
Genocide and Restitution: Ensuring Each Group's Contribution to Humanity

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Abstract

The protection of minorities in modern international law is intimately connected with and fuelled the recognition of the crimes of persecution and genocide. Minority protection represented the proactive component of the international efforts to ensure the contribution of certain groups to the cultural heritage of humankind. Prohibition and prosecution of persecution and genocide represented the reactive element of these same efforts. The restitution of cultural property to persecuted groups by the international community was recognition that their ownership and control of these physical manifestations was necessary for the realization of this purpose. In this article, I consider the emergence, contraction, and revival of the interconnection between minority protection, the prevention and punishment of genocide, and the protection and restitution of cultural heritage over the last century-long development of international law. It is argued that the central aim driving and interweaving these initiatives is the effort to ensure the continuing contribution of each group to the cultural heritage of all humanity.

1 Introduction

The preamble to the Convention for the Protection of Cultural Property in the Event of Armed Conflict states:

Being convinced that damage to the cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world.¹

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¹ Second preambular recital, Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention), 14 May 1954, in force 7 August 1956, 249 UNTS 240.

The protection of minorities in international law is intimately connected with and fuelled the recognition of the crimes of persecution and genocide. Minority protection represented the proactive component of the international efforts to ensure the contribution of certain groups to the cultural heritage of humankind. Prohibition and prosecution of persecution and genocide represented the reactive element of these same efforts. The restitution of cultural property to persecuted groups by the international community was recognition that their ownership and control of these physical manifestations was necessary for the realization of this purpose.

The articulation of the crime of genocide in the mid-20th century was based, in part, on the protection of cultural property during armed conflict and belligerent occupation in international humanitarian law. By repeatedly sanctioning the restitution of cultural property following various wars, the international community has implicitly recognized that seizure and destruction of cultural heritage are an integral part of international wrongful acts. These acts are motivated by the same intent which drives discrimination, persecution, or genocide – the elimination of diversity, the elimination of those characteristics which defined the ‘group as a group’, and, ultimately, the elimination of the group from time and space of the territory under the perpetrators’ control. Accordingly, restitution is not so much a remedy for an international wrongful act as it is the cessation of that wrong. This interpretation is reinforced by the lack of application of time limits to the restitution process, and its application to the third party states and within states.

While the international community has gradually established the apparatus to prosecute the perpetrators for these crimes, it has been more reluctant to acknowledge state responsibility. Yet, while these international criminal courts have often been empowered to make orders for the forfeiture of property, such orders have rarely been made in respect of cultural property. Instead, these criminal proceedings have been complemented by broad restitution schemes grounded in states’ civil liability. These schemes recognize that the confiscation and destruction of cultural property were not isolated individual acts but part of a systematic and widespread programme. They also reflect an appreciation that overcoming the effects of such policies and acts is more complex than ‘restoring’ the prior circumstances by overturning the offending legislation and transactions. In effect, restitution is not simply reversal but rehabilitation. Like minority protection relating to cultural and social rights, it is proactive and designed to preserve and develop those characteristics which define the group, for present and future generations.

In this article, I consider the emergence, contraction, and revival of the interconnection between minority protection, the prevention and punishment of genocide, and the protection and restitution of cultural heritage over the last century-long development of international law. It is argued that the central aim driving and interweaving these initiatives is the effort to ensure the continuing contribution of each group to the cultural heritage of all humanity. First, there is an examination of early intersections between these strands during the pre-conventional phase from 1919 to 1945. Secondly, the Genocide Convention and 1954 Hague Convention and Hague Protocol are considered with reference to the compromises wrought by Cold War

politicking. Finally, these limitations are re-evaluated in the post-1989 context, in particular, the international community's responses to the Yugoslav conflicts.

2 The Pre-conventional Period

In the first half of the 20th century, the international community was confronted with large-scale atrocities committed against minorities within states under the cloak of international armed conflicts. These atrocities spurred both major intersections between the protection of minorities, the prohibition of persecution and genocide, and the protection and restitution of cultural property in international law during this period. Following World Wars I and II, the international community established tribunals to prosecute the perpetrators of these crimes and formal schemes for the restitution of cultural property to victims. These initiatives were based on the articulation of international humanitarian law contained in the 1899 II and 1907 IV Hague Conventions.

A After World War I

The first peace treaty with Turkey and the Allied Powers (Treaty of Sèvres, 1920) represented an early intersection in international law between the articulation and denunciation of crimes against humanity, the protection of minorities, and the restitution of property to persecuted groups.² Yet, the unratified Treaty of Sèvres was of limited immediate impact; and the subsequent Treaty of Lausanne reflected the fading resolve of the Allied Powers to hold Turkey to account for its treatment of minorities within its territory.³ Nonetheless, the Treaty of Sèvres became an important precedent for the international community when formulating its response to atrocities committed by Axis countries during the 1930s and 1940s.

1 Crimes against Humanity

The first efforts to define what constitute crimes against humanity occurred after World War I in response to the persecution of minorities by a state within its own territory. The Preliminary Peace Conference established the Commission on the Responsibilities (1919 Commission)⁴ to investigate violations by Germany and its allies of the laws and customs of war and 'the principles of the laws of nations as they result[ed] from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience'.⁵ It recommended that the peace treaties

² Treaty of Peace between the Allied and Associated Powers and Turkey, 10 Aug. 1920, not ratified, 15(supp.) *AJIL* (1921) 179.

³ Treaty of Peace with Turkey, 24 July 1923, in force 5 Sept. 1924, 28 LNTS 12.

⁴ Reports of Majority and Dissenting Reports of the Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties for Violations of the Laws and Customs of War, Conference of Paris, 1919, 14 *AJIL* (1920) 95, at 122.

⁵ Eighth recital, Preamble, Convention (IV) respecting the Laws and Customs of War on Land, and Annex, 18 Oct. 1907, in force 26 Jan. 1910, 2(supp.) *AJIL* (1908) 90 ('Martens clause').

include provisions for the establishment of a tribunal to investigate and prosecute persons on charges including murders and massacres, deportation of civilians, denationalization of the inhabitants of occupied territory, pillage, confiscation of property, wanton devastation and destruction of property, and wanton destruction of religious, charitable, educational, and historic buildings and monuments.⁶ The commission found that these acts were prohibited by the Hague Regulations and those not specifically enumerated fell within the Martens clause.⁷

The Treaty of Sèvres accommodated the 1919 Commission's recommendation.⁸ Under Article 230, Turkey was obliged to recognize and cooperate with any tribunal appointed by the Allies to prosecute alleged perpetrators responsible for massacres during the war on 'territories which formed part of the Turkish Empire on 1st August 1914'. The later Treaty of Lausanne contained no such provision. Instead, it incorporated a Declaration of Amnesty which was 'desirous to cause the events which have troubled the peace in the East to be forgotten'.⁹ These thwarted prosecution efforts were an extension of a lengthy history of minority protection in international law aimed at preventing such policies and acts.

2 Minority Protection

The minority guarantee contained within the Treaty of Sèvres was a combination of protections contained in other post-war peace treaties and a reaffirmation of the *millet* system recognized under Ottoman public law.¹⁰ It was defined as the 'fundamental law' of Turkey and could not be overridden by the domestic legislature or judiciary.¹¹ In addition, it was an international guarantee with compliance overseen by the League's Council.¹² It had three components designed to ensure individual participation within the national society and the maintenance of the minority's identity. First, nationality and choice of nationality were guaranteed pursuant to prescribed rules.¹³ Secondly, the principle of non-discrimination was affirmed, specifically by extending civil and political rights exercised by all citizens of the states, to individual members of the minorities.¹⁴ Thirdly, the provisions protected economic, social, cultural, and religious rights and placed a positive duty on the relevant state to ensure that the group obtained sufficient resources to preserve and develop its own institutions

⁶ 1919 Commission, *supra* note 4, at 114–115.

⁷ Arts 42–46, Section III, 1907 Hague IV Convention, *supra* note 5; and 1919 Commission, *supra* note 4, at 19.

⁸ See Art. 228 Treaty of Sèvres, *supra* note 2.

⁹ Arts II, IV and V, Declaration of Amnesty, 24 July 1923, annexed to Treaty of Lausanne, *supra* note 3.

¹⁰ H.W.V. Temperley (ed.), *A History of the Peace Conference of Paris* (1924), vi, at 101. This hybridization of the minority protection in the Treaty of Sèvres and its lack of uniformity with minority guarantees contained in other post-World War I peace treaties was one of grounds for the treaty's repudiation by Turkey and its eventual renegotiation: Art. 5 of the National Pact of Angora, cited in Temperley, at 102.

¹¹ Art. 140 Treaty of Sèvres, *supra* note 8.

¹² *Ibid.*, Art. 151.

¹³ *Ibid.*, Arts 123–131.

¹⁴ See *ibid.*, Arts 140, 141, 145, 147, 148 and 150.

and activities.¹⁵ The rationale for these provisions was explained by the Permanent Court of International Justice in the *Minority Schools in Albania* case. It found that 'no true equality between the majority and a minority' could be attained where the minority was 'deprived of its own institutions' and 'compelled to renounce that which constitute[d] the very essence of its being as a minority'.¹⁶

3 Restitution

While the Treaty of Sèvres reflected the schema of minority protections contained in other Paris peace treaties, it was markedly different in tone and content.¹⁷ Its provisions were an extension of the Allied efforts to hold persons accountable and 'to repair so far as possible the wrongs inflicted on individuals in the course of the massacres perpetrated in Turkey during the war'.¹⁸ Accordingly, the Treaty sanctioned the reversal of forced assimilation and restitution of confiscated property. It provided that, because of the nature of the regime in Turkey from 1 November 1914, conversions to Islam by non-Muslims were not recognized unless such persons voluntarily adhered to the Islamic faith after 'regaining their liberty'. Turkey was to assist in searches for and return of individuals 'of whatever race or religion, who [had] disappeared, been carried off, interned or placed in captivity'.¹⁹ It was required to facilitate the work of mixed commissions appointed by the League's Council to receive and investigate complaints from victims or their families and order the release and restoration of the 'full enjoyment' of the rights of such people.

The Treaty of Sèvres also provided for the internal restitution of property to victims of the massacres or deportations perpetrated within Turkish territory during the war.²⁰ An arbitral commission composed of representatives nominated by Turkey, the claimant community, and League's Council had power to detain persons who took part in or incited massacres or deportations and make orders concerning their property. Turkey was required to recognize the 'injustice of the law of 1915 relating to Abandoned Properties', declaring it and related legislation 'null and void, in the past as in the future'. Property was to be restored free of any encumbrances, or compensation to the present occupier or owner. Current owners or occupiers could bring an action against those from whom they had acquired title. The commission could dispose the property of individual members to the community if they had died or disappeared without heirs. Interest in immovable property was voided, with the government indemnifying the present owner. Turkey was required to provide labour for any necessary reconstruction or restoration work.

¹⁵ *Ibid.*, Arts 147 and 148. See also Arts 142 and 149.

¹⁶ *Minority Schools in Albania* case, (1935) PCIJ, ser. A/B, No. 64, at 17.

¹⁷ See C.A. Macartney, *National States and National Minorities* (1934), at 255; and Temperley, *supra* note 10, at 102.

¹⁸ Art. 142 Treaty of Sèvres, *supra* note 8.

¹⁹ *Ibid.*

²⁰ *Ibid.*, Art. 144.

None of the reported decisions of proceedings brought pursuant to this provision dealt specifically with cultural property.²¹ Nor was a similar provision inserted in the subsequent Treaty of Lausanne. Nevertheless, the basic principles contained in the Treaty of Sèvres became an important precedent for Allied governments after World War II when they addressed the restitution of cultural property removed from groups persecuted by the Axis forces.

B After World War II

1 Crimes against Humanity and Genocide: The UNWCC and IMT

During World War II, the Allied Powers warned that they would hold persons responsible for crimes perpetrated in territories controlled by Axis forces.²² The UN War Crimes Commission (UNWCC), established to facilitate the investigation and prosecution of these crimes, was also mandated to influence the development of ‘the protection of human rights of populations against violations of their own governments’.²³ It did not confine itself to the violation of the laws and customs of war committed against Allied combatants or occupied civilians. Instead, it also investigated acts perpetrated against civilians who were stateless or Axis citizens on Axis territory and, over time, broadened its work to examine crimes committed against peoples because of their ‘race, nationality, religious or political belief . . . irrespective of where they were committed’.²⁴

The UNWCC’s Committee III (Legal) maintained that it was not restricted to the 1919 List in its endeavours to include persecution of minorities in the Commission’s brief. However, it did adopt it as a starting point. Committee III extrapolated the notion of ‘denationalization’, which it eventually renamed ‘genocide’.²⁵ Like the 1919 Commission, the UNWCC looked to international humanitarian law to define denationalization and its criminalization in international law.²⁶ Unlike the 1919 Commission, it did not rely on the Martens clause in isolation, but as an aid in its purposive interpretation of the Hague Regulations.²⁷ It found that the acts of Axis forces fell under the

²¹ B. Hollander, *The International Law of Art for Lawyers Collectors and Artists* (1959), at 32–34.

²² Including the St James Declaration, 13 Jan. 1942, and Moscow Declaration, 30 Oct. 1943, in *Punishment for War Crimes: The Inter-Allied Declaration Signed at St James Palace, London, on 13 Jan. 1942, and Related Documents* (undated); and Declaration on Security, 9 *Dep’t St. Bull.* 308 (1943), and 38 *AJIL* (1944) 5.

²³ UN Archives, Predecessor Archives Group, UN War Crimes Commission 1943–1949, New York, UN Doc.PAG-3/Rev.1 (1987), at para. ii.

²⁴ Reports on Special Classes of Axis War Crimes, Note by the Secretary-General on the History of the Question, Origin of the Idea, C.72, 29 Jan. 1945, at 4–5, 6/34/PAG-3/1.1.0, UN War Crimes Commission, Predecessor Archives Group, UN Archives, New York (UNWCC).

²⁵ See ‘Criminality of Attempts to Denationalise the Inhabitants of Occupied Territory’, Report presented by Committee III, C.149, 4 Oct. 1945, 6/34/PAG-3/1.1.0, at para. II, UNWCC.

²⁶ Schwelb, ‘Crimes against Humanity’, 23 *British Yrbk Int’l L* (1946) 178, at 181.

²⁷ Eéer, ‘Scope of the Retributive Action of the United Nations according to their Official Declarations (The Problem of “War Crimes” in connection with the Second World War)’, III/4, 27 Apr. 1944, 9/36/PAG-3/1.1.3, UNWCC, at 16.

existing heading of war crimes, including pillage and confiscation of property, which were fundamental components of denationalization.²⁸ For example, Committee III argued that the 'rationale' of Article 56 in 1907 Hague IV for the protection of religious, artistic, and scientific institutions and objects extended to the spiritual values and intellectual life related to them.²⁹

UNWCC's definition of denationalization was heavily influenced by the parameters of the inter-war minority provisions. Committee III argued that denationalization covered those policies aimed at the destruction of the collective identity of the targeted group and the imposition of the perpetrators' identity through assimilatory policies.³⁰ Acts defined as denationalization included the deprivation of cultural and social rights like the closure of existing schools and universities and their replacement by those of the perpetrator, the removal of children and their education in the perpetrator's language and religion, banning the use of the national language in all public places and in printed material and books, removal of national symbols and names, both personal and geographically, systematic dissolution of regional differences and the creation of artificial minorities, extermination of the intellectual class and its removal to unskilled labour, and interference in religious services and customs.³¹

By late 1945, the UNWCC began debating the replacement of 'denationalization' with a term recently coined by Raphaël Lemkin: 'genocide'.³² There were significant similarities between Lemkin's understanding of 'genocide' and 'denationalization', as defined by Committee III.³³ In 1933, Lemkin had promoted the legal recognition of two new international crimes. These crimes were: barbarity, which covered the 'oppressive and destructive actions directed against individuals as members of a national, religious or racial group'; and the crime of vandalism, which dealt with the 'malicious destruction of works of art and culture because they represent the specific creations of the genius of such groups'.³⁴ His latter conceptualization of genocide fused these two crimes into one.

Lemkin argued that genocide aimed to destroy the physical and cultural elements of targeted groups. For this reason, it was more than simply mass murder because it resulted in 'the specific losses of civilization in the form of the cultural contributions

²⁸ C. 149, *supra* note 25, at para. 6.

²⁹ Schwelb, 'Note on the Criminality of 'Attempts to Denationalise the Inhabitants of Occupied Territory', III/15, 10 Sept. 1945, at para. 11; and Draft Report of Committee III on the Criminality of 'Attempts to Denationalise the Inhabitants of Occupied Territory', III/17, 24 Sept. 1945, at paras 8 and 9, 9/36/PAG-3/1.1.3, UNWCC.

³⁰ C.149, *supra* note 25, at para. 6; and Preliminary Report of the Chairman of Committee III, C.148, 28 Sept. 1945, 6/34/PAG-3/1.1.0, at 3.

³¹ C.149, *supra* note 25, at para. 4.

³² 9/45/PAG-3/1.0.2, Box 5, UNWCC.

³³ R. Lemkin, *Axis Rule in Occupied Europe. Laws of Occupation, Analysis of Government, Proposals for Redress* (1944), at 79.

³⁴ R. Lemkin, 'Les actes constituant un danger general (interetatique) consideres comme delits de droit des gens, Rapport special presente à la V-me Conference pour l'Unification du Droit Penal à Madrid (14-20.X.1933) (explications additionnelles)', (Acts Constituting a General (Transnational) Danger considered as Crimes under the Law of Nations) (1933), P-154, Box 1/11 and Box 5/3, Raphael Lemkin Collection, American Jewish Historical Society, New York, at 4–6.

which can only be made by groups of people united through national, racial or cultural characteristics'.³⁵ Similarly, Committee III maintained that denationalization 'kill[ed] the soul of the nation', and was 'the counterpoint to the physical act of killing the body, which was ordinary murder'.³⁶

The drafters of the Charter of the International Military Tribunal (London Charter) resolved that its jurisdiction would not be limited to violations of the laws and customs of war. Article 6(c) covering crimes against humanity included persecution of racial, religious, and cultural groups following the installation of the Nazi regime in 1933.³⁷ Significantly, it was operative regardless of *lex loci*.³⁸ UNWCC's legal officer, Egon Schwelb, had pointed to the Treaty of Sèvres to argue that the concept of crimes against humanity pre-dated the London Charter. He maintained that the Charter was also 'a clear case of intervention by international criminal law in the cause of the protection of human rights against abuse by national authorities'.³⁹

In its indictment of the major war criminals, the IMT relied on Article 6(c) when it charged them with 'deliberate and systematic genocide, viz., the extermination of racial and national groups, against civilian populations of certain occupied territories in order to destroy particular races and classes of people, and national, racial or religious groups'.⁴⁰ The word 'genocide' was not incorporated into the Nuremberg Judgment. Its categorization within crimes against humanity proved problematic because of the IMT's requirement of a nexus between crimes against humanity and armed conflict. This fetter was removed for subsequent war crimes trials by Control Council Law No. 10, and later with the codification of genocide as a crime in international law.⁴¹

However, the International Military Tribunal and related military and national tribunals adopted a broad interpretation of which acts constituted crimes against humanity and genocide. The IMT found that confiscation and destruction of religious and cultural institutions and objects of Jewish communities amounted to persecution which was a crime against humanity.⁴² The indictment in *Greifelt and others*, before the US Military Tribunal at Nuremberg, covered the 'systematic program of genocide, aimed at the destruction of foreign nations and ethnic groups . . . in part by the elimination and suppression of national characteristics'.⁴³ In the *Greiser* case, the Polish Supreme National Tribunal defined 'physical and spiritual genocide' as attacks on

³⁵ Lemkin, 'Genocide as a Crime under International Law', 41 *AJIL* (1947) 145, at 147.

³⁶ C.148, *supra* note 30, at 2.

³⁷ Agreement by the Governments of the UK, the USA, the Provisional Government of the French Republic and USSR for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed and entered into force 8 Aug. 1945, 82 UNTS 279.

³⁸ See Goldstein, 'Crimes against Humanity', 1 *Jewish Yrbk Int'l L* (1949) 206, at 219.

³⁹ Schwelb, *supra* note 26, at 182. See Wright, 'The Law of the Nuremberg Trials', 41 *AJIL* (1947) 38, at 60.

⁴⁰ *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, November 14, 1945–October 1, 1946* (42 vols, 1947–1949), i, at 11–30.

⁴¹ Control Council Law No. 10, 20 Dec. 1945, *Official Gazette of the Control Council of Germany*, No. 3, 31 Jan. 1946, at 50–55.

⁴² *US v. Göring (Streicher Judgment)*, *Trial Proceedings*, *supra* note 40, i, at 248, 301–302; and *US v. Goring (Rosenberg Judgment)*, *Trial Proceedings*, *supra* note 40, i, at 272–275, 286–288, 293, and 295.

⁴³ *US v. Greifelt and others*, 13 L Reps Trials of War Criminals (LRTWC) (1949) 1, at 36–42.

smaller nations' right to exist and have 'an identity and culture of their own'.⁴⁴ In *Goeth*, this same court found that 'the wholesale extermination of Jews and . . . Poles had all the characteristics of genocide in the biological meaning of this term, and embraced in addition, the destruction of the cultural life of these nations'.⁴⁵

2 The Post-war Allied Restitution Programme

Allied governments were equally aware that the persecution of minorities before and during the war included the systematic confiscation and destruction of their cultural property. The Declaration of the Allied Nations against Acts of Dispossession Committed in Territories under Enemy Occupation or Control (London Declaration) of 1943 reinforced:

[T]heir resolution not to accept or tolerate the misdeeds of their enemies in the field of property, however these may be cloaked, just as they have recently emphasized their determination to exact retribution from war criminals for their outrages against persons in the occupied territories.⁴⁶

The declaration triggered a series of Allied declarations, multilateral agreements, and domestic legislation establishing a restitution programme to reverse or ameliorate the effects of Axis policies and actions upon occupied peoples and their own inhabitants. The principles developed and applied for external restitution following World War II are distinguishable from its schemes contained in the post-World War I peace treaties because of the scale of the programme and its implicit driving force transcended return in response to the violation of the laws and customs of war.⁴⁷ These principles were extended to define the parameters of restitution by neutral states and within states (internal restitution).⁴⁸

The post-war restitution programme created the legal basis for the restitution of cultural objects confiscated from individuals within German territory since 1933.⁴⁹ These transactions were clearly within the realm of private law. The Allied restitution programme was effectively an act of humanitarian intervention by the international community in the domestic activities of a state.⁵⁰ Not coincidentally, the wording of

⁴⁴ *Poland v. Greiser*, 13 LRTWC (1949) 70, at 114 and 105.

⁴⁵ *Poland v. Goeth*, 7 LRTWC (1946) 4, at 9 and 13.

⁴⁶ 8 *Dep't St. Bull.* (1943) 21. The UNWCC viewed criminal prosecutions as its role and found that restitution was conducted adequately by the British Commission for the Protection and Restitution of Cultural Material and the American Commission for Protection and Salvage of Artistic and Historic Monuments in Europe, observing that their objective 'though different, was supplementary, to its own': Minutes of 68th Meeting, 4 July 1945, 1/ 33/ PAG-3/1.0.0, UNWCC.

⁴⁷ A.F. Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (2006), at 140–148.

⁴⁸ Final Act and Annex of the Paris Conference on Reparations, Annex I: Resolution on Subject of Restitution, in J. Howard, *The Paris Agreement on Reparations from Germany* (1946), at 19.

⁴⁹ See Military Government for Germany, US Area of Control, Law No. 59: 'Restitution of Identifiable Property', *Military Government Gazette* [Germany, US Zone, Issue G] No. 10, (Nov. 1947), 42(supp.) *AJIL* (1948) 11.

⁵⁰ Bentwich, 'International Aspects of Restitution and Compensation for Victims of the Nazis', 32 *British Yrbk Int'l L* (1955–56) 204, at 205.

these provisions reflected the definition of crimes against humanity in the London Charter and the judgments covering genocide, both in their definition of victim groups and the relevant time period. The US Zone Law No. 59 – Restitution of Identifiable Property covered property removed because of the ‘race, religion, nationality, ideology or political opposition to National Socialism’ of its owner during the Nazi incumbency from 1933 to 1945.⁵¹

The multi-faceted forms of Nazi confiscations and the nature of the regime meant that the Allied restitution programme applied to transactions ‘even when they purported to be voluntary in effect’.⁵² A presumption was made in favour of the claimant that any transaction during the relevant period constituted confiscation if he or she was directly persecuted because of these grounds, or belonged to a group of persons who, because of these grounds, ‘was to be eliminated in its entirety from the cultural and economic life of Germany by measures taken by the State’.⁵³ Property was presumed to be confiscated where a person had lost possession of it because of a transfer *contra bonos mores*, threats or duress, or an unlawful taking or any other tort; confiscation due to a governmental act or by abuse of such act; and confiscation as the result of measures taken by the Nazi regime or affiliate organizations, provided the acts were caused by or constituted measures of persecution because of race, religion, nationality, ideology, or political opposition to National Socialism.⁵⁴ A possessor carried the onus of proof that he or she had acquired the item through a ‘normal transaction’, and payment was not sufficient to overcome this burden.⁵⁵

Restitution was effected regardless of whether the transactions were ‘apparently legal in form’ under *lex loci*.⁵⁶ Allied governments acknowledged that confiscation of property was an extension of the programme of persecution of groups and domestic laws had facilitated and legitimized these acts.⁵⁷ Law No. 59 set down that it was not permissible ‘to plead that an act was not wrongful or *contra bonos mores* because it conformed with a prevailing ideology concerning discrimination against individuals’ belonging to particular groups.⁵⁸ Also, restitution could not be negated by domestic laws protecting *bona fide* purchasers.⁵⁹

Relevant authorities considering restitution were required to give due recognition to difficulties faced by claimants, especially when production of evidence was thwarted through ‘the loss of documents, the death or unavailability of witnesses, the

⁵¹ Art. 1, Part II of Law No. 59, *supra* note 49.

⁵² 1943 London Declaration, *supra* note 46.

⁵³ Art. 3(1), Part II of Law No. 59, *supra* note 49.

⁵⁴ *Ibid.*, Art. 2(3) and (4), Part II.

⁵⁵ *Kunstsammungen zu Weimar v. Ellicofon*, 596 F Supp 829 (EDNY 1981), *aff'd* 678 F 2d (2nd Cir. (NY) 5 May 1982).

⁵⁶ 1943 London Declaration, *supra* note 46.

⁵⁷ E.g., Reg concerning confiscation of the works of art in the German-occupied Poland dated 16 Dec. 1939 (No. 12/1939, 20), in W.W. Kowalski, *Art Treasures and War: A Study on the Restitution of Looted Cultural Property Pursuant to Public International Law* (ed. T. Schadla-Hall, 1998), Annex 1, at 91.

⁵⁸ Art. 2(2), Part II of Law No. 59, *supra* note 49.

⁵⁹ Bentwich, *supra* note 50, at 204; Kowalski, *supra* note 56, at 58–59; and Wengler, ‘Conflicts of Laws, Problems relating to Restitution of Property in Germany’, 11 *ICLQ* (1962) 1133.

residence abroad of the claimant or similar circumstances'.⁶⁰ Further, German possessors of looted property were required to declare it to Allied authorities,⁶¹ and transfers were blocked to assist in its location and identification.⁶² Likewise, neutral states were required to distribute the inventories of looted objects not found in Germany or Austria, search for these objects in their territories, prevent their export, and their citizens were required to report the location of any listed object.⁶³ These laws were so far-reaching in terms of state responsibility that it was suggested they represented a new principle of international law.⁶⁴

Allied governments also sanctioned a generalized programme of restitution-in-kind and compensation, when restitution was impossible.⁶⁵ However, two conditions were placed on the application of restitution-in-kind.⁶⁶ First, the equivalent objects formed part of the claimant state's cultural heritage. Secondly, the obligation arose only if an object of equivalent value to that group could be found. If restitution is the cessation or reversal of a wrongful act, then restitution-in-kind highlights the importance of the return of cultural objects for the rehabilitation of the persecuted group. Acceptance of restitution-in-kind (and its limitations) reflected an acknowledgement that peoples required the possession of culturally significant property in order to ensure their ongoing contribution to the cultural heritage of mankind.

No time limit was attached to these restitution programmes.⁶⁷ In this context, restitution becomes not only a form of relief but the cessation of an ongoing international wrongful act. Nonetheless, heirless property not claimed within six months of the operation of the treaty was to be transferred to a successor organization within the country.

Contrary to international law practice, a successor organization, and not the state, could be appointed by the military governments of Germany as 'heir' to the entire estate of any persecuted person.⁶⁸ Jewish organizations argued strenuously against

⁶⁰ Art. 49, Part VIII of Law No. 59, *supra* note 49.

⁶¹ 1945 Paris Resolution, *supra* note 48, Annex, at para. (g); and General Order No. 6, Declaration of Looted Property in British Zone, both in Kowalski, *supra* note 56, Annex 8, at 113.

⁶² MRG 18-400 to 401.6 Military Government for Germany, US Zone, Law No. 52 – Blocking and Control of Property, *Military Government Gazette*, [Germany, US Zone, Issue A] (1 June 1946), at 24.

⁶³ See Swiss Decree of 22 Feb. 1946, *Eidgenössische Gesetzessammlung* (28 Feb. 1946), in force until 1947; and Agreement between the US, UK, and France in Respect of the Control of Looted Articles, 8 July 1946, 25 *Dep't St. Bull.* (1951) 340.

⁶⁴ Kowalski, *supra* note 57, at 62–64; Robinson, 'Reparations and Restitution in International Law', 1 *Jewish Yrbk Int'l L* (1949) 186, at 199 and 203; I. Vásárhelyi, *Restitution in International Law* (1964), at 115–117; Martin, 'Private Property, Rights and Interests in the Paris Peace Treaties', 24 *British Yrbk Int'l L* (1947) 274, at 280.

⁶⁵ E.g., Art. 25(1) Peace Treaty with Romania, Paris, 10 Feb. 1947, 49 UNTS 3, at 129. See Robinson, *supra* note 64, at 204–205.

⁶⁶ See 1945 Paris Resolution, *supra* note 48, Annex, at para. (d); Definition of the Term 'Restitution', para. 3, 22 Jan. 1946, Press Handout No. 151, PR Branch, CCG (BE), Berlin; Directive regulating the procedural details of restitution-in-kind pronounced by the Allied Control Authority on 25 Feb. 1947, Doc. CORC/M/46/34, in Kowalski, *supra* note 57, Annex 6, at 107; and a Memorandum on the Restitution or Indemnification of Property Seized, Damaged, or Destroyed during World War II, in Royal Institute of International Affairs, *The Postwar Settlement of Property Rights* (1945), at 1.

⁶⁷ See Hall, 'The Recovery of Cultural Objects Dispersed During World War II', 25 *Dep't St. Bull.* (1951) 339.

⁶⁸ Art. 10 of Law No. 59, *supra* note 49.

the retention of heirless property by states which had persecuted or continued to persecute minorities.⁶⁹ Like the Treaty of Sèvres before them, a crucial element of post-World War II internal restitution programmes was the explicit statement that property confiscated in these circumstances was to be returned to its previous owner or his or her legal heir, or so-called successor organizations representing missing or deceased persons.⁷⁰ The successor organization was required to use the property to provide 'relief and rehabilitation of surviving members of such groups, organizations and communities' in the relevant state.⁷¹

Such positive obligations relating to the preservation and development of minority cultures contracted markedly in the final text of the Genocide Convention and Universal Declaration of Human Rights.

3 The Genocide Convention, Human Rights and the 1954 Hague Convention

The subsequent formulation of the prohibition against genocide and the destruction of cultural property during armed conflict and related sanctioning of restitution in conventional form, within the United Nations framework, resulted in its wider acceptance by the international community. However, the limitations of these instruments meant that the progress of the immediate post-war period, particularly in respect of the originating rationales and the interconnectedness of these developments, was restricted because of the growing Cold War bipolarity.

A *The 1948 Genocide Convention*

During negotiation of the 1948 Genocide Convention, the cultural characteristics which defined the group as a group, and made them a target of genocidal policies, were abandoned as delegates focused on the physical and biological aspects of the crime to the exclusion of its cultural and social elements. By ignoring the 'spiritual' component of a group, they ignored a central conceptional pillar of this international crime espoused by its earliest proponents – the deprivation of the contribution of the group to world culture. This rationale was formally acknowledged in the 1946 Genocide Resolution and the 1954 Hague Convention. Its exclusion from the Genocide Convention disregards the role of suppression of cultural rights and alienation of cultural property in persecutory and genocidal policies, and diminishes the importance of restitution in its cessation or reversal.

⁶⁹ 95% of the heirless property was Jewish: M. Kurtz, *Nazi Contraband: American Policy on the Return of European Cultural Treasures, 1945–1955* (1985), at 198 and 208.

⁷⁰ See Arts 7 to 13, Part III of Law No. 59, *supra* note 49. See Convention on the Settlement of Matters Arising out of the War and the Occupation with Annex, 26 May 1952, entered into force 5 May 1955, 322 UNTS 219, as amended by Sched. IV of the Protocol on the Termination of the Occupation Régime in the Federal Republic of Germany, 23 Oct. 1954.

⁷¹ Art. 25(1) Peace Treaty with Romania, *supra* note 65.

1 The GA Genocide Resolution

In the wake of the Nuremberg Judgment, the UN General Assembly on 11 December 1946 unanimously adopted the Resolution on the Crime of Genocide (Genocide Resolution).⁷² The conception of genocide under the resolution was both more expansive and narrower than its interpretation by the post-war military tribunals. It stated that genocide 'is a crime under international law', independent of crimes against humanity and without reference to a nexus to armed conflict.⁷³ Yet, the invitation to member states to 'enact necessary legislation for the prevention and punishment of this crime' was considered regressive, given that the London Charter and other post-war declarations expressly overrode domestic laws. This requirement ignored an important motivator for the proposed convention: the protection of groups against the acts of their own governments.⁷⁴

The resolution's preamble notes that genocide 'shocked the conscience of mankind [and] resulted in great losses to humanity in the form of cultural and other contributions represented by these groups'.⁷⁵ However, the resolution went on to define genocide narrowly as 'a denial of the right to existence of entire human groups, as homicide is the denial of the right to live for individual human beings'.⁷⁶ It runs counter to the reasoning espoused by the UNWCC and judgments of post-war military tribunals. This development was replicated during the treaty negotiations which emphasized physical and biological genocide and eventually subsumed its cultural elements. The compromise is reflected in the preamble to the Genocide Convention, which retained the words, 'resulted in great losses to humanity', but expunged the remainder of the recital, 'cultural and other contributions represented by these groups' contained in the resolution.

2 The 1948 Genocide Convention

Following a direction from the Economic and Social Council, the Secretary-General requested the Division of Human Rights to prepare a Draft Convention on the Prevention and Punishment of Genocide. The definition of genocide contained in the Secretariat draft included the phrase, 'for the purpose of destroying them in whole or in part, *or of preventing their preservation or development*'.⁷⁷ This wording invoked the minority protection precursor to the Convention, in particular, the second arm of the international guarantee entailing positive obligations covering cultural, religious, and linguistic rights. The deletion of the phrase during the treaty negotiations signalled the eventual fate of the cultural elements of the definition in the Genocide Convention.

⁷² GA Res. 96(I) of 11 Dec. 1946, Yrbk UN (1946–47) 255.

⁷³ *Ibid.*, para. 1.

⁷⁴ UN Doc. E/621, 5 (Cuba), E/621, 9 (Chile), and E/621, 14 (Peru).

⁷⁵ First recital, Preamble, GA Res.96(I), *supra* note 72.

⁷⁶ *Ibid.*

⁷⁷ Draft Art. 1(2); Committee on the Progressive Development of International Law and its Codification, Draft Convention for the Prevention and Punishment of Genocide, prepared by the Secretariat, 6 June 1947, UN Doc. A/AC.10/42 (emphasis added).

The Secretariat draft categorized acts constituting genocide in three parts: physical, biological, and cultural. Acts which fell within the cultural element of its definition included acts designed to destroy the characteristics of the group, including the forced removal of children to another group, systematic and forced exile of representatives of the targeted group, complete prohibition on the use of its language, systematic destruction of books in the language or those related to its religious practices, and ‘systematic destruction of historical or religious monuments or their diversion to alien uses, or destruction or dispersion of documents or objects of historical, artistic, or religious interest and of religious accessories’.⁷⁸

Of the legal experts consulted by the Secretariat, only Lemkin supported the inclusion of ‘cultural genocide’. He argued that a group’s right to exist was justified morally and reiterated: ‘If the diversity of cultures were destroyed, it would be as disastrous for civilization as the physical destruction of nations’.⁷⁹ The other legal experts, Donnedieu de Vabres and Vespasian V. Pella, maintained that these cultural elements ‘represented an undue extension of the notion of genocide and amounted to reconstituting the former protection of minorities’.⁸⁰ The Secretariat also counselled against its inclusion.⁸¹ The divisions between the proponents and opponents of the inclusion of cultural elements in the definition of genocide were sustained as the draft convention progressed through the UN system.⁸²

Following the Genocide Convention’s adoption on 9 December 1948,⁸³ the UN General Assembly President, Herbert V. Evatt, acknowledged that ‘[the] wholesale or partial destruction of religious, racial and national groups had long shocked the conscience of mankind . . . The Convention on Genocide protected the fundamental right of a human group to exist *as a group*’.⁸⁴ The only, though by no means insignificant, element of the cultural component contained in the Secretariat’s definition of genocide which remains in final text is the reference to the removal of children from the group.⁸⁵ As explained below, over the intervening 60 years, the parameters demarcated by Article II of the Convention have been reaffirmed repeatedly by the international community and international courts.

⁷⁸ *Ibid.*, Draft Art. 3(e), at 3.

⁷⁹ See UN Secretary-General, Draft Convention on the Crime of Genocide and Comments, 26 June 1947, UN Doc.E/447, at 27.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*, at 16.

⁸² Ad Hoc Committee on Genocide (adopted 4-0-3), Report of the Committee and Draft Convention drawn up by the Committee, K. Azkoul, Rapporteur, 24 May 1948, UN Doc. E/794; Sixth (Legal) Committee (defeated 25-16-4), UN Doc. A/C.6/SR.83 at item 30, at 206; ECOSOC, UN Doc. E/SR.218 and 219; and J. Spiropolous, ‘Genocide: Draft Convention and Report of the Economic and Social Council’, Report of the Sixth Committee, 3 Dec. 1948, UN Doc. A/760; and GA (USSR effort to reintroduce a new Article III was defeated 14-31-10), UN Doc. A/PV.178 and 179.

⁸³ Convention on the Prevention and Punishment of the Crime of Genocide, 9 Dec. 1948, in force 12 Jan. 1951, GA Res. 260A(III), 78 UNTS 277.

⁸⁴ UN Doc. A/PV.179, *supra* note 82, at 851–852 (emphasis added).

⁸⁵ Art. 2(e) Genocide Convention, *supra* note 83. Cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, judgment (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ, 26 Feb. 2007, Separate Opinion of Judge *ad hoc* Kreća, at para. 85, available at: www.icj-cij.org/docket/files/91/13709.pdf (viewed 20 Dec. 2010).

3 The Universal Declaration of Human Rights and Minority Protection

Minority protection met a similar fate during the negotiation of the premiere human rights instrument adopted the following day by the General Assembly. During the drafting phase, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities and Secretary-General recalled the dual nature of minority protections.⁸⁶ They distinguished between non-discrimination provisions which promoted equality through a negative mode which existed whilst discrimination against the targeted groups continued. They maintained that, by contrast, minority protection schemes create positive, permanent obligations to guarantee the protection and development of the culture, language, and religion of the groups.⁸⁷ An initial draft of the declaration contained a dedicated minority protection provision.⁸⁸ However, during the ensuing deliberations, the arguments espousing the promotion of individual human rights to the exclusion of positive, group rights were victorious. The UDHR does not include positive protection for minorities but does provide for the principle of non-discrimination.⁸⁹

However, the General Assembly adopted the Resolution on the Fate of Minorities on the same day as the UDHR.⁹⁰ From this action, Article 27 of the International Covenant on Civil and Political Rights (ICCPR) was realized more than a decade later.⁹¹ Protection of minorities finally attained universal application with Article 27. It is a right granted in addition to other rights contained within the covenant, including non-discrimination.⁹² Yet, it is a universal guarantee drafted with significant limitations. First, the wording of the provision and its enforcement mechanism suggest that protection attaches to individual members, rather than to minorities as a group.⁹³ Next, Article 27 applies only to those states 'in which ethnic, religious or linguistic minorities exist'. Finally, the right is negatively conferred with the words, 'shall not be denied the right'.

In subsequent decades, the protection afforded by Article 27 was expansively interpreted, and these provisos read down. UN Special Rapporteur Francesco Capotorti maintained that non-discrimination and the protection of minorities were distinguishable, and the latter necessarily entailed a positive obligation to ensure the cultural development of groups.⁹⁴ This interpretation of minority protection was espoused by

⁸⁶ See Memorandum submitted by the Division of Human Rights of the UN Secretariat to the Sub-Commission, Definition of the Expressions 'Prevention of Discrimination' and 'Protection of Minorities', 29 Oct. 1947, UN Doc. E/CN.4/Sub.2/8.

⁸⁷ See P. Thornberry, *International Law and the Rights of Minorities* (1991), at 126.

⁸⁸ UN Doc. E/CN.4/77, Annex; and E. St Lot, Draft International Declaration of Human Rights, Report of the Third Committee, 7 Dec. 1948, UN Doc. A/777.

⁸⁹ Arts 2 and 7 Universal Declaration of Human Rights, GA Res. 217A(III), 10 Dec. 1948.

⁹⁰ UNGA Res. 217C(III), 10 Dec. 1948, UN Doc. A/810.

⁹¹ International Covenant on Civil and Political Rights (ICCPR), GA Res. 2200A(XXI), 16 Dec. 1966, in force 23 Mar. 1976, 999 UNTS 171.

⁹² General Comment No. 23, UN Doc. HRI/GEN/1/Rev.1, 38, at paras 4, 5.1, and 9.

⁹³ See *ibid.*, at para. 1; and Optional Protocol to the ICCPR, *supra* note 91.

⁹⁴ Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, UN Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/384/Add.2, at paras 130–136.

the UNESCO Declaration of the Principles of Cultural Co-operation, which recognizes that ‘each culture has a dignity and value which must be respected and preserved’.⁹⁵ Similarly, the Human Rights Committee (HRC), which oversees the implementation of the ICCPR, has stated that the right enunciated in Article 27 ‘is directed to ensure the survival and continued development of the cultural, religious and social identity of the minorities concerned’.⁹⁶ In its General Comment No. 23, the HRC states that the existence of a minority within ‘a given state party does not depend upon a decision by that state party but requires to be established by objective criteria’.⁹⁷ Also, it has repeatedly affirmed that the right of enjoyment of culture, practice of religion, or use of language can be realized meaningfully only when exercised ‘in a community’, that is as a group.⁹⁸ It has observed that Article 27 protects ‘individual rights’, but that the obligations owed by states are collective in nature.⁹⁹

B The 1954 Hague Convention and Hague Protocol

The progressive codification of the protection of cultural property during armed conflict and belligerent occupation has historically served as an important vehicle for the protection of minorities and their cultures. The 1954 Hague Convention, the first specialist international instrument for the protection of cultural heritage during war, and the Hague Protocol, codifying the principles for the protection and restitution of cultural objects during belligerent occupation, built upon this tradition.

1 The 1954 Hague Convention

Following World War II, the UN Educational, Scientific, and Cultural Organization (UNESCO) revived a pre-war initiative for the protection of cultural property during armed conflict which led to the 1954 Hague Convention.¹⁰⁰ An expert’s report prepared for UNESCO by Georges Berlia in 1949 emphasized the link between the codification and prosecution of not only war crimes but crimes against humanity and genocide for the protection of cultural heritage.¹⁰¹ This connections is tacitly affirmed in the preamble to the 1954 Hague Convention, which acknowledges that it is ‘guided by the principles’ contained within the 1899 II and 1907 IV Hague Conventions and the Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments.¹⁰² As noted above, the UNWCC had relied upon these existing instruments to explain the criminalization of denationalization (later genocide) in international law.

⁹⁵ Adopted 4 Nov. 1966, UNESCO Doc. 14C/Resolutions.

⁹⁶ General Comment No. 23, *supra* note 92, at paras 6.1, 6.2, and 9.

⁹⁷ *Ibid.*, para. 5.2.

⁹⁸ See *Kitok v. Sweden*, No. 197/1985, UN Doc. A/43/40, p. 221 (1988); *Lubicon Lake Band (Bernard Ominayak) v. Canada*, No. 167/1984, UN Doc. A/45/40, Pt. 2, at 1 (1990); and *Länsman v. Finland*, No. 511/1922, UN Doc. CCPR/52/D/511/1992, and No. 671/1995, UN Doc. CCPR/C/58/D/671/1995.

⁹⁹ General Comment No. 23, *supra* note 92, at para. 6.2.

¹⁰⁰ 14 May 1954, in force 7 Aug. 1956, 249 UNTS 240.

¹⁰¹ Berlia, ‘Report on the International Protection of Cultural Property by Penal Measures in the Event of Armed Conflict’, 8 Mar. 1950, UNESCO Doc. 5C/PRG/6, Annex I, at 12.

¹⁰² 15 Apr. 1935, in force 26 Aug. 1935, 167 LNTS 289.

The 1954 Hague Convention preamble replicates the justification for the criminalization of genocide articulated by the UNWCC and Lemkin as the rationale for the international protection of cultural property during armed conflict and belligerent occupation. The preamble explicitly acknowledges the importance of the contribution of each group to 'the cultural heritage of mankind', and its purposes and enumerated obligations implicitly conceded the importance of cultural property to the groups themselves in ensuring their 'contribution'.¹⁰³ There is deliberate reference to the cultural heritage of 'peoples' rather than states.¹⁰⁴ This phrase recognizes that the bond certain cultural property has with the culture and history of a people transcends national borders.¹⁰⁵ This aspect of the convention is reinforced through its application during international and non-international armed conflicts.¹⁰⁶

2 *The 1954 Hague Protocol*

In their studies prepared for proposed specialist instruments for the protection of cultural property during armed conflict and belligerent occupation after World Wars I and II, Charles de Visscher and Berlia respectively addressed the issue of restitution of cultural property. De Visscher provided a lengthy, detailed history of practice in support of the draft Declaration Concerning the Protection of Historic Buildings and Works of Art in Time of War and draft International Convention covering restitution during war and in peacetime,¹⁰⁷ whilst Berlia's work in the lead-up to the eventual adoption of the 1954 Hague Convention and Protocol focused not only on the 1919 Commission's efforts but the extensive Allied restitution programmes.¹⁰⁸

The Protocol for the Protection of Cultural Property in the Event of Armed Conflict (Hague Protocol) modified and codified the developments achieved in respect of the restitution of cultural property following World War II.¹⁰⁹ This was the first time restitutory relief specifically in respect of violations of the laws and customs of war relating to cultural property had been codified in international law, and was made prospective and potentially universal in application. With reaffirmation that cultural property cannot be retained as war reparations and that there is no time limit for lodging claims

¹⁰³ Second recital, Preamble, 1954 Hague Convention, *supra* note 1. See Art. 53 of the Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, in force 7 Dec. 1978, 1125 UNTS 3, and Art. 16 of the Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, in force 7 Dec. 1978, 1125 UNTS 609 which also refer to religious significance. The 1954 Hague Convention also covers sites, monuments, and objects of religious importance: Art. 1(1).

¹⁰⁴ UNESCO Doc. 7C/PRG/7, Annex II, at 20. Amendment proposed by USSR: Doc. CBC/DR/37.

¹⁰⁵ Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts (1974–1977), xv, at 220.

¹⁰⁶ Art. 19, of the 1954 Hague Convention, *supra* note 1.

¹⁰⁷ De Visscher, 'International Protection of Works of Art and Historic Monuments', in Department of State Publication 3590, *International Information and Cultural Series 8*, reprinted in *Documents and State Papers*, June 1949, at 821.

¹⁰⁸ Berlia, *supra* note 101, at 9–11.

¹⁰⁹ 14 May 1954, in force 7 Aug. 1956, 249 UNTS 358. See UNESCO Docs CL/717, Annex IV, at 46–47, and 7C/PRG/7, Annex.

reflecting its ‘specificity’, it was distinguishable from other property.¹¹⁰ However, while interpretation of the Protocol is necessarily informed by the 1954 Hague Convention, the deliberate division of restitutory relief from the body of the Convention enables states to sign it independently of that instrument.¹¹¹ Furthermore, the Protocol curbs key principles laid down in post-war restitution schemes. It does not obligate neutral states to indemnify *bona fide* purchasers;¹¹² and its obligations apply to international armed conflicts.¹¹³ Despite these limitations, by codifying these principles the Protocol has become an important template for subsequent restitution initiatives.¹¹⁴

4 The Post-Cold War Period

The end of the Cold War precipitated and coincided with various events which led to the revisiting of the limitations of international law covering genocide, human rights and minorities, and the protection and restitution of cultural property, none more so than the dissolution of Yugoslavia. However, unlike the coordinated and complementary approach of the preceding international efforts after World Wars I and II, the establishment of various tribunals, with differing yet overlapping mandates, addressing the Yugoslav conflicts and their aftermath, whilst substantiating these individual strands of international law, has endangered their vital interconnectedness through this lack of coherence.

A *The International Criminal Tribunal for the Former Yugoslavia*

Parties to the Yugoslav conflict deliberately targeted the cultural (and religious) property of the opposing sides.¹¹⁵ In response, the international community under the auspices of the United Nations quickly resolved to investigate and prosecute those responsible for these acts.¹¹⁶ The work of the resultant *ad hoc* International Criminal

¹¹⁰ Para. 3 of the Hague Protocol, *supra* note 109; and Records of the Conference convened by the United Nations Educational, Scientific and Cultural Organization held at The Hague from 21 Apr. to 14 May 1954 (1961), at 256.

¹¹¹ *Records, supra* note 105, at paras 1645 and 1750–1756.

¹¹² *Records, supra* note 105, at paras 1630 and 1637.

¹¹³ See Art. 19 of the Hague Convention, *supra* note 1; Ch. V, Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, 26 Mar. 1999, in force 9 Mar. 2004, 38 ILM (1999) 769; and UNESCO, Circular Letter regarding Draft Convention for the Protection of Cultural Property in the Event of Armed Conflict, 5 Feb. 1953, UNESCO Doc. CL/717, Annex, at 47.

¹¹⁴ E.g., SC Res. 661, 6 Aug. 1990, and SC Res. 1483, 22 May 2003, at para. 7 concerning Iraq; and the Declaration of Principles relating to Cultural Objects Displaced in connection with the Second World War, 31 July 2009, UNESCO Doc. 181/EX/53 Add.

¹¹⁵ See Interim Report of the Commission of Experts Established Pursuant to UNSC Resolution 780(1992), UN Doc. S/1993/25274; M. Kéba M'Baye, Final Report of the UN Commission of Experts Established Pursuant to SC Res. 780(1992), UN Doc. S/1994/674, Annex XI: Destruction of Cultural Property Report, at 66–68, paras 285–297; and European Community Monitoring Mission, *Cultural Heritage Report No. 2* (1995), at 2.

¹¹⁶ Statute of the International Criminal Tribunal for the Former Yugoslavia, GA Res. 827 (25 May 1993), amended by GA Res. 1166 (13 May 1998), 1329 (30 Nov. 2000), 1411 (17 May 2002), 1431 (14 Aug. 2002), and 1481 (19 May 2003), 1597 (2005), and 1668 (2006), 1775 and 1789 (2007), and 1800 (2008).

Tribunal for the former Yugoslavia (ICTY) has elaborated upon the interrelation between the protection of cultural property and the criminalization of persecution and genocide in international law.

1 Crimes against Humanity of Persecution

The establishment of the ICTY, a half century after Nuremberg, reopened the examination of persecution as it related to cultural heritage. During the first years of the Yugoslav conflicts, the International Law Commission in its 1991 Report on the Draft Code of Crimes Against Peace and Security noted that the systematic destruction of monuments, buildings, and sites of highly symbolic value for a specific social, religious, or cultural group amounted to persecution.¹¹⁷ Moreover, like the UNWCC before it, the ILC extended this definition to intangible elements of heritage including the suppression of language, religious practices, and detention of community or religious leaders.¹¹⁸

In the ICTY Statute, crimes against humanity are covered by Article 5. This provision does not list acts against cultural property, nor does it define 'persecution'. However, the tribunal has held that the destruction or damaging of the institutions of a particular political, racial, or religious group is a crime against humanity of persecution under Article 5(h).¹¹⁹ The Trial Chamber in *Kordić and Čerkez* expounded that such acts 'amount[ed] to an attack on the very religious identity of a people', adding:

As such, it manifests a nearly pure expression of the notion of 'crimes against humanity', for all humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects.¹²⁰

The ICTY has stated that the attacks must be directed against a civilian population, be widespread or systematic, and perpetrated on discriminatory grounds for damage inflicted to cultural property to qualify as persecution.¹²¹ While the *actus reus* of persecution may be identical to that of other crimes against humanity, it was distinguishable because of the discriminatory intent 'on political, racial or religious' grounds.¹²² This requirement is intended to ensure that crimes of a collective nature are penalized because individuals are victimized because of their 'membership of a targeted civilian population'.¹²³

¹¹⁷ Report of the International Law Commission on the Work of its Forty-Third Session, UN Doc. A/46/10/suppl. 10 (1991), at 268.

¹¹⁸ *Ibid.*

¹¹⁹ *Prosecutor v. Kordić and Čerkez*, Judgment, No. IT-95-14/2-T, Trial Chamber ICTY (26 Feb. 2001), at para. 207.

¹²⁰ *Ibid.*, at paras 206 and 207.

¹²¹ *Prosecutor v. Kupreškić et al.*, Judgment, Case No. IT-95-16-T, Trial Chamber ICTY (14 Jan. 2000), at para. 544; and *Prosecutor v. Blaškić*, Judgment, Case No. IT-95-14-T, Trial Chamber ICTY (30 Mar. 2000), at para. 207.

¹²² *Ibid.*, Trial Judgment, at para. 283; *Prosecutor v. Radislav Krstić*, Judgment, Case No. IT-98-33, Trial Chamber ICTY (2 Aug. 2001), at para. 480; and *Kordić and Čerkez*, Trial Judgment, *supra* note 119, at paras 211 and 212.

¹²³ *Prosecutor v. Tadić*, Opinion, Case No. IT-94-1-T, Trial Chamber ICTY (7 May 1997), at para. 644.

Consequently, cultural property is protected not for its own sake, but because it represents a particular group. In the *Blaškić* case, the Trial Chamber convicted the defendant of the persecution which took ‘the form of confiscation or destruction’ by Bosnian Croat forces of ‘symbolic buildings . . . belonging to the Muslim population of Bosnia-Herzegovina’.¹²⁴ Several indictments brought before the ICTY for the wanton destruction or damage of cultural property related to religious or ethnic groups included charges of persecution and genocide. However, while such acts have been used to establish the *mens rea* of a defendant, that is, the discriminatory intent required for proving genocide and persecution, the targeting of cultural property may amount to *actus reus* in respect of the crime of persecution. But, as explained below, the tribunal has not included such acts within the definition of genocide under Article 4 of the ICTY Statute.

3 Genocide and Cultural Heritage

Since it was first articulated in the 1940s, the international crime of genocide has been intimately, but contentiously, linked with cultural heritage. This ongoing debate has re-emerged recently in cases concerning individual criminal responsibility for genocide before the ICTY and state responsibility before the International Court of Justice.

a The ICTY and individual criminal responsibility

Article 4 replicates the definition of genocide contained in Article II of the 1948 Genocide Convention. What distinguishes this international crime from others is its *dolus specialis*.¹²⁵ The tribunal has articulated two elements to the special intent requirement: the act or acts must target a national, ethnic, racial, or religious group,¹²⁶ and the act or acts must seek to destroy all or part of that group. It has found that the *travaux préparatoires* of the Genocide Convention highlight that the list of groups contained in Article II ‘was designed more to describe a single phenomenon, roughly corresponding to what was recognised, before the second world war, as “national minorities”’.¹²⁷ Furthermore, the Trial Chamber emphasized that it was not individual members of the group who were to be targeted but the group itself.¹²⁸

In the *Krstić* case, involving the fall of Srebrenica in 1995, the Trial Chamber reconsidered whether acts directed at the cultural aspects of a group amounted to the crime of genocide in international law. It noted that:

[O]ne may also conceive of destroying a group through purposeful eradication of its culture and identity resulting in the eventual extinction of the group as an entity distinct from the remainder of the community.¹²⁹

¹²⁴ *Blaškić*, Trial Judgment, *supra* note 121, at paras 227–228.

¹²⁵ *Krstić*, Trial Judgment, *supra* note 122, at para. 480.

¹²⁶ *Ibid.*, at paras 551–553.

¹²⁷ *Ibid.*, at para. 556. Cf. crimes against humanity of persecution also includes political groups.

¹²⁸ *Ibid.*, at paras 551–553.

¹²⁹ *Ibid.*, at para. 574.

The tribunal observed that, unlike genocide, persecution was not limited to the physical or biological destruction of a group, but extended to include 'all acts designed to destroy the social and/or cultural bases of a group'.¹³⁰ However, it also found that the drafters of the Convention had expressly considered and rejected the inclusion of the cultural elements in the list of acts constituting genocide.¹³¹ Indeed, it observed that despite various opportunities to recalibrate the definition of genocide, no subsequent treaty formulation deviated from Article II of the Genocide Convention. The Trial Chamber in *Krstić* found that these developments had not altered the definition in customary international law. Likewise, the Appeals Chamber confirmed that the Genocide Convention and customary international law limited genocide to the physical or biological destruction of the group.¹³²

Nonetheless, the *Krstić* Trial Chamber used evidence of the destruction of mosques to prove the specific intent element of genocide. It found that:

[W]here there is physical or biological destruction there are often simultaneous attacks on cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group.¹³³

The Appeal Chamber pronounced that genocide was 'crime against all humankind' because 'those who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and religions provide'.¹³⁴ Judge Shahabuddeen, in his partially dissenting decision, also observed that the Convention protected the group which 'is constituted by characteristics – often intangible – binding together a collection of people as a social unit'.¹³⁵ He argued that if these characteristics are destroyed with an intent which is accompanied by an enumerated biological or physical act, it is not sustainable to argue that it 'is not genocide because the obliteration was not physical or biological'.¹³⁶

b The ICJ Genocide cases and state responsibility

The *Genocide* case filed by Bosnia and Herzegovina against Yugoslavia with the International Court of Justice in 1993 was an action for interim measures and reparations for Yugoslavia's violations of its obligations as a state party to the Genocide Convention. In its submission during the merits phase, Bosnia and Herzegovina presented only two witnesses to the Court. One gave expert testimony in respect of the destruction of cultural, religious, and architectural heritage, led to prove the specific intent element of genocide.¹³⁷

¹³⁰ *Ibid.*, at para. 575.

¹³¹ *Krstić*, Trial Judgment, *supra* note 122, at para. 576.

¹³² *Prosecutor v. Krstić*, Judgment, Case No. IT-98-33-A, Appeals Chamber ICTY (19 Apr. 2004), at para. 25.

¹³³ *Krstić*, Trial Judgment, *supra* note 122, at para. 580.

¹³⁴ *Krstić*, Appeals Judgment, *supra* note 132, at para. 36. See also *Prosecutor v. Stakić*, Judgment, Case No. IT-97-24-A, Appeals Chamber ICTY (22 Mar. 2006), at paras 20–24.

¹³⁵ *Krstić*, Appeals Judgment, *supra* note 132, dissenting judgment of Judge Shahabuddeen, at para. 50.

¹³⁶ *Ibid.*

¹³⁷ *Genocide* case, CR 2006/22 Oral arguments on behalf of Bosnia and Herzegovina, available at: www.icj-cij.org/docket/files/91/10628.pdf (viewed on 24 Mar. 2009). Riedlmayer had previously given evidence before the ICTY: *Prosecutor v. Slobodan Milošević*, Proceedings, Case No. IT-02-54, Trial Chamber ICTY (8 July 2003), at 23,785.

Accepting that there was ‘conclusive evidence of the deliberate destruction of the historical, cultural and religious heritage of the protected group’,¹³⁸ the International Court, like the ICTY before it, turned its mind to the definition of genocide and the place, if any, of the cultural elements within it. The ICJ embraced the ICTY’s interpretation in *Krstić* that the definition of genocide had not evolved to include the cultural elements discarded in 1948. It found that while ‘the elimination of all traces of the cultural or religious presence of a group’ may be contrary to ‘other legal norms’, it did not come within the ‘categories of acts’ listed in Article II.¹³⁹ The International Court also reaffirmed the ICTY Appeals Chamber’s pronouncement in *Stakić* that the Convention requires that the targeted group be positively defined.¹⁴⁰ However, while the ICJ invoked the rejection of cultural genocide during the drafting of the convention in support of its position,¹⁴¹ the ICTY had conceded that debate over the prohibition of cultural genocide has continued even after the Convention was adopted.¹⁴² The tribunal recalled Lemkin’s words that genocide was a serious crime because ‘the world loses “future contributions” that would be “based upon [the destroyed group’s] genuine traditions, genuine culture”’.¹⁴³

This issue will be revisited by the ICJ in the application filed by Croatia against Serbia and Montenegro pursuant to the Genocide Convention, in respect of various incidents including the bombing of Dubrovnik and battle of Vukovar.¹⁴⁴ Croatia’s claim is based on the broader interpretation of acts constituting genocide arising from the ICTY’s jurisprudence.¹⁴⁵ While the Court ordered that the request for restitution of cultural objects be determined at the merits phase, it has made it clear that it is unlikely to alter its finding of law ‘on the general question of interpretation of the Convention in this respect’ made in the earlier *Genocide* case.¹⁴⁶

The position of the ICJ and ICTY on this point betrays a disconnect with recent international initiatives on human rights and cultural heritage protection. As noted above, the ‘cultural’ component of the definition of genocide was a compromise necessitated by post-war resistance to the resuscitation of minority protections. However, it was no coincidence that the revival of efforts to draft and finalize an instrument on the protection of minorities in the 1990s was accompanied by increased jurisprudence on the crime of genocide. This litigation before international courts has again laid bare the internal inconsistency within the Genocide Convention’s definition of this international crime. That is, a group must have a distinct identity to attract the

¹³⁸ *Genocide* case, *supra* note 85, at para. 344.

¹³⁹ *Ibid.*, at para. 194. Cf. Dissenting Opinion of Judge *ad hoc* Mahiou, at paras 71 and 89.

¹⁴⁰ *Ibid.*, at para. 195; and *Stakić*, Appeals Judgment, *supra* note 134, at para. 21.

¹⁴¹ *Genocide* case, *supra* note 85, at para. 194.

¹⁴² *Stakić*, Appeals Judgment, *supra* note 134, at para. 24.

¹⁴³ *Ibid.*, at para. 21.

¹⁴⁴ *Application on the Convention for the Prevention and Punishment of Genocide (Croatia v. Serbia)* (*Genocide II* case), Application instituting proceedings filed 2 July 1999; and Memorial, at paras 4.36, 4.55, 4.57, 4.92, 4.104, 4.108, 4.120, 4.150, 5.219, 5.236, 5.237, and 5.241.

¹⁴⁵ *Ibid.*, Written Statement of the Republic of Croatia, 29 Apr. 2003, at para. 4.30.

¹⁴⁶ *Application on the Convention for the Prevention and Punishment of Genocide (Croatia v. Yugoslavia)*, Preliminary Objections Judgment, 18 Nov. 2008, at paras 141 and 143.

protection afforded by the Convention, but acts which target their cultural heritage and make the group distinctive are not prohibited *per se*. The continued adherence to this 'compromise' has untethered it from developments in related fields, resulting in lack of coherence between proactive element (human rights including minority protection), reactive element (criminalization of persecution and genocide), and remedies (including restitution of cultural heritage), thereby weakening protection afforded by international law to ensuring the contribution of peoples and their cultures to humanity.

B Human Rights and Minority Protection

The large-scale human tragedy and instability caused by various conflicts during the 1990s have also led to a growing acceptance that dependence on the universal application of individualized human rights alone failed to protect victims targeted because of their membership of a particular ethnic or religious community. In response, new instruments for the protection of minorities were finalized at the international and regional levels. The most significant of these are the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UN Minorities Declaration)¹⁴⁷ and the Council of Europe's Framework Convention for National Minorities (FCNM).¹⁴⁸ Both instruments built upon the general framework of earlier minority protections, including provisions for the positive protection and promotion of cultural, religious, and linguistic rights.¹⁴⁹

However, this elevated emphasis on minority protection has gone beyond voluntary acceptance of human rights standards by states to a revival of conditional recognition of statehood based on acceptance of and adherence to such standards. The acceptance of minority protection into domestic law as a condition of recognition of statehood has had a long and fraught history in international law.¹⁵⁰ Once an entity is recognized as a state, other principles come into play including non-interference and territorial integrity which impede criticism of its 'internal' affairs.¹⁵¹ However, following the dismantling of the USSR and Yugoslavia, the European Union adopted declarations covering conditions for the recognition of the emerging states which included 'guarantees for the rights of ethnic and national groups and minorities'.¹⁵²

¹⁴⁷ GA Res. 47/135, 18 Dec. 1992.

¹⁴⁸ 1 Feb. 1995, in force 1 Feb. 1998, CETS No. 157.

¹⁴⁹ See Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 4 Apr. 2005, UN Doc. E/CN.4/Sub.2/AC.5/2005/2; and CE, Framework Convention for the Protection of Minorities and Explanatory Report (1994), H(94) 10.

¹⁵⁰ See Thornberry, *supra* note 87, at 32–37.

¹⁵¹ See L. Oppenheim, *International Law: A Treatise* (3rd edn, ed. H. Lauterpacht, 1920), i, at 136.

¹⁵² Declaration on Yugoslavia, 16 Dec. 1991, 31 ILM (1992) 1485; and Declaration on 'Guidelines on the Recognition of New states in Eastern Europe and in the Soviet Union', 16 Dec. 1991, 31 ILM (1992) 1486. See also CSCE, Concluding Document of the Vienna Meeting, 17 Jan. 1989, at para. 59; and Document for the Copenhagen Meeting of the Conference on the Human Dimension, 29 ILM (1990) 1306, at paras 32 and 33.

This trend was recently reaffirmed by the United Nations in respect of Kosovo.¹⁵³ In its 2008 declaration of independence, the Kosovo Assembly indicated its acceptance of the obligations contained in the Comprehensive Proposal enunciated by UN Special Envoy, particularly ‘the rights of communities and their members’.¹⁵⁴ Several states recognizing Kosovo’s statehood made specific reference to this undertaking.¹⁵⁵ In addition to promoting equality, the Proposal contained positive obligations pertaining to minorities. Not only must Kosovo refrain from assimilationist policies,¹⁵⁶ it is obliged to establish conditions conducive for communities and their members ‘to preserve, protect and develop their identities’.¹⁵⁷ It has ‘a special duty to ensure effective protection of the sites and monuments’ of all communities and to promote their heritages as ‘an integral part of the heritage of Kosovo’.¹⁵⁸ Furthermore, the implementation of the rights and privileges afforded to the Serbian Orthodox Church, its clergy, and affiliates, activities and property is overseen by an international monitor.¹⁵⁹ The Secretary-General in reports to the Security Council in 2010 noted that while there have been recurring incidents of vandalism and desecration,¹⁶⁰ there was ‘considerable progress’ in negotiations between Kosovar and Serbian authorities concerning reconstruction efforts for the Serbian Orthodox sites damaged during ethnic unrest in 2004.¹⁶¹ The stated purpose of these provisions is the promotion of ‘a spirit of tolerance, dialogue and support reconciliation between the Communities’.¹⁶²

C Reparations and Cultural Heritage

1 The Genocide Convention, the ICTY and the ICC

The final text of the Genocide Convention is silent on the question of reparations for victims of genocide. By contrast, the issue was so central to Lemkin’s efforts to

¹⁵³ E.g., SC Res. 1244, 10 June 1999; Rambouillet Accords: Interim Agreement for Peace and Self-Government in Kosovo, 7 June 1999, UN Doc. S/1999/648. See also Council of the European Union decision of 30 Jan. 2006 (2005/56/EC).

¹⁵⁴ Kosovo’s Declaration of Independence on 17 Feb. 2008, in Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, ICJ, 22 July 2010, Introductory Note, Dossier 192, available at www.icj-cij.org/docket/files/141/15042.pdf (viewed 20 Dec. 2010). See Comprehensive Proposal for the Kosovo Status Settlement, Special Envoy for the future Status Process, M. Ahtisaari, 26 Mar. 2007, UN Doc. S/2007/168/Add.1, Annex II.

¹⁵⁵ E.g., US: Letter President G.W. Bush, 18 Feb. 2008; France: Statement Minister B. Kouchner, 18 Feb. 2010; and UK: Statement Prime Minister G. Brown, 18 Feb. 2008.

¹⁵⁶ Comprehensive Proposal, *supra* note 157, Annex II, Art. 2(6).

¹⁵⁷ *Ibid.*, Annex II, Art. 2(1).

¹⁵⁸ *Ibid.*, Annex II, Art. 2.5.

¹⁵⁹ *Ibid.*, Annex V.

¹⁶⁰ Report of the Secretary-General on the UN Interim Administration Mission in Kosovo, 5 Jan. 2010, UN Doc. S/2010/5, at paras 35–38.

¹⁶¹ *Ibid.*, at para.10. See Reconstruction Implementation Commission for Serbian Orthodox Religious Sites in Kosovo Activity Report 2008/Spring 2009 (2009).

¹⁶² Comprehensive Proposal, *supra* note 157, Annex V, Art. 2.1. See Report of the Secretary-General on the UN Interim Administration Mission in Kosovo, 29 July 2010, UN Doc. S/2010/401, at para. 52; and *Accordance with international law of the unilateral declaration of independence in respect of Kosovo, Advisory Opinion*, ICJ, 22 July 2010, available at: www.icj-cij.org/docket/files/141/15987.pdf?PHPSESSID=039115c218dfd8140b3b3afc0964ec76 (accessed 29 Dec. 2010), Separate Opinion of Judge Cançado Trindade, at para. 238.

criminalize genocide in international law that his book, *Axis Rule in Occupied Europe*, was subtitled 'proposals for redress', and in it he provided a detailed scheme for return of property including cultural property.¹⁶³ The Secretariat draft had included Article XIII (Reparations for Victims of Genocide), which provided that, when a government commits genocide or fails to prevent genocide by a part of its populace, it would grant redress to the survivors of the victim group 'of a nature and in an amount' determined by the United Nations.¹⁶⁴ The Secretariat noted that the draft provision represented 'an application of the principle that populations are to a certain extent answerable for crimes committed by their governments which they have condoned or which they have simply allowed their governments to commit'.¹⁶⁵ It suggested that reparations could include compensation to dependants and restitution of seized property. In addition, it advised that groups would benefit from reconstruction of monuments, libraries, universities, and churches and compensation for their collective needs.

While there was support for recognition of state civil liability for genocide during deliberations in 1948, the issue became entwined with the ultimately unsuccessful attempt to incorporate recognition of state responsibility for an international crime into the Convention.¹⁶⁶ Viewed as part of the jurisdiction of the future international penal tribunal slated to try genocide cases, the question of restitution and compensation was revived during the 1990s with the establishment of the ICTY and, later, the permanent International Criminal Court.

Both the ICTY and the ICC are empowered at the judgment and penalties phase to make orders directly against a convicted person in respect of any property or proceeds acquired by criminal conduct.¹⁶⁷ In contrast to the ICC Statute, the ICTY provision specifically refers to 'return' 'to rightful owners', which is not subject to the 'rights of bona fide third parties'. The courts may also order the preservation and protection of such property or proceeds until the forfeiture order is made.¹⁶⁸ The ICTY's power extends to property or proceeds in the hands of third parties unconnected with the crime.¹⁶⁹ While these provisions cover all property including religious and cultural property, no such orders have been made to date.¹⁷⁰ The powers of the ICTY and ICC

¹⁶³ Lemkin, *supra* note 33 at 40–49.

¹⁶⁴ UN Doc.E/447, *supra* note 79, at 5–13.

¹⁶⁵ *Ibid.*, at 47.

¹⁶⁶ See UN Docs. A/C.6/SR.95 and 96, *supra* note 79.

¹⁶⁷ Art. 24(3), Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute), GA Res. 827 of 25 May 1993, amended by GA Res. 1166 (1998), 1329 (2000), 1411 (2002), 1431 (2002) 1481 (2003), 1597 (2005), 1668 (2006), 1775 and 1789 (2007), and 1800 (2008); Rule 98ter(B) (On Judgment), Rules of Procedure and Evidence (ICTY Rules), UN Doc. IT/32/Rev. 44 (2009); and Art. 77(2)(B), Rome Statute of the International Criminal Court (ICC Statute), 17 July 1998, in force 1 July 2002, UN Doc. A/CONF. 183/9; 2187 UNTS 90.

¹⁶⁸ Rule 105(A), ICTY Rules; and Arts 75(4) and 93, ICC Statute, *supra* note 167.

¹⁶⁹ Rule 105(B) of the ICTY Rules, *supra* note 167.

¹⁷⁰ In respect of the Yugoslav conflicts, it has been dealt with as state succession or in peace agreements: see Agreement on Succession Issues between the Five Successor States of the Former Yugoslavia, 29 June 2001, 2262 UNTS 25, Art. 3, Annex A; and Comprehensive Proposal, *supra* note 154, Annex V, Art. 6.

do not prejudice other rights which victims may have under international or national laws, such as the Human Rights Chamber for Bosnia and Herzegovina discussed below.¹⁷¹

The ICC recognizes that it has a restorative as well as a punitive function.¹⁷² The ICC Statute charges it with establishing principles governing reparations to or on behalf of victims.¹⁷³ In this respect, the Assembly of States Parties has repeatedly recalled the leading UN sanctioned principles and guidelines for remedies in respect of gross violations of human rights and humanitarian law.¹⁷⁴ Victims include not only natural persons suffering harm arising from crimes within the Court's jurisdiction but also 'organizations or institutions that have sustained direct harm to any of their property dedicated to religion, education, art, or science or charitable purposes, and to their historic monuments, hospitals and other places and objects of humanitarian purposes'.¹⁷⁵ The Court may award reparations on an individual or collective basis.¹⁷⁶ The victim or his or her legal representative, the convicted person, or the Court on its own motion, may appoint an appropriate expert to assess the scope and extent of damage, loss, or injury and for victims to suggest types and modalities of reparations.¹⁷⁷ No award for reparations has been made by the ICC as of October 2010.

2 *The Human Rights Chamber for Bosnia and Herzegovina*

Established pursuant to the General Framework Agreement for Peace (GFA), the Human Rights Chamber for Bosnia and Herzegovina (HRCBiH) was a *sui generis*, mixed national–international court which sat from March 1996 to September 2003.¹⁷⁸ Its remit covered violations of human rights obligations contained in the European Convention on Human Rights and its Protocols, and 16 other international human rights instruments including the Genocide Convention and FCNM. Despite its limited jurisdiction, the Chamber's jurisprudence, particularly on reparations, alleviated the

¹⁷¹ SC Res. 826, 25 May 1993, at para. 7; and Art. 75(6) of the ICC Statute, *supra* note 167.

¹⁷² Report of the Court on the Strategy in Relation to Victims, Doc. ICC-ASP/8/45, 10 Nov. 2009, at para. 3.

¹⁷³ Art. 75 of the ICC Statute, *supra* note 167. UN Doc. A/CONF.183/C.1/WGPM/L.2/Add. 7, at 5: referring to reparations for victims, victims' families, and successors.

¹⁷⁴ See Resolution RC/Res. 2 on the impact of the Rome Statute system on victims and affected communities, fourth preambular recital, adopted 8 June 2010. Including Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Justice Principles), GA Res. 40/34, 29 Nov. 1985; Basic Principles and Guidelines on the Right to a Remedy and Reparations of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Reparations Principles), GA Res. 60/147, 16 Dec. 2005; and Updated Set of Principles for the Protection and Promotion of Human Rights through action to Combat Impunity (Impunity Principles), 8 Feb. 2005, UN Doc. E/CN.4/2005/102/Add.1.

¹⁷⁵ Rule 85, Rules of Procedure and Evidence of the International Criminal Court, adopted Assembly of States Parties on and in force 9 Sept. 2002, Doc. ICC-ASP/1/3, Part II-A.

¹⁷⁶ *Ibid.*, Rule 96.

¹⁷⁷ *Ibid.*, Rule 97.

¹⁷⁸ General Framework Agreement for Peace in Bosnia and Herzegovina, signed and entered into force 14 Dec. 1995, 35 ILM (1996) 89, Annex 6: Agreement on Human Rights.

reticence of other international tribunals dealing with internationally wrongful acts committed in the region during 1990s and their aftermath.

While the HRCBiH could reject or defer consideration of a matter if it was already before an international human rights body or commission established by the GFA,¹⁷⁹ in practice, the Chamber did not decline applications involving sites being handled by the Commission to Preserve National Monuments, constituted under Annex 8. It found that issues before the two bodies were different. The Commission considers designation of national monuments, while the Chamber was charged with determining human rights violations.¹⁸⁰ Also, the HRCBiH was not to examine an application which was substantially the same as a matter 'already . . . submitted to another procedure of international investigation or settlement'.¹⁸¹ Nonetheless, the Chamber regularly referred to the findings of fact of the ICTY.¹⁸²

The HRCBiH could receive applications from individuals, non-governmental organizations, or groups of individuals as victims or acting on behalf of victims who were missing or deceased.¹⁸³ Applications concerning cultural heritage were almost exclusively brought by religious entities representing the Islamic Community or Catholic Church. Following European Court of Human Rights jurisprudence, the Chamber permitted applications concerning the right to freedom of religion or right to peaceful enjoyment of property by entities holding property in their own right in accordance with domestic law or who had authorization to act on behalf of individual victims.¹⁸⁴

Its jurisdiction *ratione temporis* covered violations perpetrated after the agreement came into force in 14 December 1995 and not those which occurred during the Yugoslav conflict proper. However, the Chamber overcame this stricture through its interpretation of ongoing violations.¹⁸⁵ For instance, in the *Banja Luka Mosques* case, it held that the application was admissible even though the 15 mosques were destroyed in 1993. The Republika Srpska authorities' persistent stymieing of reconstruction efforts, together with other discriminatory acts, was found to be an ongoing violation which triggered the jurisdiction of the Chamber.¹⁸⁶ This temporal

¹⁷⁹ *Ibid.*, Art. VIII(2)(d).

¹⁸⁰ The Islamic Community in *Bosnia and Herzegovina v. The Republika Srpska (Banja Luka Mosques)*, Decision on the Admissibility and Merits, Case No. CH/96/29, 11 June 1999, at paras 138–139; and Human Rights Chamber for Bosnia and Herzegovina, *Digest, Decisions on Admissibility and Merits 1996–2002* (2003), at 23.

¹⁸¹ Art. VIII(2)(b) of GFA Annex 6, *supra* note 178.

¹⁸² E.g., the 'Srebrenica Cases', Decision on Admissibility and Merits, Case Nos. CH/01/8397 *et al.*, 7 Mar. 2003, at paras 15ff.

¹⁸³ Art. VIII(2) of DPA Annex 6, *supra* note 178.

¹⁸⁴ *Banja Luka Mosques* case, *supra* note 180, at paras 127–131.

¹⁸⁵ See also *Jurisdictional Immunities of the State (Germany v. Italy)*, Counter Claim, Order, ICJ, 6 July 2010, Dissenting Opinion of Judge Cañado Trindade, at paras 55–92, available at www.icj-cij.org/docket/files/143/16031.pdf (viewed 20 Dec. 2010). Cf. *Certain Property (Liechtenstein v. Germany)*, Preliminary Objections, Judgment [2005] ICJ Rep 6.

¹⁸⁶ *Banja Luka Mosques* case, *supra* note 180, at paras 132–136.

limitation on the HRCBiH's jurisdiction necessarily restricted its ability fully to attain the restorative purpose of reparations in international law, that is, to place victims in the position they would have been if the human rights violations had not occurred.¹⁸⁷

Indeed, this jurisdictional limitation propelled the most innovative aspect of the HRCBiH's jurisprudence: its interpretation of violations of human rights norms and how remedies were interpreted and deployed in respect of cultural heritage to ameliorate or reverse their impact. Prior to considering the modes of reparation, it should be noted that restitution, compensation, rehabilitation, and satisfaction must all be considered and utilized to achieve full reparation for the injury or loss flowing from the wrongful act.¹⁸⁸

Restitution, particularly if it involves cultural heritage, is considered the primary remedy.¹⁸⁹ It is only when restitution is impossible or inadequate that other remedies are considered. Indeed, if the obligation which is breached is a peremptory norm or the violation is ongoing, restitution may also involve cessation of the wrongful conduct.¹⁹⁰ In the *Banja Luka Mosques* case, the order sought by the applicant, that is, that the respondent reconstruct the mosques on the former sites, could not be made because the destruction occurred in 1993. However, the Chamber found that there was an ongoing violation of freedom of religion because the relevant authorities had persistently refused permission for reconstruction after the war, and ordered that such permission be granted.¹⁹¹ In a similar vein, it had ordered the removal of business facilities from the site of a destroyed mosque,¹⁹² the transfer of a school building to the Catholic Church,¹⁹³ and the repeal of an impugning law prohibiting burials in the Muslim Town Cemetery.¹⁹⁴

Similarly, in its current ICJ application, Croatia is seeking an order that Serbia return 'any items of cultural property within its jurisdiction or control which were seized in the course of the genocidal acts for which it is responsible'.¹⁹⁵ The

¹⁸⁷ *Factory at Chorzów*, Jurisdiction, 1927, PCIJ Series A, No. 9, at 21.

¹⁸⁸ See J. Crawford, *ILC Articles on State Responsibility: Introduction, Text and Commentaries* (2002), at 211; and Principle 18, *Reparations Principles*, *supra* note 174.

¹⁸⁹ *Ibid.*, Principle 19 includes: restoration of liberty, enjoyment of human rights, identity, family life, and citizenship, return to one's place of residence, and return of property.

¹⁹⁰ Art. 30 of the Articles on Responsibility of States for Internationally Wrongful Acts, UNGA Res. 58/83, 12 Dec. 2001, UN Doc. A/56/10/2001 (Articles on State Responsibility); and Crawford, *supra* note 188, at 196–197 and 214–216.

¹⁹¹ *Banja Luka Mosques* case, *supra* note 180, at paras 212 and 213. It also ordered Republika Srpska to allow the Islamic Community to erect fencing round the site of the destroyed mosques, refrain from destroying or removing any other objects remaining on the site, or construct any other structure on the site. See also Principles 8, 10 and 11 of the Justice Principles, *supra* note 174.

¹⁹² *Islamic Community in Bosnia Herzegovina v. Republika Srpska (Zvornik Mosques)*, CH/98/1062, Decision on Admissibility and Merits, 12 Oct. 2001, *Digest*, *supra* note 180, at 177.

¹⁹³ *Catholic Archdiocese of Vrhbosna v. Federation of Bosnia and Herzegovina*, CH/02/9628, Decision on Admissibility and Merits, 6 June 2003, at para. 119.

¹⁹⁴ *Islamic Community in Bosnia Herzegovina v. Republika Srpska ('Prnjavor Graveyard')*, CH/99/2177, Decision on Admissibility and Merits, 11 Feb. 2000, at para. 111 and *Digest*, *supra* note 180, at 233.

¹⁹⁵ *Genocide II* case, *supra* note 144, Written Statement of Croatia, 29 April 2003, at 42.

international community has recently reiterated the primacy of restitution of the subject cultural property when it has been removed in 'circumstances deemed offensive to the principles of humanity and dictates of public conscience'.¹⁹⁶ However, the International Court has indicated that the question of appropriate remedies to be ordered by the court is dependent on the findings concerning breaches of the Genocide Convention.¹⁹⁷ An inference that any remedial order is similarly qualified by Article II not only collapses primary and secondary rules of state responsibility,¹⁹⁸ it runs counter to the wider humanitarian purpose of the criminalization of genocide in international law and the practice of the international community over several decades in reversing or ameliorating its effects, detailed above.

While restitution is the 'preferred' remedy, it is often not feasible in cases involving human rights violations.¹⁹⁹ As explained earlier, the international community has approved restitution-in-kind or compensation where the item cannot be returned, because it has been destroyed, lost, or it may impact negatively on the cultural or religious heritage of the group against whom the restitution order is made. The HRC-BiH declined to sanction the removal of an Orthodox Church constructed on the site of a destroyed mosque. Instead, it ordered restitution-in-kind by requiring Republika Srpska to make a parcel of land available to the Islamic Community and permit reconstruction of the mosque on the alternative site.²⁰⁰

Likewise, compensation can be used to provide full reparations, in so far as the damage cannot be made good by restitution, the damage is 'economically assessable', and the compensation is 'appropriate and proportional' to the gravity of the violation in each case.²⁰¹ Its purpose is corrective and rehabilitative rather than punitive.²⁰² In the *Srebrenica* cases, the Chamber ordered Republika Srpska to pay compensation to the Foundation of the Srebrenica-Potocari Memorial and Cemetery to enable families to bury the deceased according to their traditional religious beliefs and facilitate collective memory of the victims of the massacres.²⁰³ The modest quantum awarded collectively was based only on the right of the families to know the truth, as violations of the deceased's rights fell outside the Chamber's jurisdiction.²⁰⁴ This award could also

¹⁹⁶ UNESCO Doc. 181/EX/53 Add, Annex I, at 2.

¹⁹⁷ *Genocide II* case, *supra* note 144, Preliminary Objections Judgment, at para. 143.

¹⁹⁸ Cf. *Temple of Preah Vihear (Cambodia v. Thailand)*, Merits [1962] ICJ Rep 6, at 36–37. In respect of the primary rules, the ICJ has indicated that the obligations to prevent and punish genocide 'are two distinct but connected obligations': *Genocide* case, *supra* note 85, at para. 425. Arguably, the obligation of the state to prevent genocide is not delimited by Arts II and III which underpin the obligation to punish and individual criminal responsibility.

¹⁹⁹ D. Shelton, *Remedies in International Human Rights Law* (2nd edn, 2005), at 272.

²⁰⁰ *Zvornik Mosques* case, *supra* note 192, at 194, and Decision on Review, 9 Feb. 2001, at paras 33 and 34, *Digest*, *supra* note 180, at 178.

²⁰¹ Art. 36(1) of the Articles on State Responsibility, *supra* note 190; Principle 20 of the Reparations Principles, *supra* note 174; and Principles 12 and 13 of the Justice Principles, *supra* note 174.

²⁰² See Crawford, *supra* note 188, at p. 219; and Shelton, *supra* note 199, at p. 291.

²⁰³ *Srebrenica Cases*, *supra* note 182, at para. 217.

²⁰⁴ Principles 2, 3 and 4 of the Impunity Principles, *supra* note 174.

be viewed as rehabilitation designed to ‘address massive trauma that can be life-long or even multigenerational’²⁰⁵ and ‘restore the dignity and reputation of the victims’.²⁰⁶

UN initiatives covering reparations for gross human rights violations have enumerated satisfaction as a mechanism for redress, designed to address moral injury.²⁰⁷ This remedy augments the right to know and the right to justice.²⁰⁸ Satisfaction in accordance with the right to know can include a public apology which acknowledges the facts and accepts responsibility as in the *Srebrenica* cases,²⁰⁹ search for and return of human remains of the disappeared for reburial according to traditional religious practices,²¹⁰ and declaration by way of the publication of the Chamber’s finding in the official gazette or the Court’s judgment in the ICJ *Genocide* case.²¹¹ Satisfaction in accordance with the right to justice would include effective measures aimed at the cessation of continuing violations,²¹² and judicial and administrative sanctions against persons liable for violations.²¹³ And so, in several respects, the HRCBiH’s jurisprudence harked back to the minority provision contained in the Treaty of Sèvres, almost a century ago.

5 Conclusion

The lot of genocide and minority protection in international law, because of their complementary purposes, has ebbed and flowed in tandem over the last century. The establishment of a permanent international criminal court to prosecute cases of genocide was a concern of the drafters of the Genocide Convention.²¹⁴ Unlike their antecedents, the International Criminal Court and UN Minorities Declaration, realized in the late 1990s, have universalized the reach of these reactive and proactive elements of minority protection. The ICC is charged with prosecuting offenders with international crimes including the crimes against humanity of persecution and genocide, and awarding reparations to victims of these crimes. Fostered by a restorative aim focussed on the victim, rather than a punitive function targeting the perpetrator, its award of reparations is guided by principles developed in response to gross violations of human rights and humanitarian law generally. Lemkin noted that ‘remedies . . . after liberation for such populations can at best obtain only reparation for damages

²⁰⁵ Shelton, *supra* note 199, at 275.

²⁰⁶ Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, T. Van Boven, 2 July 1993, UN Doc. E/CN.4/Sub.2/1993/8, at 57. See Principle 21 of the Reparations Principles, *supra* note 174; and Principle 34 of the Impunity Principles, *supra* note 174.

²⁰⁷ Principle 22 of the Reparations Principles, *supra* note 174; and Principle 34 of the Impunity Principles, *supra* note 174.

²⁰⁸ *Ibid.*, Principles 2–5, 19.

²⁰⁹ Principle 22(e) of the Reparations Principles, *supra* note 174; and *Srebrenica Cases*, *supra* note 182, at para. 219.

²¹⁰ Principle 22(c) of the Reparations Principles, *supra* note 174; and *Srebrenica Cases*, *supra* note 182, at para. 211.

²¹¹ Principle 22(d) of the Reparations Principles, *supra* note 174; *Srebrenica Cases*, *supra* note 182, at para. 213; and *Genocide* case, *supra* note 85, at para. 463.

²¹² Principle 22(a) of the Reparations Principles, *supra* note 174; and *Srebrenica Cases*, *supra* note 182, at para. 211.

but never restoration of those values which have been destroyed and which can never be restored, such as human life, treasures of art, and historical archives'.²¹⁵ Yet, it is clear that the international community has repeatedly over the decades sanctioned a central role for cultural heritage in the restoration and rehabilitation of victims of systemic discrimination, persecution, and genocide, not just because such crimes 'deeply shock the conscience of humanity'.²¹⁶

Rather, the drive of the international community is constructive and prospective. It is contained in opening lines of the ICC Statute:

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time.²¹⁷

These words echo the preambles to the 1992 Minorities Declaration, the 1946 Genocide Resolution, and the 1954 Hague Convention. These instruments covering minority protection, criminalization of persecution, and genocide, and protection and restitution of cultural property are bounded by this common rationale. It was a sentiment left unsaid in the 1948 Genocide Convention because of Cold War bipolarity and the fear of some states of possible international scrutiny of their domestic policies concerning minorities. However, since 1989, it is a sentiment which has been revived with the renewed recognition that crimes like genocide occur during every period of history, and that each group's contribution to the cultural heritage of humanity can be ensured only by encompassing in a coordinated and coherent way these proactive, reactive, and remedial strands of international law.

²¹³ Principle 22(f) of the Reparations Principles, *supra* note 174; Part C of the Impunity Principles, *supra* note 174; and *Srebrenica Cases*, *supra* note 182, at para. 212.

²¹⁴ Art. VI of the Genocide Convention, *supra* note 83.

²¹⁵ Lemkin, *supra* note 33 at 95.

²¹⁶ First preambular recital, Resolution RC/Res.2. The impact of the Rome Statute system on victims and affected communities, adopted at the 9th plenary meeting, 8 June 2010, available at www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.2-ENG.pdf (viewed 20 Dec. 2010).

²¹⁷ First recital, Preamble to the ICC Statute, *supra* note 167.