The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia

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I. INTRODUCTION

Destruction constitutes an inherent component of armed conflict. No war has been fought without damaging private or public property at least collaterally. In numerous conflicts, however, belligerents have tried to obtain psychological advantage by directly attacking the enemy's cultural property without the justification of military necessity. Such was the case during the conflict in the former Yugoslavia. In the same way that rape became an instrument to destroy the adversary's identity, cultural aggression, i.e., the destruction and pillage of the adversary's non-renewable cultural resources, became a tool to erase the manifestation of the adversary's identity. Both rape and damage to cultural property represented forms of "ethnic cleansing."

In the Croatian city of Vukovar, for example, Serb-controlled Federal troops vandalized ancient and medieval sites as well as the eighteenth-century Eltz Castle, which contained a museum.[1] The same troops attacked a complex of Roman villas in Split[2] and inflicted damage on the sixteenth-century Fortress of Stara Gradiška overlooking the Sava River.[3] In Dubrovnik, retreating Federal troops targeted the Renaissance arboreta, St. Ann Church, and the old city center, which is included on the World Heritage list.[4] The perpetrators in other cases have not yet been identified. The As-

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1. Karen J. Delting, *Eternal Silence: The Destruction of Cultural Property in Yugoslavia*, 17 MD. J. INT'L L. & TRADE 41, 66–67 (1993) (citation omitted).

2. *Id.* at 66.

3. *Id.*

4. *Id.* at 67–68.

sumption and St. Dimitrius churches in Osijek were attacked.[5] In Bosnia-Herzegovina, Baščaršija and Stari Most, the historic centers of Sarajevo and Mostar respectively, were targeted.[6] In Croatia, the Jasenovac memorial complex fell under attack.[7]

These events illuminate the psychology behind the systematic destruction of cultural property both in the former Yugoslavia and in other conflicts where the destruction of cultural property is not merely collateral damage. By inflicting cultural damage on present generations, the enemy seeks to orphan future generations and destroy their understanding of who they are and from where they come. Degrading victims' cultural property also affects their identity before the world community and decreases world diversity. History has witnessed the poignant fate of many nations and peoples following brutal and intensive cultural mutilation. Some have ceased to exist while others have had their identity deeply and irreversibly altered.

The present study examines the various avenues available for prosecuting the destruction of cultural property through the statute and case law of the International Criminal Tribunal for the former Yugoslavia (ICTY). Although the ICTY has prosecuted and punished crimes relating to cultural property, it has encountered a number of psychological and legal challenges. Because the conflict in the former Yugoslavia centered on ethnicity and religion, most of the crimes against cultural property related to religious or educational targets. For a long time, existing indictments did not clearly cover other types of cultural property, such as institutions dedicated to science or works of science. Very recent practice shows the Tribunal's willingness to issue indictments charging crimes against more secular components of cultural property. In addition to finding a *prima facie* case, an international tribunal must consider these components important enough to address in an indictment.[8]

The ICTY must also deal with the impact that the prosecution and punishment of crimes against cultural property may have on the traditional distinction between crimes against property and crimes against persons. The

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5. *Id.* at 67.

6. Delting, *supra* note 1, at 68.

7. *Id.*

8. On February 22, 2001, shortly before this Article went to press, the ICTY issued an indictment concerning the attacks on Dubrovnik, Croatia. Although five days later the confirming judge issued an order limiting public disclosure of the indictment, an ICTY press release said,

> several individuals have been charged with grave breaches of the Geneva Conventions of 1949 and with violations of the laws or customs of war arising from attacks made by the Yugoslav Peoples' Army on the Dubrovnik region between 1 October and 31 December 1991. The specific offences charged in the indictment include murder, cruel treatment, attacks on civilians, *devastation not justified by military necessity, unlawful attacks on civilian objects, destruction of historic monuments, wanton destruction of villages, and plunder of public and private property.*

Press Release, ICTY Office of the Prosecutor, Prosecutor Carla Del Ponte Issues Dubrovnik Indictment, P.H./P.I.S./569-E (Mar. 1, 2001), *at* http://www.un.org/icty/pressreal/p569-e.htm (emphasis added). This indictment is significant because, although the content of the indictment is under seal, "destruction of historic monuments" probably encompasses secular components of cultural property.

anthropocentric approach of law psychologically confines crimes against cultural property to a less visible position than other crimes.[9] Even when crimes against cultural property are addressed, it is because the perpetrators' objective was to harm the population whom the cultural property represented. For example, the ICTY addresses crimes involving the destruction of a mosque because they harmed the Muslim population. The same reasoning applies to the destruction of a Catholic monastery, which injured the Croat population, or of an Orthodox church, which harmed the Serb population. These anthropocentric and ethnocentric approaches require the establishment of a link between cultural property and the group of individuals that it represents. As a result, in the hierarchy of international crimes, there is often a tendency to place crimes against cultural property below crimes against persons. Although no one can deny the difference between the torture or murder of a human being and the destruction of cultural property, it remains important to recognize the seriousness of the latter, especially given its long-term effects.

This study will analyze how and when the ICTY gives crimes against cultural property adequate weight. Part II presents the definition of armed conflict and a tentative definition of cultural property. This study then analyzes the provisions of the ICTY Statute and judgments that are likely to apply to the protection of cultural property. Parts III and IV respectively analyze the direct and indirect protection of cultural property while Part V analyzes the protection *a posteriori*. The Article concludes by considering ways to increase protection for cultural property in the future.

II. Definitions

This Part defines the two key elements of this study, namely "armed conflict" and "cultural property."

A. Armed Conflict

In response to the atrocities that occurred during the armed conflicts surrounding the collapse the Socialist Federal Republic of Yugoslavia (SFRY) in the 1990s, the UN Security Council, pursuant to UN Charter Chapter VII, established 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."[10] Its Statute

9. For this reason, most ICTY judgments referred to in this study involve cases where cultural property was not at stake. Some of the legal findings of the Chambers in these cases, however, can be applied to crimes involving cultural property by analogy. At the time of writing, other cases more directly related to cultural property lie dormant because the accused has not been arrested (and consequently no trial has been initiated) or the case is at the pre-trial stage or the trials are ongoing. Finally, it must be borne in mind that some of the judgments referred to in this study come from the first instance stage and are waiting the final judgment of the ICTY Appeals Chamber.

10. S.C. Res. 827, U.N. SCOR, 3217th Meeting, U.N. Doc. S/RES/827 (1993).

gives the ICTY jurisdiction to prosecute natural persons (competence *ratione personae*)[11] for grave breaches of the Geneva Convention of 1949, violations of the laws or customs of war, crimes against humanity, and genocide (competence *ratione materiae*).[12] These crimes must have occurred in the territory of the former Yugoslavia, including its land surface, airspace, and territorial waters (competence *ratione loci*) on or after January 1, 1991 (competence *ratione temporis*).[13]

Operating within the framework of the specific series of armed conflicts that had taken place in the former Yugoslavia since 1991, the ICTY had to define the term "armed conflict." According to the *Tadić Jurisdiction Decision*, "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[14] This definition encompasses both international and internal armed conflicts. With regard to geography, if an armed conflict took place within a given region, then the Tribunal does not need to establish the existence of the conflict in each territorial component of that region.[15] With regard to temporal scope, the *Tadić Jurisdiction Decision* held that it "applies from the initiation of . . . armed conflict and extends beyond the cessation of hostilities until a general conclusion of peace is reached," in the case of international armed conflict, or "a peaceful settlement is achieved," in the case of non-international armed conflict.[16]

Inseparable from the occurrence of armed conflict is the body of law that governs it.

> [T]he expression *international humanitarian law applicable in armed conflict* means international rules, established by treaties or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limits the right of Parties to a conflict to use the methods and means of warfare of their choice or protect persons and property that are, or may be,

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11. *Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808*, Annex, at 38, U.N. Doc. S/25704 (1993) [hereinafter *Report of the Secretary-General*] (including the text of the ICTY Statute in the Annex). *See also id.* at 14 (differentiating between "juridical persons, such as an association or organization" and "natural persons").

12. *Id.* at 36–38.

13. *Id.* at 39.

14. The Prosecutor v. Duško Tadić (Decision on the Defence Motion for Interlocutory Appeal Jurisdiction), No. IT-94-1-AR72, para. 70 (ICTY 1995), *available at* http://www.un.org/icty/tadic/appeal/decision-e/51002.htm [hereinafter *Tadić Jurisdiction Decision*].

15. *See* The Prosecutor v. Tihomir Blaškić (Trial Judgment), No. IT-95-14-T, para. 64 (ICTY 2000), *available at* http://www.un.org/icty/blaskic/trialc1/judgement/index.htm [hereinafter *Blaškić Trial Judgment*].

16. *Tadić Jurisdiction Decision*, No. IT-94-1-AR72, para. 70.

> affected by conflict. The expression . . . is often abbreviated to *international humanitarian law* or *humanitarian law*.[17]

This definition raises two issues. First, international humanitarian law consists of two major components: Geneva law, which protects war victims, and Hague law, which regulates the "methods and means of conducting hostilities."[18] Geneva law is much more developed than Hague law because of states' very cautious approach to constraints on their means of waging effective warfare.[19]

The definition also suggests a link between this body of law and the geographic nature of the armed conflict. While international humanitarian law is applicable to both international and non-international conflicts, the body of law for the former is much more developed because of the doctrine of state sovereignty.[20] Non-international armed conflicts, such as civil wars, were traditionally considered internal matters, which gave a state primary responsibility for the resolution of its conflict unless it requested the help of other states or international organizations. With a few exceptions during the Cold War,[21] this doctrine prevented a detailed elaboration of humanitarian law applicable to non-international armed conflicts. Since the early to mid-1990s, however, with the power vacuum created by the Soviet Union's collapse and the events in northern Iraq, the SFRY, Somalia, and Rwanda, the international community has acquired wider latitude to intervene—on an extremely selective basis—in places where either non-international armed conflicts or a combination of international and non-international armed conflicts occur. The issue of conflict classification remains important, however, because it determines which body of law governs the conflict; this is especially true in the case of the former Yugoslavia, which, depending on the time and place, experienced conflicts of a mixed nature.[22]

B. Cultural Property

The Statute of the ICTY does not use the term "cultural property." Article 3(d) provides some insight into its definition when it refers to "institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science." The absence of explicit reference to cultural property, however, correlates to the lack of a uniform

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17. CLAUDE PILLOUD ET AL., INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at xxvii (Yves Sandoz et al. eds., 1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS].

18. W.J. Fenrick, *Humanitarian Law and Criminal Trials*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 23, 27 (1997).

19. *See id.*

20. *Id.* at 25.

21. The 1967–70 Biafran conflict in Nigeria offers an example.

22. *See* Fenrick, *supra* note 18, at 26.

definition of this concept in international instruments.[23] Two questions present obstacles to defining this concept: (1) What does "culture" encompass? (2) What type of property qualifies as "cultural"? Rather than formulating a precise definition of the concept, this section will seek to clarify it by reviewing the relevant international instruments in order to single out a common denominator comprised of those components of cultural property that are referred to by all the instruments.

1. International Instruments Referring to the Components of Cultural Property

Most international instruments relating to armed conflict refer to the components of cultural property, not to cultural property explicitly. For example, Article 56 of the Hague Convention (IV) Respecting the Laws and Customs of War on Land of 18 October 1907 (Hague Convention (IV)) and the Regulations annexed thereto (Hague Regulations) provides:

> 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.[24]

Article 3(d) of the ICTY Statute enumerates identical components for cultural property. Article 27 of the Hague Regulations provides for the protection of "buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected" as long as they are not used for military purposes.[25] The reference to cultural property together with places where the sick and wounded are collected represents an early recognition of the significance of cultural property.

The 1935 Roerich Pact aimed exclusively to protect cultural property. Article 1 of the Pact provides for the neutrality and protection of "historic monuments, museums, scientific, artistic, educational and cultural institu-

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23. The Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151, uses the term "cultural heritage." According to some writers, the difference between the two terms is that while cultural property comprises tangible movable and immovable property of cultural significance, cultural heritage "includes intangible heritage, such as crafts, folklore, and skills." Theresa Papademetriou, *International Aspects of Cultural Property: An Overview of Basic Instruments and Issues*, 24 INT'L J. LEGAL INFO. 270, 271–73 (1996).

24. Hague Convention Respecting the Laws and Customs of War on Land (Hague IV) and the Regulations annexed thereto, Oct. 18, 1907, Annex, art. 56, 36 Stat. 2277, 2309 [hereinafter Hague Convention (IV) and Regulations]. The Annex to Hague Convention (IV) is referred to as the Hague Regulations.

25. *Id.* Annex, art. 27, at 2303; *see also* Hague Convention Respecting Bombardment by Naval Forces in Time of War (Hague IX), Oct. 18, 1907, art. 5, 36 Stat. 2351, 2364.

tions."[26] The Pact, however, has a more limited geographic scope because it was concluded under the auspices of the regional Pan-American Union, the predecessor of the Organization of the American States.

Adopted on July 17, 1998, Article 8 of the International Criminal Court (ICC) Statute adopts the same approach as its precursors. Articles 8(2)(b)(ix) and 8(2)(e)(iv) refer to, among other serious violations of the laws of war, intentional attacks on cultural and religious institutions.[27] Like Article 27 of the Hague Regulations, it includes hospitals in the same list as cultural property.

These instruments encompass almost identical components of cultural property and illustrate the approach adopted by the majority of international instruments related to armed conflicts over the past century. A more limited number of international instruments refer to cultural property per se. They all have come into existence in the second half of the twentieth century.

2. *International Instruments Referring to Cultural Property Per Se*

After the Second World War wreaked havoc on the cultural heritage of Europe, an international breakthrough occurred that increased the protection of cultural property during armed conflicts. Signed on May 14, 1954, the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention)[28] became the first armed conflict-related instrument to use the term "cultural property."[29] Article 1 provides:

> For the purposes of the present Convention, the term "cultural property" shall cover, irrespective of origin or ownership:
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> (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;
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> (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

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26. Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact), Apr. 15, 1935, 49 Stat. 3267, 3268, 167 L.N.T.S. 289, 290.

27. Rome Statute of the International Criminal Court, at 7–10, U.N. Doc. A/CONF.189/9 (1998) [hereinafter ICC Statute].

28. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 [hereinafter 1954 Hague Convention].

29. The same term is used by the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, S. EXEC. DOC. B, 92-2 (1972), 823 U.N.T.S. 231.

> refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a);
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> (c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as "centres containing monuments."[30]

Including significant buildings, objects, and depositories, this definition of cultural property is one of the most comprehensive ever provided in an international instrument, especially one related to armed conflict.

Almost a quarter of a century later, Article 53 of Additional Protocol I followed the example of the 1954 Hague Convention and referred to cultural property per se, although not in its heading ("Protection of cultural objects and of places of worship").[31] It built on the 1954 Hague Convention, providing that:

> Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:
>
> (a) to commit 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.[32]

The language, however, differed on one point. Article 1 of the 1954 Hague Convention referred to property that is "of great importance to the cultural heritage,"[33] while Article 53 of Additional Protocol I, for the same purpose, refers to objects that "constitute the cultural or spiritual heritage."[34] According to the Commentary on the Additional Protocols, "despite this difference in terminology the basic idea is the same."[35] Although "the adjective 'cultural' applies to historic monuments and works of art while the adjective 'spiritual' applies to places of worship,"[36] there are instances where the two may be interchangeable. For example, a temple may have cultural value, and a historic monument or work of art may have spiritual value.[37] When it is

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30. 1954 Hague Convention, *supra* note 28, at 242.

31. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, 27 [hereinafter Additional Protocol I]. *See also* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, S. TREATY DOC. NO. 100-2 (1987), 1125 U.N.T.S. 609.

32. Additional Protocol I, *supra* note 31, at 27 (citation omitted).

33. 1954 Hague Convention, *supra* note 28, at 242.

34. Additional Protocol I, *supra* note 31, at 27.

35. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 17, para. 2064.

36. *Id.* para. 2065.

37. *Id.*

difficult to categorize an object, the Commentary gives extra weight to the views of the people who see it as part of their heritage.[38]

The above analysis reveals a common denominator among these instruments with regard to cultural property, namely "institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science," as described in Article 3(d) of the ICTY Statute.[39] If an item does not fit one of these components, this study will include it in the general protection provided to civilian objects.[40]

C. Typology of ICTY Protective Measures

Having defined the territorial and temporal scope of both armed conflict and humanitarian law and having clarified the concept of cultural property, this study now analyzes the ICTY Statute's relevant provisions and their application by the Chambers. Many ICTY indictments deal with the concept of property. Some, which will not be addressed in this study, focus on private property in the form of personal belongings.[41] Others deal with cultural property, charging crimes, cumulatively or alternatively, under three counts: (1) grave breaches of the Geneva Conventions of 1949, (2) violations of the laws or customs of war, and (3) crimes against humanity, particularly persecution on political, racial, and religious grounds. A crime targeting an institution dedicated to religion, for example, may be charged under a combination of these three counts.

Violations of these statutory provisions can lead to prosecution and punishment. The United Nations created the ICTY in order to punish those persons responsible for the commission of war atrocities in Yugoslavia. To this end, the ICTY Statute had to formulate norms and establish ways to protect them. It did so by criminalizing certain behaviors. Because the war was ongoing, the Tribunal also sought to deter future atrocities. The incorporation of norms in its Statute demonstrated the seriousness of the crimes and their condemnation by the international community as a result of its failure to protect them. The following sections of this Article analyze three types of protective measures for cultural property that can be identified in the ICTY Statute and case law: direct protection (Part III), indirect protection (Part IV), and protection *a posteriori* (Part V).

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38. *Id.* ("In case of doubt, reference should be made in the first place to the value or veneration ascribed to the object by the people whose heritage it is.").

39. *Report of the Secretary-General*, *supra* note 11, at 37.

40. *See infra* Part IV.

41. *See* The Prosecutor v. Goran Jelisić (Indictment), No. IT-95-10, para. 36, Count 44 (ICTY 1998), *available at* http://www.un.org/icty/indictment/english/jel-2ai981019e.htm; The Prosecutor v. Zejnil Delalić "Čelebići" (Indictment), 1996 ICTY Y.B. 149, No. IT-96-21, para. 37, Count 49, *available at* http://www.un.org/icty/indictment/english/cel-ii960321e.htm; The Prosecutor v. Dragoljub Kunarac (Amended Indictment), No. IT-96-23-PT, Count 13 (ICTY 1999), *available at* http://www.un.org/icty/indictment/english/kun-3ai991201e.htm.

III. Direct Protection—Article 3(d) of the Statute: Violations of the Laws or Customs of War

A number of ICTY indictments alleging violations of the laws or customs of war refer explicitly to the components of cultural property. They charge "destruction or wilful damage done to institutions dedicated to religion,"[42] "destruction or wilful damage to institutions dedicated to religion or education,"[43] and "seizure, destruction or wilful damage done to institutions dedicated to religion."[44] These phrases all refer to Article 3(d) of the Statute, which provides:

> 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: . . .
>
> (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.[45]

Article 3(d) punishes the most direct violations of cultural property envisioned by the ICTY and makes explicit reference to the "common denominator" components of cultural property.[46]

A. Scope and Conditions of Applicability

ICTY case law has determined the scope and conditions of applicability of the Statute's Article 3. According to the *Tadić Jurisdiction Decision*, Article 3 applies to both internal and international armed conflicts.[47] In addition, as established by the *Čelebići* and *Blaškić Trial Judgments*, a nexus between the alleged crimes and the armed conflict must exist in order to charge under

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42. The Prosecutor v. Radovan Karadžić (Indictment), 1995 ICTY Y.B. 204, 215, No. IT-95-5, Count 6, *available at* http://www.un.org/icty/indictment/english/kar-ii950724e.htm [hereinafter *Karadžić Indictment*]; The Prosecutor v. Radoslav Brđanin (First Amended Indictment), No. IT-99-36, Count 12 (ICTY 1996), *available at* http://www.un.org/icty/ind-e.htm.

43. The Prosecutor v. Tihomir Blaškić (Second Amended Indictment), No. IT-95-14-T, para. 11, Count 14 (ICTY 1997), *available at* http://www.un.org/icty/indictment/english/bla-2ai970425e.htm [hereinafter *Blaškić Indictment*]; The Prosecutor v. Dario Kordić (First Amended Indictment), No. IT-95-14/2, paras. 57, 58, Counts 43, 44 (ICTY 1998), *available at* http://www.un.org/icty/indictment/english/kor-1ai980930e.htm [hereinafter *Kordić Indictment*].

44. The Prosecutor v. Mladen Naletilić (Indictment), No. IT-98-34-I, Count 22 (ICTY 1998), *available at* http://www.un.org/icty/indictment/english/nal-ii981221e.pdf [hereinafter *Naletilić Indictment*].

45. *Report of the Secretary-General*, *supra* note 11, at 37.

46. Article 3(d) constitutes *lex specialis* because it explicitly enumerates a number of components of cultural property. For aspects of cultural property that are not mentioned in Article 3(d), reference may be made to those provisions of the ICTY Statute that constitute *lex generalis*, i.e., Articles 3(b), 3(c), and 3(e), Article 2(d) (although only for occupied territories), and Article 5(h). *See* Parts IV.A, IV.B, and IV.C *infra*.

47. *See Tadić Jurisdiction Decision*, No. IT-94-1-AR72, para. 137 (ICTY 1995), *available at* http://www.un.org/icty/tadic/appeal/decision-e/51002.htm.

Articles 2 and 3 of the Statute.[48] The *Blaškić Trial Judgment* held, however, that the accused did not need to intend active participation in the armed conflict if the "act fits into the geographical and temporal context of the conflict."[49] This broad interpretation of intent does not require a sophisticated level of organization, such as a plan or direct policy, for commission of a crime. The alleged crimes need not be "part of a policy or of a practice officially endorsed or tolerated"[50] by the belligerents, "in actual furtherance of a policy associated with the conduct of war,"[51] or even in the actual interests of the belligerents.[52]

The violations of the laws or customs of war enumerated in Article 3 of the Statute do not constitute an exhaustive list[53] and thus allow for more protection of cultural property. The Hague Convention (IV), as interpreted and applied by the Nuremberg Tribunal (IMT), represents the basis for Article 3 of the Statute.[54] Because it applies to both international and non-international armed conflicts, Article 3 is broader than common Article 3 of the 1949 Geneva Conventions, which applies only to non-international armed conflicts.[55] The *Blaškić* Trial Chamber stated that Article 3 of the

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48. *See* The Prosecutor v. Zejnil Delalić "Čelebići" (Trial Judgment), No. IT-96-21-T, paras. 193–98 (ICTY 1998), *available at* http://www.un.org/icty/celebici/trialc2/jugement/main.htm [hereinafter *Čelebići Trial Judgment*]; *Blaškić Trial Judgment*, No. IT-95-14-T, para. 65 (ICTY 2000), *available at* http://www.un.org/ icty/blaskic/trialc1/judgement/index.htm.

49. *Blaškić Trial Judgment*, No. IT-95-14-T, para. 71.

50. The Prosecutor v. Duško Tadić (Trial Judgment), No. IT-94-1-T, para. 573 (ICTY 1997), *available at* http://www.un.org/icty/tadic/trialc2/jugement-e/tad-tj970507e.htm#_Toc387417337 [hereinafter *Tadić Trial Judgment*]. *See also Čelebići Trial Judgment*, No. IT-96-21-T, para. 195.

51. *Tadić Trial Judgment*, No. IT 94-1-T, para. 573.

52. *See Tadić Trial Judgment*, No. IT-94-1-T, para. 573.

53. *Blaškić Trial Judgment*, No. IT-95-14-T, para. 168. According to the Report of the Secretary-General, the Geneva Conventions, Hague Convention (IV), the Convention on the Prevention of the Crime of Genocide of 9 December 1948, and the Charter of the International Military Tribunal of 8 August 1945 represent "the part of conventional international humanitarian law which has beyond doubt become part of international customary law." *Report of the Secretary-General*, *supra* note 11, at 9.

54. *Report of the Secretary-General*, *supra* note 11, at 11.

55. *Id.*; *see also Tadić Jurisdiction Decision*, No. IT-94-1-AR72, para. 86 (ICTY 1995), *available at* http://www.un.org/icty/tadic/appeal/decision-e/51002.htm. Pursuant to common Article 2 of the Geneva Conventions, the Conventions apply to international armed conflicts, including cases of total or partial occupation by one state of the territory of another. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31, 32 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85, 86 [hereinafter Geneva Convention II]; Geneva Convention relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135, 136 [hereinafter Geneva Convention III]; Geneva Convention relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, 288 [hereinafter Geneva Convention IV]. Common Article 3 of the Conventions, by contrast, applies to non-international armed conflict and encourages belligerents in such conflicts to bring into force other provisions of the Conventions, either partially or totally. Geneva Convention I, *supra,* at 32–34; Geneva Convention II, *supra,* at 86–88; Geneva Convention III, *supra,* at 136–38; Geneva Convention IV, *supra,* at 288–90. In the *Tadić Jurisdiction Decision*, the Appeals Chamber indicated that "in the present state of development of the law, Article 2 of the Statute only applies to offences committed within the context of international armed conflicts," *Tadić Jurisdiction Decision*, No. IT-94-1-AR72, para. 84, and that it was not possible to prosecute violations of common Article 3 under the grave breach provisions of the Geneva Conventions, *see id.* para. 87. The Appeals Chamber, however, agreed with the prosecution's argument that Article 3 of

Statute also encompasses the provisions of Additional Protocol I in relation to unlawful attacks upon civilian targets.[56] Therefore, the Trial Chamber did not need to rule on the applicability of Additional Protocol I.[57] The ICTY can be guided by Articles 52, "General protection of civilian objects," and 53, "Protection of cultural objects and places of worship," of Additional Protocol I when dealing with offenses involving cultural property.[58] In conclusion, under Article 3 of the Statute, the ICTY can prosecute persons not only for the violations listed therein, but also for violations of customary international law norms, such as common Article 3 of the Geneva Conventions, and for violations of treaty law that was binding upon the parties at the time of the conflict.

Finally, Article 7 of the Statute imposes individual criminal responsibility for violations of Article 3 of the Statute.[59] More generally, the *Tadić Jurisdiction Decision* held that customary international law imposes criminal responsibility for serious violations of common Article 3.[60]

B. Elements of the Offenses with Regard to Cultural Property

The cultural property protection provided by Article 3(d) has three advantages. First, it has a wide scope because it applies to both international and non-international armed conflicts. Second, the element of intent is broadly interpreted. Third, unlike other provisions of the Statute, it refers directly to cultural property. Nevertheless, this type of protection encounters a number of obstacles, mainly due to the qualification of the sites relating to cultural property.

ICTY case law provides some guidelines for which types of sites constituting or sheltering cultural property may be protected under Article 3(d). The *Blaškić Trial Judgment* held that "the damage or destruction must have been committed intentionally to institutions which may clearly be identified

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the ICTY Statute confers power to prosecute the violation of common Article 3 of the Geneva Conventions. *See id.* paras. 88 – 93. In fact, it regarded Article 3 of the Statute as a general clause covering all violations of humanitarian law not falling within Articles 2, 4, or 5 of the Statute. *Tadić Jurisdiction Decision*, No. IT-94-1-AR72, para. 89.

56. *See Blaškić Trial Judgment*, No. IT-95-14-T, para. 170.

57. *Id.* If the Trial Chamber had had to rule on the applicability of Additional Protocol I, it would have found it applicable because both Croatia and Bosnia and Herzegovina were parties to it as of January 1, 1993. M.J. BOWMAN & D.J. HARRIS, MULTILATERAL TREATIES: INDEX AND CURRENT STATUS 287–88 (11th ed. Supp. 1995). *See also Tadić Jurisdiction Decision*, No. IT-94-1-AR72, paras. 98, 102, 134; *Tadić Trial Judgment*, No. IT-94-1-T, paras. 609–11 (ICTY 1997), *available at* http://www.un.org/icty/tadic/trialc2/jugement-e/tad-tj970507e.htm#_Toc387417337; *Čelebići Trial Judgment*, No. IT-96-21-T, para. 301 (ICTY 1998), *available at* http://www.un.org/icty/celebici/trialc2/judgement/main.htm; The Prosecutor v. Jean-Paul Akayesu, No. ICTR-96-4-T, para. 608 (ICTR 1998), *available at* http://www.ictr.org/ENGLISH/cases/Akayesu/judgement/akay001.htm [hereinafter *Akayesu Trial Judgment*]; Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 114 (June 27).

58. *See, e.g., infra* Part IV.B.2.

59. *See Blaškić Trial Judgment*, No. IT-95-14-T, para. 176; *see also Report of the Secretary-General*, *supra* note 11, at 38.

60. *Tadić Jurisdiction Decision*, No. IT-94-1-AR72, para. 134.

as dedicated to religion or education."[61] Although the *Blaškić Indictment* dealt mainly with institutions dedicated to religion, when Article 3(d) is considered in its entirety, the same reasoning can be applied to institutions dedicated to charity, art, or science, historic monuments, and works of art and science. It could be argued, however, that Article 3(d) specifically limits protection to the sites enumerated in the provision and does not apply to other aspects of cultural property, such as those listed in Article 1 of the 1954 Hague Convention.[62] The *Blaškić Trial Judgment* also held that at the time of the acts, the sites must not have been "used for military purposes" or within "the immediate vicinity of military objectives."[63] Subjecting the direct protection of cultural property to the uncertain parameters of military necessity is a drawback added to the already burdensome requirement of establishing a nexus between the alleged crimes and the armed conflict.

IV. Indirect Protection

Articles providing indirect protection mention neither cultural property per se nor its components. Rather, they afford protection through that provided to civilian objects[64] and through the more anthropocentric crime of persecution.[65]

A. Article 2(d) of the Statute: Grave Breaches of the Geneva Conventions of 1949

Indictments use a variety of language to allege a grave breach of the Geneva Conventions of 1949 with regard to crimes involving cultural property. Common phrases include: "destruction of property,"[66] "extensive destruction of property,"[67] "appropriation of property,"[68] and "unlawful and wanton extensive destruction and appropriation of property not justified by military necessity."[69] Article 2(d) itself states:

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61. *Blaškić Trial Judgment*, No. IT-95-14-T, para. 185.
62. 1954 Hague Convention, supra note 28, at 242.
63. *Blaškić Trial Judgment*, No. IT-95-14-T, para. 185.
64. *See* discussion *infra* Parts IV.A and IV.B.
65. *See* discussion *infra* Part IV.C.
66. *Karadžić Indictment*, 1995 ICTY Y.B. 215, No. IT-95-5, Count 7, *available at* http://www.un.org/icty/indictment/english/kar-ii950724e.htm; The Prosecutor v. Ivica Rajić (Indictment), No. IT-95-1, Counts 2, 5 (ICTY 1995), *available at* http://www.un.org/icty/indictment/english/raj-ii950829e.htm [hereinafter *Rajić Indictment*].
67. *Blaškić Indictment*, No. IT-95-14-T, para. 10, Count 11 (ICTY 1997), *available at* http://www.un.org/icty/indictment/english/bla-2ai970425e.htm; *Kordić Indictment*, No. IT-95-14/2, paras. 55, 56, Counts 37, 40 (ICTY 1998), *available at* http://www.un.org/icty/indictment/english/kor-1ai980930e.htm; *Naletilić Indictment*, No. IT-98-34-I, Count 19 (ICTY 1998), *available at* http://www.un.org/icty/indictment/english/nal-ii981221e.pdf.
68. *Karadžić Indictment*, No. IT-95-5, para. 43, Count 8.
69. *Brđanin Indictment*, No. IT-99-36, Count 10, *available at* http://www.un.org/icty/ind-e.htm.

> 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.[70]

The language used by the indictments illustrates various ways to apply this article. Since Article 2(d) does not refer either to cultural property or its components, this section will analyze the general scope and conditions of applicability of Article 2(d) before examining its application to crimes relating to cultural property.

1. Scope and Conditions of Applicability

Unlike Article 3 which applies to both international and non-international armed conflicts, Article 2 applies only when the conflict is international.[71] After establishing the international character of a conflict, the court must look for a nexus between the alleged crimes and the armed conflict.[72]

Article 2(d) imports into the Statute one of the grave breaches enumerated in Article 147 of Geneva Convention IV.[73] The "grave breaches must be perpetrated against persons or property covered by the 'protection' of any of the Geneva Conventions of 1949."[74] Article 53 of Geneva Convention IV prohibits an occupying power from extensively destroying property without the justification of military necessity.[75] In keeping with the requirement that the conflict be international, this protection is restricted to property within

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70. *Report of the Secretary-General*, *supra* note 11, at 36.

71. *See Tadić Jurisdiction Decision*, No. IT-94-1-AR72, paras. 79–84 (ICTY 1995), *available at* http://www.un.org/icty/tadic/appeal/decision-e/51002.htm; The Prosecutor v. Tadić (Appeal Judgment), No. IT-94-1-A, para. 80 (ICTY 1999), *available at* http://www.un.org/icty/tadic/appeal/judgement/main.htm [hereinafter *Tadić Appeal Judgment*].

72. *See supra* Part III.A.

73. Article 147 of Geneva Convention IV provides:

> Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: 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.*

Geneva Convention IV, *supra* note 55, at 388 (emphasis added).

74. *Blaškić Trial Judgment*, No. IT-95-14-T, para. 74 (ICTY 2000), *available at* http://www.un.org/icty/blaskic/trialc1/judgement/index.htm.

75. *See id.* para. 148.

the occupied territory.[76] "In order to dissipate any misconception in regard to the scope of Article 53 it must be pointed out that the property referred to is not accorded general protection; the Convention merely provides here for its protection in occupied territory."[77] Applying this rule, the Trial Chamber in *Blaškić* agreed with the prosecution's submission that enclaves in Bosnia and Herzegovina that were dominated by Bosnian Croat armed forces (HVO, or Croatian Defense Council)[78] constituted an occupied territory and that the Republic of "Croatia played the role of Occupying Power through the overall control it exercised over the HVO."[79] For similar facts with the same time frame and geographic scope,[80] however, the *Kordić* Trial Chamber found that Croatia exercised overall control over the HVO in central Bosnia,[81] but the territory controlled by the HVO did not constitute occupied territory.[82] Having examined the general conditions under which

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76. OSCAR M. UHLER ET AL., INT'L COMM. OF THE RED CROSS, THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY IV 301 (Jean C. Pictet ed., Ronald Griffin & C.W. Dumbleton trans., 1958) [hereinafter COMMENTARY ON GENEVA CONVENTION IV]; *see also Blaškić Trial Judgment*, No. IT-95-14-T, para. 148. Since the Geneva Conventions do not define the term "occupied territory," the *Kordić* Trial Chamber referred to and accepted the definition provided by customary international law. Article 42 of the Hague Regulations provides that a "'[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.'" The Prosecutor v. Dario Kordić and Mario Čerkez (Trial Judgment), No. IT-95-14/2-T, paras. 338–39 (ICTY 2001), *available at* http://www.un.org/icty/kordic/trialc/judgement/index.htm [hereinafter *Kordić Trial Judgment*] (quoting Hague Convention (IV) and Regulations, *supra* note 24, Annex, art. 42, at 2306).

77. COMMENTARY ON GENEVA CONVENTION IV, *supra* note 76, at 301.

78. This indictment charged Colonel Blaškić, the Commander of the Central Bosnia Operative Zone of the HVO, on the basis of both individual and superior responsibilities (respectively Articles 7(1) and 7(3) of the ICTY Statute, *Report of the Secretary-General*, *supra* note 11, at 38–39) for serious violations of international humanitarian law against Bosnian Muslims in Bosnia and Herzegovina from May 1992 to January 1994. These violations included persecution (Count 1), unlawful attacks on civilians and civilian objects (Counts 2–4), willful killing and causing serious injury (Counts 5–10), destruction and plunder of property (Counts 11–13), destruction of institutions relating to religion (Count 14), and inhuman treatment, the taking of hostages, and the use of human shields (Counts 15–20). *See generally Blaškić Indictment*, No. IT-95-14-T (ICTY 1997), *available at* http://www.un.org/icty/indictment/english/ bla-2ai970425e.htm.

79. *See Blaškić Trial Judgment*, No. IT-95-14-T, para. 149–50.

80. The *Kordić Indictment* charges politician Dario Kordić and military leader Mario Čerkez on the basis of individual and superior responsibilities (Articles 7(1) and 7(3) of the ICTY Statute respectively) for serious violations of international humanitarian law against Bosnian Muslims in Bosnia and Herzegovina between 1991 and 1994. Kordić served as Vice President of the Croatian Community of Herceg-Bosna and of the Croatian Republic of Herceg-Bosna and President of the Croatian Democratic Union of Bosnia and Herzegovina, and Mario Čerkez served as Commander of the HVO Viteška Brigade. *Kordić Indictment*, No. IT-95-14/2, paras. 9, 12 (ICTY 1998), *available at* http://www.un.org/icty/indictment/english/kor-1ai980930e.htm. The violations they were charged with included persecution on political, racial, or religious grounds (Counts 1–2); unlawful attacks on civilians and civilian objects (Counts 3–6); willful killing, murder, causing serious injury, inhuman acts, and inhumane treatment (Counts 7–20); imprisonment, inhuman treatment, taking of hostages, and the use of human shields (Counts 21–36); destruction and plunder of property (Counts 37–42); and destruction of institutions dedicated to religion or education (Counts 43–44). *See generally id.*

81. *Kordić Trial Judgment*, No. IT-95-14/2-T, para. 145.

82. *Id.* para. 808. This type of finding may have far reaching consequences. Based on its finding that the property destroyed was not located in occupied territory, the Trial Chamber found that the offenses of extensive destruction of property as a grave breach of the Geneva Conventions under Article 2(d) of the

Article 2(d) applies, this Article will now focus on its specific application to crimes against cultural property.

2. *Elements of the Offenses with Regard to Cultural Property*

Geneva Convention IV prohibits an occupying power from destroying movable and immovable property "except when such destruction is rendered absolutely necessary for military operations."[83] To constitute a grave breach under this provision, the destruction must be extensive, unlawful, wanton, and unjustified by military necessity.[84] The scope of "extensive" depends on the facts of the case. A single act, such as the destruction of a hospital, may suffice to characterize as an offense under Article 2(d).[85] It remains unclear, however, whether one can analogize cultural property to a hospital. Article 27 of the Hague Regulations and Articles 8(2)(b)(ix) and 8(2)(e)(iv) of the ICC Statute mention "hospitals and places where the sick and wounded are collected" together with the components of cultural property.[86] If cultural property were given weight equal to a hospital, as suggested by those articles, the destruction of a single piece of cultural property might also qualify as an offense under Article 2(d).

The *Kordić Trial Judgment* described two distinct situations where the extensive destruction of property constitutes a grave breach.[87] The first situation is "where the property destroyed is of a type accorded general protection under the Geneva Conventions of 1949,[88] regardless of whether or not it is situated in occupied territory." The second situation is "where the property destroyed is accorded protection under the Geneva Conventions of 1949,[89] on account of its location in occupied territory" but only if destruction is not justified by military necessity and occurs on a large scale.[90] While the general protection applies to health-related objects, cultural property, when con-

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Statute were "not made out"; it found the defendants not guilty on Counts 37 and 40 of the Indictment. *Id.* para. 808 and Disposition.

83. COMMENTARY ON GENEVA CONVENTION IV, *supra* note 76, at 601.

84. *Id.*

85. *Id.*

86. *See supra* Part II.B.1.

87. In both situations, the perpetrator must have acted with the "intent to destroy the property in question or in reckless disregard of the likelihood of its destruction." *Kordić Trial Judgment*, No. IT-95-14/2-T, paras. 341 (ICTY 2001), *available at* http://www.un.org/icty/kordic/trialc/judgement/index.htm.

88. *See, e.g.*, Geneva Convention I, *supra* note 55, chs. 3, 5, 6, at 44, 52, 54 (protecting medical units, buildings and material, and vehicles and aircraft); Geneva Convention II, *supra* note 55, arts. 22, 38, at 100, 108 (protecting hospital and medical transport ships). Article 18 of Geneva Convention IV provides that "[c]ivilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of an attack, but shall in all times be respected and protected by the Parties to the conflict." Geneva Convention IV, *supra* note 55, at 300.

89. Even with regard to this type of property, however, the Conventions identify circumstances where the general protection will cease. *See, e.g.*, Geneva Convention I, *supra* note 55, arts. 21, 33, 36, at 46, 53, 54 (medical units, buildings and material, and medical aircraft, respectively); Geneva Convention II, *supra* note 55, art. 34, at 104 (hospital ships).

90. *Kordić Trial Judgment*, No. IT-95-14/2-T, paras. 341, 808.

sidered a type of civilian object, receives the second, more limited kind of protection. If cultural property could be analogized to hospitals, as suggested above, it would be covered by a very high degree of protection. Even then, however, the question remains as to which aspects of the general protection would apply to the protection of cultural property. Would it be its territorial aspect (i.e., protection beyond occupied territories), its military necessity aspect (i.e., prohibition of destruction regardless of military necessity), or its scale of destruction aspect (i.e., destruction of a single piece enough for a grave breach)? This broader type of protection would most likely embrace at least the third aspect because each piece of cultural property is unique and therefore people protest the loss of even a single piece of cultural property.

In sum, Article 2(d) has limited scope and conditions of applicability. It remains subject to the definition of military necessity. Moreover, it only applies to an occupied territory in the context of international armed conflict if a nexus between the alleged crimes and the armed conflict exists.

B. Articles 3(b), 3(c), and 3(e) of the Statute: Violation of the Laws or Customs of War

A number of indictments refer to the protection provided to civilian objects and/or to unlawful methods of combat. They use phrases such as: "plunder of public or private property,"[91] "plunder of public or private property,"[92] "deliberate attack on the civilian population and wanton destruction of the village,"[93] "unlawful attack on civilian objects,"[94] "wanton destruction not justified by military necessity,"[95] "wanton destruction of cities, towns or villages, or devastation not justified by military necessity,"[96] and "devastation not justified by military necessity."[97] These indictments cite to sections (b), (c), and (e) of Article 3 of the Statute, which provide:

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91. *Karadžić Indictment*, 1995 ICTY Y.B. 216, No. IT-95-5, para. 43, Count 9, *available at* http://www.un.org/icty/indictment/english/kar-ii950724e.htm; *Blaškić Indictment*, No. IT-95-14-T, para. 10 Count 13 (ICTY 1997), *available at* http://www.un.org/icty/indictment/english/bla-2ai970425e.htm; *Naletilić Indictment*, No. IT-98-34-I, Count 21 (ICTY 1998), *available at* http://www.un.org/icty/indictment/english/nal-ii981221e.pdf.

92. *Kordić Indictment*, No. IT-95-14/2, Counts 39, 42 (ICTY 1998), *available at* http://www.un.org/icty/indictment/english/kor-1ai980930e.htm.

93. *Rajić Indictment*, No. IT-95-1, Counts 3, 6 (ICTY 1995), *available at* http://www.un.org/icty/indictment/english/raj-ii950829e.htm.

94. *Blaškić Indictment*, No. IT-95-14-T, para. 8, Count 4; *Kordić Indictment*, No. IT-95-14/2, para. 40, 41, Counts 4, 6.

95. *Kordić Indictment*, No. IT-95-14/2, para. 55, 56, Counts 38, 41; *Naletilić Indictment*, No. IT-98-34-I, Count 20.

96. *Brđanin Indictment*, No. IT-99-36, Count 11, *available at* http://www.un.org/icty/ind-e.htm.

97. *Blaškić Indictment*, No. IT-95-14-T, para. 8, 10, Counts 2, 12.

> 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: . . .
>
> (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.

In order to examine the application of this article to the protection of cultural property in the former Yugoslavia, this study analyzes the scope and conditions of applicability of Article 3 as determined by the ICTY case law.

1. Scope and Conditions of Applicability

The scope and conditions of applicability of Articles 3(b), 3(c), and 3(e) are the same as those of Article 3(d), which provided direct protection for cultural property.[98] While also indirect, the protective measures implied in Articles 3(b), 3(c), and 3(e) have two advantages over Article 2(d), which dealt with grave breaches. First, they have a wide scope because they apply to both international and non-international armed conflicts. Second, their enumerated list of violations is not exhaustive. Despite their broader scope, however, Articles 3(b), 3(c), and 3(e) present the same difficulty as Article 2(d). They require the establishment of a nexus between the alleged crimes and the armed conflict.

2. Elements of the Offences with Regard to Cultural Property

Article 3(b) of the Statute prohibits the devastation of property not justified by military necessity. Under this rule, the destruction of property, which could include cultural property, is punishable if it was intentional or "the foreseeable consequence of the act of the accused."[99] Therefore, both military necessity and the perpetrator's intention, however broadly interpreted, limit the protection provided by Article 3(b).[100]

Article 3(c) forbids the attack or bombardment by any means of undefended towns, villages, dwellings, or buildings. It thus protects cultural property when it is an integral part of these sites. The provision makes a distinction between civilian objects, which cannot be attacked, and military

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98. *See supra* Part III.A.

99. *Blaškić Trial Judgment*, No. IT-95-14-T, para. 183 (ICTY 2000), *available at* http://www.un.org/icty/blaskic/trialc1/judgement/index.htm (referring to Count 12 of the *Blaškić Indictment* which pertains to Article 3(b) of the Statute).

100. *See supra* Part III.A.

objectives. Unfortunately, the Geneva Conventions refer to but do not define "military objective."[101]

Other instruments offer guidance for making this distinction. Article 8(1) of the 1954 Hague Convention offers a partial definition, which provides that "a limited number" of cultural sites

> may be placed under special protection . . . provided that they:
>
> (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, [etc.] . . .
>
> (b) are not used for military purposes.[102]

This definition has limited value because it merely provides examples, such as an aerodrome, of what can constitute a military objective. Additional Protocol I's Article 52(2), "General Protection of Civilian Objects," narrows the definition of military objectives to "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."[103] Finally, Article 52(3) establishes a presumption against finding ordinary civilian objects to be used for military purposes;[104] places that constitute or shelter cultural property must be presumed to serve civilian purposes. Thus the main challenge of Article 3(c) lies in distinguishing between civilian objects and military objectives, which are poorly defined in international instruments.

The notion of cultural property damage embraces not only its physical destruction, but also acts of plunder likely to lead to its illegal export and/or sale. The *Blaškić Trial Judgment* held that Article 3(e)'s "prohibition on the wanton appropriation of enemy public or private property extends to both isolated acts of plunder for private interest and to 'the organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory.'"[105] The *Čelebići Trial Judgment* defined plunder as "all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international law,

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101. *See, e.g.*, Article 18 (on the "Protection of Hospitals") of Geneva Convention IV which, in its last paragraph, provides, "In view of the dangers to which hospitals may be exposed by being close to military objectives, it is recommended that such hospitals be situated as far as possible from such objectives." Geneva Convention IV, *supra* note 55, at 300.

102. 1954 Hague Convention, *supra* note 28, at 246.

103. *Id.*

104. *Id.* ("In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship . . . is being used to make an effective contribution to military action, it shall be presumed not to be so used.").

105. *Blaškić Trial Judgment*, No. IT-95-14-T, para. 184 (ICTY 2000), *available at* http://www.un.org/icty/blaskic/trialc1/judgement/index.htm.

including those acts traditionally described as 'pillage.'"[106] Whether isolated or organized, the plunder of cultural property is punishable.

C. Article 5(h)—Persecution: A Crime Against Humanity

Under the category of crimes against humanity, a number of indictments refer to "persecutions on political, racial [and/or] religious grounds"[107] in order to allege crimes involving damage to cultural property. In Article 5 of the Statute, the subcategory of persecution appears along with those of "murder," "extermination," "enslavement," "deportation," "imprisonment," "torture," "rape," and "other inhumane acts."[108] More specifically, Article 5(h) of the Statute states:

> 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.[109]

To examine how the crime of persecution can be linked to damage inflicted to cultural property is to determine the scope and the conditions of applicability of this crime.

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106. *Čelebići Trial Judgment*, No. IT-96-21-T, para. 591 (ICTY 1998), *available at* http://www.un.org/icty/celebici/trialc2/judgement/main.htm.

107. The Prosecutor v. Duško Tadić (Indictment), No. IT-94-1, Count 1 (ICTY 1999), *available at* http://www.un.org/icty/indictment/english/tad-2ai951214e.htm [hereinafter *Tadić Indictment*]; The Prosecutor v. Blagoje Simić (Second Amended Indictment), No. IT-95-9, Count 1 (ICTY 1998), *available at* http://www.un.org/icty/indictment/english/sim-2ai981211e.htm; *Blaškić Indictment*, No. IT-95-14-T, para. 7, Count 1 (ICTY 1997), *available at* http://www.un.org/icty/indictment/english/bla-2ai970425e.htm; *Kordić Indictment*, No. IT-95-14/2, Counts 1, 2 (ICTY 1998), *available at* http://www.un.org/icty/indictment/english/kor-1ai980930e.htm; The Prosecutor v. Zoran Kupreškić (Amended Indictment), No. IT-95-16, Count 1 (ICTY 1998), *available at* http://www.un.org/icty/indictment/english/kup-1ai980209e.htm\ [hereinafter *Kupreškić Indictment*]; The Prosecutor v. Mitar Vasiljević (Indictment), No. IT-98-32, Count 2 (ICTY 1998), *available at* http://www.un.org/icty/indictment/english/vas-ii000125e.htm; The Prosecutor v. Radislav Krstić (Indictment), No. IT-98-33, Count 6 (ICTY 1998), *available at* http://www.un.org/icty/indictment/english/krs-ii981102e.htm; *Naletilić Indictment*, No. IT-98-34-I, Count 1 (ICTY 1998), *available at* http://www.un.org/icty/indictment/english/nal-ii981221e.pdf; *Brđanin Indictment*, No. IT-99-36, Count 3, *available at* http://www.un.org/icty/ind-e.htm; The Prosecutor v. Slobodan Milošević (Indictment), No. IT-99-37, Count 4 (ICTY 1999) *available at* http://www.un.org/icty/indictment/english/mil-ii990524e.htm; The Prosecutor v. Momčilo Krajišnik (Indictment), No. IT-00-39-I, Count 7 (ICTY 2000), *available at* http://www.un.org/icty/indictment/english/kra-1ai000321e.htm.

108. *Report of the Secretary-General*, *supra* note 11, at 38.

109. *Id.*

1. Scope and Conditions of Applicability

Unlike Article 5 of the Statute, other international instruments, such as the Report of the Secretary-General, Article 3 of the International Criminal Tribunal for Rwanda (ICTR) Statute, and Article 7 of the ICC Statute do not require the existence of an armed conflict as an element of the definition of a crime against humanity.[110] According to the *Blaškić Trial Judgment*, however, while the ICTY does not include armed conflict in its definition of a crime against humanity, it makes it a condition for punishment by the Tribunal.[111] The *Tadić Appeal Judgment* states, "the armed conflict requirement is a *jurisdictional* element, 'not a substantive element of the *mens rea* of crimes against humanity.'"[112] Thus, while the requirement that there be an armed conflict is a condition for charging under Articles 2 and 3 of the Statute, which enumerate war crimes, it simply constitutes a condition for jurisdiction under Article 5.[113] Crimes against humanity may occur outside the context of an armed conflict, but the ICTY must find a nexus with armed conflict in order to have jurisdiction to prosecute.

a. Elements Common to All Crimes Against Humanity: The Widespread or Systematic Attack Against Any Civilian Population

Article 3 of the ICTR Statute,[114] Article 7 of the ICC Statute,[115] and the case law of both ad hoc Tribunals[116] all require an attack to be "widespread or systematic." According to the International Law Commission (ILC), "systematic" means "pursuant to a preconceived plan or policy. The implementation of this plan or policy could result in the repeated or continuous commission of inhumane acts."[117] The *Blaškić Trial Judgment* identified four elements that establish the systematic character of an act: (1) the existence of a political objective, plan, or ideology that aims to "destroy, persecute, or weaken" a community; (2) the commission of a large-scale crime against a civilian group or of repeated and continuous inhumane acts that are related

110. *Id.* at 13. *Cf. Akayesu Trial Judgment*, No. ICTR-96-4-T, paras. 563–84 (ICTR 1998), *available at* http://www.ictr.org/ENGLISH/cases/Akayesu/judgement/ akay001.htm; The Prosecutor v. Clément Kayishema, No. ICTR-95-1-T, paras. 119–34 (ICTR 1999), *available at* http://www.ictr.org/ENGLISH/cases/KayishemaRuzindana/judgement/index.htm [hereinafter *Kayishema Trial Judgment*].

111. *See Blaškić Trial Judgment*, No. IT-95-14-T, para. 66 (ICTY 2000), *available at* http://www.un.org/icty/blaskic/trialc1/judgement/index.htm.

112. *Tadić Appeal Judgment*, No. IT-94-1-A, para. 249.

113. *See Tadić Jurisdiction Decision*, No. IT-94-1-AR72, para. 140.

114. S.C. Res. 955, U.N. SCOR, 3452d mtg., Annex, at 4, U.N. Doc. S/RES/955 (1994).

115. ICC Statute, *supra* note 27, at 5.

116. *See Tadić Trial Judgment*, No. IT-94-1-T, para. 648 (ICTY 1997), *available at* http://www.un.org/icty/tadic/trialc2/judgement-e/tad-tj970507e.htm#_Toc387417337; *Akayesu Trial Judgment*, No. ICTR-96-4-T, paras. 579–81 (ICTR 1998), *available at* http://www.ictr.org/ENGLISH/cases/Akayesu/judgement/akay001.htm; *Kayishema Trial Judgment*, No. ICTR-95-1-T, para. 123 (ICTR 1999), *available at* http://www.ictr.org/ENGLISH/cases/KayishemaRuzindana/judgement/index.htm.

117. Report of the International Law Commission on the Work of Its Forty-Eighth Session, U.N. GAOR, 51st Sess., Supp. No. 10, at 94, U.N. Doc. A/51/10 (1996) [hereinafter 1996 ILC Report].

to each other; (3) reliance on significant public or private, military or non-military resources; and (4) the involvement of political and military leaders in the creation of a plan.[118] This plan need be neither "conceived at the highest level of the State,"[119] nor declared expressly or clearly.[120] It may be presumed from the occurrence of a series of events, such as significant acts of violence or "the destruction of non-military property, in particular, sacral sites."[121]

The "widespread" character of a crime against humanity, generally a matter of quantity, depends on the scale of the acts perpetrated and on the number of victims. The ILC considers acts "large-scale" if they are "directed against a multiplicity of victims."[122] This definition seems to exclude from crimes against humanity "an isolated inhumane act committed by a perpetrator acting on his own initiative and directed against a single victim."[123] Nevertheless, a crime may be considered widespread or committed on a large scale if it has "the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude."[124] It is impossible to define the quantitative criterion since no threshold test has been developed to determine whether an act qualifies as "widespread or systematic."

Relying on the practices of both ad hoc Tribunals,[125] the Report of the Secretary-General,[126] Article 7(1) of the ICC Statute,[127] and the work of the ILC,[128] the *Blaškić Trial Judgment* asserted that the criteria of scale and systematic character "are not necessarily cumulative." In practice, however, they are often inextricably linked, because the combination of a widespread at-

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118. *Blaškić Trial Judgment*, No. IT-95-14-T, para. 203 (ICTY 2000), *available at* http://www.un.org/icty/blaskic/trialc1/judgement/index.htm; *Report of the Secretary-General*, *supra* note 11, at 13. *See also Tadić Trial Judgment*, No. IT-94-1-T, para. 648; *Akayesu Trial Judgment*, No. ICTR-96-4-T, para. 580; *Kayishema Trial Judgment*, No. ICTR-95-1-T, para. 123.

119. *See Blaškić Trial Judgment*, No. IT-95-14-T, paras. 204, 205; *Tadić Trial Judgment*, No. IT-94-1-T, para. 654; *Kayishema Trial Judgment*, No. ICTR-95-1-T, para. 126; *Akayesu Trial Judgment*, No. ICTR-96-4-T, para. 580; 1996 ILC Report, *supra* note 117, at 93.

120. *See Blaškić Trial Judgment*, No. IT-95-14-T, para. 204; *Tadić Trial Judgment*, No. IT-94-1-T, para. 653.

121. *See Blaškić Trial Judgment*, No. IT-95-14-T, para. 204.

122. 1996 ILC Report, *supra* note 117, at 94–95.

123. *Id.* at 95.

124. *Id.*

125. *Blaškić Trial Judgment*, No. IT-95-14-T, para. 207, *citing* The Prosecutor v. Mile Mrkšić (Review of the Indictment Pursuant to Article 61 of the Rules of Procedure and Evidence), No. IT-95-13-R61, para. 30 (ICTY 1996); *Tadić Trial Judgment*, No. IT-94-1-T, paras. 646–47; *Akayesu Trial Judgment*, No. ICTR-96-4-T, para. 579; *Kayishema Trial Judgment*, No. ICTR-95-1-T, para 123.

126. *Blaškić Trial Judgment*, No. IT-95-14-T, para. 207, *citing Report of the Secretary-General*, *supra* note 11, para. 48.

127. *Blaškić Trial Judgment*, No. IT-95-14-T, para. 207, *citing* Article 7(1) of the ICC Statute, *supra* note 27, at 5.

128. *Blaškić Trial Judgment*, No. IT-95-14-T, para. 207, *citing* 1996 ILC Report, *supra* note 117, at 94–95.

tack and a large number of victims generally requires a certain amount of planning or organization.[129]

Finally, crimes against humanity are committed not only against civilians but also against former combatants who have ceased to participate in hostilities at the time of the crimes.[130] An intentionally targeted civilian population continues to qualify as such even if soldiers are present within that population.[131]

b. Elements Specific to the Crime of Persecution

i. Actus Reus

Although the Statutes of the IMT and both ad hoc Tribunals sanction political, racial, and religious persecution under crimes against humanity, they fail to define this subcategory. The *Kupreškić Trial Judgment* defines persecution as "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."[132] This broad definition could encompass acts prohibited under other parts of Article 5 and other articles of the Statute as well as acts of "equal gravity and severity" not covered by the Statute.[133] The crime of persecution includes acts "of a physical, economic, or judicial nature that violate an individual's basic or fundamental rights."[134] As a result, it covers attacks against persons and property, including cultural property, which will be discussed in detail below.[135] In the context of Article 5(h), attacks against property often involve the destruction of towns, villages, and other public or private property belonging to a given civilian population or extensive devastation not justified by military necessity and carried out unlawfully, wantonly, and discriminatorily. Attacks against property may also result in the plunder of property, which the court defines as "the unlawful, extensive, and wanton appropriation of property belonging to a particular" entity, such as an individual, state, or "quasi-state" public collective.[136] While often encompassing

129. *See Blaškić Trial Judgment*, No. IT-95-14-T, para. 207.

130. *See Akayesu Trial Judgment*, No. ICTR-96-4-T, para. 582 (ICTR 1998), *available at* http://www.ictr.org/ENGLISH/cases/Akayesu/judgement/akay001.htm; *Blaškić Trial Judgment*, No. IT-95-14-T, para. 214.

131. *See* The Prosecutor v. Zoran Kupreškić (Trial Judgment), No. IT-95-16-T, para. 549 (ICTY 2000), *available at* http://www.un.org/icty/kupreskic/trialc2/judgement/index.htm [hereinafter *Kupreškić Trial Judgment*]; *Tadić Trial Judgment*, No. IT-94-1-T, para. 643 (ICTY 1997), *available at* http://www.un.org/icty/tadic/trialc2/judgement-e/tad-tj970507e.htm#_Toc387417337; *Akayesu Trial Judgment*, No. ICTR-96-4-T, para. 582; *Blaškić Trial Judgment*, No. IT-95-14-T, para. 214.

132. *Kupreškić Trial Judgment*, No. IT-95-16-T, para. 621.

133. *Id.* paras. 617, 619.

134. *Id.* para. 616.

135. *See* Part IV.C.2 *infra*.

136. *Blaškić Trial Judgment*, No. IT-95-14-T, para. 234.

a series of acts,[137] persecution may be a single act if it occurs as part of a widespread and systematic attack against a civilian population and there is "clear evidence of the discriminatory intent" described in Article 5(h) of the Statute.[138]

From the text of Article 5 and the *Tadić Appeal Judgment*, it appears that the requirement of discriminatory purpose applies only to persecution.[139] According to the *Tadić Trial Judgment*, discrimination on "political, racial, and religious grounds" (read disjunctively) constitutes a crime against humanity.[140] The *Kupreškić Trial Judgment* finds that persecution may have an identical *actus reus* to other crimes against humanity but distinguishes persecution as "committed on discriminatory grounds."[141] Since some acts alone may not be serious enough to constitute a crime against humanity, discriminatory acts charged as persecution must be examined in context and weighed for their cumulative effect.[142]

ii. Mens Rea

The crime of persecution requires a mental element specific to crimes against humanity in addition to the required criminal intent.[143] "The perpetrator must knowingly participate in a widespread or systematic attack against a civilian population" with the intent to discriminate on political, racial, or religious grounds.[144] Neither Article 5 of the ICTY Statute[145] nor Article 3 of the ICTR Statute[146] defines the *mens rea* of a crime against humanity. Only Article 7 of the ICC Statute requires that criminal acts be perpetrated "with knowledge" of the "widespread or systematic attack."[147] As evident in the ad hoc Tribunals' case law, however, the *mens rea* of crimes against humanity has two parts: the accused must have knowledge of "the general context in which his acts occur" and of the nexus between his action and that context.[148]

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137. *Kupreškić Trial Judgment*, No. IT-95-16-T, para. 615(d) ("persecution is commonly used to describe a series of acts rather than a single act.").

138. *Id.* para. 624. *See also Report of the Secretary-General*, *supra* note 11, at 38.

139. *See Tadić Appeal Judgment*, No. IT-94-1-A, paras. 697, 710 (ICTY 1999), *available at* http://www.un.org/icty/tadic/appeal/judgement/main.htm.

140. *Tadić Trial Judgment*, No. IT-94-1-T, paras. 711–13 (ICTY 1997), *available at* http://www.un.org/icty/tadic/trialc2/judgement-e/tad-tj970507e.htm#_Toc387417337.

141. *See Kupreškić Trial Judgment*, No. IT-95-16-T, para. 607.

142. *See id.* at 622.

143. *See Blaškić Trial Judgment*, No. IT-95-14-T, para. 244.

144. *Id.* para. 244.

145. *Report of the Secretary-General*, *supra* note 11, at 38.

146. S.C. Res. 955, *supra* note 114, at 4.

147. ICC Statute, *supra* note 27, at 5.

148. *See Kayishema Trial Judgment*, No. ICTR-95-1-T, para. 133 (ICTR 1999), *available at* http://www.ictr.org/ENGLISH/cases/KayishemaRuzindana/judgement/index.htm ("[T]o be guilty of crimes against humanity the perpetrator must know that there is an attack on a civilian population and that his act is part of the attack . . ."); *Blaškić Trial Judgment*, No. IT-95-14-T, para. 247; *Tadić Appeal Judgment*, No. IT-94-1-A, para. 248 (ICTY 1999), *available at* http://www.un.org/icty/tadic/appeal/judgement/main.htm; *Tadić Trial Judgment*, No. IT-94-1-T, para. 656 (ICTY 1997), *available at* http://www.

With regard to the second component of the *mens rea*, the *Blaškić Trial Judgment* held that it is not necessary for the accused to "have sought all the elements of that context."[149] The case law of both ad hoc Tribunals requires only knowledge by the accused of the criminal policy or plan.[150] As indicated in the *Blaškić Trial Judgment*, the *mens rea* for a crime against humanity simply requires that the agent "knowingly [take] the risk of participating in the implementation of the ideology, policy, or plan" in the name of which mass crimes are perpetrated. Even if an agent takes a "deliberate risk in the hope that the risk does not cause injury," his conduct equals knowledge.[151] The court can infer the defendant's knowledge of the political context from such factors as "the historical and political circumstances"; "the functions and responsibilities of the accused within the political or military hierarchy"; the scope, gravity, and nature of the crimes; and "the degree to which they are common knowledge."[152]

2. *Elements of the Offenses with Regard to Cultural Property*

Whether attacks on property constitute persecution depends on the type of property involved. In the *Flick* case, pursuant to the Allied Control Council for Germany's Law No. 10, the American military tribunal held that the compulsory taking of industrial property, even on discriminatory grounds, did not constitute persecution.[153] By contrast, the IMT stated that the per-

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un.org/icty/tadic/trialc2/judgement-e/tad-tj970507e.htm#_Toc387417337 ("The perpetrator must know of the broader context in which his act occurs.").

149. The accused's knowing participation in a particular context can be inferred from his willingness to take "the risk of participating in the implementation" of a larger plan. *Blaškić Trial Judgment*, No. IT-95-14-T, para. 251. With regard to the commander's responsibility, the Trial Chamber held that the responsibility of questioning the "malevolent intentions of those defining the ideology, policy or plan" that resulted in the commission of a mass crime is incumbent upon the commander who participated in that crime. *Id.* para. 253.

150. *Tadić Trial Judgment*, No. IT-94-1-T, para. 657; *Tadić Appeal Judgment*, No. IT-94-1-A, para. 248; *Kayishema Trial Judgment*, No. ICTR-95-1-T, para. 133. The *Blaškić Trial Judgment*, however, allowed for "indirect malicious intent" (where the perpetrator could predict the outcome although he did not seek it) and "recklessness" (where the perpetrator foresaw the outcome as a probable or possible but not inevitable consequence). *Blaškić Trial Judgment*, No. IT-95-14-T, para. 254.

151. *Id.* paras. 254, 257.

152. *Id.* para. 259. In the *Kordić Trial Judgment*, the Trial Chamber held that

> In practice, it is hard to imagine a case where an accused somehow has the objective knowledge that his or her acts are committed in the context of a widespread or systematic attack against a civilian population, yet remains ignorant of the [discriminatory] grounds on which the attack was launched.

In that case, "any distinction between persecutions and any other crimes against humanity [would] collapse[ ]." *Kordić Trial Judgment*, No. IT-95-14/2-T, para. 218 (ICTY 2001), *available at* http://www.un.org/icty/kordic/trialc/judgement/index.htm. The Trial Chamber also found that "in order to possess the necessary heightened mens rea for the crime of persecution, the accused must have shared the aim of the discriminatory policy: 'the removal of those persons from the society in which they live alongside the perpetrator, or eventually from humanity itself.'" *Id.* para. 220 (quoting the *Kupreškić Trial Judgment*, No. IT-95-16-T, para. 634 (ICTY 2000), *available at* http://www.un.org/icty/kupreskic/trialc2/judgement/index.htm).

153. *See* U.S. v. Flick, 6 Nurenberg Military Tribunals 1215 (1949).

secution of the Jews was particularly apparent in, for example, the burning and demolishing of synagogues. The court convicted Alfred Rosenberg of war crimes and crimes against humanity for his involvement with "a system of organized plunder of both public and private property throughout the invaded countries;"[154] following Hitler's orders, Rosenberg established the *Einsatzstab Rosenberg*, which looted museums and libraries and stole collections and masterpieces of art.[155] Defendant Julius Streicher was found guilty of crimes against humanity, including the demolition of the Nuremberg synagogue.[156] In the *Eichmann* case many years later, the Jerusalem District Court held that the systematic destruction of synagogues manifested persecution of the Jews.[157] The 1991 and 1996 ILC reports similarly asserted that persecution may encompass the "systematic destruction of monuments or buildings representative of a particular social, religious, cultural or other group" when committed in a systematic manner or on a mass scale.[158]

With regard to Article 5(h), ICTY case law has had the opportunity to deal with crimes against property in general and crimes against cultural property in particular. The *Kupreškić Trial Judgment* held that comprehensive home and property destruction may have inhumane consequences identical to those of forced transfer or deportation and, if done discriminatorily, may constitute persecution.[159] The *Blaškić Trial Judgment* pointed out that persecution may take the form of "acts rendered serious not by their apparent cruelty but by the discrimination they seek to instill within humankind."[160] Thus the crime of persecution encompasses both crimes against persons ("bodily and mental harm and infringements upon individual freedom") and crimes against property ("acts which appear less serious, such as those targeting property") as long as the perpetrators selected victims on political, racial, or religious grounds.[161] In the *Blaškić Indictment*, persecution took "the form of confiscation or destruction" by Bosnian Croat forces of "symbolic buildings ... belonging to the Muslim population of Bosnia-Herzegovina."[162] The Muslim village of Ahmići, for example, not only had "no strategic importance,"[163] but also had "particular significance for the

154. United States v. Göring (Rosenberg Judgment), 1 International Military Tribunal: Trial of the Major War Criminals 293, 295 (1946).

155. *Id.*

156. United States v. Göring (Streicher Judgment), 1 International Military Tribunal: Trial of the Major War Criminals 301, 302 (1946).

157. Attorney-General of the Government of Israel v. Adolf Eichmann, 361 I.L.R. 5, para. 57 (Dist. Ct. of Jerusalem 1961) (Isr.).

158. Report of the International Law Commission on the Work of Its Forty-Third Session, U.N. GAOR, 46th Sess., Supp. No. 10, at 268, U.N. Doc. A/46/10 (1991).

159. *Kupreškić Trial Judgment*, No. IT-95-16-T, para. 631 (ICTY 2000), *available at* http://www.un.org/icty/kupreskic/trialc2/judgement/index.htm.

160. *Blaškić Trial Judgment*, No. IT-95-14-T, para. 227 (ICTY 2000), *available at* http://www.un.org/icty/blaskic/trialc1/judgement/index.htm.

161. *Id.* para. 233.

162. *Id.* para. 227.

163. In its findings, the *Kordić* Trial Chamber held that "the HVO deliberately targeted mosques and

Muslim community in Bosnia. Many imams and mullahs came from there. For that reason, Muslims in Bosnia considered Ahmići to be a holy place. In that way, the village of Ahmići symbolised Muslim culture in Bosnia."[164] The Trial Chamber used these factors to establish the discriminatory nature of the attack.

Discussing the destruction of institutions dedicated to religion in that village, the Trial Chamber established a link between the cultural and religious character of the newly built mosque in the hamlet of Donji Ahmići. It noted that the "inhabitants of Ahmići had collected the money to build it and were extremely proud of its architecture."[165] The Trial Chamber further concluded that "[t]he methods of attack and the scale of the crimes committed against the Muslim population or the edifices symbolising their culture sufficed to establish beyond reasonable doubt that the attack was aimed at the Muslim civilian population."[166] The Trial Chamber then quoted a witness according to whom: "apart from the systematic destruction and the religious edifices that had been dynamited, what was most striking was the fact that certain houses remained intact, inhabited even, and one wondered how those islands had been able to survive such a show of violence."[167] By taking into account this testimony, the Trial Chamber emphasized the discriminatory character of the attacks on cultural property.

In its analysis of the events in the central Bosnian municipality of Kiseljak, the *Blaškić* Trial Chamber established the systematic and massive nature of the attacks, which were part of an organized plan approved "at a high-level of the military hierarchy."[168] A number of events occurred together, such as the systematic looting, damage, and destruction of Muslims' places of worship in most villages.[169] The attacks were also massive and targeted at least ten Muslim villages in the Kiseljak municipality.[170]

Finally, in the "dispositions" of the *Blaškić* and *Kordić Trial Judgments,* the Trial Chambers found defendants Tihomir Blaškić, Dario Kordić, and Mario Čerkez guilty of Counts 1 and 2 of their respective indictments. Accordingly, the Trial Chamber convicted Blaškić of having ordered a crime against humanity, namely persecutions against the Muslim civilians of Bosnia, *inter alia*, through attacks on towns and villages and the destruction and plunder of property and in particular of institutions dedicated to religion and educa-

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other religious and educational institutions [including] the Ahmići mosque which . . . was *not* used for military purposes but was deliberately destroyed by the HVO." *See Kordić Trial Judgment*, No. IT-95-14/2-T, para. 809 (ICTY 2001), *available at* http://www.un.org/icty/kordic/trialc/judgement/index.htm. In the Vitez municipality, four mosques and one Muslim junior seminary were destroyed. *Id.* para. 807(ii).

164. *Blaškić Trial Judgment*, No. IT-95-14-T., para. 411.
165. *Id.* para. 419.
166. *Id.* para. 422.
167. *Id.* para. 425.
168. *See id.* para. 624.
169. *See Blaškić Trial Judgment*, No. IT-95-14-T, para. 625.
170. *See id.* para. 626.

tion.[171] Convicting Kordić and Čerkez, the Trial Chamber held that the persecution of Bosnian Muslims by the Community of Herzeg-Bosna and the HVO "took the form of the most extreme expression of persecution, i.e., of attacking towns and villages with the concomitant destruction and plunder, killing, injuring and detaining of Bosnian Muslims."[172]

Finding an accused guilty of damages inflicted on cultural property under Article 5(h) gives high symbolic value to the protection of cultural property. Such crimes inflicted on cultural property constitute persecution, which is the subcategory of crimes against humanity closest to genocide in terms of *mens rea*. The ILC specifies that its provision on the definition of persecution "would apply to acts of persecution which lacked the specific intent required for the crime of genocide."[173] As stated in the *Kupreškić Trial Judgment*:

> the *mens rea* requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide .... Persecution as a crime against humanity is an offence belonging to the same *genus* as genocide .... In both categories what matters is the intent to discriminate .... [F]rom the viewpoint of *mens rea*, genocide is an extreme and most inhuman form of persecution. [W]hen 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.[174]

This analysis demonstrates how close are the boundaries between the crimes of persecution and genocide in terms of the element of intent.

While the parallel between persecution and genocide has the advantage of attaching symbolic value to the protection of cultural property, it also brings the problem of the high threshold for the presentation of evidence relating to both the *actus reus* and *mens rea* of the crime of persecution. For damages inflicted to cultural property to qualify as persecution, the attacks must be directed against a civilian population, widespread or systematic, and done on discriminatory grounds. This definition depends on an anthropocentric view of cultural property. Cultural property is protected not for its own sake, but because it represents a particular group of people.

V. PROTECTION *A POSTERIORI*

While the direct and indirect protections discussed above relate to the ICTY's subject matter jurisdiction, protection *a posteriori* appears in the judgment and penalties part of the Statute and deals with the results of the

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171. *See id.* Part VI Disposition.

172. *Kordić Trial Judgment*, No. IT-95-14/2-T, para. 827 (ICTY 2001), *available at* http://www.un.org/icty/kordic/trialc/judgement/index.htm.

173. 1996 ILC Report, *supra* note 117, at 98.

174. *Kupreškić Trial Judgment*, No. IT-95-16-T, para. 636 (ICTY 2000), *available at* http://www.un.org/icty/kupreskic/trialc2/judgement/index.htm.

theft or illegal export of cultural property. The ICTY Statute does not directly address the problem of restitution of stolen or illegally exported cultural property that has been plundered and pillaged. If the term "property" is interpreted broadly, however, then the following provisions could apply to the restitution of cultural property as well.

This protection is *a posteriori* because it goes beyond the punishment mandated by the Statute and aims for restitution of the property. Article 24(3) of the Statute provides: "In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners."[175] Rule 98 *ter* (B) (on Judgment) of the Rules of Procedure and Evidence (Rules) complements Article 24(3). It provides that:

> 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 judgment. The Trial Chamber may order restitution as provided in Rule 105.[176]

Article 24(3) of the Statute, as complemented by Rules 98 *ter* (B) and 105, provides for the return of property to its rightful owners. With regard to cultural property, this principle raises the question of who is the rightful owner of stolen cultural property: the state from where it was stolen, the municipality, or the village, in the case of those objects important only for the local inhabitants? Furthermore, what if individuals belonging to the ethnic majority of a state stole cultural property from a minority that no longer lives in the state because it was ethnically cleansed? In such a case, what entity can represent the displaced minority efficiently, or in other words, to whom should the restitution be addressed?

The above provisions, especially Rule 105(A), also raise the issue of preservation of property. Their utility has yet to be tested for dealing with stolen and/or illegally exported cultural property, but in such a case, their effectiveness should not be in doubt. In the face of substantial damage to cultural

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175. *Report of the Secretary-General, supra* note 11, at 45. *See also id.* at 28.

176. *See also* Rule 105 of the Rules of Procedure and Evidence on "Restitution of Property," which provides:

> (A) After a judgement of conviction containing a specific finding as provided in Sub-rule 98 *ter* (B), the Trial Chamber shall, at the request of the Prosecutor, or may, *proprio motu*, hold a special hearing to determine the matter of the restitution of the property or the proceeds thereof, and may in the meantime order such provisional measures for the preservation and protection of the property or proceeds as it considers appropriate.
>
> (B) The determination may extend to such property or its proceeds, even in the hands of third parties not otherwise connected with the crime of which the convicted person has been found guilty.

RULES OF PROCEDURE AND EVIDENCE, BASIC DOCUMENTS OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, at 132, U.N. Doc. IT/32/REV.13, U.N. Sales No. E/F-98-III-P-1 (1998), *available at* http://www.un.org/icty/basic/rpe/IT32_rev18con.htm.

property, however, the utility of these provisions becomes extremely limited. Even if rebuilding a private house may not be an insurmountable task, the restoration of ancient frescoes that were intentionally blown up is a significantly harder undertaking.[177]

As analyzed in this Part, the ICTY Statute addresses the problem of stolen and illegally exported cultural property, but through a skeletal body of law instead of a comprehensive set of provisions. The most significant challenges that the ICTY faces are the identification of property's rightful owners and the actual restoration of damaged cultural property.

VI. CONCLUSION

The insertion in the ICTY Statute of crimes pertaining to cultural property, whether directly or indirectly, was a major step toward strengthening previous international instruments' protection of cultural property in times of armed conflict. The inclusion in ICTY indictments of criminal charges addressing damages to cultural property concretized this step. Finally, the ICTY's conviction of defendants for crimes involving cultural property was a remarkable achievement because it demonstrated the importance of the protection of cultural property in times of armed conflict. The *Blaškić* and *Kordić Trial Judgments* are the ICTY's most comprehensive judgments for offenses concerning cultural property because of the scale of the armed conflict and the allegations contained in the corresponding indictments.[178] The judgments' dispositions cover—and condemn—the violations of both direct and indirect protections reviewed in the present study.[179] While the ICTY has been successful in prosecuting and punishing crimes related to cultural

177. The current techniques for restoring art damaged in armed conflicts were developed in Italy in the post–World War II period. The first and most extensive campaign of restoring frescoes lasted from 1944 to 1958 and concerned the fourteenth- to fifteenth-century fresco cycle in the Camposanto (burial ground) in Pisa, which had been seriously damaged during a fire in July 1944. *See generally* CLARA BARACCHINI & ENRICO CASTELNUOVO, IL CAMPOSANTO DI PISA 201–12, ill. 88–91 (1996). By 1957, the fragments of the fifteenth-century *Tabernacolo di Mercatale* in Prato, Tuscany, which had been destroyed during an aerial bombardment in March 1944, had also been reassembled. *See* CESARE BRANDI ET AL., SAGGI SU FILIPPINO LIPPI 18, 92, ill. 41 (1957).

178. *See supra* note 78 and 80.

179. The Trial Chamber found Tihomir Blaškić guilty of persecution for, *inter alia*, "attacks on towns and villages . . . [and] the destruction and plunder of property and, in particular, of institutions dedicated to religion or education." The Trial Chamber also found Blaškić committed a grave breach under Article 2(d) for extensive destruction of property and violations of Article 3 for unlawful attack on civilian objects, Article 3(b) for devastation not justified by military necessity, Article 3(e) for plunder of public or private property, and Article 3(d) for destruction or willful damage done to institutions dedicated to religion or education. *See Blaškić Trial Judgment*, No. IT-95-14-T, Part VI Disposition (ICTY 2000), *available at* http://www.un.org/icty/blaskic/trialc1/judgement/index.htm. The *Kordić* Trial Chamber found both Dario Kordić and Mario Čerkez guilty of persecution under Article 5(h), a violation of the laws or customs of war under Article 3 for unlawful attack on civilian objects, a violation of the laws or customs of war under Article 3(b) for wanton destruction not justified by military necessity, a violation of the laws or customs of war under Article 3(e) for plunder of public or private property, and a violation of the laws or customs of war under Article 3(d) for destruction or willful damage to institutions dedicated to religion or education. *See Kordić Trial Judgment*, No. IT-95-14/2-T, Part IV Disposition (ICTY 2001), *available at* http://www.un.org/icty/kordic/trialc/judgement/index.htm.

property, a problem remains when one goes beyond punishment and tries to ensure restitution and restoration of cultural property.

The ICTY's prosecution of cultural property crimes is also significant because it blurred the traditional distinction between crimes against persons and crimes against property. The ICTY equates a crime against property to a grave breach of the Geneva Conventions of 1949, a violation of the laws or customs of war, and especially the crime against humanity of persecution. This practice of the ICTY may collapse in the long term the distinction between those two categories of crimes, at least for religious cultural property. Due to the nature of the conflict in the former Yugoslavia, religious symbols constituted the main targets of attacks on cultural property. Very recently, the ICTY demonstrated its willingness to issue indictments charging crimes against other forms of cultural property.[180] The admirable endeavor of making attacks on cultural property a primary crime also has political limits; it might exacerbate the reluctance of great military powers, such as the United States, to ratify the ICC because the fragile nature of cultural property makes it always subject to damage at least collaterally.[181]

The ultimate step, which has yet to be taken by international criminal justice, would be adopt a less anthropocentric approach with regard to cultural property and to indict solely on the basis of damage inflicted on cultural property. This study suggests "less anthropocentric" instead of "not anthropocentric" because cultural property is the product of humans and receives its cultural value from humans. The new type of indictments would depend on two *sine qua non* conditions. First, an international criminal court (either the ICC or another court) would have to find a *prima facie* case of ac-

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180. *See supra* note 8 and accompanying text. *See also* Press Release, UNESCO, Director-General Welcomes Tribunal's Indictment on Destruction of Heritage in Dubrovnik, No.2001-40 (Mar. 13, 2001), *at* http://www.unesco.org/opi/eng/unescopress/2001/01-40e.shtml. UNESCO Director-General Koïchiro Matsuura "welcomed" the ICTY's inclusion of the destruction of historic monuments in its Dubrovnik indictment. He said,

> This sets a historic precedent as it is the first time since the judgements of the Nürnberg and Tokyo tribunals that a crime against cultural property has been sanctioned by an international tribunal. This indictment concerns a breach of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict . . . . It shows that the international community will not sit idly by and condone crimes against cultural property.

Id. When he stated that "it is the first time since the judgements of the Nürnberg and Tokyo tribunals that a crime against cultural property has been sanctioned by an international tribunal," the Secretary-General probably meant a crime against cultural property registered under the 1954 Convention because, as this Article has shown, the ICTY has already condemned crimes against cultural property for sites not registered under the 1954 Hague Convention.

181. Thus, if a missile hits a target, the risk and amount of damage inflicted collaterally on a cultural site located in the vicinity are higher than to a concrete building situated at the same distance. *See, e.g.*, Michel Bessaguet, *Ravages et Dommages*, GÉO, May 1991, at 213, 217; David A. Meyer, *The 1954 Hague Cultural Property Convention and Its Emergence into Customary International Law*, 11 B.U. INT'L L.J. 349, 376–77 (1993) (explaining that, during Operation Desert Storm, despite the Coalition's care, an ancient temple in Ur, the Biblical city of the prophet Abraham, was collaterally damaged by a Coalition bombing campaign conducted against military targets located in the vicinity). *See also id.* at 365 (explaining that during the 1980–88 Iran-Iraq war the eleventh-century Jomeh (or Jameh) Mosque, located in the Iranian city of Isfahan, was damaged following the explosion of Iraqi Scud missiles).

tual damage inflicted on cultural property. Second, the court would have to perceive the damage as serious enough to be addressed per se for what cultural property is—the memory of humanity.