
The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency

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Abstract

This article undertakes a comparative analysis of the two main international legal instruments providing for offences against cultural property and cultural heritage in times of armed conflict in order to assess existing gaps and lacunas, and to make suggestions on how better to advance the protection of cultural property through international criminal law. The International Criminal Court Statute takes a very retrograde attitude to this kind of crime – which the author calls the civilian-use approach – whereas the Second Protocol to the 1954 Hague Convention on the Protection of Cultural Property in Times of Armed Conflict seems far more innovative, preferring a cultural-value oriented approach. The author concludes that the latter approach is more appropriate and that, at present, the most effective tool for pursuing war crimes against cultural property is Protocol II to the 1954 Hague Convention. It is thus crucial to promote ratification by a large number of states and to encourage states to adopt implementing legislation that may allow domestic judges to prosecute the most serious crimes against cultural heritage on the basis of jurisdictional criteria provided for in Protocol II to the 1954 Hague Convention.

1 Introduction

The idea for this article stems from the *prima facie* observation that there are serious inconsistencies among the legal instruments which provide for the criminalization

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of acts against cultural property in times of armed conflict. Even a very quick comparison between the two most recent instruments including criminal offences against cultural property – that is to say the Statute of the International Criminal Court (hereinafter ICC Statute) on the one hand and Protocol II to the 1954 Hague Convention on the Protection of Cultural Property in Times of Armed Conflict (hereinafter Protocol II to the 1954 HC) on the other – reveal two different and partially divergent approaches to the criminalization of such conduct. It seems therefore appropriate to undertake a comparative analysis of both instruments against the background of other existing legal texts in order to understand the reasons underlying these diverse attitudes, to assess existing gaps and *lacunas*, and to make suggestions on how better to advance the protection of cultural property through international criminal law.

2 Is Cultural Heritage to be Specially Protected through International Criminal Law? Civilian-Use v. Cultural-Value Approach

There are two main courses of action which have been followed to penalize acts against cultural property committed in times of war:¹ the first one is characterized by a traditional international humanitarian law orientation – I shall refer to it as the *civilian-use* rationale² – whereas the second path was undertaken more recently and reflects what I would call a *cultural-value* approach, intended directly to criminalize acts against cultural property with a much higher degree of specificity and differentiation in gravity.

The divide between these two different perspectives can be traced back to the decision to develop a specific instrument dedicated to the protection of cultural property in times of armed conflict. One of the reasons lying beneath the initiative to adopt such a treaty was precisely the need to provide for penal sanctions, which were considered a decisive tool for the enforcement of international humanitarian law provisions (IHL)

¹ Scholars who have dealt with the legal protection of cultural property often refer to two ways of thinking about cultural property, opposing cultural internationalism to cultural nationalism as the two rationales underlying different treaties in this field: see Merryman, 'Two Ways of Thinking About Cultural Property', 80 *AJIL* (1986) 831. I will try to explore a different line of distinction which seems better to reflect the differences in legal instruments which focus on the criminal prosecution of crimes against cultural property in times of war.

² I borrow this expression from Brilmayer and Chepiga, who use it to put forward the argument that, if and when recovery is possible for civilian property illegally destroyed during war, damages should reflect not just the replacement value or market value of the items destroyed, but rather the humanitarian value, or what they refer to as the 'civilian use' value: see Brilmayer and Chepiga, 'Ownership or Use? Civilian Property Interests in International Humanitarian Law', 49 *Harvard Int'l LJ* (2008) 413. The term is freely used in this article to reflect the main concern traditionally underlying the protection of cultural property, that is not the protection of property *per se* (only marginally taken into account) but its protection as a means to protect civilians.

protecting cultural property and crucial for purposes of deterrence and prevention.³ The promoters of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (hereinafter the 1954 HC) intended to address the protection of a specific segment of cultural property the protection of which was not distinctively addressed by the 1949 Geneva Conventions, that is to say property of universal cultural value which falls within the more definite concept of cultural heritage.⁴ During the preparatory phase leading to the adoption of the text reference was always made to the protection of cultural treasures of inestimable value, and this aim is clearly reflected in the definition of cultural property opening the Convention.⁵ The idea emerged to protect this kind of property for itself, because of its intrinsic value and importance to humanity,⁶ above and beyond its everyday use by civilians, the civilian casualties that could be caused by acts against such property, and the consequences that its destruction could bring on civilians living nearby.

³ See, for instance, the position expressed by 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, stressing, among other things, that 'the most that can be said is that complaints which had not been met by penal measures went to swell the claims for reparations made on the former Central powers. There is no need to stress, however, that the possibility of civil reparations is of very minor interest when we are concerned with property which is essentially irreplaceable', at 2.

⁴ There is neither a universally accepted definition of cultural property nor of cultural heritage. Scholars have written excellent studies on the difference between these two legal concepts. See, for instance, Frigo, 'Cultural property v cultural heritage: A "battle of concepts" in international law?', 86 *IRRC* (2004) 367. Besides the different and nuanced views that may be exposed, it is contended in this article that cultural property of universal value falls within the more specific concept of cultural heritage and deserves specific protection also in terms of penal sanctions.

⁵ Art. 1, Definition of Cultural Property: 'For the purposes of the present Convention, the term "cultural property" shall cover, irrespective of origin or ownership: (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above; (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a); (c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as "centres containing monuments"'. This is a very broad definition of cultural property which underlines the importance for the whole of humanity of property representing the cultural heritage of all people: for the first time the two expressions cultural property and cultural heritage were used in the same text. The Convention is available at: http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html.

⁶ This idea was already enshrined in a legal instrument in the interwar-period. The Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, signed in Washington in 1935 by 21 American states (better known as the Roerich Pact), available at: www.roerich.org/nr_RPact.html, was adopted with the aim 'to preserve in any time of danger all nationally and privately owned immovable monuments which form the cultural treasure of peoples', in times both of war and peace. However, the criminalization of acts against such cultural treasures was not yet envisaged. See Dörmann, 'The Protection of Cultural Property as laid down in the Roerich Pact of 15 April 1935', 6 *Humanitäres Völkerrecht* (1993) 230.

The results, however, were very modest in terms of penal provisions inserted in the Convention, and even more deceiving as far as their practical implementation is concerned.⁷ Yet this was a common fate for all provisions criminalizing serious violations of the laws of war; one has just to mention that the first criminal trials, at the domestic level, dealing with grave breaches of the 1949 Geneva Conventions took place only in the 1990s.⁸

Conversely, it is somewhat surprising that when the winds of changes blew in the international criminal law field – some 40 years after the adoption of the 1954 HC – these two rather different ways of approaching the criminalization of acts against cultural property proceeded along parallel lines and that, in spite of some relevant occasions, there was no serious attempt to make them converge, or at least come a little closer. In fact, the drafters of the statutes of the international criminal tribunals – established by the Security Council in the 1990s – built on the traditional IHL or *civilian-use* approach when they elaborated the provisions on offences against cultural property, and so did the drafters of the ICC Statute, whereas a more specific approach – oriented by a *cultural-value* rationale – was purported with the criminal provisions inserted into Protocol II to the 1954 HC. Remarkable evidence of the persistence of these two diverse approaches may be found in the different definitions of offences contained in these instruments.

A close look at the statutes of the international criminal tribunals reveals that they all provide for non-specific offences against cultural property. Article 6 of the Nuremberg Charter establishing the International Military Tribunal is the first relevant example, as it listed ‘plunder of public and private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity’ among war crimes.⁹ The statutes of international and mixed criminal tribunals created since the beginning of the 1990s adopted more specific definitions,¹⁰ but the point of reference for the drafting of provisions proscribing acts against cultural property were

⁷ The only provision inserted is the rather vaguely formulated Art. 28, which did not receive actual implementation at domestic level.

⁸ Maison, ‘Les premiers cas d’application des dispositions pénales des Conventions de Genève par les juridictions internes’, 6 *EJIL* (1995) 260.

⁹ This definition is quite vague and incomplete. Its principal merit lies in the fact that it is the first international rule penalizing certain conduct and on which basis international criminal trials have been held. The Charter is available at: www.icrc.org/ihl.nsf/FULL/350?OpenDocument. See Berlia, *supra* note 3, Annex I, at 12–13.

¹⁰ Art. 3(d) ICTY Statute, available at: www.icty.org/sid/135, criminalizes acts of ‘seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science’. Art. 7 of the Law on the Extraordinary Chambers of Cambodia, available at: www.eccc.gov.kh/english/law.list.aspx, which is the only criminal provision which is directly linked to the provision of the 1954 HC, reads: ‘[t]he Extraordinary Chambers shall have the power to bring to trial all Suspects responsible for the destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict, and which were committed during the period from 17 April 1975 to 6 January 1979’. On the other hand, the ICTR Statute (Art. 4(f)), available at: www.un.org/ict/statute.html, and the Statute of the Special Court for Sierra Leone (Art. 3(f)) explicitly mention only pillage as a war crime related to cultural property.

still general IHL instruments – mainly the Hague Regulations of 1907 and the Geneva Conventions of 1949 – and there was no attempt to draw offences more specifically shaped to criminalize serious acts against cultural heritage, notwithstanding the existence of the 1954 HC. The traditional IHL rules and the approach underlying them were embodied in the Statutes without much further rationalization.

However, there is no definition of cultural property in the above-mentioned IHL instruments, and relevant provisions include in their listing historic monuments, buildings dedicated to education and religion, as well as hospitals and places where the sick and wounded are collected.¹¹ Hospitals need special protection because their destruction implies the killing of many civilians and impairs possible use by other civilians in the continuing conflict; churches and schools as well, in other respects. The civilian-use approach sets as a clear priority the safeguard of civilians; protection is afforded basically only to the buildings and it serves the main purpose of sparing civilian lives.

Hence, this traditional IHL approach fails to address the concern that historic buildings, monuments, and works of art deserve protection above and beyond their material dimension, precisely because of their cultural value both for the local community and for humanity as a whole. One relevant example is Article 3(d) of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY).¹² Albeit that a little step forward was taken with this provision – for at least it deals only with cultural property and no longer lists historic monuments with hospitals – the phrasing that was chosen reflects no differentiation among different elements of property and it only marginally takes into consideration the cultural value of the property to be protected.¹³ This choice was made notwithstanding that extensive destruction of invaluable cultural property was taking place in the Former Yugoslavia when the Statute was drafted,¹⁴ and despite

¹¹ It seems that the drafters of the statutes of international criminal tribunals did not take into consideration that the two Additional Protocols of 1977 to the 1949 Geneva Conventions, available at: www.icrc.org/ihl.nsf/FULL/470:OpenDocument and www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/d67c3971bcff1c10c125641e0052b545 respectively, attempted to give more specific protection to cultural property. See Arts 53 and 85(4)(d) of Protocol I and Art. 16 of Protocol II, which mention 'historic monuments, works of art and places of worship that constitute the cultural or spiritual heritage of peoples'.

¹² Art. 3(d) of the ICTY Statute, *supra* note 10, reads: 'd) seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; e) plunder of public or private property'. Other provisions which were used to charge acts against cultural property but not specifically aimed at this objective are: Art. 3(b), wanton destruction of cities, towns or villages, or devastation not justified by military necessity; Art. 3(c), attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; and Art. 3(e), plunder of public or private property. Art. 3(d) is clearly inspired by Arts 27 and 56 of the Regulations annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land of 18 October 1907, *supra* note 10.

¹³ There is no graduation of gravity and, to give a concrete example, attacks against a small mosque have fallen under the very same provision (Art. 3(d)) as the shelling of the old town of Dubrovnik.

¹⁴ In particular, deliberate destruction of cultural property in the former Yugoslavia has been on a horrendous scale. Expert assessments indicated that the cultural damage and loss in the first 7 months of the 1991 Yugoslav/Serb fighting in Croatia was of a different order of magnitude from that of the devastating 1979 Montenegro earthquake, and greater than in the 4 years of the Yugoslav campaign of the Second World War. See P.J. Boylan, *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention of 1954)*, Report, UNESCO Doc. CLT-93/WS/12 1993, 3 Feb. 1993, at para. 13.9.

the fact that there were clear suggestions by the UN Committee of Experts about the need to insert criminal sanctions against these acts, with explicit reference to the rules contained in the 1954 HC.¹⁵ It is therefore disappointing that in the final text of the ICTY Statute the language echoes older and less precise provisions, also in light of the fact that all belligerents were parties to the 1954 HC and to its First Protocol.¹⁶ One possible explanation is obviously that given the massive scale of crimes being perpetrated against people and the ensuing irreparable loss of human life, the protection of certain kind of property *per se* was not considered a priority. At the time when the Statute of the ICTY was drafted, the main concern was certainly to stop and deter massive continuing violence against human beings. In addition, the fact that a set of criminal offences was not clearly delineated by the 1954 HC and, not least, the fact that the US and UK – among the countries which played a leading role in the drafting of the ICTY Statute – were not parties to the 1954 Hague Convention surely influenced the final result.

Be that as it may, the conflict in the Former Yugoslavia showed the magnitude of the damage caused by serious attacks against cultural monuments of great importance for the cultural heritage of humanity; it suffices here to mention the Mostar bridge, the National Library in Sarajevo, and the Old Town of Dubrovnik to give the idea of an incomparable loss.¹⁷ It is indeed regrettable that the opportunity to adopt specific provisions which accurately describe criminal conduct against different kinds of cultural property was not taken, contrary to the suggestions of distinguished experts.¹⁸ The lack of specific provisions may weaken the prosecution of such conduct: without a clear-cut definition of offences it is more difficult adequately to address the punishment of acts against cultural heritage and it becomes more difficult to set the boundaries within which individual criminal liability may be upheld.¹⁹

Excellent reasons to follow a cultural-value approach in the criminal prosecution of certain kind of acts clearly transpire, in any case, from ICTY case law. In the *Jokić* case,

¹⁵ In the Final Report of the UN Commission of Experts explicit reference was made, in the section dedicated to applicable law, to Art. 19 of the 1954 HC: see *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, UN doc. S/1994/674, 27 May 1994, Part II, at para. A. Toman criticizes the fact that the Report does not refer to Art. 18 of the 1954 HC: see J. Toman, *Cultural Property in War: Improvement in Protection. Commentary on the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict* (2009), at 265, but in my opinion the explicit mention of Art. 19 in the Report was intended to underline that the 1954 HC, *supra* note 5, applies to internal conflicts, e.g., also in the event that the conflict in the Former Yugoslavia was to be considered an internal conflict.

¹⁶ Yugoslavia was a High Contracting Party to the 1954 Hague Convention and 1954 Hague Protocol, *supra* note 5, and after its dissolution the successor states have all become parties: Croatia (1992), Slovenia (1992), Bosnia and Herzegovina (1993), The Former Yugoslav Republic of Macedonia (1997), Serbia (2001), and Montenegro (2007).

¹⁷ See the Annex XI. Destruction of cultural property report, attached to the Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN doc. S/1994/674/Add.2 (Vol. V), 28 Dec. 1994.

¹⁸ See P. J. Boylan, *supra* note 14, at para. 9.25 on Legal Enforcement and Sanctions.

¹⁹ See *infra* sect. 3.

in which the accused was sentenced for the shelling of the Old Town of Dubrovnik, the judges took into account the gravity of such acts and stressed at length the reasons why these kinds of attacks against cultural heritage bear an inherent gravity.²⁰ Reference was explicitly made to the fact that the Old Town of Dubrovnik was already at the time a UNESCO World Cultural Heritage site pursuant to the 1972 Convention for the Protection of the World Cultural and Natural Heritage.²¹ The judges also underlined that:

The whole of the Old Town of Dubrovnik was considered, at the time of the events contained in the Indictment, an especially important part of the world cultural heritage. It was, among other things, an outstanding architectural ensemble illustrating a significant stage in human history. The shelling attack on the Old Town was an attack not only against the history and heritage of the region, but also against the cultural heritage of humankind.²²

They also placed emphasis on the fact that restoration is possible but that it can never return the buildings to their original status; this kind of loss is indeed irreplaceable.²³

While it may be observed that prosecution of serious acts against cultural heritage was possible through non-specific Articles of the ICTY Statute, it is hereby submitted that specificity of the incriminating rule is always a positive feature in criminal law, and the existence of more specific offences penalizing acts against invaluable cultural property does not rule out the fact that the very same conduct may be charged under different headings if other rules are also infringed and different values are at stake.²⁴ It does not actually come as a surprise that in ICTY case law the most serious war crimes against cultural property have been punished, where the conditions of

²⁰ '[T]he Old Town was a "living city" (as submitted by the Prosecution) and the existence of its population was intimately intertwined with its ancient heritage. Residential buildings within the city also formed part of the World Cultural Heritage site, and were thus protected. The Trial Chamber finds that, since it is a serious violation of international humanitarian law to attack civilian buildings, it is a crime of even greater seriousness to direct an attack on an especially protected site, such as the Old Town, constituted of civilian buildings and resulting in extensive destruction within the site. Moreover, the attack on the Old Town was particularly destructive. Damage was caused to more than 100 buildings, including various segments of the Old Town's walls, ranging from complete destruction to damage to non-structural parts. The unlawful attack on the Old Town must therefore be viewed as especially wrongful conduct. In determining an appropriate sentence to reflect the full extent of Miodrag's culpability, the Trial Chamber has taken into consideration the fact that some of the crimes to which he pleaded guilty contain identical legal elements, proof of which depends on the same set of facts, and were committed as part of one and the same attack on the Old Town of Dubrovnik': see *Prosecutor v. Jokić*, Judgment, Case No. IT-01-42/1, Trial Chamber, 18 Mar. 2004, at paras 51–54. See also the preceding paragraphs.

²¹ It was also stressed that the perpetrator was aware that a number of buildings in the Old Town and the towers of the Old Town's Walls were marked with the symbols mandated by the 1954 Hague Convention: *ibid.*, at para. 23.

²² See *ibid.*, at para. 51.

²³ 'Restoration of buildings of this kind, when possible, can never return the buildings to their state prior to the attack because a certain amount of original, historically authentic, material will have been destroyed, thus affecting the inherent value of the buildings': *ibid.*, at para. 51.

²⁴ The ICTY judges asserted on several occasions that cumulative charges and cumulative convictions based on the same set of facts are lawful. The ICC has also adopted a practice of multiple charges indictments. On this issue see A. Cassese, *International Criminal Law* (2nd edn, 2008), at 178 ff.

applicability were satisfied, on the basis of Article 3(d), the most detailed provision on cultural property inserted into the Statute. The decision to give preference to Article 3(d) as the statutory basis for punishing the most serious attacks against cultural property also reflects, in our opinion, the will to stress the gravity of such attacks.²⁵

3 Actual Gaps and Inconsistencies between the ICC Statute and Protocol II to the 1954 HC

Most likely, the lack of more specific offences in the ICTY Statute had as a positive consequence the showing of the urgency of including adequately defined criminal offences describing acts against cultural property in the text of Protocol II to the 1954 HC, but admittedly it also had a negative impact on the drafting of the rules criminalizing acts against cultural property included in the ICC Statute.

The adoption of the ICC Statute is indeed a missed opportunity in this respect, and it is regrettable that the negotiation of the ICC Statute and the drafting of Protocol II to the 1954 HC, which occurred in parallel for several years, did not find some point of convergence on the definition of offences and on other relevant issues. The ICC Statute maintains a very traditional approach to crimes against cultural property, with a few quite unfortunate results, as will be exposed below.

A The Definition of Offences: Civilian-Use v. Cultural-Value Approach

As is well known, the ICC Statute adopts a two-fold approach to war crimes, and it penalizes separately offences committed in international and non-international armed conflicts. This dual system implies an imperfect correspondence between the two spheres.²⁶ The specific provisions prohibiting acts against various elements of cultural property – Article 8(2)(b)(ix) and 8(2)(e)(iv) – are identical for both international and non-international armed conflicts and, at least in this respect, the ICC Statute is in line with the approach followed by the 1954 HC and its Protocol II, which are applicable indiscriminately in internal and international armed conflicts. However, there is no perfect coincidence amongst the more general provisions relating to crimes against property which are applicable in international and non-international armed conflict, and this may have repercussions also if these general provisions are used to charge a defendant with acts against cultural property.

What is less adequate though is the insertion into the ICC Statute of very generic rules, the texts of which recall the language of the Hague Regulations of 1907 and

²⁵ See Frulli, 'Advancing the Protection of Cultural Property through the Implementation of Individual Criminal Responsibility: The Case-Law of the International Criminal Tribunal for the former Yugoslavia', 15 *Italian Yrbk Int'l L* (2005), at 195–216.

²⁶ The distinction is regrettable in many respects and it has been widely criticized by scholars for being retrograde: see Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', 10 *EJIL* (1999) 144, at 150.

which contain a very general list of protected property which regresses to the inclusion of historic monuments together with hospitals and places where the sick and wounded are collected.²⁷ The widely recognized need to take into consideration a cultural-value approach for the purposes of criminalizing conduct against cultural property of universal importance was completely overlooked.²⁸ Valid reasons militating against this choice have already been exposed in the previous section and it is indeed regrettable that such a conservative and inadequate attitude towards the definition of criminal acts against cultural property characterizes the ICC Statute. On the other hand, Protocol II to the 1954 HC moves forward and – building on the precise definition of cultural property which was included in the 1954 HC – attempts clearly to define a set of serious violations of the Protocol itself.²⁹

Another important feature which was embodied in Protocol II to the 1954 HC – precisely with the intention of fostering a cultural-value approach – is the introduction of a differentiation in gravity for offences against cultural property. In fact, it *de facto* distinguishes between two classes of offences: those committed against property under enhanced protection entail more serious consequences. Actually, all of the offences listed in Article 15 of Protocol II to the 1954 HC are to be considered serious violations, but only the first three – among which the first two concern property under enhanced protection – correspond to what are called grave breaches in the Geneva Conventions and Additional Protocols, and states parties accordingly also have a duty to try or extradite any person who committed such serious violations, that is to say to exercise universal jurisdiction whenever an alleged offender is present on their territory.³⁰ Introducing a differentiation in gravity between acts perpetrated against the

²⁷ See Bothe, 'War Crimes', in A. Cassese, P. Gaeta, and J. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2001) 379, at 409–410.

²⁸ Conversely, Arts 85(4)(d) and 53 AP I, Art. 16 AP II and Art. 3(d) ICTY Statute, all *supra* note 10, were at least dedicated only to proscribing acts against cultural property. In particular the two additional protocols both mention 'historic monuments, works of art and places of worship that constitute the cultural or spiritual heritage of peoples'.

²⁹ See Art. 15, Protocol II to the 1954 HC, devoted to serious criminal violations of the Protocol: '1. Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts: a. making cultural property under enhanced protection the object of attack; b. using cultural property under enhanced protection or its immediate surroundings in support of military action; c. extensive destruction or appropriation of cultural property protected under the Convention and this Protocol; d. making cultural property protected under the Convention and this Protocol the object of attack; e. theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the convention.'

³⁰ See, however, the exception provided for in Art. 19 which establishes the jurisdictional criteria, especially para. 2(b): 'except in so far as a State which is not Party to this Protocol may accept and apply its provisions in accordance with Article 3 paragraph 2, members of the armed forces and nationals of a State which is not Party to this Protocol, except for those nationals serving in the armed forces of a State which is a Party to this Protocol, do not incur individual criminal responsibility by virtue of this Protocol, nor does this Protocol impose an obligation to establish jurisdiction over such persons or to extradite them'.

different elements of cultural property,³¹ in our opinion, and attaching greater seriousness to acts against cultural heritage is utterly consistent with one of the main functions of criminal law: to express retribution and, more precisely, not only to express the fact of wrong-doing but also to articulate the degree of wrong-doing.³² And it better serves the interests of an effective criminal justice.

Looking for some consistency between the two legal instruments under review, one finds at least a positive feature which characterizes both the provisions of Protocol II to the 1954 HC and the ICC Statute, dealing expressly with offences against cultural property. None of these provisions requires destruction to occur in order to penalize attacks against cultural property: it suffices that the attack was intentionally directed at the protected property.³³

B The Lacunas: The Protection of Moveable Property

Another serious drawback of the ICC Statute is the fact that no reference is made to moveable cultural property in provisions which may be used to charge acts against cultural property: one has just to recall the destruction of thousands of ancient manuscripts in the National Library of Sarajevo and the looting of the National Museum of Baghdad to realize how serious this lacuna is.³⁴ Conversely, Protocol II to the 1954 HC includes acts against this kind of property among the types of conduct to be criminalized. As recalled above, Protocol II is based on the definition of property inserted into the 1954 HC, which includes moveable property, and during the negotiation of Protocol II several states made it clear that such property had to be included.³⁵ In addition one should mention Article 53 of the 1977 Additional Protocol I to the Geneva Conventions which is entitled ‘Protection of cultural objects and of places of worship’,³⁶

³¹ The last two serious violations included in Art. 15 were introduced because the same acts had been inserted among war crimes provided for in the ICC Statute and therefore, as one commentator explained, ‘they could not be included in a general provision on “other violations” which would only require States to suppress such acts without specifying the means of doing so’. The last two serious violations amount to war crimes, but states have the obligation only to repress them through the traditional grounds for jurisdiction, namely territoriality and active nationality. There is no obligation to exercise universal jurisdiction, although states are allowed to do so.

³² A. Ashworth, *Principles of Criminal Law* (1999), at 37.

³³ *Contra* Art. 85(4)(d) Additional Protocol I to the Geneva Conventions, *supra* note 11.

³⁴ On this point see Gottlieb, ‘Criminalizing Destruction of Cultural Property: A Proposal for Defining New Crimes Under the Rome Statute of the ICC’, 23 *Pennsylvania State Int’l L Rev* (2004–2005) 857.

³⁵ See UNESCO, Meeting of Governmental Experts. Summary of comments received from states parties to the Hague Convention and from the International Council on Archives, Doc. CLT-96/CONF.603/INF.4, Paris, Dec. 1996. See Art. 15 and in particular Art. 15(1)(e) of Protocol II, listing among serious offences ‘[t]heft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention’.

³⁶ Art 53: ‘[w]ithout prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited: (a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; (b) to use such objects in support of the military effort; (c) to make such objects the object of reprisals’. See also Art. 85(4)(d) and Art. 16 of Additional Protocol II, *supra* note 11.

Article 3(d) of the ICTY Statute which also includes ‘works of art and science’, and Article 7 of the Law on the Extraordinary Chambers of Cambodia, which is the only criminal provision contained in the statute of an international or mixed tribunal which provides for prosecution pursuant to the provisions of the 1954 HC and, as a consequence, establishes a direct link to the broad definition of cultural property contained therein.³⁷

The ICC Statute provisions which could be used to address seizure or appropriation of property are Article 8(2)(a)(iv),³⁸ Article 8(2)(b)(xiii),³⁹ or the provisions proscribing pillage, that is to say Article 8(2)(b)(xvi) and 8(2)(e)(v).⁴⁰ At a closer look, however, only the provisions prohibiting pillage may be used to charge acts against moveable property, since the first two provisions – apart from their lack of specificity – are usually interpreted as referring to immoveable property. In addition, they are applicable only in international armed conflicts, while the prohibition of pillage is inserted into twin provisions applicable in international and internal armed conflicts respectively.

Yet the crime of pillaging is one of the unsatisfactory compromises reached at Rome. The application of previous rules criminalizing pillage or plunder was not made contingent on military necessity,⁴¹ in line with the idea of punishing any appropriation of private or public property.⁴² During the negotiation of the ICC Statute the delegates of some states tried to introduce military necessity as a possible justification for acts of pillage. While they failed to have it inserted into the definition of the offence – which means that military necessity is not an element of the war crime of pillaging – they succeeded in having military necessity inserted in a footnote to the elements of this crime, which reads: ‘[a]s indicated by the use of the term “private or personal use”, appropriations justified by military necessity cannot constitute the crime of pillaging’.⁴³ The elements of crimes are not binding for ICC judges. It is nonetheless very disappointing that an express reference to military necessity appears in relation to a prohibition which elsewhere is formulated as an absolute prohibition.

C The Possible Limitations: What Room Is Left for Military Necessity?

Beyond the example of pillage illustrated above, military necessity is one of the most discussed exceptions which may be brought into play for breaching IHL rules and it

³⁷ See *supra* note 10. The Cambodian Law was adopted after the ICC Statute, but the discussion about the creation of an international or mixed tribunal to deal with past atrocities committed in Cambodia started as early as 1997.

³⁸ Corresponding to a grave breach of the Geneva Conventions and inserted also into Art. 2(d) of the ICTY Statute, *supra* note 10.

³⁹ Corresponding to Art. 23(g) Hague Regulations 1907, *supra* note 12, and inserted into Art. 3(b) of the ICTY Statute, *supra* note 10.

⁴⁰ Art. 28 Hague Regulations, *supra* note 10.

⁴¹ See Art. 3(e) ICTY Statute, *supra* note 10, which prohibits: ‘plunder of public or private property’, and Art. 4(f) ICTR Statute, *supra* note 10, which prohibits ‘pillage’.

⁴² For further considerations on the issue of military necessity see *infra* sect. 3C.

⁴³ See the Elements of Crimes, ICC-ASP/1/3(part II-B), n. 47 at 28 and n. 61 at 39.

has always been relied upon to justify attacks against cultural property. This exception is invoked by states to avoid liability, but the same formula of military necessity has been inserted into criminal law rules and it appears in several provisions included in the ICC Statute. For those Articles which expressly provide for a military necessity exception, this has been included amongst the elements of the corresponding crimes.⁴⁴ In this respect, it may not be considered as a defence in a proper sense: the lack of military necessity, being an element of the crime, has to be proven by the prosecution in order to charge a defendant under a certain count.

Military necessity as such does not appear in the ICC Statute Articles expressly prohibiting acts against cultural property. However, as outlined above, it may happen – as it did before the ICTY – that acts against cultural property are charged under different Articles which provide for a military necessity exception. In addition, the lack of a definition of military necessity and the ambiguity of Article 31 of the ICC Statute – providing for grounds excluding criminal liability – do not allow one to rule out that military necessity could be raised by defendants charged with attacks against cultural property and raise some concerns as to the limits within which military necessity may come into play. According to Article 31(1)(c), one of the grounds for excluding criminal liability is the following: '[t]he person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected'. Several authors expressed the concern that this provision might be interpreted as allowing for a plea of military necessity,⁴⁵ and underlined the vagueness of this clause and its potential disadvantages,⁴⁶ whereas others believe that its scope is very restrictive.⁴⁷

What may be relevant for the future interpretation of this rule is the case law of the ICTY, which on several occasions had to pronounce on the boundaries of military necessity and which represents a very important point of reference for potential future cases. Albeit that the justification of military necessity has never hitherto been

⁴⁴ See, for instance, Art. 8(2)(a)(iv): 'extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly'; Art. 8(2)(b)(xiii): '[d]estroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war'; Art. 8(2)(e)(xii): '[d]estroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict'. On the crime of pillage see *supra* sect. 3B.

⁴⁵ See E. Van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), at 259; G.A. Knoops, *Defenses in Contemporary International Criminal Law* (2nd edn. 2007), at 76 and 136. There was a US proposal expressly to include military necessity as a separate ground for excluding criminal liability. The proposal was rejected but, as said above, ambiguity remains as to the role military necessity may play in excluding the criminal liability of a defendant.

⁴⁶ Cassese, *supra* note 26, at 155.

⁴⁷ Hayashi, 'Requirements of Military Necessity in International Humanitarian Law and International Criminal Law', 28 *Boston U Int'l LJ* (2010) 39.

accepted by the ICTY, several decisions have shown how difficult it is to come to terms with this concept in international criminal law.⁴⁸

Article 8(2)(b)(ix) and 8(2)(e)(iv) – the most specific ICC Statute provisions dealing with acts against cultural property – refer instead to the concept of military objective and not to looser notions such as military purposes or military necessity: this may be considered an improvement if compared to the language of older provisions.⁴⁹ In fact, these sub-articles criminalize attacks against cultural property which has not become a military objective. In principle, this is an important step forward, because the concept of military objective is more precisely defined and can be interpreted more restrictively than the notion of military necessity or military efforts.⁵⁰ This concept requires a set of precise conditions to be satisfied: not every use of a certain property is apt to transform it into a military objective.⁵¹ Protocol II to the 1954 HC goes in the same direction as it attempts to circumscribe military necessity – not ruled out by the 1954 HC – by referring to the notion of military objective and by indicating property which may never be transformed into a military objective.

However, such a positive change is devoid of a great part of its meaning in the ICC Statute because it is not complemented by provisions criminalizing conduct by the holder of the property. In other words, if acts against cultural property may be justified where the property has become a military objective, then it is crucial also to criminalize the conduct of those who transformed the very same property into a military objective: the two sides of this coin have to be taken into consideration to enhance the protection of property through criminal sanctions.⁵² The 1954 HC already prohibited any use of protected objects which could expose them to the risk of becoming military objectives,⁵³ and Additional Protocols I and II to the Geneva

⁴⁸ See *Prosecutor v. Strugar*, Judgment, case IT-01-42, Trial Chamber, 31 Jan. 2005, at paras 328–330.

⁴⁹ See, for instance, Art. 27(1) Hague Regulations IV, *supra* note 12.

⁵⁰ As is noted by a distinguished commentator with reference to Art. 53 AP I, *supra* note 10: '[t]he obligation is also stricter than that imposed by the 1954 Hague Convention, since it does not provide for any derogation, even "where military necessity imperatively requires such a waiver". As long as the object concerned is not made into a military objective by those in control – and that is not allowed – no attack is permitted commentary'. See 'Commentary to Article 53', *ICRC Commentary on 1977 Additional Protocol I* (1987), at para. 2072.

⁵¹ The notion of military objective was defined for the first time in Art. 52 (2) of AP I, *supra* note 10, which reads: '[a]ttacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage'.

⁵² At the Hague Diplomatic Conference in 1999, the Working group on Chapter 4 outlined that it introduced these two paragraphs in order to create a 'balance in criminalizing acts of the attacker and the defender, a new development in humanitarian law, which only recently began to take into account the experience of actual conflict in which objects were endangered by being used to protect military objectives': see *Presentation of the results of the Working Group of Chapter 4*, 25 Mar. 1999, Conference doc. HC/1999/INF.5, at 2.

⁵³ '[A]ny use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict': see *supra* note 5, Art. 4(1).

Conventions explicitly proscribe the use of cultural property in support of military efforts.⁵⁴ The latter prohibition forms the essential counterpart for the respect due under the provision prohibiting acts of hostility directed against the protected objects because ‘the use of such objects “in support of the military effort” would in fact be clearly incompatible with the obligation for the adversary to respect them’.⁵⁵

The insertion of a provision penalizing the use of cultural property (in particular the use of cultural property under enhanced protection) or its immediate surroundings in support of military action into Protocol II, among those entailing the possibility for states to exercise universal jurisdiction, is thus to be commended. That having been done, no real room is left for military necessity considerations: either it is possible to punish those who attacked the protected property or those who exposed it to the loss of immunity from attack, thus offering stronger protection to cultural property and bearing a much greater potential in terms of deterrence and prevention.⁵⁶

4 Looking Ahead: Fostering Ratification and Implementation of Protocol II to the HC

It is submitted here that a more specific cultural-value oriented approach to the criminalization of acts against cultural property committed in times of armed conflict would be coherent with the overall developments in the field of international criminal law, constantly evolving into a more sophisticated body of law.

Possible amendments to the ICC Statute though are not currently on the agenda. It is not to be ruled out that changes may be taken into account in the future, and it is certainly worth proposing possible definitions of crimes to be inserted in the Statute.⁵⁷ However, at present, the most important and appropriate tool for pursuing war crimes against cultural property is Protocol II to the 1954 HC. It is thus crucial to promote ratification by a large number of states and to encourage states to adopt implementing legislation which may allow domestic judges to prosecute the most serious crimes against cultural heritage on the basis of jurisdictional criteria provided for in Protocol II. If it is crystal clear that the ICC may not exercise jurisdiction over offences which are not included in the Statute, states may well introduce in their internal legislation crimes which are not included in the ICC Statute and pave the way for future changes to be proposed also with respect to the ICC Statute.

One last remark: the conclusions reached in this article as to merits of a culture-value approach to the definition of war crimes against cultural property are not

⁵⁴ See Arts 85(4)(d) and 53 AP I, and Art. 16 AP II, both *supra* note 10.

⁵⁵ See ‘Commentary to Article 53’, *ICRC Commentary*, *supra* note 50, at para. 2069.

⁵⁶ Similar provisions may become even more crucial in times where US soldiers reportedly admitted to have put snipers in a 1,200 year-old spiral minaret at a Samarra mosque in Iraq (in 2005) to deter insurgents after the streets below became the scene of frequent attacks by such insurgents. See G.S. Corn, ‘Snipers in the Minaret – What Is the Rule? The Law of War and the Protection of Cultural Property: A Complex Equation’, *The Army Lawyer* (July 2005), at 28.

⁵⁷ See Gottlieb, *supra* note 34.

meant in any way to underestimate the human dimension of cultural heritage. On the contrary, it is contended that humanitarian and human rights considerations underlying the protection of cultural property may be better advanced through other international criminal law provisions, in particular through the category of crimes against humanity, as ICTY case law has clearly shown.⁵⁸ On a final note, it is worth mentioning that the category of crimes against humanity could also be useful to prosecute crimes against cultural heritage in peacetime. The crime of persecution, in particular, could play an important role in prosecuting widespread offences against intangible cultural heritage.

⁵⁸ Frulli, *supra* note 25.