000, paragraph 568, available at http://www.un.org/icty/kupreskic/trialc2/judgement/index.htm (visited January 2006).

[48] *Prosecutor v. Kupreskić*, *supra* note 43, paragraph 621. See also paragraph 624, where the judges stated "In its earlier conclusions the Trial Chamber noted that persecution was often used to describe a series of acts. However, the Trial Chamber does not exclude the possibility that a single act may constitute persecution. In such a case, there must be clear evidence of the discriminatory intent. For example, in the former Yugoslavia an individual may have participated in the single murder of a Muslim person. If his intent clearly was to kill him because he was a Muslim, and this occurred as part of a wide or systematic persecutory attack against a civilian population, this single murder may constitute persecution. But the discriminatory intent of the perpetrator must be proved for this crime to qualify as persecution."

dedicated to religion in a given village also aims at depriving its inhabitants of some of their fundamental rights and may well amount to persecution.

In *Kupreskić*, the judges confirmed that property belonging to the Muslim population was targeted with a discriminatory intent and that attacks against such property must be considered acts of persecution. In the judgement reference is made to "Muslim property" generally, but not specifically to religious or cultural sites, or buildings. However, it may be inferred from the general facts of the case that one of the most serious acts at issue was precisely the destruction of two Mosques in the Ahmici village.[49]

Furthermore, ICTY judges clearly established that it is not necessary to find a nexus between the crime of persecution and one of the other crimes against humanity listed in Article 5. It is worth mentioning that, in doing so, ICTY judges implicitly recognized that Article 7 1 (h) of the ICC Statute is not to be considered customary international law. According to the latter provision, an act of persecution must be accomplished in connection with one of the other crimes listed in Article 7 or with another crime under the jurisdiction of the Court.[50]

On the other hand, ICTY judges confirmed that the Tribunal may exercise its jurisdiction only over crimes against humanity committed during armed conflict.[51] However, it is generally recognized that connection with an armed conflict is not an element of crimes against humanity according to customary international law: it is a "jurisdictional" link required by the ICTY Statute.[52]

A few months later, in the *Blaskić* Trial Judgement, it was explicitly stated that attacks against institutions dedicated to religion may amount to persecution. The judges here recalled both the Nuremberg judgement and the preparatory works of the ILC for the *Draft Code of Crimes against Peace and Security of Mankind* and established that the crime of persecution encompasses attacks on property belonging to a specific group, selected as a

[49] "The Trial Chamber finds that attacks on property can constitute persecution. To some extent this may depend on the type of property involved: in the passage from *Flick* cited above the Tribunal held that the compulsory taking of industrial property could not be said to affect the life and liberty of oppressed peoples and therefore did not constitute persecution. There may be certain types of property whose destruction may not have a severe enough impact on the victim as to constitute a crime against humanity, even if such a destruction is perpetrated on discriminatory grounds: an example is the burning of someone's car (unless the car constitutes an indispensable and vital asset to the owner). However, the case at hand concerns the comprehensive destruction of homes and property. Such an attack on property in fact constitutes a destruction of the livelihood of a certain population. This may have the same inhumane consequences as a forced transfer or deportation. Moreover, the burning of a residential property may often be committed with a recklessness towards the lives of its inhabitants. The Trial Chamber therefore concludes that this act may constitute a gross or blatant denial of fundamental human rights, and, if committed on discriminatory grounds, it may constitute persecution", *ibidem*, paragraph 631.

[50] Article 7, 1) h): "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".

[51] This condition does not correspond to customary international law. In fact, such a connection is not rerquired under the ICC Statute.

[52] The *chapeau* of Article 5 of the ICTY Statute says: "The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population".

target on discriminatory grounds.[53] During the trial, it became apparent that General Blaskić organized several attacks against Bosnian Muslim villages and systematically ordered the targeting of institutions dedicated to Muslim religious activities and education: the accused was eventually sentenced for these and other awful acts under the charge of persecution.[54]

In this case - as well as in others - the accused was sentenced for the same set of facts under both the charge of war crimes and of crimes against humanity. It is precisely because the Trial Chamber proved that the aforementioned attacks were committed with a discriminatory intent[55] that they were deemed punishable not only as offences under Article 3 d) but also as crimes under Article 5 (h).

A number of other indictees were condemned for persecution (in addition to being condemned under article 3 d)) for acts against institutions and sites dedicated to religion. Hence, ICTY judges discussed the reasons underlying the inclusion of acts against cultural property in the sub-category of crimes of persecution on several other occasions. In the *Kordić/Cerkez* Judgement, for instance, Trial Chamber I maintained that attacks against religious or cultural sites, or buildings aim at destroying the very identity of the targeted group. All of humanity is offended by "the destruction of a unique religious culture and its concomitant cultural objects".[56]

This practice may already be considered consolidated. A substantial number of suspects have been sentenced under article 5 (h) for attacks against cultural and religious property.[57] The cultural and historical importance of (damaged or destroyed) monuments and institutions dedicated to education and religion is constantly and even increasingly emphasized in the judgments.[58]

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[53] "The Trial Chamber finds from this analysis that the crime of "persecution" encompasses not only bodily and mental harm and infringements upon individual freedom but also acts which appear less 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." See *Prosecutor v. Blaskić*, cit. *supra*, paragraph 233.

[54] The judgement includes among acts of persecution: "the destruction and plunder of property and, in particular, of institutions dedicated to religion or education". Blaskić was sentenced for attacks against institutions dedicated to religion both under Article 3 (d) and under Article 5 (h). More generally, on the practice of cumulative charges and convictions, see *supra*, passim.

[55] "However, persecution may take forms other than injury to the human person, in particular those acts rendered serious not by their apparent cruelty but by the discrimination they seek to instil within humankind. As put forward by the Prosecutor in the indictment against the accused, persecution may thus take the form of confiscation or destruction of private dwellings or businesses, symbolic buildings or means of subsistence belonging to the Muslim population of Bosnia-Herzegovina." *Prosecutor v. Blaskić*, *supra* note 18, paragraph 227.

[56] "This act, when perpetrated with the requisite discriminatory intent, amounts to an attack on the very religious identity of a people. As such, it manifests a nearly pure expression of the notion of "crimes against humanity", for all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects", paragraph 207.

[57] Most recently, see *Prosecutor v. Brđanin*, cit. *supra*.

[58] Just to give another relevant example, one may quote the following excerpt from *Prosecutor v. Plavsić*, Trial Chamber, Judgment, 27 February 2003, paragraph 44 : "29 of the 37 municipalities listed in the Indictment possessed cultural monuments and sacred sites that were destroyed. This includes the destruction of over 100 mosques, 2 mektebs and 7 Catholic churches. Some of these monuments were located in the Foca, Visegrad and Zvornik municipalities, and dated from the Middle Ages. They were, quite obviously, culturally, historically and regionally significant sites. As one example, the Prosecution referred to the wanton destruction of the Alid`a mosque in Foca, which had been in existence since the year 1550. According to the witness, this mosque was a "pearl amongst the cultural heritage in this part of Europe".

All these cases demonstrate that the destruction of cultural, religious or historic monuments not only bears an inherent gravity, but may also correspond to a serious crime against persons, who are injured by the devastation brought to sites and monuments bearing a highly symbolic value for them. Through the destruction of institutions dedicated to education and religion, those affected may also be deprived of some of their fundamental rights.

Some may argue that classifying attacks against cultural property as crimes against humanity undermines the importance attached to protection of cultural heritage, *per se*, by again focusing on individuals. In my opinion, the contrary view may well be sustained: categorizing attacks against cultural or religious institutions as acts of persecution shows how important cultural property is for the life and identity of every human group and, on a more general level, for the heritage of mankind. This approach actually represents a significant contribution by the ICTY to the body of international law created to protect cultural property.

6. The Destruction of Cultural Property as Evidence to Prove the Mental Element of the Crime of Genocide

The definition of genocide contained in the Convention on the Prevention and the Punishment of the Crimes of Genocide, adopted in 1948 by the UN General Assembly, does not encompass "cultural genocide". This result reflects a conscious choice made by States participating in the negotiation of the Convention, notwithstanding the fact that the original notion of genocide seemingly had a cultural dimension.

The term "genocide" was coined by Raphael Lemkin, who was also the first to develop a comprehensive notion of the crime[59] and to prompt negotiation of an international convention on genocide.[60] Lemkin formulated a very broad notion of genocide and identified a very close bond between the physical element of genocide and its cultural dimension. He defined genocide as a: "coordinated plan of different actions aimed at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objective of such a plan would be *disintegration of the political and social institutions of culture, language, national feelings, religion*, and the economic existence of national groups and the destruction of the personal security, liberty, health, dignity and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity but as members of the national group."[61]

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[59] Lemkin was a leading (Polish) scholar in the field of international law. See LEMKIN, *Axis Rule in Occupied Europe,* Washington, Carnegie Endowment for World Peace, 1944. Se also ID., "Genocide as a Crime under International Law", in *American Journal of International Law*, 1947, at 79 ff. and "Le crime de génocide", *Revue de droit international*, 1946, at 213 ff.

[60] Lemkin has been defined "le père spirituel de la Convention", see CHAUMONT, "Qu'est-ce qu'un génocide", in *Génocide, identités, reconnaissance*, Paris, 1997, at 205.

[61] See *Axis Rule in Occupied Europe*, at p.79. (Emphasis added.) Schabas stresses that the definition is very broad, but is at the same time narrow in the sense that it refers to national groups, instead of groups in general, SCHABAS, *Genocide in International Law. The Crime of Crimes*, Cambridge, 2000, at 25. This definition encompasses two different crimes Lemkin had proposed - already in 1933 at the international conference on the unification of criminal law – should be recognized as international crimes: vandalism and

During the negotiations that eventually led to the adoption of the Genocide Convention, the General Assembly initially seemed to accept the notion developed by Lemkin.[62] This conclusion may be inferred from Resolution n. 96 (I) adopted by the GA on 11 December 1946, together with (well-known) Resolution 95 (I) containing the Nuremberg Principles. Resolution 96 (I) adopted the following definition of genocide: "denial of the right to existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented these human groups".[63]

Both the UN Secretary-General[64] and, later on, an ad hoc Committee on Genocide created by the UN Economic and Social Council prepared different draft proposals for the text of the future convention on genocide: both projects mentioned the cultural dimension of genocide together with its biological and physical elements. According to Article 3 of the draft project prepared by the ECOSOC ad hoc Committee, genocide was to be intended as any premeditated act, committed with the intent to destroy language, religion or culture of a national, racial or religious group because of the national, racial or religious characteristics of this group. Among these acts, Article 3, d) of the ECOSOC draft project included not only the destruction of libraries, museums, schools, historic monuments, religious sites or other cultural institutions but also the prohibition to access these sites or buildings.[65]

It is also relevant to recall that the notion of persecution inserted into the Nuremberg Charter and applied by the Nuremberg Military Tribunal possessed a cultural dimension, as shown above. It also shouldn't be underestimated that the Holocaust, which obviously prompted the drafting of the Genocide Convention, dramatically showed the relevance of the cultural aspect of genocide, as well as the difficulty of considering the physical and cultural dimensions of the crime as separate and distinct elements.

During the subsequent negotiations, however, a vast majority of States expressed the opinion that the notion of "cultural genocide" was too vague and imprecise, and that it could too easily be manipulated for political purposes. It was thus considered appropriate to

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barbarity. Whereas barbarity was to encompass acts directed against racial, religious or social collectivities (massacres, pogroms, collective cruelties), vandalism was to be considered a crime comprising destruction of art and culture in general, belonging to humanity as a whole. His proposal was rejected by the Conference.

[62] Lemkin was also a consultant to the Secretary-General throughout the drafting process of the Convention.

[63] A/RES/96 (I), 11 December 1946. In this resolution the GA requested the Economic and Social Council to consider the drafting of an international convention on the crime of genocide. Initially, ECOSOC asked the Secretary-General to elaborate a draft proposal, which he did in 1947 (UN Doc. E/447). The draft was distributed to member States for their comments. At this stage the GA, endorsing the view of the Sixth Committee, adopted a new resolution entrusting ECOSOC "to continue the work it has begun concerning the suppression of genocide, including the study of the draft convention prepared by the Secretariat, and to proceed with the completion of a convention" (A/RES/180, 1947). ECOSOC then appointed an ad hoc Committee on Genocide, which elaborated a draft project in May 1948 (UN doc. E/794).

[64] UN Doc. E/447, 1947.

[65] The text of Article 3 of the ECOSOC draft project is reproduced in Italian in J.VERHOVEN, "Il concetto di genocidio", in *Genocidi/Genocidio* (edited by the Fondazione internazionale Lelio Basso), Rovigo,1995, at 48.

deal with cultural and physical genocide in distinct documents.[66] Hence, cultural genocide was deleted from the definition eventually included in the Convention adopted by the GA in 1948.[67]

As partial compensation for the elimination of the cultural aspect of the crime, States decided to add the adjective "ethnic" to "national, racial, religious" in order to identify the possible target-group: in this way at least groups with distinct cultural and linguistic traits were protected. However, destruction was intended in a material sense, meaning physical or biological destruction, as the acts enumerated in Article II clearly show and as also confirmed, more recently, by the ILC in its Commentary annexed to the *Draft Code of Crimes against Peace and Security of Mankind*, adopted in 1996.[68]

The notion of genocide agreed-upon was also included in the domestic legislation of States that ratified the 1948 Convention, and naturally does not generally include cultural genocide. It is worth mentioning one exception among national laws: the Nazi and Nazi Collaborators punishment Law, an Israeli statute adopted in 1950[69] together with the national law implementing the 1948 Genocide Convention.[70] This law provides for a specific category of crimes: "crimes against the Jewish People". This category, though clearly inspired by the commonly accepted notion of genocide, comprises among prohibited acts: "destroying or desecrating Jewish religious or cultural assets and values" (Article 1,(b),(6)). The preparatory works of this provision disclose that the Israeli legislator was aware that the Genocide Convention did not encompass such acts. It was decided to include a cultural property dimension in the definition of the crime to emphasize the unique nature

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[66] *See* 3 U.N. GAOR C.6, 63rd mtg. at 8, U.N. Doc. A/C.6/SR.63 (1948) (Mr. Chaumont, Fr.); 3 U.N. GAOR C.6, 66th mtg. at 31, U.N. Doc. A/C.6/SR.66 (1948) (Mr. Abdoh, Iran). Several States were worried about the possibility that condemnation of cultural genocide would be interpreted as a prohibition on the assimilation of minority groups, which would, in turn, have posed a serious threat to the ratification process.

[67] Article II defines genocide as: "any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group." At least one commentator noted that "despite the failure to prohibit cultural genocide, constraints on cultural expression, along with the destruction of historic objects and monuments, may provide circumstantial evidence of an intent to exterminate a group as well as an act in furtherance of a violation of Articles II(b) and (c) of the Convention". LIPPMANN, "The Convention on the Prevention and Punishment of the Crime of Genocide Fifty Years Later", in *Arizona Journal of International and Comparative Law*, 1998, 451-515, at 458.

[68] "As clearly shown by the preparatory work for the Convention, the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group. The national or religious element and the racial or ethnic element are not taken into consideration in the definition of the word "destruction", which must be taken only in its material sense, its physical or biological sense", Commentary to Article 17.

[69] *Nazi and Nazi Collaborators (Punishment) Law,* 1950. Around forty cases involving Kapos were handled under this law (in addition to the famous Eichmann case, also conducted on the basis of this law). The "Kapos" were (Jewish and non-Jewish) inmates in Nazi Camps and ghettoes who were appointed by the Nazis to serve among other inmates in various capacities, mainly in the areas of discipline, order, policing and hygiene. See BEN-NAFTALI; TUVAL, "Punishing International Crimes Committed by the Persecuted: the Kapo Trials in Israel (1950-1960)", *Journal of International Criminal Justice*, 2006, 128-178.

[70] *The Crime of Genocide (Prevention and Punishment) Law,* 1950.

of the Jewish Genocide, which encompassed not only the physical but also the cultural existence of the Jewish people.[71]

The tragic uniqueness of the Holocaust cannot be underestimated, but it does seem that, on a more general level, the rigid distinction made between the physical or biological and the cultural aspects of genocide is artificial.

Recent practice concerning the heinous crimes committed in the former Yugoslavia has shown that the attempted physical elimination of a specific group inevitably goes together with an attempt at destroying the cultural and religious symbols of this same group: institutions and buildings dedicated to religion or education, monuments, museums, libraries and any other objects that could remind one of the existence of the target-group the author of the crime aims to eliminate.

ICTY case-law explicitly recognized this connection and gave a relevant contribution to the "re-evaluation or reappraisal" - if one may use this expression - of the cultural dimension of the crime of genocide, at least as far as the *mens rea* of the crime is concerned.

In the *Krstić* case, Trial Chamber I firmly established that the destruction of institutions dedicated to religion or culture may be considered as an element to prove the specific intent (*dolus specialis*) required for the crime of genocide.[72] The Trial Chamber recognized that, despite recent developments, customary international law confines the definition of genocide to acts aiming at the physical or biological destruction of all or part of a specific group. Hence, an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate those elements which give that group its own identity, distinct from the rest of the community, would not fall under the definition of genocide. However, it also pointed out that "where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group. In this case, the Trial Chamber will thus take into account as evidence of intent to destroy the group the deliberate destruction of mosques and houses belonging to members of the group."[73]

Judge Shahabudden further elaborated on this issue in his Partial Dissenting Opinion appended to the *Krstić* Appeals Judgement, delivered on 19 April 2004. The Appeals Judgement reaffirmed the conviction of the accused under the count of genocide without coming back to the elements that proved specific intent. On the contrary, Judge Shahabudden wanted to make a few things clear in his partially dissenting opinion: [74] "First,

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[71] See BEN-NAFTALI; TUVAL, op.cit., *passim.*

[72] The *mens rea* of the crime is defined by Article II of the Genocide Convention as: "the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such".

[73] *Prosecutor v. Krstić*, Judgement, Trial Chamber, 2 August 2001, paragraph 580, available on-line at http://www.un.org/icty/krstic/TrialC1/judgement/index.htm (visited January 2006). The Trial Chamber recalled a number of decisions that have read the intent to destroy clause in article 4 so as to encompass evidence relating to acts that involved cultural and other non-physical forms of group destruction, such as the UN GA Resolution on ethnic cleansing (Resolution 47/121 of 18 December 1992) and the Decision of the Federal Constitutional Court of Germany of 12 December 2000, Federal Constitutional Court, 2 BvR 1290/99, 12 December 2000.

[74] He partially dissented with the Appeals Chamber as to the level of the appellant's criminal responsibility. Whereas the Trial Chamber considered that appellant's criminal responsibility was that of a "principal perpetrator" of genocide, the Appeals Chamber considered that the level should be that of an aider and abettor. Judge Shahabudden agreed with the Trial Chamber's determination.

the question is whether there was the required intent, not whether the intent was in fact realized. Second, the foregoing is not an argument for the recognition of cultural genocide. It is established that the mere destruction of the culture of a group is not genocide: none of the methods listed in article 4(2) of the Statute need be employed. But there is also need for care. The destruction of 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."[75]

This development concerning the construction of the mental element of the crime of genocide seems particularly important. By virtue of this interpretation, the ICTY found a way to take into account the cultural dimension of genocide without reopening the debate on the modification or expansion of the notion of genocide included in the 1948 Convention and reproduced in other international documents.[76]

7. CONCLUDING REMARKS

Overall, ICTY jurisprudence has made a relevant contribution to the enforcement of international rules designed to protect cultural property. It has also significantly contributed to the development of such international law rules.

The evolution of ICTY case-law highlights the strong connection between crimes against individuals or human groups and crimes against cultural and religious property. International criminal law is intrinsically "anthropocentric", since it actually deals with the most serious of crimes against human beings and human dignity. However, individuals cannot be safeguarded only through the protection of their physical existence or integrity. It is also necessary to protect their cultural and religious identity, which finds expression in monuments, buildings, institutions dedicated to education or religion, libraries and museums, as well as in their "intangible heritage", that is to say customs and traditions.

Persecution or attempts at physically destroying a specific target-group often usher in violence against religious or cultural property, because it is precisely a different religious or cultural identity that triggers fear and hatred: on this point anthropologists and sociologists have conducted very interesting studies. Cultural identity is reflected and symbolized in buildings and sites dedicated to art and religion. The protection of cultural property and cultural heritage is thus of primary importance to safeguard the identity and memory of different human groups and, ultimately, to ensure their survival.

A number of restrictions remain in place as far as the ICTY is concerned. For instance, as already noted, according to the ICTY Statute crimes against humanity must have been committed in an armed conflict and have a nexus with the conflict: acts against cultural property may thus be charged as war crimes or crimes against humanity only where committed in times of war.

As to the crime of genocide an individual may be tried under this charge only where the *actus reus* corresponds to one of the acts listed in Article 4 of the ICTY Statute - that is, acts which aim at the physical or biological destruction of a national, ethnic, racial or religious group. However, as highlighted above, the ICTY found a way to take into account

[75] See paragraph 53.

[76] See *supra*, the position expressed by LIPPMANN, op.cit., at 458.

the destruction of cultural property as an element to prove the specific intent required for the crime of genocide. This is a relevant step toward an evolving interpretation of the characteristics of this crime and opens the way for future developments.

Finally, ICTY case-law is not only important *per se*, but also because it may be an important reference for domestic judges applying international criminal law as well as, in the near future, for the International Criminal Court. The precedents set by the ICTY judges could also be taken into account in cases where crimes under the national jurisdiction or under the jurisdiction of the ICC were committed in times of peace. In this sense, ICTY case-law has certainly paved the way for a remarkable expansion of the possibility to punish attacks against cultural and religious property as crimes against humanity[77] or as elements to prove the mental element of the crime of genocide.

It is possible to affirm that ICTY case-law represents an important contribution to filling the existing gap in the protection of cultural property in the event of armed conflict and in the protection of cultural property in times of peace, at least as far as the implementation of individual criminal liability is concerned. If one thinks, for instance, of terrorist attacks or of attacks against cultural property such as that conducted by the Taliban against the Buddhas of Bamiyan,[78] the potential of ICTY case-law is immediately evident. The *UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage*, adopted in October 2003, points in exactly the same direction.

[77] Certain conditions must naturally be met for a national judge to convict someone for an attack against cultural property, charged as a crime of persecution - for instance the act must have been committed in the framework of a widespread or systematic attack against a civilian population.

[78] See FRANCIONI; LENZERINI, "The Destruction of the Buddhas of Bamiyan and International Law", in *European Journal of International Law*, 2003, 619-651.