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Criminalizing Destruction of Cultural Property: A Proposal for Defining New Crimes under the Rome Statute of the ICC

Yaron Gottlieb*

Abstract

“There are people whose hearts are made of stone;
There are stones with human hearts.”

-Yosi Gamzo, Israel

Destruction of cultural property has been addressed by several international conventions, yet it remains an acute universal phenomenon. The first part of the paper examines the development of the criminalization of destruction of cultural property under international law. Following an assessment of the existing legal norms, the paper concludes that the articulation of the crime in international instruments—in particular under the Rome Statute of the ICC—is anachronistic, incomplete, and inconsistent.

The second part of the paper therefore explores the need to enunciate new crimes pertaining exclusively to protection of cultural property. It proposes definitions for three new crimes within the framework of the Rome Statute and discusses the elements of the proposed crimes. The paper then outlines the principal points related to the definition of “cultural property” and proposes a new definition to be incorporated in the Rome Statute.

I. Introduction

Every nation has its own stones that possess “human” souls, its own cultural heritage which represents the memories and uniqueness of the

* LL.M., NYU School of Law. This paper is based on a paper written for the course “Transitional Justice in Times of Transition” taught by Professor Alex Boraine and Professor Paul Van Zyl. I would like to thank Paul Van Zyl from the International Center for Transitional Justice for his insightful comments on the paper.

nation's people. That cultural heritage, which comprises tangible property such as historical monuments as well as intangible heritage such as folklore, frequently holds universal significance.

Nonetheless, the phenomenon of destruction of cultural property is common and goes back to the early days of civilization. The special value societies give to religious sites and cultural objects perpetuates the desire to utilize the destruction of cultural property as a repressing tool towards minorities within the society or as a manifestation that the old regime was vanquished. Frequently, the destruction is only a by-product of an armed conflict, yet with similar devastating results.

Throughout modern history, attempts have been made to enhance the protection of cultural property on the international normative level. The first chapter of this paper examines the developments of the criminalization of destruction of cultural property under international law, and concludes that the existing legal norms—in particular those articulated by the Rome Statute of the International Criminal Court¹—present an obsolete and incoherent approach. The second chapter of this paper explores the need to enunciate new crimes pertaining exclusively to the destruction of cultural property. It proposes definitions for three new crimes within the framework of the Rome Statute—two war crimes and one crime against humanity—and discusses the elements of the proposed crimes. The paper then continues with an outline of the principal points related to the definition of “cultural property” and proposes a new definition to be incorporated in the Rome Statute.

II. Criminalization of Destruction of Cultural Property Under International Law

A. *The Division Between Protection of Cultural Property During Armed Conflicts and in Peacetime*

The historical developments in the protection of cultural property, as well as current normative approaches in the field, divide the threats to cultural property into two general categories: threats that emanate from armed conflicts and threats concerned in “peacetime.”² For the most

1. The Rome Statute of the International Criminal Court, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998. U.N. Doc. A/CONF.183/9 (1998) [hereinafter “The Rome Statute”].

2. Defining “armed conflict” and “peacetime” is, in and of itself, an intricate task and a matter of dispute within the international community. For example, during the preparatory work on the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, *signed at the Hague*, May 14, 1954, 249 U.N.T.S. 240 (1954) [hereinafter “The 1954 Convention”], a suggestion for defining “conflict” and listing the conditions for the applicability of Article 19 of the convention concerning the protection

part, the former category has received more attention in the international arena, which has led to notable advancements in imposing criminal responsibility on those involved in destruction of cultural property in armed conflicts. Conversely, the general normative framework related to individual accountability deriving from peacetime conducts remains significantly weaker.

The justifications for the distinction between the two general categories are questionable on the pragmatic level as well as on the normative one.³ That division, however, will be methodologically used in this paper for the sole purpose of depicting current international norms and their proposed modifications.

B. The Status of the Crime Committed During Armed Conflicts

1. Developments in the Protection of Cultural Property until the 1990's

Destruction of enemy cultural property—whether utter destruction or pillage—was originally considered a legitimate part of war. Even religious property, often exempted from destruction due to its sacred character, was sometimes targeted where belligerent parties shared different religions, and even more so when the warfare itself stem from these differences, as in the Crusades Wars.

The protection of cultural property was thus intertwined with the laws of war. The first indications that cultural property was to be protected came at the time of the Renaissance,⁴ yet the first official

of cultural property in armed conflict not of an international character was not adopted. See JIRI TOMAN, *THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT: COMMENTARY ON THE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT AND ITS PROTOCOL, SIGNED ON 14 MAY, 1954 IN THE HAGUE, AND ON OTHER INSTRUMENTS OF INTERNATIONAL LAW CONCERNING SUCH PROTECTION*, 210-211 (Dartmouth, UNESCO Publishing, 1996). As this point deserves a separate discussion, for the purpose of this paper it will suffice to follow the definition of "armed conflict" prescribed by the International Criminal Tribunal for the Former Yugoslavia ["ICTY"]: "*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.*" See *Prosecutor v. Tadic*, Decision, ICTY Appeals Chamber, para. 70, Case No. IT-94-1 (Oct. 2, 1995) (decision on the Defence Motion for Interlocutory Appeal Jurisdiction).

3. Indeed, the application of two different set of laws and their outcome have been criticized by scholars. See, e.g., M. Cherif Bassiouni, *Reflections on Criminal Jurisdiction in International Protection of Cultural Property*, 10 SYR. J. INT'L. L. & COM. 281, 287 (1983); Victoria A. Birov, *Prizes or Plunder? The Pillage of Works of Art and the International Law of War*, 30 N.Y.U.J. INT'L L. & POL. 201, 222 (1997).

4. See *Prosecutor v. Strugar*, Judgment, ICTY Trial Chamber, at para. 229, n. 779, Case No. IT-01-42-T (Jan. 31, 2005) [hereinafter "The Strugar Case"]; TOMAN, *supra*

governmental and inter-governmental legal documents that forbade destruction of cultural property were created in the late-nineteenth century.⁵ The concept of protecting certain forms of immovable property including "buildings dedicated to religion, art, science, or charitable purposes" and "historic monuments" was later adopted by the Hague Convention of 1907 on the Laws and Customs of Wars on Land.⁶

World War I, however, proved that states often ignore the laws of war, and that endeavors to adjudicate the perpetrators *ex-post-facto* have failed.⁷ It was not until the Nuremberg Trials, which followed World War II, that a true attempt to enforce humanitarian law and to establish individual accountability was made by the international community. Article 6(b) of the Nuremberg Charter included among its list of war crimes "plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity."⁸ Thus, the Charter and the ensuing trials, where German Nazis were convicted for the crime of plunder, are considered the first true international enforcement of protection of cultural property.⁹

The acknowledgement by the international community of the need for a separate instrument with the sole purpose of protecting cultural property during armed conflicts led to the drafting and signing of the 1954 Hague Convention. Article 28 of the 1954 Convention provides that "the High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach

note 2, at 4-10.

5. The first legal document that referred to the protection of cultural property was the U.S. Lieber Code. *See id.*; Articles 35 and 36 of Instructions for the Government of Armies of the United States in the Field, promulgated as General Order No. 100 by Abraham Lincoln, April 24, 1863. The first international document on the subject, although never ratified, was the 1874 Declaration of Brussels. *See* Project of an International Declaration Concerning the Laws and Customs of War (Declaration of Brussels), *adopted by the conference of Brussels*, Aug. 27, 1874, 4 Martens Noveua Recueil (ser. 2) 219, Article 18(g).

6. *See* Convention Respecting the Laws and Customs of War on Land art. 27, 1907, 36 Stat. 2277 (a907), T.S. No. 539, 3 Martenese Noveua Recueil (ser. 3) 461 [hereinafter "The 1907 Convention"].

7. Matthew Lippman, *Nuremberg: Forty Five Years Later*, 7 CONN. J. OF INT'L L. 1 (1991).

8. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 18, 1945; 59 Stat. 1544, 82 U.N.T.S. 279, E.A.S. No. 472 (Aug. 18, 1945).

9. *See* M.CHERIF BASSIOUNI & JAMES A.R.NAFZIGER, PROTECTION OF CULTURAL PROPERTY, INTERNATIONAL CRIMINAL LAW I 949, 954 (M.Charif Bassiouni ed. 2nd ed.) (1999).

of the present Convention.”¹⁰ Destruction of cultural property may thus yield individual accountability,¹¹ yet the effectiveness of the provision was undermined by a failure to enumerate specific offenses that could give rise to criminal prosecutions.¹² Furthermore, the implementation and enforcement of article 28 was left solely to member states. As a result, member states are given an excessive margin of discretion.¹³

The 1977 Additional Protocols to the Geneva Conventions reiterated the obligation to protect cultural property.¹⁴ In the *Jokic Case*, the ICTY Trial Chamber emphasized that both Protocols expanded the scope of protection by outlawing “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.”¹⁵ The Tribunal also adopted the ICRC Commentary to Protocol I, according to which the Protocols prohibited direct attacks against cultural property whether or not the attacks result in actual damage, and provided the property immunity that is “clearly additional to the protection attached to civilian objects.”¹⁶

It appears, however, that despite the advancements on the conventional level, the protection proved to be ineffective in most conflicts which followed the 1954 Convention and the 1977 Protocols. An exception, perhaps the most successful implementation of the notions prescribed by the 1954 Convention, occurred during the Gulf War I in 1991, where the United States, itself not a party to the 1954 Convention, attempted to avoid the destruction of cultural property with the creation of “no-fire-target-list” of places where cultural property was known to

10. 1954 Convention art. 28.

11. In the *Strugar Case*, the Trial Chamber referred, *inter alia*, to Article 28 of the 1954 Convention, to establish its conclusion that Articles 3(b) and 3(d) of the Tribunal’s Statute (criminalizing the destruction of civilian property, including the destruction of cultural property), entail individual criminal responsibility. See *Prosecutor v. Strugar*, Judgment, ICTY Trial Chamber, at para. 223, Case No. IT-01-42-T (Jan. 31, 2005).

12. See David Keane, *The Failure to Protect Cultural Property in Wartime*, 14 DEPAUL-LCA J. ART & ENT. L. 1, 15 (2004). See also Jean-Marie Henckaerts, *New Rules for the Protection of Cultural Property in Armed Conflict*, 81 INT’L REVIEW OF THE RED CROSS NOS. 835 (the author argues that Article 28 “has largely remained a dead letter” due to that problem).

13. See DIETER FLECK, ET AL., *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* 403 (2001).

14. See Protocol Additional to the Geneva Conventions of August 12, 1949 and Relating to the Protection of Victims of International Armed Conflicts art. 53, 1125 U.N.T.S. 17512 [hereinafter “Protocol I”]; Protocol Additional to the Geneva Conventions of August 12, 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts art. 16, 1125 U.N.T.S. 609 [hereinafter “Protocol II”].

15. See *Prosecutor v. Jokic*, Sentencing Judgment, ICTY Trial Chamber, para. 50, Case IT-01-42/1-S (Mar. 18, 2004) [hereinafter “The Jokic Case”].

16. *Id.*

exist.¹⁷ Other armed conflicts such as the one in the former Yugoslavia, have resulted in significant demolition of cultural property.

2. The Statutes of International Tribunals and the International Criminal Court

The “resurrection” of the notion of indicting individuals for grave crimes before international or hybrid criminal tribunals did not exclude the crime of destruction of cultural property, although different powers were given to the tribunals in that respect. Article 3(d) of the Statute establishing the ICTY specifically referred to destruction of cultural property by criminalizing acts of “seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.”¹⁸ Article 7 of the Cambodian Law, which established the Extraordinary Chambers for the prosecution of crimes committed by the Khmer Rouge regime, provided the Chambers with the power “to bring to trial all Suspects most responsible for the destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict, and which were committed during the period from 17 April 1975 to 6 January 1979.”¹⁹

In comparison, Article 3 of the Statute establishing the Rwandan Tribunal explicitly mentions only plunder as a war crime related to destruction of cultural property, although the tribunal is not limited by the list of the enumerated violations in that article.²⁰ A similar approach

17. See BASSIOUNI & NAFZIGER, *supra* note 9. It should be mentioned, however, that information received from archeologists suggest the existence of disparities between the official U.S. policy and the actual damage caused to certain sites. See Marion Forsyth, *Casualties of War: The Destruction of Iraq's Cultural Heritage as a Result of U.S. Action During and After the 1991 Gulf War*, 14 DEPAUL LCA J. ART & ENT. L. 73 (2004).

18. See Statute of the International Tribunal for the Protection of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S.C. Res., U.N. SCOR, 48th Sess., 3217th mtg, at 1-2, U.N. Doc. S/RES/827 (1993), *reprinted in* 33 I.L.M. 1159 [hereinafter “The ICTY Statute”]. Further indirect protection for cultural property was provided by Articles 3(c) of the ICTY Statute, which criminalizes attacks on enemy property, and articles 2(d), 3(b), and 3(e) of the ICTY Statute, which criminalize destruction and plunder of enemy property.

19. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Reach Kram No. NS/RKM/0801/12, *available at* <http://www.cambodia.gov.kh/krt/english/index.htm> [hereinafter “The Cambodian Statute”].

20. Statute of the International Tribunal for the Protection of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of the Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations Committed in the Territory of Neighboring States, between 1 Jan

was taken by the Statute establishing the Special Court for Sierra Leone.²¹

The disparity between the ICTY and the Cambodian Statutes on the one hand and the ICTR and Sierra Leone Statutes on the other hand clearly derives from the perception that the property destroyed in Rwanda and Sierra Leone was not considered to be of universal cultural value.²² Conversely, the fighting in former Yugoslavia involved enormous destruction of cultural property that was also well documented at the time. Particular international attention (alas not enough to lead to a sufficient action) was drawn to the massive bombardments on the Old Town of Dubrovnik, a UNESCO World Cultural Heritage Site in its entirety, where many buildings were marked with the symbols mandated by the 1954 Convention.²³ Thus, the framers of the ICTY planned on prosecuting those responsible for the ruthless attack. Indeed, indictments containing separate charges based on the ICTY Statute's articles cited above have been brought against some of the Serbian commanders who ordered the bombings and conducted the attack on the Old Town.²⁴ Similar reasoning led to the explicit empowerment of the Cambodian

1994 and 31 Dec. 1994, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453 rd. mtg, U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M 1598 [hereinafter "The ICTR Statute"].

21. Article 3(f) of the Statute of the Special Court for Sierra Leone, Annex to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, *signed on* 16 January 2002. Article 5 of the Statute also refers to general destruction of property (such as houses and public building) under Sierra Leonean law, yet without specific mentioning of destruction of cultural property.

22. See Franseco Francioni & Federico Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, 13 EUR. J. INT'L L. 619 (2003). The authors argued that the disparities between the ICTY and the ICTR Statutes may be explained "by the negligible impact that the atrocities committed in Rwanda had on cultural heritage of international importance." Naturally, this presumption could be challenged, particularly in reference to the destruction of intangible cultural property (such as traditions and folklore) as a result of the mass killings that took place in these countries.

23. An analysis conducted by the Institute for the Protection of Cultural Monuments, in conjunction with UNESCO, found that of the 824 buildings in the Old Town, 563 had been hit by projectiles in 1991 and 1992, and 314 direct hits were recorded on buildings facades and on the paving of streets and squares. See *Prosecutor v. Pavle Strugar*, Third Amended Indictment, para. 29, Case No. IT-01-42-PT (Dec. 10, 2003). In its judgment in this case, the Trial Chamber found that as a result of the attack on the Old Town, led by forces under the command of the accused on December 6, 1991, 52 buildings of the Old Town were damaged, six of which were completely destroyed. Among these damaged buildings were monasteries, churches, a mosque, a synagogue and palaces. See *The Prosecutor v. Strugar*, Judgment, ICTY Trial Chamber, at par. 318-320, 461, Case IT-01-42-T (Jan. 31, 2005).

24. See Hiram Abtahi, *The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia*, 14 HARV. HUM. RTS. J. 1 (Spring 2001) (provides an analysis of the ICTY jurisprudence). Pertinent judgments in these cases will be further discussed in this paper.

Extraordinary Chambers to adjudicate cases concerning destruction of cultural property. The Khmer Rouge acts of destruction included systematic attacks against minorities' religious sites such as destroying most of the country's 3,000 Buddhist pagodas, damaging Muslim mosques of the Cham people, and attacking Christian places of worship.²⁵ In addition, the Khmer Rouge engaged in a "holy war" against minorities as well as the country's intellectuals and art performers. The "holistic social engineering" conducted by Pol Pot and his followers spared almost no Buddhist monks and hardly any art performers.²⁶

One of the most important landmarks in the field of international criminal law is the establishment of the International Criminal Court ["ICC"]. Article 8 of the Rome Statute, reflecting much of the existing laws of war, defines a number of war crimes that may be applied in cases related to the destruction of cultural property: "Extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly" [Article 8(2)(a)(iv)];²⁷ "Intentionally directing attacks against civilian objects, that is, objects which are not military objectives" [Article 8(2)(b)(ii)]; "Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives" [Article 8(2)(b)(ix)]; "Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war" [Article 8(2)(b)(xiii)]; and "Pillaging a town or place, even when taken by assault" [Article 8(2)(b)(xvi)]. Article 8(2)(e) enumerates few similar serious violations related to the laws and customs applicable in armed conflicts not of an international character.²⁸

25. See STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW—BEYOND THE NUREMBERG LEGACY 294 [Oxford University Press, 2nd ed. 2001].

26. It is estimated that as a result of Khmer Rouge policies, nine out of ten performers died during the Cambodian genocide, leading to a near abolishment of traditional Cambodian performing arts—a unique intangible cultural heritage of the society. See World Education (Asia Programs/Special Projects), *Cambodian Master Performers Program* at <http://www.cambodianmasters.org> (last visited April 8, 2005).

27. Article 8(2)(a)(vi) refers to grave breaches of the 1949 Geneva Conventions. An example for destruction of cultural property that was considered a grave breach was the destruction of the Old Town of Dubrovnik. See Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 789, *Destruction of Cultural Property* (Annex II), U.N. Doc. S/1994/674/Add. 2 (Vol. V) (1994); David Keane, *supra* note 12, at 24.

28. See Rome Statute art. 8(2)(e)(iv) and art. 8(2)(e)(v), which are identical to Article 8(2)(b)(ix) and Article 8(2)(b)(xvi) respectively. The decision to recognize fewer crimes in cases of non-international conflicts derives from the concern of an international intervention in domestic affairs, as was reflected in the contentious debate in the Rome

An examination of the above Statutes and the Rome Statute in particular suggests that their approach to the field of protection of cultural property is unsatisfactory. To begin with, the term “cultural property” does not exist in the Statutes. Rather, the Statutes borrowed, without much elaboration, the traditional language used by conventions dealing with the laws of war, namely the 1907 Hague Convention and the 1949 Geneva Conventions.²⁹

A primary objective of these laws of war was to differentiate between the civilian population and combatants, between civilian objects and military objectives.³⁰ Hence, the protection of cultural property—a specific form of civilian property—was directly related to the general protection of civilian objects. As a result of this broad categorization, article 8(2)(b)(ix) of the Rome Statute—the only article which protects specific types of cultural property³¹—provides the same level of protection to historic monuments as to “hospitals and places where the wound and sick were collected.”³² Although that approach may be considered as elevated protection of cultural property, there is a clear distinction between the two types of protected institutions: Civilian immovable objects (such as hospitals) are protected in wartime due to their “human cargo” or important civil services they offer. Consequently, they stand to lose the protected status when civilians are not within their confines or when their services are no longer in need. Cultural property, on the other hand, should be protected regardless of transient factors such as the presence of people within its borders or their

Conference regarding the inclusion of Article 8(2)(e) in the Rome Statute. That concern also led to the qualification of that article by Article 8(2)(f), which states that Article 8(2)(e) “does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.” See Rome Statute art. 8(2)(f).

29. See e.g., Rome Statute art. 8(2)(b)(ii) (adopted, almost verbatim, Article 27 of the 1907 Convention). Article 3(d) of the ICTY Statute was also based on Article 27 of the 1907 Hague Convention. See *Prosecutor v. Strugar*, Judgment, ICTY Trial Chamber, at para. 229, Case IT-01-42-T (Jan. 31, 2005).

30. The ICTY reiterated the importance of this principle in several decisions. For example, in the *Kordic Case*, the Appeals Chamber stated that: “The prohibition against attacking civilians stems from a fundamental principle of international humanitarian law, the principle of distinction, which obliges warring parties to distinguish at all times between the civilian population and combatants, between civilian objects and military objectives and accordingly to direct military operations only against military objectives.” See *Prosecutor v. Kordic & Cerkez*, Judgment, ICTY Appeals Chamber, para. 54, Case No. IT-95-14/2-A (Dec. 17, 2004); see also, *Prosecutor v. Strugar*, Judgment, ICTY Trial Chamber, at para. 225, Case IT-01-42-T (Jan. 31, 2005).

31. The ICTY viewed the offence in Article 3(d) of the ICTY Statute (which is similar to Article 8(2)(b)(ix) of the Rome Statute) as *lex specialis* as far as acts against cultural heritage are concerned. See *Prosecutor v. Kordic and Cerkez*, Judgment, ICTY Trial Chamber, para 361, Case No. IT-94-14/2-T (Feb. 26, 2001).

32. See Rome Statute art. 8(2)(b)(ix); see also, the 1907 Convention art. 27.

need for a particular service. Thus, although cultural property is often real and tangible, its shield is abstract and everlasting.

Several others principal characteristics evolved from the objective of protecting civilians during armed conflicts. First, article 8(2)(b)(ix) of the Rome Statute defines all protected property other than historic monuments by their nature or purpose.³³ The “purpose” test, however, is obsolete and unconvincing on both doctrinal and pragmatic grounds. As explained above, applying that test suggests that the property may lose its protective nature when its purpose is no longer fulfilled. A better approach would define and distinguish cultural property from other types of property using a “cultural value test,” namely a test based on the property’s substantial contribution to the cultural heritage of the human race. Indeed, this test is applied—although with variations—in the definitions of cultural property found in several international conventions.³⁴

Secondly, the protection focuses on immovable objects. The contents of protected buildings, although sometimes containing more significant heritage than the buildings themselves, is not protected by article 8(2)(b)(ix). Movable cultural property is thus protected only through other provisions in the Rome Statute, which generally address the destruction of enemy property regardless of its unique cultural and contribution to humanity.³⁵

Another major drawback of the Rome Statute is the exception allowing attacks on cultural property due to “military necessity,”³⁶ or if the property becomes a “military objective.”³⁷ This doctrine, found also in other related conventions,³⁸ may seriously threaten the protection of cultural property in armed conflicts since the exceptions to the rule

33. See Rome Statute art. 8(2)(b)(ix) (“Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes. . .” (emphasis added)).

34. See, e.g., the definition of cultural property of The 1954 Convention art. 1 (“movable or immovable property of great importance to the cultural heritage of every people . . .”); and the definition of cultural heritage in Article 1 of The Convention Concerning Protection of World Cultural Property and Natural Heritage, U.N. Doc. A/CONF. 48 /PC/11/Add. 3, 15 (1972) [hereinafter “The 1972 Convention”], which is based on the property’s “outstanding universal value.”

35. See, e.g., Rome Statute art. 8(2)(b)(xiii) (“Destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war”).

36. See Rome Statute art. 8(2)(a)(iv) and art. 8(2)(b)(xiii).

37. See Rome Statute art. 8(2)(b)(ii), art. 8(2)(b)(ix) and art. 8(2)(e)(iv).

38. See, e.g., 1954 Convention art. 4 and art. 11; see also 1977 Protocol I art. 52. Based on these conventions and on the ICTY Statute, the ICTY case-law confirmed this exception. See, e.g., *Prosecutor v. Blasik*, Judgment, ICTY Trial Chamber, para. 185, Case No. IT-95-14-T (May 3, 2000); *Prosecutor v. Strugar*, Judgment, ICTY Trial Chamber, at para. 310, Case IT-01-42-T (Jan. 31, 2005).

frequently evolve to normative behavior.³⁹ It was therefore correctly noted that to provide full protection to cultural property this doctrine “must be eliminated or at least circumscribed.”⁴⁰

The Rome Statute also fails to criminalize the use of cultural property by the holder of the property in support of a military action. The ban on that wrongful use was recognized by the 1977 Protocols,⁴¹ and in the ICTY jurisprudence.⁴² Recent events in the war in Iraq such as the battles in the town of Faluja, where insurgents consistently turned Mosques into arms depots and sanctuaries, have proven that problem to be a serious threat to the protection of cultural property.

All in all, the decision of the drafters of the Rome Statute to apply the more conservative approach to the crime of destruction of cultural property appears surprising in light of the significant developments in the field since World War II and in view of the sights of destruction witnessed by the world in recent armed conflicts such as in the former Yugoslavia. Indeed, it seems that the opportunity to come full circle on the normative level of the protection of cultural property in armed conflicts—from only one segment of traditional laws of war to a separate, independent, and well-defined war crime—was overlooked by the delegates to Rome Conference.

3. The 1999 Second Protocol to the 1954 Convention

The most recent normative contribution to the field of protection of cultural property in armed conflicts is found in the 1999 Second Protocol to the 1954 Convention.⁴³ The 1999 Protocol applies in its entirety to

39. For example, during the conflict in the former Yugoslavia, the Serbs invoked military necessity to justify their attacks on Dubrovnik. See *Prosecutor v. Strugar*, Judgment, ICTY Trial Chamber, at para. 182, Case IT-01-42-T (Jan. 31, 2005). See also, *Yugoslav Army Rejects Authenticity of Report*, *United Press Int'l*, Dec. 5, 1991, available in LEXIS, News Library, UPI File; Birov, *supra* note 3, at 237.

40. *Id.* at 241. The author persuasively argues that the military necessity exception, which was already anachronistic at the time of the adoption of the 1954 Convention, is no longer demanded by modern weapons technology. *Id.* at 242.

41. Article 53 of Protocol I and Article 16 of Protocol II prohibit the use of all cultural objects and places of worship (defined in these Protocols as “historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples”) in support of a military effort.

42. In the *Strugar Case*, the Trial Chamber ruled that if the Croatian defenders had defensive military positions in the Old Town of Dubrovnik, it would have been “a clear violation of the World Heritage protected status of the Old Town.” See *Prosecutor v. Strugar*, Judgment, ICTY Trial Chamber, at para. 183, Case IT-01-42-T (Jan. 31, 2005). Based on the evidence presented in that case, the Tribunal found no evidence to support the argument that the Croatian forces indeed establish such military positions, and asserted that even if such evidence existed it would not have justified the nature, extent, and duration of the attack on the Old Town. *Id.* at para. 193, 195.

43. Second Protocol to the Hague Convention for the protection of Cultural Property

both international and non-international armed conflicts, although it adopted the Rome Statute's cautious approach towards the latter form of armed conflicts.⁴⁴

Among the key areas of development by the 1999 Protocol were the creation of a Committee for the Protection of Cultural Property,⁴⁵ and the elaboration of a system that provides enhanced protection to certain types of cultural property.⁴⁶ Moreover, the 1999 Protocol defined the term "military objective" and made important clarifications in reference to the "military necessity" exception found in the 1954 Convention as well as to the authority to invoke it.⁴⁷

Most notably for the cause of criminalizing destruction of cultural property, the 1999 Protocol went a further step than the 1954 Convention and expanded upon the issue of individual criminal responsibility. First, it enumerated acts which are considered serious violations of the Protocol: (a) making cultural property under enhanced protection the object of attack; (b) using cultural property under enhanced protection or its immediate surroundings in support of military action; (c) extensive destruction or appropriation of cultural property protected under the 1954 Convention and the Protocol; (d) making cultural property protected under the 1954 Convention and the Protocol the object of attack; and (e) theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the 1954 Convention.⁴⁸ The first three offenses listed above correspond to the Geneva Conventions and the 1977 Protocol I, while the latter two are considered to be serious violations of the 1954 Convention and the 1999 Protocol.⁴⁹ Worth

in the Event of Armed Conflict, *signed at the Hague*, 26 March 1999 [hereinafter "The 1999 Protocol"] at <http://erc.unesco.org/cp/convention.asp?KO=15207&language=E>. The Protocol entered into force on Mar. 9, 2003, and, as of Jan. 2005, has twenty-six State parties. *Id.*

44. The 1999 Protocol, art. 22, para. 1 states that: "This Protocol shall apply in the event of an armed conflict not of an international character, occurring within the territory of one of the Parties." Article 22, Paragraph 2 of the 1999 Protocol duplicates the language of Paragraph 2(f) of the Rome Statute: "This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature."

45. The 1999 Protocol ch. 6 art.24.

46. *Id.* at ch. 3. That system departs from the "special protection" system established by the 1954 Convention.

47. *Id.* at art. 1, 6, 13.

48. *Id.* art. 15. In addition, Article 21 of the 1999 Protocol requires member parties to take

[S]uch legislative, administrative or disciplinary measures as may be necessary to suppress the following acts when committed intentionally: (a) any use of cultural property in violation of the Convention or this Protocol; (b) any illicit export, other removal or transfer of ownership of cultural property from occupied territory in violation of the Convention or this Protocol.

49. Henckaerts, *supra* note 12, at 11; Keane, *supra* note 12, at 33-34.

noting is the concept of imposing criminal responsibility also on the holder of the property,⁵⁰ in comparison to the current existing norms under the Rome Statute, where such responsibility is attached only to the attacker side.

In addition, the 1999 Protocol obliged each member state to establish jurisdiction over perpetrators,⁵¹ and to either extradite offenders who are found in its territories or prosecute them “without exception whatsoever and without undue delay . . . through proceedings in accordance with its domestic law or with, if applicable, the relevant rules of international law.”⁵² The obligation to extradite or prosecute is found in international law in reference to particularly grave crimes.⁵³ Thus, it reflects the strong message conveyed by the Protocol’s Member Parties as to the gravity and status of the crimes. To conclude, the 1999 Protocol presents a more modern and desired normative platform for the protection of cultural property in armed conflict in comparison to the one found in the Rome Statute.

4. Criminalization of Destruction of Cultural Property During Armed Conflicts as Customary International Law

Despite the significant developments in the field—at least on the normative level—it remains unclear whether protection of cultural property has reached the status of customary international law and is thus binding on all members of the international community. The general view has been that the 1954 Convention and its two Protocols have yet to reach that status.⁵⁴

50. Imposition of criminal liability on the holder of the property is applied only in reference to cultural property under enhanced protection. See The 1999 Protocol art. 15(b).

51. *Id.* at art. 16.

52. *Id.* at art. 17.

53. See Draft Code Of Crimes Against The Peace And Security Of Mankind art. 9, 1996, adopted by The International Law Commission at its forty-eighth session, 1996, at <http://www.un.org/law/ilc/texts/dcodefra.htm> [hereinafter “ILA Draft Code”] (prescribes for the principle of “extradite or prosecute.” The Commentary to Article 9 explains that: “The fundamental purpose of this principle is to ensure that individuals who are responsible for particularly serious crimes are brought to justice by providing for the effective prosecution and punishment of such individuals by a competent jurisdiction.” See *id.* at Para. (2).

54. See, e.g., FLECK, *supra* note 13, at 379. “The law of the Hague Peace Conferences of 1899 and 1907 is binding as customary international law of the whole international community of states; the [1954 Convention], exclusively dedicated to this matter, binds only a limited number of contracting parties.” *Id.* See also the Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), UN Doc. S/25704 (May 3, 1993) (which, in Article 35, specified the part of conventional international humanitarian law which has beyond doubt become part of international customary law. Its list of treaties did not include the 1954 Convention).

Some scholars, however, have convincingly pointed to the fulfillment of the conditions required for the norm to be considered as customary law:⁵⁵ 1) The provisions of the 1954 Convention were intended to be of norm-creating character; 2) There is a significant number of state parties to that Convention;⁵⁶ 3) States' practice, particularly those whose interests are most specifically affected (e.g. Egypt, Greece, and Italy), has indicated a widespread acceptance of the norms; and 4) States' practice derive from a sense of legal obligation (*opinio juris*), as also supported by adherence to the 1954 Convention principals by non-parties such as the U.S. Indeed, in the recent *Strugar Case*,⁵⁷ the ICTY concluded that Article 3(d) of the ICTY Statute, which specifically refers to the protection of cultural property, is a rule of international humanitarian law which reflects customary international law and applies to both international and non-international conflicts.⁵⁸ This development in the status of the rules protecting cultural property was also acknowledged in a recent UNESCO declaration.⁵⁹ At the same time, the norm has not reached the status of jus cogens,⁶⁰ although the progress in the field may suggest that such a norm may be developing.⁶¹

The question still remains whether the recognition of the protection of cultural property as customary international law, if accepted, would necessarily provide that the war crime of destruction of cultural property

55. See David A. Meyer, *The 1954 Hague Cultural Property Convention and Its Emergence into Customary International Law*, 11 B.U. INT'L L.J. 349, 387-388 (1993).

56. As of January 2005, there are 113 states party to the 1954 Convention, representing the majority of European, African and Asian states. See UNESCO.org., *Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention*, The Hague (May 14, 1954) at <http://erc.unesco.org/cp/convention.asp?KO=13637&language=E> (last visited April 8, 2005). States of North America and South America that are not members to the 1954 Convention are still obliged by the rules of the Roerich Pact. See Meyer, *supra* note 55.

57. Prosecutor v. Strugar, Judgment, ICTY Trial Chamber, Case IT-01-42-T (Jan. 31, 2005).

58. *Id.* at para. 230. Also noteworthy is that the ICTY Appeals Chamber found that Article 19 of the 1954 Convention, which refers to the obligation of High Contracting Parties to protect cultural property during conflicts not of an international character, have become part of customary law. See Prosecutor v. Tadic, Decision, ICTY Appeals Chamber, para. 98, Case No. IT-94-1 (Oct. 2, 1995) (decision on the Defence Motion for Interlocutory Appeal Jurisdiction). See also Keane, *supra* note 12, at 21.

59. See the UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage, Adopted by the thirty-second session of the UNESCO General Conference, Paris, (Oct. 17, 2003) [hereinafter "UNESCO's 2003 Declaration"]. Its preamble reads: "[Mindful] of the developments of rules of customary international law as also affirmed by the relevant case-law, related to the protection of cultural heritage in peacetime as well as in the event of armed conflict." *Id.* at Preamble.

60. Only few rules have been recognized as jus cogens norms. See PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 58 (Routledge, 7th revised ed. 1997).

61. See Forsyth, *supra* note 17, at 101.

is also recognized as customary international norm. In reference to the 1954 Convention, it appears that a distinction should be made between specific “technical” principles (such as the actual designs of the protecting emblem of cultural property) and substantive rules based on the traditional laws of war. While the former category is less likely to represent customary international law, the latter one is, as previously explained.⁶² Although the sanctions article (Article 28) is not, in and of itself, part of the laws of war, it could arguably belong to the second category. The conclusion that sanctioning individuals for the destruction of cultural property in armed conflict is part of customary international law is reinforced by the jurisprudence of the ICTY and by the inclusion of versions of the crime in the 1999 Protocol and, more importantly, in the Rome Statute, whose drafters aspired to reach a world-wide consensus at the end of the Rome Conference.

*C. The Status of the Crime Committed During Peacetime—Inter Pacem Silent Leges?*⁶³

The earliest international document to protect cultural property in times of peace (as well as in times of war) was the regional Inter-American Roerich Pact signed in 1935.⁶⁴ Two international conventions signed in the 1970’s—the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property⁶⁵ and the 1972 Convention—attempted to provide further protection of cultural property primarily in peacetime.⁶⁶ Two more recent UNESCO conventions provide protection for other forms of cultural property: Underwater cultural heritage,⁶⁷ and intangible cultural

62. See Meyer, *supra* note 55, at 387. Article 19 of the 1954 Convention, recognized as customary law by the ICTY, is an example for a substantive rule.

63. In Latin—“Does the law fall silent in peacetime?” This is a paraphrase to the Roman maxim coined by Cicero “*Inter Armas Silent Leges*,” meaning the law falls silent during wartime.

64. Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, Apr. 15, 1935, 49 Stat. 3267, T.S. No. 899, 167 L.N.T.S. 289. Article 1 of the Pact provides that the “same respect and protection shall be accorded to the historic monuments, museums, scientific, artistic, educational and cultural institutions in time of peace as well as in war.”

65. The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted November 14, 1970, 823 U.N.T.S. 231 [hereinafter “The 1970 Convention”].

66. The two conventions may apply also to armed conflicts. For example, in the *Jokic Case*, the ICTY took into account the fact that the Old City of Dubrovnik, which was attacked by Serbian forces under the defendant’s command, was listed on the World Heritage List established by the 1972 Convention. See *Prosecutor v. Jokic*, Sentencing Judgment, ICTY Trial Chamber, Case IT-01-42/1-S (Mar. 18, 2004).

67. The Convention of the Protection of the Underwater Cultural Heritage, adopted in Paris, November 2, 2001 at <http://erc.unesco.org/cp/>

heritage.⁶⁸

A review of these international conventions reveals that while destruction of cultural property in armed conflicts has been established as an individual international crime—although not in an ideal format—the protection of cultural property during peacetime is more ambiguous. Only two of the above conventions—the 1970 Convention and the Underwater Cultural Heritage Convention—provide general guidance to member parties to impose legal sanctions on perpetrators.⁶⁹ Recent acts of destruction during peacetime—in particular that of the Bamiyan Buddhas in Afghanistan—have led UNESCO’s members to call on all states to take appropriate measures to hold perpetrators accountable for their acts.⁷⁰ At the same time, though, the Intangible Cultural Heritage Convention, adopted by UNESCO the same day the Declaration was pronounced, completely disregarded criminal responsibility. Thus, while that Convention contributes to the general protection of cultural property by enlarging the scope of the definition to include intangible heritage and by establishing certain administrative mechanisms, it lacks substantial enforcement tools.

That said, it would be far fetched to conclude that no legal protection is given to cultural property in peacetime. Several international conventions and declarations acknowledge the importance of protecting individual and collective cultural rights.⁷¹ Accordingly, the

convention.asp?KO=13520&language=E [hereinafter “The Underwater Cultural Heritage Convention”]. According to Article 27 of the Convention it shall enter into force three months after the date of the deposit of the twentieth instrument of ratification, acceptance, approval or accession. As of January 2005, there are three Member Parties to the Convention. *See id.*

68. The Convention for the Safeguarding of the Intangible Cultural Heritage, adopted in Paris, October 17, 2003 at <http://erc.unesco.org/cp/convention.asp?KO=17116&language=E> [hereinafter “The Intangible Cultural Heritage Convention”]. Article 34 of the Convention prescribes that the Convention shall enter into force three months after the date of the deposit of the thirtieth instrument of ratification, acceptance, approval or accession. As of April 2005, there are twelve Member Parties to the Convention. *See id.*

69. *See* 1970 Convention art. 8; Underwater Cultural Heritage Convention art. 17. Both articles resemble the language of article 28 of the 1954 Convention. *See* 1954 Convention art. 28.

70. *See* UNESCO’s 2003 Declaration art. IV (“States should take all appropriate measures, in accordance with international law, to establish jurisdiction over, and provide effective criminal sanctions against, those persons who commit, or order to be committed, acts of intentional destruction of cultural heritage of great importance for humanity, whether or not it is inscribed on a list maintained by UNESCO or another international organization”).

71. *See, e.g.,* Universal Declaration of Human Rights art. 18, 22, 27, *adopted* Dec. 10 1948, G.A. Res. 217A (III), UN Doc. A/810, at 71 (1948); International Covenant on Civil and Political Rights art. 15, 27, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976; International Covenant on Economic, Social and Cultural Rights art. 15(a), *adopted* Dec.

intentional violation of the right of an identifiable group to exercise its tradition and culture by, for example, destructing objects of particular cultural importance to that group, is akin to persecution against that group on cultural grounds or even, in some cases, on ethnic and religious grounds. That persecution, upon fulfillment of certain conditions, may be considered a crime against humanity.

Crimes against humanity were first discussed at the Nuremberg Trials, where a correlation between these crimes and crimes against peace or war crimes was required by the Nuremberg Charter. However, it is now firmly established in customary international law that crimes against humanity are autonomous and that no nexus is required between them and crimes against peace or war crimes.⁷² Thus, that category is applicable for both peacetime and wartime crimes.

Prior to the establishment of the ICTY, it was difficult to draw a clear-cut conclusion of courts' interpretation of the destruction of cultural property as a crime against humanity. Although the Nuremberg Tribunals convicted German Nazis of plunder, they seemed to regard those acts only as a war crime.⁷³ At the same time, the Tribunals found that persecution of Jews was particularly apparent in the destruction of their synagogues.⁷⁴ A similar view was later expressed by the Israeli District Court in the case of Eichmann.⁷⁵ The Nuremberg Tribunal also found that imposition of a massive fine on Jews after Kristallnacht (that is, in "peacetime") and confiscation of possessions of inmates or deported Jews were crimes against humanity.⁷⁶

Recent jurisprudence of the ICTY, while made in connection with armed conflict, clarified that the destruction of cultural property may amount to persecution and thus to a crime against humanity. The ICTY Statute defined "persecutions on political, racial and religious grounds" as crimes against humanity.⁷⁷ Persecution on "cultural grounds" was not

16 1966, entered into force Jan. 3, 1976, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966), 999 UNTS 3, reprinted in 6 ILM 360 (1967); The Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), 72 ILO Official Bull. 59, entered into force Sept. 5, 1991.

72. See *Prosecutor v. Tadic*, ICTY Trial Chamber, para. 75-81, Case No. IT-94-1 (Aug. 10, 1995) (Decision on the Defense Motion on Jurisdiction); Darryl Robinson, *Defining 'Crimes against Humanity' at the Rome Conference*, 93 AM. J. INT'L L. 43, 45-46 (1999).

73. See RATNER & ABRAMS, *supra* note 25, at 76.

74. *United States v. Goring*, 1 International Military Tribunal: Trial of the Major War Criminals 293, 295 (1946) (Rosenberg Judgment); see also Abtahi, *supra* note 24, at 26.

75. *Attorney-General of the Government of Israel v. Adolf Eichmann*, 361 I.L.R. 5, para. 57 (Dist. Ct. of Jerusalem 1961) (Israel); see also Abtahi, *supra* note 24, at 26.

76. See RATNER & ABRAMS, *supra* note 25, at 76.

77. ICTY Statute art. 5(h).

specifically mentioned in the Statute. Nonetheless, the ICTY made the link between the religious nature of buildings and institutions and their cultural character. In the *Blaskic* case,⁷⁸ the Trial Chamber made the religious-cultural link in reference to attacks made by Serbian forces on a mosque built at the town of Ahmici. The Tribunal concluded that the attacks committed against the Muslim population and the edifices symbolizing their culture “sufficed to establish beyond reasonable doubt that the attack was aimed at the Muslim civilian population.”⁷⁹ The Tribunal further concluded that destruction and plunder of property, in particular of institutions dedicated to religion and education, amounts to persecution.⁸⁰ Similarly, in the *Kordic* Case, the Trial Chamber found that acts of destruction or willful damage done to institutions dedicated to religion, when perpetrated with the requisite discriminatory intent,

amounts to an attack on the very religious identity of a people. As such, it manifests a nearly pure expression of the notion of “crimes against humanity,” for all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects. The Trial Chamber therefore finds that the destruction and willful [sic] damage of institutions dedicated to Muslim religion or education, coupled with the requisite discriminatory intent, may amount to an act of persecution.⁸¹

The nexus between destruction of cultural property and the crime against humanity of persecution has therefore been established.

Acknowledging the wider range of forms of persecution, the drafters of the Rome Statute expanded the ICTY’s definition of the crime to read as follows:

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

78. Prosecutor v. Blaskic, Judgment, ICTY Trial Chamber, Case No. IT-95-14-T (May 3, 2000).

79. *Id.* at para. 425; Abtahi, *supra* note 24, at 27.

80. See *id.*; Blaskic, *supra* note 78, at part vi disposition. The Appeals Chamber confirmed that attacks on civilian objects and destruction or pillage of property may amount to a crime of persecution. See Prosecutor v. Blaskic, Judgment, ICTY Appeals Chamber, para 149, 159, Case No. IT-95-14-T (July 29, 2004).

81. Prosecutor v. Kordic and Cerkez, Judgment, ICTY Trial Chamber, at para. 207, Case No. IT-94-14/2-T.. 207. The Appeals Chamber confirmed that attacks on civilian objects and destruction or pillage of property may amount to a crime of persecution. See Prosecutor v. Kordic and Cerkez, Judgment, ICTY Appeals Chamber, para. 104, 108, Case No. IT-95-14/2-A (Dec. 17, 2004).

the Court.⁸²

The term “persecution” was defined as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”⁸³

The Rome Statute refers to the protection of a “group” or a “collectivity.” Thus, it is reasonable to interpret the Statute to include not only minorities but also any distinct group of people subject to persecutions. An example may be found in the direct targeting of Cambodian’s traditional art performers under the Khmer Rouge regime. Accordingly, as far as the Rome Statute and potential jurisprudence of the ICC will be invoked by the Cambodian Extraordinary Chambers, Khmer Rouge leaders should be held responsible for the persecution of that distinct group of people.

Prosecution of crimes against humanity under the Rome Statute requires surmounting certain legal hurdles such as the prerequisite that the crime was committed as part of a widespread or systematic attack against civilian population.⁸⁴ In reference to the crime of persecution there is an additional requisite condition: Article 7(1)(h) requires that persecutions must be committed in connection to another crime within the jurisdiction of the ICC or any act referred to in paragraph 1 (namely, other inhumane acts such as murder or rape). Thus, the court does not have jurisdiction to prosecute persecution *per se*.⁸⁵ It has been argued that, in practical terms, the requirement should not prove unduly restrictive, since a review of historical acts of persecution shows that persecution is inevitably accompanied by such inhumane acts.⁸⁶ However, while that argument may be accurate in cases of crimes such as murder or torture, it appears to be less persuasive in reference to destruction of cultural property. For example, a systematic destruction of religious sites of unique cultural value, conducted by a certain

82. Rome Statute art. 7(1)(h) (emphasis added).

83. *Id.* at art. 7(2)(g).

84. *Id.* at art. 7(1). However, persecution (or any other crimes against humanity) may consist of a single act as long as it is part of the widespread or systematic attack. *See, e.g.*, Prosecutor v. Vasiljevic, Judgment, ICTY Appeals Chamber, Case No. IT-98-32-A (Feb. 25, 2004). The court ruled that: “Although persecution often refers to a series of acts, a single act may be sufficient, as long as this act or omission discriminates in fact and is carried out deliberately with the intention to discriminate on one of the listed grounds.” *Id.* at para. 113.

85. This element of the crime is inconsistent with the ICTY and ICTR Statutes. It was added to ensure that persecution will not be simply an auxiliary offense or aggravating factor. It is not necessary, however, to demonstrate that the connecting crime was committed on a widespread or systematic basis: any instance of another criminal act under the Rome Statute will suffice, even if it does not amount to a crime against humanity in its own right. *See* Robinson, *supra* note 72, at 53-55.

86. *Id.*

government outside the scope of an armed conflict, may not necessarily be in conjunction with any other crime under the Rome Statute, thus these acts may go unpunished.

Moreover, the ICTY determined that the mens rea element of the crime of persecution is higher than the one required for ordinary crimes against humanity, although lower than the one required for genocide.⁸⁷ If this approach is adopted by the ICC, the already elevated threshold for prosecuting crimes against humanity will be higher still.

An alternative route for prosecuting perpetrators under Article 7 of the Rome Statute is found in the provision which criminalizes "other inhuman acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."⁸⁸ This residual provision can provide a solution to the problems discussed in reference to the crime of persecution (such as the required connection to other crimes), although its open-ended nature will require interpretation by the Court.⁸⁹

To conclude, the current legal regime related to protection of cultural property during peacetime still falls short of providing adequate protection, particularly on the enforcement level as reflected by international conventions. Unlike the protection of cultural property during armed conflict, it appears that the customary status of the norms governing peacetime conducts is still evolving.⁹⁰

At the same time, positive developments in the field are noteworthy. They include, *inter alia*: 1) new trends in international law such as the erosion of the concept of unconditional state sovereignty, enabling international scrutiny and demands for accountability for crimes conducted during peacetime; 2) the increasing universal awareness and recognition of the importance of protecting cultural property also in

87. See *Prosecutor v. Kupreskic*, Judgment, ICTY Trial Chamber, para. 636, Case No. IT-95-16-T (Jan. 14, 2000); Abtahi, *supra* note 24, at 28.

88. Rome Statute art. 7(1)(k). This article is similar to Article 5(i) of the ICTY Statute and Article 3(i) of the ICTR Statute, both criminalizing "other inhumane acts."

89. Both the ICTY and the ICTR stressed that the decision whether the alleged perpetrator's conduct rose to the level of inhumane acts should be determined on a case-by-case basis. See *Prosecutor v. Kayishema & Ruzindana*, Judgment, Trial Chamber, para. 151, Case No. ICTR-95-1-T (May 21, 1999); *Prosecutor v. Kordic and Cerkez*, Judgment, ICTY Appeals Chamber, para. 117, Case No. IT-95-14/2-A (Dec. 17, 2004).

90. It has been proposed, however, that an *opinio juris* regarding the unlawful character of destruction of cultural heritage also in peace time is emerging. See Francesco Francioni, *Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity*, 25 MICH. J. INT'L. L. 1209, 1219 (2004). The author based his argument on the world-wide condemnation of the destruction of the Bamiyan Buddhas and the unanimous adoption of UNESCO's 2003 Declaration, which represents the will of the international community as a whole and applies, although as an instrument of soft law, to both times of armed conflicts and times of peace.

peacetime—as manifested by recent conventions and by UNESCO’s 2003 Declaration; and 3) the potential establishment (although somewhat restricted) of individual accountability through linking cultural destruction and persecution or other inhuman acts amounting to crimes against humanity. Accordingly, prosecuting the Khmer Rouge leaders, who persecuted traditional performers, or the Taliban leaders who intentionally ordered the destruction of the Bamiyan Buddhas, may have ample legal basis.⁹¹

D. *A Comment on Jurisdiction Issues in Domestic Courts*

While the establishment and operation of international tribunals clearly advance the rule of law, it is generally accepted that the enforcement of international criminal law cannot depend solely on international tribunals.⁹² Indeed, the drafters of the Rome Statute acknowledged the importance of the continuing role of domestic courts in that field by determining that the ICC “shall be complementary to national criminal jurisdictions.”⁹³ Accordingly, questions related to jurisdiction of domestic courts are likely to arise. Due to the vastness of that field, this sub-chapter will touch upon only certain issues related to that matter.⁹⁴

First, with the exception of the 1999 Protocol, the existing international conventions governing the field of protection of cultural

91. It is noteworthy that even if substantive criminal law enables prosecution of perpetrators connected to the crimes conducted in Cambodia or Afghanistan, certain legal obstacles may still need to be surmounted. For example, the ICC will not have jurisdiction over those cases due to the *ratione temporis* limit prescribed by Article 11 of the Rome Statute, according to which the ICC will have jurisdiction only with respect to crimes committed after the entry into force of the Rome Statute (July 1, 2002). This, however, should not preclude the prosecution of perpetrators in other tribunals that may be established in these countries such as the internationally-assisted Cambodian tribunal approved by the United Nations and Cambodia in 2004. See also Francioni & Lenzerini, *supra* note 22 (the authors arguing that despite the fact that no international court or tribunal had jurisdiction over the crimes committed in Afghanistan at the time of the destruction of the Afghan cultural heritage or in the subsequent period, international law is not entirely powerless with regard to violations committed by the Taliban, and an international tribunal that may be established in Afghanistan ought to allow prosecution of individuals responsible for the shameful destruction of the Buddhas of Bamiyan).

92. See Theodore Meron, *International Criminalization of Internal Atrocities*, 89 AM.J.INT’L L. 554, 555 (1995); Gabriel Bottini, *Universal Jurisdiction after the Creation of the International Criminal Court*, 36 N.Y.U. J. INT’L L. & POL. 503, 547 (2004). See also ILA Draft Code, *supra* note 53, at Commentary to art. 8 (stating that, “As a practical matter it would be virtually impossible for an international criminal court to single-handedly prosecute and punish the countless individuals who are responsible for crimes under international law.” *Id.* at Commentary to Article 8, Para. (4).

93. Rome Statute Preamble and art. 1.

94. See, e.g., BASSIOUNI & NAFZIGER, *supra* note 9, at 974-981 (provides an elaborate discussion of jurisdiction matters related to culture property).

property do not cover issues of jurisdiction. As a result, when, for example, an artifact is stolen in state A, stored in state B, the violator is a citizen of state C and is detained in state D—there may be multiple competent jurisdictions. The lack of clear jurisdiction provisions could lead to conflicts of applicable law, inconsistency, unpredictability, and even lack of enforcement.⁹⁵

It also appears that all criminal jurisdictional paradigms, namely the territorial principle, the active and passive nationality principles, the protective interest principle, and the universal jurisdiction principle, may be applicable in cases of destruction of cultural property. Thus, a person who ordered the destruction of cultural property or took an active part in that act might face criminal charges not only in the country where the crime took place (based on the territorial principle), but also in the country of his or her nationality (based on the active nationality principle). Indeed, the 1999 Protocol requires Member Parties to establish jurisdiction based on the above two categories.⁹⁶ Similarly, a state from which an artifact has illegally been removed would be able to exercise jurisdiction over an individual offender based on the protective interest principle.⁹⁷

The passive personality principle provides for jurisdiction over aliens for acts abroad harmful to nationals of the forum.⁹⁸ Accordingly, it could be applied where the property destroyed was privately owned by a national of the forum. An interesting scenario is created when the property destroyed was not owned by a forum's national, yet was directly related to his or her exercise of rights. An example is the destruction of property of religious significance. Although the primary recourse of the forum state may be found in a protest (or a similar remedy) on an international state-to-state level, criminal charges based on passive personality jurisdiction are also conceivable. In that respect, it is noteworthy that the ICC Rules of Procedure and Evidence define the term "victim" broadly enough to include not only natural persons but also organizations and institutions that have sustained direct harm to

95. BASSIOUNI & NAFZIGER, *supra* note 9, at 976.

96. Article 16 of the 1999 Protocol requires each Member Party to take the necessary legislative measures to establish its jurisdiction over the offences listed in Article 15 of the Protocol in the following cases: "(a) when such an offence is committed in the territory of that State" [territorial jurisdiction]; and "(b) when the alleged offender is a national of that State" [active personality jurisdiction].

97. BASSIOUNI & NAFZIGER, *supra* note 9, at 976. This paradigm, however, is meant to establish jurisdiction primarily for acts that affect the security of the state. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 302 [Oxford University Press, 6th ed. 2003].

98. *Id.*

certain types of their property such as historic monuments.⁹⁹

The universal jurisdiction paradigm enables every state to bring criminal charges against individuals “even in the absence of territorial, nationality or other accepted contacts with the offender or the victim.”¹⁰⁰ That category is particularly appropriate if the argument that destruction of cultural property in an armed conflict is a violation of customary law is accepted.¹⁰¹ If the forum state regards such an act to be an international crime also when conducted during peacetime (for example, by considering the act as a crime against humanity) then the paradigm may be applied in that situation as well.¹⁰²

Invoking the universal jurisdiction paradigm is generally permissive,¹⁰³ although Member Parties to the 1999 Protocol are obliged to apply it and prosecute alleged perpetrators present in their territory in certain cases.¹⁰⁴ UNESCO’s 2003 Declaration, while non-binding, presents a similar approach.¹⁰⁵ Also noteworthy is that certain countries, which have already incorporated the Rome Statute into their domestic legal systems, could apply universal jurisdiction based on recently enacted acts. Such is the case, for example, with Canada’s Crimes Against Humanity and War Crimes Act, which establishes jurisdiction in cases where the offence took place outside Canada and “after the time the offence is alleged to have been committed, the person is present in Canada.”¹⁰⁶ The New Zealand act that implemented the Rome Statute went even further, providing its court with jurisdiction to try Rome Statute crimes

[R]egardless of: (i) the nationality or citizenship of the person

99. See Rule 85 [Definition of Victims] of the ICC Rules of Procedure and Evidence, which states: “For the purposes of the Statute and the Rules of Procedure and Evidence: . . . (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.” International Criminal Court, Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1 (2000).

100. See Meron, *supra* note 92, at 570.

101. See *supra* chapter 1.B.4.

102. BASSIOUNI & NAFZIGER, *supra* note 9, at 977.

103. See Meron, *supra* note 92, at 570; Bottini, *supra* note 93, at 516. It is noteworthy that the ILA Draft Code prescribed for mandatory universal jurisdiction in reference to grave crimes. See ILA Draft Code, *supra* note 53 at Commentary to Article 8, para. (9).

104. The 1999 Protocol requires each Member Party to establish jurisdiction when the alleged offender is present in its territory “in the case of offences set forth in Article 15 sub-paragraphs (a) to (c).” See 1999 Protocol art. 16(c).

105. See Article VII of UNESCO’s 2003 Declaration, *supra* note 70.

106. Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24., art. 8(b). See also the South African Implementation of the Rome Statute of the International Criminal Court Act, 2002, Government Gazette 18 July, 2002, which contains a similar provision.

accused; or (ii) whether or not any act forming part of the offence occurred in New Zealand; or (iii) whether or not the person accused was in New Zealand at the time that the act constituting the offence occurred or at the time a decision was made to charge the person with an offence.¹⁰⁷

It appears that in all cases where invoking universal jurisdiction is not mandatory, two factors will determine its application. The first is the attitude of the international community in general and the forum state in particular towards that jurisdictional principle.¹⁰⁸ The second is the discourse preferred in the debate over the definition and status of cultural property between those regarding the property to be an asset of a given state and those viewing cultural property as belonging to the entire world community.¹⁰⁹ If the latter view prevails and the property destroyed is considered as belonging to all humanity, universal jurisdiction is more likely to be applied.

III. A Proposal for Defining Acts of Destruction of Cultural Property as New Crimes under the Rome Statute

A. *The Need to Articulate New Crimes and their Ideal Normative Platform*

The assessment of the international legal regime in reference to criminalization of destruction of cultural property suggests an anachronistic, incomplete and inconsistent approach. The term “cultural property” does not even appear in the statutes establishing international tribunals. These statutes apply incoherent tests to define cultural property and focus on protecting certain forms of property—primarily tangible immovable property—while disregarding the protection of other forms of cultural property such as intangible property. They address the conduct related to the attackers of the property, yet overlook the

107. Section 8(1)(c) of New Zealand International Crimes and International Criminal Court Act, 2000 (N.Z.).

108. The revival of the universal jurisdiction principle in the last decade—see, for example, the case regarding the extradition of Pinochet and the approach of the ILA Draft Code—seems to be shifting back towards a narrower interpretation. See Luis Benavides, *Introduction Note to the Supreme Court of Spain: Judgment on the Guatemalan Genocide Case*, 42 I.L.M. 683 (2003). It has also been argued that, given certain legal and political problems involved with the application of that jurisdictional paradigm, universal jurisdiction should be replaced by the ICC for most crimes. See Bottini, *supra* note 92. The International Court of Justice, in the case of (Democratic Republic of Congo v. Belgium) 2002 I.C.J. 121 (General List, No. 121, Feb. 14, 2002) (the court refrained from addressing the subject in its judgment, although opposing views were presented by the Court’s Judges in their separate opinions).

109. See *infra* chapter 2.F (discusses the internationalist-nationalist debate).

culpability of the holder of the property. The statutes also preserve obsolete doctrines such as “military necessity,” which in the past were invoked too frequently to the extent that they have become the rule rather than the exception. Moreover, different levels of protection are accorded to the same property in times of peace and in times of armed conflicts. And since destruction of cultural property is sometimes pressed into preexisting legal crimes (such as persecution), certain additional and otherwise unnecessary preconditions have to be overcome to satisfy the elements of these crimes.

Furthermore, the absence of a clear and modern definition of a separate international crime influences the status of the crime, as such a definition goes well beyond the actual charges brought against certain individuals. It can provide a strong statement of the approach endorsed by the international community towards the protection of cultural property, one that sends an unequivocal message to perpetrators and shifts the focal center of enforcement from the states’ willingness to sanction offenders to the international arena.¹¹⁰

Hence, it is proposed that separate crimes referring solely to the destruction of cultural property be included in the list of international crimes. The Rome Statute, which strives to represent the most comprehensive approach to individual criminal responsibility under international law, ought to serve as the normative platform for the inclusion of the new crimes, despite its unwieldy mechanisms for amendments.¹¹¹

In that reference, it is noteworthy that although the 1999 Protocol includes a list of offences, its enforcement mechanisms and international status differ from that of the Rome Statute. First, as a protocol to the 1954 Convention, the 1999 Protocol was confined to the Convention’s general tenets (such as the “military necessity” doctrine) and could only qualify them rather than completely remove them.¹¹² Secondly, adjudication of cases under the 1999 Protocol is left to domestic courts. While that discourse may be more efficient in certain cases, it nonetheless underestimates the potential impact the ICC’s jurisprudence will have. And lastly, as there are currently only twenty-six Member Parties to the 1999 Protocol, it could not be considered as representing

110. An example of the recognition of the international community of the need to create a distinct category of crimes is found in the field of gender-related crimes. Until recent years these crimes were dealt with—if at all—primarily through other crimes such as torture. The developments in the field have finally led to the incorporation of separate provisions in the Rome Statute dedicated to these crimes. Similar reasoning for that welcome progress applies, *mutatis mutandis*, to the protection of cultural property.

111. See Rome Statute art. 121.

112. See Keane, *supra* note 12, at 29.

the view of the international community on that subject.¹¹³

Although technically it may be easier to include the new crimes through amendments to existing provisions in the Rome Statute, it is proposed to add the crimes in separate provisions to emphasize their independent nature. The definitions of the new crimes will not require amendments to other existing crimes (although such amendments may be desirable on doctrinal grounds), as the latter also address acts that are unrelated to destruction of cultural property. For example, Article 8(2)(b)(ix) of the Rome Statute, which criminalizes attacks against certain objects (including buildings dedicated to art and historic monuments), also protects immovable property such as schools and hospitals that have not reached the status of cultural property. In cases where such property is acknowledged as cultural property, it is suggested that the new crimes will govern as *lex specialis* norms.

Assuming the proposed new crimes will be included within the framework of the Rome Statute, it is also worth highlighting the existence of general provisions in the Statute which provide for a significant number of perpetrators that could potentially be held accountable. Thus, for example, the doctrine of superior responsibility Article 28 of the Statute could lead to prosecution of leaders who did not prevent destruction of cultural property or did not punish the perpetrators under their command for their acts of destruction.¹¹⁴ The tenets of individual criminal responsibility, enumerated in Article 25 of the Statute, could provide for prosecution of a person who, for example, instigated for the destruction of cultural property or assisted the direct perpetrators in “any other way.”

In consideration of the definition of the new crimes, the following points ought to be addressed: the categories where the crimes will be located; the crimes’ material elements (*actus reus*); the crimes’ mental elements (*mens rea*); and the definition of the term “cultural property.” The following sub-chapters will discuss these issues.

113. It is noteworthy, though, that if the proposition for the definition of the new crimes in the Rome Statute is accepted, the enforcement legal tools of the 1999 Protocol will complement the Rome Statute mechanisms. For example, the 1999 Protocol could be invoked if the ICC lacks jurisdiction over a particular case. The Rome Statute does not affect the validity of the 1999 Protocol (or any other international instruments), as indicated by Article 10 of the Rome Statute: “Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.” See Rome Statute art. 10.

114. The doctrine of superior responsibility has been incorporated in the ICTR Statute (Article 6(3) of the Statute) and the ICTY Statute (Article 7(3) of the Statute) and was developed in the Tribunals’ jurisprudence. For example, in the Strugar Case, the Trial Chamber found the accused guilty of not stopping the unlawful shelling of the Old Town and of not punishing the perpetrators. See Prosecutor v. Strugar, Judgment, ICTY Trial Chamber, at para. 446, Case No. IT-01-42-T (Jan. 31, 2005).

B. *Categorization of the Crimes*

Based on the discussion so far, it is apparent that protection of cultural property is required for both war times and peace times. Accordingly, the new crimes ought to be located in two categories—War Crimes (Article 8 of the Rome Statute), and Crimes against Humanity (Article 7 of the Rome Statute), which cover crimes conducted in peacetime as well as during armed conflicts. The Rome Statute recognizes certain acts to be both a crime against humanity and a war crime,¹¹⁵ thus there is no impediment to listing the crimes related to destruction of cultural property in both categories.

A third potential category for addressing the destruction of cultural property is that of the crime of Genocide.¹¹⁶ A full discussion of the legal repercussions of destruction that amounts to “Cultural Genocide” exceeds the scope of this paper. Suffice it to say that customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group and thus does not recognize an enterprise attacking only the cultural or sociological characteristics of a human group to fall within the definition of genocide.¹¹⁷ It is noteworthy, though, that attacks on cultural and religious property and symbols of the targeted group may serve as evidence of the element of *mens rea* required for the commission of the crime of genocide.¹¹⁸

C. *Attacking Cultural Property as a New War Crime*

In comparison to crimes against humanity, most elements of the war crimes listed in Article 8 are found within the definition of the crimes themselves. It is proposed to add the new crime to the list of “other serious violations of the laws and customs” in both international and non-international armed conflicts.¹¹⁹ The crime will be defined as follows: “[a]ttacking, by whatever means, cultural property, any structure that contains cultural property, or their immediate

115. See, e.g., Rome Statute art. 7(1)(f); art. 8(2)(a)(ii) (the crime of torture).

116. *Id.* at art. 6. Prosecutor v. Strugar, Judgment, ICTY Trial Chamber, at para. 229, n.779, Case No. IT-01-42-T (Jan. 31, 2005)

117. See Prosecutor v. Krstic, Judgment, ICTY Trial Chamber, para. 576-580, Case No. IT-98-33 (Aug. 2, 2001). In its discussion, the Trial Chamber mentioned a decision of the Federal Constitutional Court of Germany, which presented a different, broader approach to the definition of the crime, one that is aimed also at protecting the social existence of the group as opposed to its purely biological existence. *Id.* at para. 579. See also Francioni, *supra* note 90, at 1218.

118. See Prosecutor v. Krstic, Judgment, ICTY Trial Chamber, para. 580, Case No. IT-98-33 (Aug. 2, 2001).

119. Rome Statute art. 8(2)(b) and (2)(e).

surroundings.”

The elements of the crime will be: 1) the perpetrator attacked; 2) the object of the attack was cultural property or any structure that contains cultural property or the immediate surroundings of the protected property or the structure containing it; and 3) the perpetrator was aware of the factual circumstances that established the status of the property or the structure containing the property and intended that property, structure, or their immediate surroundings, to be the object of the attack nonetheless.

1. Explanation of the Material Elements

A mere attack is banned, regardless of whether or not it resulted in damage to the property. This approach ensures better protection for cultural property and is consistent with the elements of the existing crime that bans an attack on protected objects (Article 8(2)(b)(ix) of the Rome Statute) as well as with the pertinent articles of 1977 Protocols.¹²⁰ The phrase “by whatever means” was added to encompass every sort of attack which could cause damage to cultural property.¹²¹

The proposed crime also protects from attacks moveable property located inside structures such as libraries and archives that on their own would not be considered as cultural property. The crime therefore incorporates the already existing notion of protecting such structures from attacks, as reflected in article 1 of the 1954 Convention, while avoiding the conceptually inaccurate inclusion of these structures within the definition of cultural property in that article.¹²²

Another notion derived from the 1954 Convention and the 1999 Protocol is the ban on attacks directed at the immediate surroundings of the cultural property or the structure containing cultural property.¹²³ That ban is aimed at mitigating the effects of “collateral damage,” namely destruction caused to cultural property as a result of an attack directed at a nearby target with no recognized protected status. That ban will

120. *See supra* ch. 1.B.1.

121. That phrase was used in Article 8(2)(b)(v) of the Statute: “Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives.” *See* Rome Statute art. 8(2)(b)(v).

122. Article 1(b) of the 1954 Convention refers to buildings whose main and effective purpose is to preserve or exhibit the movable cultural property; Article 1(c) of the Convention refers to centers containing a large amount of cultural property. *See* 1954 Convention art. 1.

123. *See* 1954 Convention art. 4(1) (the article requires High Contracting Parties to refrain from any use of the property and its immediate surroundings for purposes which are likely to expose it to destruction or damage in the event of armed conflict); 1999 Protocol art. 15(1)(b) (the article criminalizes the use of cultural property under enhanced protection or its immediate surroundings in support of military action).

complement the general protection provided by the Rome Statute against excessive incidental damages.¹²⁴ The phrase “immediate surroundings” will require implementation on a case-by-case basis, by taking into account considerations such as the actual distance between the military target and the protected property and the weapon to be used in the attack.

The proposed new crime abolishes the anachronistic “military necessity” doctrine. While that proposal presents a different approach than the one found in the Rome Statute and the 1954 Convention, it is still in accordance with other international humanitarian conventions. For example, the Roerich Pact and the 1949 Geneva Conventions both require unconditional protection of cultural property.¹²⁵

In fact, by definition, cultural property should not be a military objective or serve as any other military purpose. The only justified exception to that rule is found in cases where the protected property is attacked or otherwise used in self-defense. In such cases, the accused can rely on the general rules which exclude criminal responsibility.¹²⁶ In all other incidents, armed forces ought to refrain from attacking or otherwise utilizing cultural property or a structure containing cultural property, and employ other means to capture or neutralize them. An example for an alternative method used recently in an armed conflict was the siege of a church in Bethlehem by Israeli forces, where suspected terrorists sought to find haven. Despite continuous shootings from

124. Rome Statute art. 8(2)(b)(iv). That crime is not recognized in non-international armed conflict, although there appears to be no convincing reason for that distinction. The main difference between that crime and the new proposed crime is that the latter prescribes a complete ban on an attack regardless of whether the potential results are excessive or not, while at the same time limits the protected zone to the immediate surroundings of the property (a limitation that does not exist in Article 8(2)(b)(iv)). Both crimes, however, do not purport to eliminate collateral damage altogether. While that result is certainly desirable, it seems unrealistic to entirely forbid a conduct that may produce some sort of damage or harm to innocent people or cultural property.

125. See Keane, *supra* note 12, at 19.

126. Article 31(1)(c) excludes criminal responsibility when:

The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph. See Rome Statute art. 31(1)(c).

The result of applying that rule may be a qualification of the “military necessity” doctrine rather than a complete abolishment. The tenets of self-defense, however, are well-accepted even in reference to grave crimes and include important safeguards such as a requirement for proportionality. The article clearly presents an exception to the rule and will hopefully be interpreted narrowly to avoid a “back door” introduction of the “military necessity” doctrine.

within the church, the soldiers surrounding the church refrained from returning fire. Following negotiations conducted between the belligerent sides through third parties, an agreement for the withdrawal of the suspected terrorists from the church was reached and the church was left intact.

2. Explanation of the Mental Element

The drafters of the Rome Statute chose to address the question of the mental element (*mens rea*) in a general provision, which serves as a “default rule” regarding the required mental elements of all crimes listed in the Statute. Article 30 of the Statute determines that “unless otherwise provided” a person shall be held criminally responsible only if the material elements of the crime were committed with an “intent and knowledge.”

Accordingly, the elements of the crimes listed in Articles 6-8 of the Statute do not include the required mental elements, unless the drafters sought to clarify the mental element or to provide an exception to the general rule. These exceptions could be related to both the intensity of the intent or knowledge requirements or to the scope of the *mens rea* coverage.¹²⁷

Similar to the existing provision related to destruction of protected objects (Article 8(2)(b)(ix) of the Statute), the new proposed crime requires the perpetrator to intend the protected property, the structure containing it or their immediate surroundings, to be the object of the attack. Adding the word “intentionally,” as was done in other war crimes (including the above article), appears to be superfluous. Also noteworthy is that specific intent does not require any legal appreciation of the protected status of the attacked objects, but rather only awareness of the factual circumstances that give the property special protection (e.g. its status as a UNESCO World Heritage Site). That requisite is consistent with other existing war crimes related to destruction of property.¹²⁸

D. *Improper Use of Cultural Property as a New War Crime*

The proposed new war crime related to attacks on cultural property does not address the crucial problem of the improper use of cultural property by its holder. As mentioned above, that rampant phenomenon was thus far dealt with only by the 1977 Protocols and to some extent

127. See The International Criminal Court, *Elements of Crimes and Rules of Procedure and Evidence* 30-31 (2001) (edited by Roy S. Lee).

128. See, e.g., Rome Statute art. 8(2)(b)(xiii); Rome Statute art. 8(2)(e)(xii) (the crime of destroying or seizing the enemy’s property).

also by the 1954 Convention and the 1999 Protocol. In its current format, the Rome Statute explicitly forbids only the use of civilians and protected persons as “human shields.”¹²⁹ One plausible proposal may therefore be to amend that article by adding a phrase which criminalizes the utilization of cultural property for gaining immunity from military operations.¹³⁰ This potential amendment, however, will not cover all cases of forbidden use of cultural property by its holder. For example, mere stocking of piles of ammunition in a protected building puts the property at risk, regardless of whether or not that act was meant by the holder to provide immunity against an impending attack.

Hence, it is proposed to add to the list of “other serious violations of the laws and customs” in both international and non-international armed conflicts a new war crime, which will be similar to the crime found in Article 15(1)(b) of the 1999 Protocol. The new crime will read: “Utilizing cultural property or any structure that contains cultural property or their immediate surroundings in support of a military action.”

The elements of the crime will be: 1) the perpetrator utilized cultural property or any structure that contains cultural property or their immediate surroundings for any purpose which is in support of a military action; 2) the perpetrator was aware of the factual circumstances that established the status of the property or the structure containing the property and intended that property, structure, or their immediate surroundings, to be utilized in support of a military action nonetheless.

1. Explanation of the Material Elements

Similar to the other proposed new war crime, there is no requirement for any specific damage, but rather the mere usage of the protected property in support of a military action is forbidden, thus ensuring better protection for cultural property. Furthermore, there is no requirement that a related military action has actually been carried out. Omitting that requirement prevents the unnecessary burden of proving a causal link between the usage of the property and an ensuing military action. At the same time, the usage of the property is required to be in the general context of an armed conflict, as the new proposed crime belongs to the category of war crimes.

As is the case with the other proposed new crime, the scope of protection was expanded to include structures containing cultural

129. *Id.* at art. 8(2)(b)(xxiii).

130. Amended Article 8(2)(b)(xxiii) will read as follows: “Utilizing the presence of a civilian or other protected person *or utilizing cultural property* to render certain points, areas or military forces immune from military operations.” See *id.* at amended art. 8(2)(b)(xxiii) (amendment underscored).

property such as libraries and museums in order to protect cultural property such as paintings and small artifacts, which by themselves cannot serve for military purposes, yet may be at risk due to the usage of the structure they are located within for such purposes. Similar reasoning exists in reference to the military-free zone of the property's immediate surroundings.

2. Explanation of the Mental Element

The mental element is similar to that of the other proposed new war crime, namely it requires an awareness of the factual circumstances of the status of the protected property and a specific intent to utilize it in support of military action.

E. Destruction of Cultural Property as a New Crime Against Humanity

Defining destruction of cultural property as a new crime against humanity is desirable for at least two reasons: First, to emphasize the gravity of the crime, since crimes against humanity are considered serious international offences. The second, and perhaps most important reason, is to protect cultural property also during peacetime.¹³¹

Ideally, a new proposed crime against humanity ought to mirror the new war crimes proposed in the previous sub-chapters, thus ensuring a unified approach towards the crime of destruction of cultural property in both peacetime and wartime. However, the structure and shared elements of crimes against humanity under Article 7 of the Rome Statute render inherent dissimilarities in comparison to the war crimes defined under Article 8 of the Statute. For example, the chapeau of Article 7 requires that crimes against humanity will be conducted "as part of a widespread or systematic attack."¹³² Conversely, Article 8 does not contain that threshold, although it is provided that the ICC will exercise its jurisdiction "in particular when the crime was committed as part of a plan or policy or as part of a large-scale commission of such crimes."¹³³

Another important distinction between war crimes and crimes against humanity is that the former may criminalize certain conducts regardless of their outcome.¹³⁴ In contrast, crimes against humanity require, as part of the material element, damage or harm to be inflicted on the victims (through extermination, enslavement, sexual violence,

131. Naturally, the new proposed crime against humanity will also apply to armed conflict and for that purpose it will complement the new proposed war crimes.

132. Rome Statute art. 7(1).

133. *Id.* at art. 8(1).

134. *See supra* ch. 2.C.

etc.).¹³⁵ Furthermore, the nature of the crimes listed in Article 7 renders that the harm inflicted is to be severe.¹³⁶ Accordingly, if the new crime against humanity adopts the language of the new proposed war crimes verbatim and criminalizes the mere attack on or utilization of cultural property, it will not be consistent with the general doctrinal approach towards crimes against humanity as reflected in the Rome Statute.

The differences emanating from the general schemes of Article 7 and Article 8 of the Rome Statute therefore dictate that certain disparities between the protections provided to cultural property in armed conflicts and in peacetime will persist. While undesired, that outcome appears to be inevitable considering the current framework of the Rome Statute.

Based on the foregoing discussion, it is proposed to define the new crime against humanity as follows: "Causing severe damage to cultural property." The elements of the crime will be: 1) the perpetrator caused severe damage to property; 2) the property damaged was cultural property; and 3) the perpetrator was aware of the factual circumstances that established the status of the property and intended that property to be severely damaged nonetheless.

1. Explanation of the Material Elements

As explained, all crimes against humanity necessitate serious harm to have been inflicted, thus the new proposed crime will also require actual and acute damage, although it is not required that the damage caused be irreversible.

As for the general requirements of Article 7, it is noteworthy that a single act causing severe damage to cultural property may constitute a crime against humanity, as long as it was "committed as part of a widespread or systematic attack."¹³⁷ Moreover, while Article 7 criminalizes an "attack directed against any civilian population," that

135. A general exception to that requirement is found in the criminalization of an attempt to commit a crime. See Rome Statute art. 25(3)(f). Hence, a fruitless attack may be considered as an attempt to cause destruction of cultural property that yields individual criminal responsibility.

136. Grave harm is inherent in certain crimes against humanity such as murder, thus these crimes did not necessitate further elaboration in the Statute. In cases where doubts could arise in reference to the required level of the harm inflicted, the drafters of the Rome Statute incorporated phrases that underscore the prerequisite for grave consequences of the forbidden conduct. See, e.g., *id.* at art. 7(1)(e), "imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;" art. 7(1)(k), "other inhumane acts of a similar character intentionally causing *great suffering*, or *serious injury* to body or to mental or physical health;" and art. 7(2)(g) "'persecution' means the intentional and *severe* deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity" (emphasis added).

137. See *supra* ch. 1.C., n.73.

attack does not have to involve military means,¹³⁸ and could be carried out by the holder of the property—the government, for example. The expression “directed against” specifies that “in the context of a crime against humanity the civilian population is the primary object of the attack.”¹³⁹ This, however, does not render that only conducts targeted at the physical well-being of humans are criminalized. Rather, the expression should be construed broadly to also include acts such as destruction of property (cultural or other) that cause severe harm to civilian population. That interpretation is consistent with the case-law regarding the crime of persecution,¹⁴⁰ as well as with the general goal of Article 7 to protect “humanity” and not only “humans.” Indeed, culture is one of the main characteristics of the human race and thus ought to be protected for the sake of humanity.¹⁴¹

It is also worth mentioning that, in exceptional circumstances, a governmental or organizational policy that deliberately fails to take actions may be considered an attack amounting to a crime against humanity, although the existence of such a policy “cannot be inferred solely from the absence of governmental or organizational action.”¹⁴² Accordingly, neglecting a historic monument or an archeological site is unlikely to yield criminal responsibility. Conversely, if governmental officials purposely ignore on-going attacks against protected property while possessing the means to be aware of these attacks and the ability to take appropriate steps to prevent the attacks and punish the perpetrators, they may be held responsible for their inaction.¹⁴³

138. Rome Statute art. 7 (Elements of Crimes, Intro., para. 3).

139. See Prosecutor v. Kunarac, Kovac, & Vukovic, Judgment, ICTY Trial Chamber, para. 421, Case No. IT-96-23-1 (Feb. 22, 2001).

140. See *supra* ch. 1.C.

141. See Prosecutor v. Kordic & Cerkez, Judgment, ICTY Trial Chamber, para. 207, Case No. IT-94-14/2-T (Feb. 26, 2001). The Trial Chamber held that destruction of institutions dedicated to religion “amounts to an attack on the very religious identity of a people. As such, it manifests a nearly pure expression of the notion of “crimes against humanity,” for all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects.” *Id.*

142. See Rome Statute art. 7 (Elements of Crimes, Intro., para. 3, n.6):

A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action. *Id.*

143. See The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence 76 (2001) (edited by Roy S. Lee).

2. Explanation of the Mental Element

A common element of all crimes against humanity under the Rome Statute is that the perpetrator had “knowledge of the attack.”¹⁴⁴ The drafters of the Statute stressed, however, that it is unnecessary to prove that “the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization.”¹⁴⁵ Also noteworthy is that both the ICTR and the ICTY concluded that constructive knowledge (and not only actual knowledge) of the broader context of the attack may fulfill the “knowledge” requirement of crimes against humanity.¹⁴⁶

The specific mental element of the new proposed crime against humanity, namely the awareness of the factual circumstances that established the status of the property and the intention to damage it, are consistent with both the new proposed war crimes and with the approach found in several existing crimes against humanity.¹⁴⁷ The intent to damage the protected property could be inferred from evidence such as the deliberate attack on the protected property and the fact that protective UNESCO emblems were posted on the property.¹⁴⁸

F. The Definition of Cultural Property

The introduction of new crimes to the Rome Statute requires a definition of the term “cultural property.” As Article 8 of the Statute (War Crimes) does not include a list of definitions, the proposed definition will be best located among the definitions enumerated by Article 7(2) of the Statute (Crimes against Humanity), and a reference

144. Rome Statute art. 7(1).

145. See Rome Statute art. 7 (Elements of Crimes, Intro., para. 2).

146. See *Prosecutor v. Tadic*, Opinion and Judgment, ICTY Trial Chamber, para. 659, Case No. IT-94-1 (May 7, 1997); *Prosecutor v. Kayishema & Ruzindana*, Judgment, Trial Chamber, para. 134, Case No. ICTR-95-1-T (May 21, 1999). It is important to note that the expression “with knowledge of the attack” does not appear in the ICTY and the ICTR Statutes. It remains to be seen if the ICC adopts the jurisprudence of the ICTR and the ICTY on that point.

147. See, e.g., Rome Statute art. 7(1)(e), criminalizing “Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law.” The elements of the crime require the perpetrator to be aware of the factual circumstances that established the gravity of the conduct. *Id.*

148. For example, in the *Strugar* Case, the intent to deliberately destroy cultural property—the required mens rea for convictions under Article 3(d) of the ICTY Statute, which is similar to the mental element of the proposed new crime against humanity—was inferred from the evidence of the deliberate attack on the Old Town of Dubrovnik; the renown cultural and historical character of that property as a UNESCO World Heritage Site; and the fact that protective UNESCO emblems were visible to the attackers of the property. See *Prosecutor v. Strugar*, Judgment, ICTY Trial Chamber, at para. 329, Case No. IT-01-42-T (Jan. 31, 2005).

should also be made to that definition in the new proposed war crimes under Article 8.

The definition of cultural property is complex, has evolved over the years, and differs from one contemporary legal source to another.¹⁴⁹ A full discussion of the subject exceeds the scope of this paper, thus only certain key points will be addressed in order to provide the general framework for the paper's proposal for the new definition.

First, the definition ought to be broad enough to include various forms of existing cultural property as well as potential future types of protected property. Hence, it is recommended to phrase the definition in general terms, preferably with several illustrative examples, rather than lay-out an exhaustive list of types of property which may be regarded as cultural property.¹⁵⁰

Secondly, it is recommended to include intangible cultural property within the definition to ensure the protection of a variety of important cultural forms such as oral traditions, performing arts, and social rituals.¹⁵¹ Until recently, these important aspects of cultural property received little recognition on the international level, thus many of them were, and still are, exposed to complete extinction. The inclusion of intangible cultural property within the definition is also a step towards the harmonization of the different legal regimes currently governing intangible and tangible cultural property, a prominent objective recently advocated for by UNESCO's leadership.¹⁵²

149. A different definition of cultural property is found in all three major international Conventions regulating that field: the 1954 Convention, the 1970 Convention, and the 1972 Convention.

150. An example of the list-type definition is found in article 1 of the 1970 Convention. An example of a general definition which includes concrete examples is found in the 1954 Convention.

151. See *Intangible Cultural Heritage Convention* art. 2 (provides a definition of intangible cultural heritage).

152. A symposium entitled 'Safeguarding of Tangible and Intangible Cultural Heritage: Toward an Integrated Approach', co-sponsored by UNESCO and the Japanese Cultural Agency, was held in Nara, Japan, in October 2004. The Director-General of UNESCO, Koïchiro Matsuura, insisted in his opening remarks on the need "to pay attention to the totality of cultural heritage of nations and communities so that protection measures are not only adapted to each component but also mutually supportive where possible." In that regard, he added, the development of cooperation between the two major UNESCO Conventions dealing with the protection and safeguarding of the tangible and intangible heritage will be of outmost importance. He reiterated "the need for the harmonization of definitions and for the development of a consistent set of heritage policies," and concluded his remarks by stating that "a new, inclusive and, where appropriate, unified vision of heritage" and "an integrated approach, which respects the diversity of cultures and which acknowledges the interdependencies of tangible and intangible heritages as well as their autonomy, will have to be studied and translated into concrete measures of implementation." See UNESCO.org., "Safeguarding of Tangible and Intangible Cultural Heritage: Toward an Integrated

In addition, the test for determining cultural property as such should not be based on the property's purpose but rather on its cultural value.¹⁵³ The cultural value test also rises above—and thus avoids—other general or legal characterizations of property which are inappropriate for the sake of protecting cultural property. Accordingly, the definition will apply to a given property regardless of the property's origin or ownership, whether it is moveable or immovable, or whether it is used for religious or secular purposes.

A related question is whether to create within the category of cultural property sub-categories that are based on differences in cultural value. That concept was applied in the 1954 Convention and the 1999 Protocol.¹⁵⁴ However, the legal regime of special or enhanced protection given to property “of very great importance” was meant to accommodate the constraints of the “military necessity” doctrine by providing further (although not complete) immunity for the “high level” protected property.¹⁵⁵ Upon the removal of that doctrine—as proposed by this paper—there appears to be no justification for creating sub-categorization within the definition or by creating separate crimes related to destruction of different protected property.

That said, the importance of a particular property could still be acknowledged in the prosecution process in the following ways: First, the ICC's Prosecutor may take into account the fact that the property damaged was of particular importance to human heritage upon deciding whether to initiate an investigation and later prosecute.¹⁵⁶ Similarly, the Court may take that fact into account upon discussing the gravity of the

Approach (Oct. 20, 2004) at http://whc.unesco.org/pg.cfm?cid=82&id_news=89 (last visited April 8, 2005).

153. See *supra* ch. 1.B.2. The actual wording of the test—whether, for example, the property is to be considered of “great importance” (see 1954 Convention art. 1) or of “outstanding universal value” (see 1972 Convention art. 1)—appears to be less significant. See also the ICTY discussion regarding the differences between Article 1 of the 1954 Convention and Article 53 of 1977 Protocol I: “Article 1 of the Hague Convention of 1954 refers to property which is “of great importance to the cultural heritage” and not as in Article 53 of Additional Protocol I, to objects which “constitute the cultural or spiritual heritage.” The Commentary on the Additional Protocols states that despite this difference in terminology, the basic idea is the same, and that the cultural or spiritual heritage covers objects whose value transcends geographical boundaries, and which are unique in character and are intimately associated with the history and culture of a people.” See *Prosecutor v. Kordic & Cerkez*, Judgment, ICTY Appeals Chamber, para. 91, Case No. IT-95-14/2-A (Dec. 17, 2004).

154. Chapter II of the 1954 Convention intended to provide “special protection” to certain forms of property; Chapter 3 of the 1999 Protocol created a separate category of property under “enhanced protection.”

155. See 1999 Protocol art. 15(a) and art. 15(b) (both criminalizing acts related only to cultural property under enhanced protection).

156. See Rome Statute art. 17 and art. 53.

crime and in determining the aggravating factors as part of the sentencing of convicted perpetrators.¹⁵⁷

Another challenging dilemma to be addressed is whether the definition should empower individual states to designate cultural property or whether the cultural value test will be based on universal standards. That conundrum is linked to the debate between two schools of thoughts—the nationalist view (cultural nationalism) and the internationalist one (cultural internationalism).¹⁵⁸ Cultural nationalism reflects the notion of state sovereignty by providing states with the sole power of assigning cultural property as such. An example for that approach is found in the 1970 Convention.¹⁵⁹ Conversely, cultural internationalism views cultural property as belonging to the heritage of the world, “independent of property rights or national jurisdiction.”¹⁶⁰ Accordingly, the definition of cultural property under that school of thoughts will be based on general terms such as the property’s importance to humankind. Examples for that approach are found in the 1954 Convention and the 1972 Convention.¹⁶¹

The nationalists approach presents a very clear test for recognizing cultural property, an important characteristic for a definition related to criminal law, and is also likely to be favored by certain parties to the Rome Statute concerned with erosion of state sovereignty. Nonetheless, leaving the decision-making power to states may threaten the protection of cultural property in cases where states are not party to the Rome Statute, are unwilling to protect the property, or worse still are directly responsible for the property’s destruction, as was the case of the destruction of the Bamiyan Buddhas.

It is not surprising then, that scholars’ inclination towards the internationalist approach has inspired drafters of recent international

157. For example, the ICTY Trial Chamber found that while attacking civilian buildings is a serious violation of international humanitarian law, it is a crime of even greater seriousness to direct an attack on an especially protected site such as the Old Town of Dubrovnik. See *Prosecutor v. Jokic*, Sentencing Judgment, ICTY Trial Chamber, para. 53, Case IT-01-42/1-S (Mar. 18, 2004).

158. The distinction between these two outlooks on cultural property was first outlined by Professor John Henry Merryman. See John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AMER. J. INT’L. L. 831, (1986).

159. Article 1 of the 1970 Convention reads: “For the purposes of this Convention, the term ‘cultural property’ means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories. . . .” See 1970 Convention art. 1.

160. Merryman, *supra* note 158, at 831; Birov, *supra* note 3, at 225.

161. Article 1 of the 1972 Convention defines cultural heritage based on its “outstanding universal value.” 1972 Convention art. 1. Article 1 of the 1954 Convention defines cultural property based on its “great importance to the cultural heritage of every people.” 1954 Convention art. 1.

instruments to take this path. For example, the Preamble of UNESCO's 2003 Declaration begins by "**Recalling** the tragic destruction of the Buddhas of Bamiyan that affected the international community as a whole." Article II(2) of the Declaration defines "intentional destruction" as an act intended to destroy in whole or in part cultural heritage in a manner which constitutes a violation of international law or an "unjustifiable offence to the principles of humanity and dictates of public conscience." Articles VI and VII of the Declaration correspondingly attach responsibility for both states (for failing to prohibit, prevent, stop, and punish intentional destruction) and individuals who were involved in intentional destruction of "cultural heritage of great importance for humanity, whether or not it is inscribed on a list maintained by UNESCO or another international organization."¹⁶²

It is therefore proposed to adopt a similar approach in the new definition of "cultural property" under the Rome Statute, namely one that is based on the property's importance to humanity rather than its designation as such by State Parties. The Court will have to construe the phrase chosen for the definition and apply it on a case-by-case basis, based on specific evidence of the property's importance (e.g. being listed on the World Cultural Heritage List) or by utilizing general judicial interpretation tools.

Based on the discussion thus far, the proposed definition of the term "cultural property" will read as follows:

"Cultural Property"—Human created property of great importance for humanity, irrespective of the property's origin or ownership, its territorial or geographical location, its tangible or intangible nature, whether it is moveable or immovable, whether it is used for religious or secular purposes. Such property will include, inter alia, historical monuments, archeological sites, works or arts, books, and people's unique skills and traditions.

IV. Conclusion

This paper assessed the status of criminalization of cultural property under international law and concluded that by now it is considered a grave crime, particularly in relation to armed conflicts and to some extent also to peacetime. In both cases, though, a stronger and clearer message by the international community is yet to be proclaimed, thus a definition of new international crimes dealing exclusively with destruction of

162. The explicit reference to cases where certain property is not inscribed on a list maintained by international organization is meant to address situations such as the destruction of the Bamiyan Buddhas, which were not listed as a protected site at the time of their destruction.

cultural property ought to be deliberated. The definitions of the new crimes should also include a modern and broad definition of the term “cultural property” to provide it with the utmost protection. The platform for the inclusion of proposed international crimes ought to be that of the Rome Statute of the ICC, which, despite its cumbersome mechanisms for amendments, currently strives to represent the most comprehensive approach to individual criminal responsibility under international law.