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The Protection of Cultural Property under International Criminal Law

A special analysis of the International Criminal Tribunal for the Former Yugoslavia and of the International Criminal Court Case Law

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Abbreviations

ECHR	European Convention on Human Rights
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICC	International Criminal Court

Table of contents

Introduction 4

2. Theoretical Framework 6

3. Cultural Property and Cultural Heritage 12

4. The Protection of Cultural Property under International Criminal Law 18

4.1. As a War Crime 18

4.1.1 In the ICTY Statute and Case Law 18

The General Elements of War Crimes (In the ICTY Statute and also in the ICC Statute) 20

Conditions for the Applicability of Article 3 24

Specific Conditions for the Applicability of Article 3 (d) 25

ICTY Case Law on article 3 (d) – special insight in the *Pavle Strugar* Case 26

4.1.2 In the ICC Statute 29

Article 8 of the ICC Statute 29

4.2 As a Crime Against Humanity 31

4.2.1. In the ICTY Statute 33

4.2.2. In the ICC Statute 34

General Characteristics of Crimes Against Humanity 35

The Specific Requisites of the Crime of Persecution under Article 7 (h) 37

5. Al Mahdi Case 39

Conclusions 44

Bibliography 50

Introduction

The present study intends to be a reflection about the protection of cultural property under International Law. In particular, under International Criminal Law. How is this protection assured? Which dimensions of cultural heritage and which particular objects are under protection? Which are the crimes that directly or indirectly protect cultural property from attacks? What is the most viable and effective legal institute to secure that protection? Can the attacks on cultural property be analyzed as crimes against humanity? What are the advantages of this approach? In particular, how did the International Criminal Tribunal for the former Yugoslavia and the International Criminal Court case law treat this issue?

In order to effectively analyze the protection of cultural property under International Criminal Law it is also important to understand the relationship between this field of law, Humanitarian Law and with Human Rights Law. These three dominions are intrinsically connected. Also, the UNESCO Conventions about the protection of Cultural Property, especially the 1954 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocols, are of great importance in order to understand which are the goals behind the consideration of some property as cultural heritage.

We shall start with clarifying some legal concepts and how they generally relate in order to understand how their intersections build the protection of cultural property.

Secondly, we will analyze the concepts of cultural property and cultural heritage. In particular, which tangible objects are protected and by what means intangible dimensions are also covered by the protection. We will also reflect about who are the people who have a relevant interest on the protection of cultural property and why the term "World Heritage Sites" is used by UNESCO Conventions.

Furthermore, it's of the utmost importance to study the doctrine of war crimes and of crimes against humanity. Firstly, we the focus shall be on war crimes, specifically the crime of attacking protected objects, in the ICTY Statute and its case law, particularly in the *Prossecutor vs Pavle Strugar* case. Afterwards, the elements of this crime in the ICC Statute

shall be analyzed. Moreover, an analysis of the protection of cultural property under the crime against humanity of persecution, both in the ICTY Statute and the ICC Statute.

We shall also examine the sentence of the recent "Al Mahdi Case," the first case in which the war crime of attacking cultural property was applied by the ICC.

Finally, we will engage in using our previous study to conclude about what is protected when referring to cultural property; what is the best legal institute for the protection of cultural property: the war crime of attacking protected objects or the crime against humanity of persecution; how the ICC applied the war crime of attacking protected objects in the Al Mahdi Case and how the ICTY jurisprudence contributed for the development of the court's interpretation of the different elements of the crime; what are the challenges for a better protection of cultural property in the future.

2. Theoretical Framework: International Criminal Law, International Humanitarian Law and Human Rights Law

In order to understand the context of the protection of cultural property under International Law, we must consider three different fields of International Public Law: International Human Rights Law, International Humanitarian Law and International Criminal Law.

International Humanitarian Law includes the "Hague Law" and "Geneva Law". The "Hague Law", based on The Hague Conventions of 1899 and 1907, contains rules about how to conduct a war, while "Geneva Law" is directed to the protection of the victims of war. The first Geneva Conventions were the Conventions of 1864, 1906 and 1929. They were followed by the four Geneva Conventions of 1949 and their two Additional Protocols of 1977. The four conventions are directed towards the protection of people in the event of armed conflicts. They protect specific groups: the wounded and sick, prisoners of war, civilians and shipwrecked.[1]

International Criminal Law is the field of International Law that establishes the rules defining international crimes, international criminal principles and rules about the investigation, prosecution and punishment of these crimes. International Crimes are the ones that protect the interests of the international community as a whole and the values of international law. International Criminal Law's rules provide direct individual responsibility for the practice of international crimes. However, State responsibility also exists when the perpetrators act as State agents. This differs from Human Rights Law: while International Criminal Law establishes direct individual responsibility, Human Rights Law addresses primarily to States. International Criminal Law is a field of International Law. Therefore, it has the same sources of International Law: treaties, statutes of international courts and tribunals, costume and general principles of law. However, there are also National Criminal Law principles that deeply influence International Criminal Law, which explains why International Criminal Law is often considered as a *hybrid*.[2]

1 Zgonec-Rožej, M., *International Criminal Law Manual,* 2010, p. 30
2 Zgonec-Rožej, M., *International Criminal Law Manual,* 2010, p. 25

International Criminal Law is related to Humanitarian Law. On the outset, International Humanitarian Law is one of the most important sources of International Criminal Law, even considered the main source of International Criminal Law. On the other hand, International Criminal Law complements International Humanitarian Law by determining the criminal nature of the violations of the prohibitions under the Geneva Conventions.[3]

Human Rights Law is also inherently related to International Humanitarian Law and to International Criminal Law. The post second World War Geneva Conventions, the Universal Declaration of Human Rights and the European Convention on Human Rights were all reactions to the mass violations of Human Rights committed during the war. The *ad Hoc* Criminal Tribunals, namely the ICTY (International Criminal Tribunal for the former Yugoslavia) and the ICTR (International Criminal Tribunal for Rwanda) were created in order to respond effectively to and punish Human Rights and International Humanitarian Law violations. In their statutes, as in the posterior ICC Statute, some offenses to Human Rights were criminalized. This concedes Human Rights a new level of protection. These three fields have the same genetic basis and their ultimate concern is to secure human dignity. They overlap in some areas, but they ultimately have their own particular scope of application. International Criminal Law criminalizes some of the conducts described in International Humanitarian Law and in Human Rights Law, but there are Human Rights lacking criminal protection and some areas of International Humanitarian Law that are not criminalized.[4] In sum, only serious violations of International Humanitarian Law are converted to war crimes.

The protection of cultural property is assured under International Criminal Law by two means. Firstly, and more directly, through the war crime of attacking protected objects. War crimes is a category of crimes that protects not only people, but also property. For instance, the International Criminal Court Statute provides the crime of attacking civilian property, for cases in which the attacks are not justified by military necessity. It also protects humanitarian aid objects and ultimately undefended villages and towns. The protection of property is complete with the inclusion of the protection of objects and buildings dedicated to culture under the seal of war crimes: "*For the purpose of this Statute, 'war crimes' means: Intentionally directing attacks against buildings dedicated to religion, education, art, science*

3 *Ibid*., p. 30
4 *Ibid*., p. 38, 39

or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives".[5] Secondly, the protection of cultural property can also be assured by the crime against humanity of Persecution. This reality is not obviously identifiable given the nature of crimes against humanity, which protect individual human beings in their personal dimensions. Article 7 (1) (h) of the International Criminal Court Statute states: "*For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: Persecution against any identifiable group or collectivity on political, racial, national, ethnical, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court*".

As we can observe, this is a crime directed towards the protection of people. More specifically, towards the protection of groups with common characteristics under significant grounds such as culture, religion or ethnicity. In cases in which the destruction of property is carried out as a means to persecute people, the crime of Persecution also protects cultural property. This protection is secondary, given that "Persecution" is a crime against people that protects individual human beings in the first place. For instance, if one wants to persecute a group because the people that belong to that group are muslims, shelling the mosque that they usually attend is an act of persecution. It violates their freedom of religion, which is a fundamental right, and it is an act of discrimination, given that they are being targeted because of their religion. This complies with the provision of article 7 of the ICC that provides that *"'Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity*."

As we have noted before, crimes against humanity are usually representative of violations against people's basic human rights: right to life, freedom of movement and sexual freedom (right to liberty), prohibition of torture, right to a fair trial, right to physical integrity, amongst others. War Crimes also protect basic human rights but its' focus is mainly on attacks and how they are conducted during a war situation. The distinction between these two types of crimes ends up being artificial, and therefore subject to some overlapping situations.

5 Rome Statute of the International Criminal Court, Article 8 (e) (iv)

In order to illustrate this reality, we shall go through the general connection between war crimes and crimes against humanity. The notion of crimes against humanity first appeared within the Charter of the Nuremberg International Military Tribunal of 1949. It is important to note that the notion of protection of civilians in time of war had already been developed under international law in such a way that the doctrine identified this principle as being part of the *jus cogens*, the set of binding principles beyond the will of the subjects of International Law.[6] The protection associated to the humanity concept had its first expression on the Preamble of the 1907 Hague Convention, under the designation of "the laws of humanity". Additional Protocols I and II to the Geneva conventions of 1949 managed to unify the protection under humanitarian law and the laws of regulation of armed conflicts. The category of crimes against humanity, and particularly, its distinction from the concept of war crimes, introduced by the Charter, was deeply influenced by that division and the main goal behind both areas of protection, which ends up being the protection of Human Rights, both in a context of peace and also indirectly under a fair way of conducting hostilities in the context of war. The notion of crimes against humanity arose from the necessity of covering offenses to human rights that weren't yet covered by the narrow scope of war crimes. Besides the nature of the offense, the impossibility of application of these crimes was also related to the specific characteristics of the conflict and to the people protected. These crimes were so offensive to the basic nature of the human being that could not stay unpunished simply because there was not, at the time, a positive legal institute that covered them.

The essential genetic difference between crimes against humanity and war crimes in the Charter of the Nuremberg International Military Tribunal is that crimes against humanity cover the acts committed against nationals of the same state of the perpetrator, whilst war crimes only protect nationals from another State. The only characteristic necessary in order to be a protected person under this provision is humanity. The United Nations War Crimes Commission established that Crimes against Humanity are applicable in times of peace, under determined circumstances.

As we have affirmed, some crimes against humanity and war crimes overlap when the offense also constitutes a violation of the laws and customs of war. When this overlapping occurs, the war crime is applied, meaning that crimes against humanity are only applicable

6 Miranda J., *Curso de Direito Internacional Público,* Lisboa: Princípia, 2012, p. 117

when the conduct does not constitute a violation of the laws of war. Crimes against humanity are analogous to war crimes and also represent its extension.[7]

Throughout our study, we shall be able to develop the several elements of the crime against humanity of persecution. But how is it related to the protection of cultural property in the first place? We considered that crimes against humanity have a more intimate relationship with human rights when compared to war crimes. Which human rights and whose human rights are protected when the different legal norms establish the protection of cultural property?

In our opinion, the main human rights related to the protection of cultural property/cultural heritage are the freedom of thought, conscience and religion (article 9 of the European Convention on Human Rights) and the prohibition of discrimination (article 14 of the ECHR). While explaining the connection between the crime of persecution and the protection of cultural property, we affirmed that persecution is an act of discrimination. As we will be able to study further, one of the elements of the crime of persecution is the discriminatory intent. The deprivation of fundamental rights is carried out because of the characteristics of the targeted group. They are treated differently from the way they would be treated if they did not possess those characteristics. When cultural property is destroyed as a way to persecute people whose characteristics (*v.g.,* religion, race, nationality) are intimately related to that property, it represents a violation of the prohibition of discrimination.

As we will be able to observe, the protection of cultural property is inherently linked to the characteristics of that property that turn it into a site or object worthy of protection. These characteristics are always related to the identity of a population and, ultimately, to the identity of all humankind, since the preservation of these sites is key in understanding history and this understanding is a common interest of every individual, regardless of religion, nationality, race or beliefs. That is why the protection of cultural property in general is so important, but also important specifically under the crime against humanity of persecution, applied to the cases in which the destruction of cultural property is carried out with a discriminatory intent. This destruction represents a direct violation of the human rights of the people that attend those protected sites and ultimately a violation of the human rights

7 Bassiouni, M.C., *Crimes Against Humanity in International Criminal Law,* Netherlands: Kluwer Academic Publishers, 1992, p. 147-192

(principally, the prohibition of discrimination and the freedom of thought and religion) of all mankind.

Prosecuting the destruction of cultural property under the crime of attacking protected objects is a way of protecting cultural property that is related to the meaning of that conduct within the conduction of hostilities. Thus, the interest of the human race in the preservation of the object is not easily and directly reflected in the violation of a human right, but in the destruction of an object itself. As we have seen, there are human rights violations in these cases. However, it can be said that here the protection is made in a more objective way than under the crime of persecution, which demands necessarily a subjective dimension, a substrate of people whose fundamental rights have been concretely violated, and also a discriminatory intent. We will further analyze these aspects throughout our study.

3. Cultural Property and Cultural Heritage

The notion of cultural heritage has its' origins in the Renaissance period, when the concern for protecting works of art and monuments first arose. In international law, the 1907 Hague Regulations concerning the Laws and Customs of War on Land were the first instruments to protect cultural property, essentially by protecting monuments.[8] After that, UNESCO took a big step towards establishing a more complete level of protection of Cultural Heritage by creating the UNESCO 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict. More instruments followed, UNESCO Recommendations[9] and Conventions (from 1970 forward) regarding the protection of cultural and also natural heritage.[10]

There is no generally accepted definition of the concept of "cultural heritage" and "cultural property". At the beginning, we must notice the particular difficulty of having two concepts deeply interlinked and referring to the same reality but also having some specific individual *nuances*. Another difficulty on defining a legal term is the circumstance that legal terms often are constructed for a specific legal instrument.[11] The definition of their scope of application depends on the scope intended for that particular treaty or other type of instrument.

When defining cultural heritage, one has to consider that the concept derives from other social sciences, such as anthropology and archaeology. A definition has to be created in dialogue with these sciences, baring in mind that legal definitions have particularities of its own. Reaching a uniting unique concept thus becomes a hard task. Also, the different nature

8 Blake, Janet (2000) On Defining The Cultural Heritage. *The International and Comparative Law Quaterly*. P. 61. Available in: http://www.jstor.org/stable/761578?seq=1#page_scan_tab_contents

9 UNESCO 1956 Recommendation on the conduct of archaeological excavations, 1960 Recommendation concerning the most effective means of rendering museums assessable to everyone, 1962 Recommendation concerning the safeguarding of the beauty and character of landscapes and sites, 1968 Recommendation concerning the preservation of cultural property endangered by public or private works

10 1970 Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property; 1972 Convention concerning the protection of the world Cultural and Natural Heritage

11 Blake, Janet (2000) On Defining The Cultural Heritage. *The International and Comparative Law Quaterly*. P. 63. Available in: http://www.jstor.org/stable/761578?seq=1#page_scan_tab_contents

of the instruments is to be noted, in particular UNESCO's ones: while Conventions have the ability to set universal standards, Recommendations are not binding for parties.[12]

Culture can generally and simplistically be described as the habits and ways of behaving of a certain community. The notion has some similar elements to the ones of costume as a source of law. In order for a costume to be considered as relevant, we must be in the face of a "*settled practice*" and a "*belief that this practice is rendered obligatory by the existence of a rule requiring it*".[13] "Cultural behavior" can also be described as the set of practices that by its repetition in time gain the solidity necessary to reflect a steady characteristic of a group or population. These behaviors are also accompanied by a belief, a conviction that the practices adopted are the right ones or the most socially adequate. These values and beliefs under the behaviors that characterize a culture are reflected on the actions of each individual belonging to the group. Different cultures represent different systems of values expressed in various areas such as language, history, religion, food and way of relating to people. It is very difficult to measure the extent of homogeneity needed in order to consider that the group has a cultural identity that distinguishes it from another one.

Regarding the term "cultural heritage", the 1956 UNESCO's Recommendation on the Conduct of Archaeological Excavations described some elements as being essential in order to reach a definition. It points the idea that the protection of cultural heritage is an interest of all mankind. This concedes to cultural heritage the dignity of a universal good that helps building consensus and cooperation in the international community, therefore promoting respect and mutual understanding. Two important UNESCO instruments use the concept in their tittles: The 1972 Convention concerning the protection of the World Cultural and Natural Heritage and the 1972 Recommendation concerning the Protection, at a National Level, of the Cultural and Natural Heritage. It is to note that both of them deal not only with Cultural Heritage, but also with Natural Heritage. They set a new way of relating these two realities as resources which should be preserved in an equal way for future generations.[14]

The term "cultural property" seems to cover the same realities as the term "cultural heritage". However, in some cases, it is considered as a sub-group within the second. Article

12 *Ibid.,* p. 64

13 Zgonec-Rožej, M., *International Criminal Law Manual,* 2010, p. 32

14 Blake, Janet (2000) On Defining The Cultural Heritage. *The International and Comparative Law Quaterly*. P. 67. Available in: http://www.jstor.org/stable/761578?seq=1#page_scan_tab_contents

1 of the Hague Convention of 1954 provides the following definition of the term cultural property: "*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*". This suggests that cultural property is contained on the broader concept of cultural heritage, being one of its dimensions.

The 1978 UNESCO Recommendation for the protection of Movable Cultural Property provides a definition of cultural property: "*movable property shall be taken to mean all movable objects which are the expression and testimony of human creation or of the evolution of nature and which are of archaeological, historical, artistic, scientific or of technical value and interest...*". This also alludes to the relationship between cultural property and its meaning within cultural heritage.

Janet Blake notices that "property" may not be the best word to describe the reality that is under protection. Property is a legal concept imported from other areas of law, namely areas within Private Law. It is related to *ownership*. It can not be said that all humans "own" cultural property or cultural objects. Ownership is a necessarily individualistic or at least particular concept, meaning that it can never represent a *general* reality. Also, property represents a concept that is not broad enough to contain every reality that can be considered as cultural heritage.[15]

Cultural heritage covers two types of elements: tangible and intangible. The tangible elements include "*monuments and complexes of buildings, sites of archaeological or historical significance, ancient works of art (including rock carvings and cave paintings), ethnographic items, places associated with the development of a technology or industry, landscapes and topographical features, grave sites, sacred places and ritual sites, natural features endowed with special cultural significance to a people…"* (Blake, 2000). The elements of intangible culture include "*the know-how related to a particular type or ship-building, oral poetry or musical traditions, ceremonial and ritual traditions, aspects of the*

15 *Ibid*., p. 65, 66

way of life of certain societies and the special relationship between certain peoples and the land they inhabit."[16]

The 1968 UNESCO Recommendation concerning the preservation of cultural property endangered by public or private works also seems to include the intangible cultural property element on its preamble: "*...the product and witness of the different traditions and of the spiritual achievements of the past and thus is an essential element in the personality of the peoples in the world*".

Cultural heritage is considered to be a broader concept that can include the intangible elements referred above, given that the concept of "heritage" includes the language, ideas, values and beliefs of a community. On the first legal norms about cultural heritage and property, these intangible elements were not considered. However, as we were able to see, some efforts of UNESCO towards the extension of the concept in order to cover all realities can be noticed in more recent instruments.[17] One of the texts from the 1995 Helsinki Conference of Ministers Responsible for Cultural Heritage states that "*the relationship that must exist between the cultural heritage and the natural and social environment to which it belongs is underestimated. Lastly, being based on archaeological heritage, these definitions focus on the physical side, completely ignoring the question of its function in contemporary society*."[18] Other document elaborated in this conference states that "*In a wide sense, the concept of the cultural heritage covers all the manifestations and messages of intellectual activity in our environment. These messages are passed on from generation to generation through learning, intellectual quest and insights*."[19]

However, some reservations must be kept in mind when we consider the inclusion of the intangible dimensions into the scope of protection. Culture heritage has to necessarily be a *narrower* concept than culture, in order to prevent it from some critics that are often made about the concept of culture, sometimes considered as a *totalizing* concept: *"...it is a totalizing*

16 *Ibid*., p.66

17 *Ibid*., p. 71-73

18 IVth European Conference of Ministers responsible for the Cultural Heritage, Helsinki, 30-31 May 1995, Docs. MPC – 4(96)1 rev. to MPC – 4 (96)15., *apud* Blake, Janet (2000) On Defining The Cultural Heritage. *The International and Comparative Law Quaterly*. P. 73. Available in: http://www.jstor.org/stable/761578?seq=1#page_scan_tab_contents

19 *Cultural Heritage – a Key to the Future* (Strasbourg, 1996) Doc. MPC-4(96)7 p.1., *apud* Blake, Janet (2000) On Defining The Cultural Heritage. *The International and Comparative Law Quaterly*. P.73. Available in: http://www.jstor.org/stable/761578?seq=1#page_scan_tab_contents

concept because everything becomes, or is considered, culture. There is material culture, symbolic culture, social institutions, patterned behavior, language-as-a-culture, values, beliefs, ideas, ideologies, meanings and so forth. Secondly, nor only is almost everything in a society culture, but the concept is also totalizing because everything in the society is supposed to have the same culture (as in the concept of culture and shared values)...."[20]

The choice of the elements of culture that constitute legally considerable cultural heritage is a political choice made by the different States. This choice is reflected under national and international legislation and defines what should be protected and preserved for the future generations. At an international level, the choice emerges when institutions enforce the defense of cultural heritage by including it among other levels and areas of legal protection. For instance, in 1993, at a summit meeting of the Council of Europe Heads of State, the concern of giving expression to the relationship between human rights and cultural heritage was shown, recognizing the importance of the protection of cultural heritage, in order to contribute to an informed pluralist democracy and for the promotion of the respect for human rights.[21]

Also, regarding human rights and cultural property, professor Eugene Kamenka states that "*...the importance to human beings of the sense of identity, given not so much by material improvement, but by customs and traditions, by historical identification, by religion... is, for most people, essential to their dignity and self-confidence, values that underlie in part the concept of human rights itself*".[22]

Human Rights Law protects some rights related to culture, such as the freedoms of religion, of thought and of conscience, and the prohibition of discrimination. However, there is no right that directly protects cultural heritage. To develop the protection of cultural heritage, the existence of cultural rights is an essential prerequisite, as Professor Lyndel Prott defends.[23] At the Human Rights level, these rights would be considered as group rights. This

20 Sider, G.M., Culture and Class in Anthropology and History (Cambridge University Press, 1986) at p.6, *apud* Blake, Janet (2000) On Defining The Cultural Heritage. *The International and Comparative Law Quaterly*, P. 67. Available in: http://www.jstor.org/stable/761578?seq=1#page_scan_tab_contents

21 Blake, Janet (2000) On Defining The Cultural Heritage. *The International and Comparative Law Quaterly*, P. 73. Available in: http://www.jstor.org/stable/761578?seq=1#page_scan_tab_contents

22 Kamenka, E., *Human Rights and Peoples' Rights,* in Crawford, op. Cot. Supra n.67, pp.127-139 at p. 134 *apud* Blake, Janet (2000) On Defining The Cultural Heritage. *The International and Comparative Law Quaterly*, P. 77. Available in: http://www.jstor.org/stable/761578?seq=1#page_scan_tab_contents

23 Blake, Janet (2000) On Defining The Cultural Heritage. *The International and Comparative Law Quaterly*, P. 77. Available in: http://www.jstor.org/stable/761578?seq=1#page_scan_tab_contents

is an *evolving* notion in international law, and its' development is necessary in order to face the challenges of environment and cultural heritage protection, which can hardly be seen as the right of a single individual. However, it is difficult to define a specific group without using cultural criteria, and it is difficult to define culture without having a group reference.[24] This means that identifying the groups subject to cultural rights is a demanding task.

Janet Blake provides us some common characteristics of cultural heritage. The first one is that culture is seen as something that has to be protected on the behalf of future generations. The second characteristic illustrates the difficulties of the "culture" and "group" concepts' interaction. It is the *linkage* of cultural heritage with group identity. Cultural heritage is "*both a symbol of the cultural identity of a self-identified group, and an essential element in the construction of that group's identity. Finally, it represents not only the physical material elements that represent a population's history, but also and principally the "range of associations that accompany an object or monument and which provide the sense of being part of a group.*" (Blake, 2000)

As we could see, the culture of a specific group or population is intimately related to their identity. Tensions may arise between different groups, especially in cases of aggressive affirmation of identity. This may lead to armed conflicts and to the destruction of cultural symbols and property as an attempt to destroy the very identity of a group.[25] These kind of conflicts, as we will be able to remark, took place in the former Yugoslavia, where crimes against cultural property were committed. These forms of aggressive affirmation of identity show us that most of the times what is under attack is not the property itself, but the intangible element of cultural heritage, the identity of a cultural group.[26]

24 Blake, Janet (2000) On Defining The Cultural Heritage. *The International and Comparative Law Quaterly*, P. 5. Available in: http://www.jstor.org/stable/761578?seq=1#page_scan_tab_contents
25 *Ibid*., p. 84
26 *Ibid*., p. 76

4. The Protection of Cultural Property under International Criminal Law

4.1. As a War Crime

"*What ultimately distinguishes a war crime from a purely domestic offense is that a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed... The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed*."[27]

Cultural heritage is protected not only by UNESCO's Conventions and Recommendations but also under International Criminal Law. The attack on protected objects and sites is considered a war crime. Throughout our study, we will mainly focus on the conditions and elements of application of the crimes regarding cultural property stated in the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia (ICTY) and in the International Criminal Court Statute.

4.1.1 In the ICTY Statute and Case Law

The ICTY is an *ad hoc* court created by the United Nations for the prosecution of the people responsible for the war crimes committed on the territory of the countries part of the former Yugoslavia.[28] The Court was established by the 827 UN Security Council Resolution of May 1993. Both the ICTY and the ICTR (International Criminal Tribunal for Rwanda) were established on behalf of the entire international community and are considered the first international tribunals for the prosecution of persons responsible for violations of international humanitarian law and international human rights law. During the disintegration of the countries part of the former Yugoslavia there were massive human rights violations

27 *Prosecutor* v. *Kunarac*, IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2002, para. 58. Available in: http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf

28 Toman, Jiří (2009) 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, *World Heritage Series,* p. 736, Available in: http://unesdoc.unesco.org/images/0018/001864/186496e.pdf

committed. Attacks were carried out against the population and on cultural property, creating a long trail of destruction.[29]

The Commission of Experts, an organ established by the United Nations to investigate the situation in the former Yugoslavia and the information submitted by the States and by International Humanitarian Organizations about the human rights violations taking place there, noticed that: "*The Commission has received extensive information on destruction of cultural property, but it was not in a position to investigate all these allegations... In the autumn of 1991, the region of Dubrovnik was surrounded and besieged by the Yugoslav National Army. After a few weeks, Dubrovnik itself was cut off by land and sea by the forces of the former Yugoslavia. This situation continued up to the autumn of 1992, when the district of Dubrovnik was recognized as forming part of the Republic of Croatia. The military occupation of the district of Dubrovnik captured international attention because of the cultural and historical significance of the region and the town. Dubrovnik is now known as an old town which has suffered great damage as a result of the Serbian attacks. In 1979, the old town had been included in UNESCO's list of the world's cultural heritage... The shelling was selective and deliberately aimed at the buildings in the old town and there is no doubt that the destruction of cultural property was intentional... According to estimates, 55.9 per cent of the buildings of the old town were affected, either by fires or by damage to the structures and special elements or to the facades and roofs. Thus, in respect of the statute of the International Tribunal, the offenses in Dubrovnik can be said to concern extensive destruction and appropriation of property not justified by military necessity and seizure or destruction and damage to religious institutions dedicated to charity, education, the arts and sciences as well as historic monuments and artistic and scientific works... The concept of a military objective should also be considered in this connection in order to shed light on the crimes committed. Indeed, it seems quite clear that this destruction of cultural property did not in any way contribute to the military action and could in no way be considered necessary in terms of the military objectives pursued. Nor is there any way that the perpetrators of these crimes can claim to have been utilizing the monuments for military purposes. In the Commission's view, other concepts in addition to military objectives should be applied: the concepts of undefended place or object, of proportionality and of neutrality*."[30]

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29 Aksar, Y., *Implementing International Humanitarian Law*, London: Routledge, 2004, p. 8, 9

30 United Nations Security Council, S/1994/674 - 27 May 1994. *Final Report of the Commission of Experts.* Established Pursuant to Security Council Resolution 780 (1992). http://www.his. com/~twarrick/commxyu1.htm.... parts J and K of the Report *abed* Toman, Jiří (2009) Cultural Property in War:

The General Elements of War Crimes (in the ICTY Statute and also in the ICC Statute)

The elements of war crimes are divided into *general* elements and elements of a *specific* crime provision. They can be physical or mental. All war crimes are intimately related to the humanitarian law provision they are based in.

The "Tadić Case" is one of the most important cases decided under the jurisdiction of the ICTY, since it was the first trial held before the court, on 7 May 1996. This trial represented the first time international humanitarian law was applied and the interpretation of the elements of the different crimes charged is therefore an importante guideline for the following cases before the Court. Duško Tadić was charged with the crimes against humanity of inhuman treatment and persecution. He was also charged for cruel treatment as a violation of the laws and customs of war, and for murder and wilful killing.

The first general element of war crimes is the existence of an armed conflict. The Appeals Chamber on the *Prossecutor v. Tadić Case* defined this concept by explaining that "*an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State...".* International humanitarian law is applicable to that conflict since it starts and until the cessation of hostilities.

Not an element but a characteristic of the conflict is its internationality. The conflict can be of an international or non international nature. The international humanitarian law provision about internal conflicts is the Common article 3 to the Geneva Conventions. It states that: "*In case of armed conflict not of an international character occurring in the territory of the High Contracting Parties, each Party of the conflict shall be bound to apply, as a minimum, the following provisions:…".* However, this disposition does not explain when we have an internal conflict in hands. Consequently, it leaves space for arbitrary interpretations of the concept. Nevertheless, Additional Protocol II to the Geneva

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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. *World Heritage Series.* p. 740, Available in: http://unesdoc.unesco.org/images/0018/001864/186496e.pdf

Conventions, in its article 1 (2), provides that it "*shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts*".[31]

An internal conflict would exist whenever there is protracted armed violence between governmental authorities and organized armed groups or between such groups within a State, and when that armed violence does not constitute situations of internal disturbances and tensions. According to the Trial Chamber opinion in the "Tadić Case", to know if an internal conflict fits within the scope of Common Article 3, we need to fulfill two requirements: (i) the intensity of the conflict and (ii) the military organization of the parties. This follows the distinction made in article 1(2) of the Additional Protocol II to the Geneva Conventions and leaves outside the scope of the article every minor insurrection, banditry or terrorist activities.[32] Article 8 (2) f of the ICC Statute provides similar criteria from the ones set in article 1(2) of the Additional Protocol II and on "Tadić Case". The article provides that "*paragraph (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups*".

The second element of war crimes is the nexus between the acts of the accused and the armed conflict. There must exist a clear link between the criminal act and the armed conflict. The Appeals Chamber in the "Tadić Case" interpreted this article by stating that the proof of a close relationship between the armed conflict and the alleged crimes is enough for the existence of a relevant nexus. The Trial Chamber concretized how close the link should be: "*It would be sufficient to prove that the crime was committed in the course of or as part of the hostilities in, or occupation of, an area controlled by one of the parties...".*[33] The existence of this link, such as the definition of armed conflict, are both important to distinguish between relevant war crimes and merely domestic crimes.[34] Regarding this matter, the ICTY Appeals Chamber in the "Kunarac Case*"* stated that "*the armed conflict need not have been causal to*

31 Aksar, Y., *Implementing International Humanitarian Law*, London: Routledge, 2004, p. 121, 122

32 *Prosecutor* v. *Tadić,* IT-94-1-T, Judgment, 14 July 1997, Available in: http://www.icty.org/x/cases/tadic/tjug/en/tad-sj970714e.pdf

33 *Prossecutor vs. Tadić*, IT-94-1-T, Opinion and Judgment, 7 May 1997, para. 573

34 Aksar, Y., *Implementing International Humanitarian Law*, London: Routledge, 2004, p. 124

the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed."[35] This supports the idea that the armed conflict has to be the determinant surrounding of the commission of the crime, however not its direct cause.

The perpetrator can be a member of the military or a civilian. According to the ICC Elements of Crimes, the perpetrator must be aware of the existence of the factual circumstances correspondent to the legal notion of armed conflict.[36]

The *victim* and *object* of the crime are also an element of war crimes. The Geneva Conventions set the conditions under which a person or property are protected under International Humanitarian Law. Also, some crimes define the particularities of the people or the property affected by the offense, such as article 8 (e) (iv) of the ICC, the article concerning the attack on cultural property in the course of a non international conflict.[37]

The *seriousness of the violation* of international humanitarian law is also a requisite for the international Courts and tribunals to have jurisdiction over the offense committed. The ICC Statute provides a list of the crimes considered serious, which includes grave breaches of the Geneva Conventions of 1949, serious violations of the laws or customs applicable in international and non international armed conflicts, and serious breaches of common Article 3. Differently from Crimes against Humanity, war crimes can be constituted by one isolated act within the context of an armed conflict, therefore not having to be a part of a widespread or systematic attack.[38]

The mental element is also common to both the ICTY and ICC War Crimes provisions. The perpetrator must have the *intent* of committing the crime. This means that he has to be aware of the factual elements of the crime and has to want them verified because of his action. This element is defined in article 30 of the ICC Statute and is constituted by knowledge and intent. Article 30 States that: "*2 - For the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b)In relation to a*

35 [35] *Prossecutor vs. Kunarac*, IT-96-23& IT-96-23/1-A, Appeals Judgment, 12 June 2002, para. 58

36 See: eg: article 8(2)(a)(i), War crime of wilful killing, p. 14–15, requiring under para (5) that "the perpetrator was aware of factual circumstances that established the existence of an armed conflict".

37 Zgonec-Rožej, M., *International Criminal Law Manual,* 2010, p. 109

38 *Ibid*., p. 110

consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events; 3 - For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly."

War crimes, on The ICTY Statute, are divided into the Grave Breaches System and the Violations of the Laws or Customs of War. The difference between the two is that the Grave Breaches System imposes an obligation on State parties to the Geneva Conventions of 1949 to prosecute or extradite people responsible for violations of the provisions of the texts. In its' article 2, the ICTY statute establishes the Grave Breaches System. Article 2 (d) enshrines the crime of "*extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly*". This article was not applied by the court in the cases of destruction of cultural property as it provides protection to property in general, while article 3 (d) provides a specific provision, protecting cultural property in particular: "*seizure of, destruction or willful damage of institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and sciences*".

A case in which the clarification of this distinction was important is the *Prossector v. Dario Kordić and Mario Čerkez case*. Dario Kordić was the the Vice-President of the Presidency of the Croatian Community of Herceg-Bosna after its foundation on 18 November 1991 and continued serving as Vice-President when the Herceg-Bosna turned itself into the Croatian Republic of Herceg-Bosna ("HR H-B") in August 1993. Mario Čerkez was a military man and the commandant of the Viteška Brigade. They were charged for the persecution of Bosnian Muslims, for the attack of civilian property not justified by military necessity, for wilful killing, murder and inhuman treatment, imprisonment and inhuman treatment of Bosnian Muslims, for the taking of hostages and the use of human shields, for the destruction and plunder of Bosnian Muslim property and for the destruction of institutions dedicated to religion or education.

When explaining the elements of the crimes, specifically the elements of the crime under article 3 (d), the Trial Chamber in the *Prossecutor vs. Kordić Case* notes that the scope

of article 3 (d) overlaps at some point the scope of the attack on civilian objects in general. This overlapping is solved by considering that article 3 (d) is *lex specialis*, intentionally directed only to the protection of cultural property.[39] Another important note on Article 3 is that it applies to international and non international conflicts, whilst article 2 only applies to international situations, meaning that article 3 covers more situations than article 2.[40] It covers the violations of humanitarian law that do not belong within the scope of article 2, and also of articles 4 and 5.

Conditions for the Applicability of Article 3

First, the action carried out must constitute an infringement of a rule of international humanitarian law. Secondly, the rule violated must be customary in nature, or be part of an applicable treaty (the treaty must be binding for the parties on the time of the alleged offense and must not be in conflict or derogated from peremptory norms of international law). This rules include violations of Hague Law, non-grave breaches of the Geneva Conventions, violations of Common Article 3 of the Geneva Conventions, and also violations of customary law.

Thirdly, the violation must be serious, meaning that it must constitute a breach of a rule protecting important values. The breach must involve severe consequences for the victim.

Finally, the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[41]

Another particularity of the application of this article – however not a condition in the rigorous sense of the term – is that this article applies to international and also to internal conflicts.[42]

39 *Prossecutor vs. Kordić*, IT-95-14/2-T, Judgment, 26 February 2001, para. 361. Available in: http://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf

40 Toman, Jiří (2009) 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, *World Heritage Series,* p. 744, Available in: http://unesdoc.unesco.org/images/0018/001864/186496e.pdf

41 Zgonec-Rožej, M., *International Criminal Law Manual,* 2010, p. 96

42 *Prosecutor* v. *Tadić,* IT-94-1-T, Appeals Chamber Judgment, 15 July 1999, para. 94. Available in: http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf

Specific Conditions for the Applicability of Article 3 (d)

The case law of the ICTY helped in constructing and interpreting the elements of the crime of destruction of cultural property stated on article 3 (d).

The first element is the quality of the objects under attack. These objects must be "*institutions which may clearly be identified as dedicated to religion or education and which were not being used for military purposes at the time of the acts*", as explained by the Trial Chamber on the *Prosecutor v. Blaškić Case*. Tihomir Blaškić was a Croatian general who was convicted on March 2000 for the destruction of institutions dedicated to religion and education in 12 towns and villages located in the Lašva Valley in the central part of Bosnia and Herzegovina and for other offences that included violations of the law and customs of war under Article 3 of the Statute. This case is important for the development of the elements of the crime of attacking protected objects and also of the crime against humanity of persecution.

The second element is the *intention* of the perpetrator to attack specifically those sites with the characteristics described.

A third element is also specifically mentioned by the Trial Chamber in the "Blaškić Case", when the Chamber refers that the institutions "*must not have been in the immediate vicinity of military objectives*".[43] [44]

The *Mladen Naletilić and Vinko Martinović Case* is also helpful in establishing the different elements of article 3 (d). In this case, the two defendants were convicted for ordering the destruction of a mosque in the village of Dosanj in Croatia. Here, the Trial Chamber considers the element of the quality of the objects and adds the requirement of the non usage for military purposes of the property destroyed. However, it rejects that the property needs to

43 Toman, Jiří (2009) 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, *World Heritage Series,* p. 746, Available in: http://unesdoc.unesco.org/images/0018/001864/186496e.pdf

44 *Prosecutor v. Blaškić*, IT-95-14-PT, Judgment, 3 March 2000, para. 185. Available in: http://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf

be outside the immediate vicinity of military objectives in order for its destruction to be punished.[45]

ICTY Case Law on article 3 (d) – Special Insight in the *Pavle Strugar* Case

The *Miodrag Jokić* and *Pavle Strugar* cases are about the shelling of Dubrovnik's Old Town. The damages caused by the shelling on cultural property are well described in the United Nations' Commission of Experts report. The particularity of the Old Town is that it has been declared as an UNESCO World Cultural Heritage site in 1974.[46]

The Trial Chamber explained that article 3 (d) is based on articles 27 and 56 of the Hague Regulations (annexed to the 1907 Fourth Hague Convention Respecting the Laws and Customs of War and Land).[47] The most important source of protection of cultural heritage in the event of armed conflict considered by the Chamber was the 1954 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict.[48] The preamble of the 1972 UNESCO World Heritage Convention, in particular when it states that the "*deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world*" is also an important instrument, as are articles 53 of the 1977 Additional Protocol I and Article 16 of the Additional Protocol II to the Geneva Conventions of 1949, both cited on the decisions.[49] Pavle Strugar was the commander of the Second Operational Group of the Yugoslav People's Army, which was responsible for the shelling of the Old Town. Miodrag Jokić was the commander of the Yugoslav Navy at the time and pleaded guilty for the shelling of Dubrovnik.

45 *Prosecutor* v. *Naletilić and Martinović*, IT-98-34-T, Judgment, 31 March 2003 para. 603, 604. Available in: http://www.icty.org/x/cases/naletilic_martinovic/tjug/en/nal-tj030331-e.pdf

46 *Prosecutor* v. *Jokić*, IT-01-42/1-S, Sentencing Judgment, 18 March 2004. Available in: http://www.icty.org/x/cases/miodrag_jokic/tjug/en/jok-sj040318e.pdf

47 *Prossecutor v. Pavle Strugar,* IT-01-42-T, Judgment, 31 January 2005, para. 228. Available in: http://www.icty.org/x/cases/strugar/tjug/en/str-tj050131e.pdf

48 *Prosecutor v. Jokić*, IT-01-42/1-A, 30 August 2005. para 48 *aped* Toman, Jiří (2009) 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, *World Heritage Series,* Available in: http://unesdoc.unesco.org/images/0018/001864/186496e.pdf

49 *Prosecutor v. Jokić*, IT-01-42/1-A, 30 August 2005. para 50;

When analyzing the requisites for the application of article 3 that were defined in the "Tadić Case", the Chamber starts with identifying the sources of this provision under international customary and treaty law: article 27 and 56 of the Hague Regulations of 1907, the Hague Convention of 1954, Article 53 of Additional Protocol I and Article 16 of Additional Protocol II. The type of cultural property protected by these instruments is essentially the same. This fulfills the requisite that states that the rule violated must be customary in nature of part of an applicable treaty. The requisite that the conduct must constitute an infringement of a rule of international humanitarian law is also verified because of the breaching of article 27 and 56 of theHague Regulations of 1907.

According to the Chamber, and also to the position in the "Tadić Case", article 3 applies to international and to non international armed conflicts.[50] The third "Tadić Case" condition is that the violation must be serious, and that this gravity is measured by the analysis of the consequences for the victims. To illustrate this, the Chamber quotes article 1 (a) of the 1954 Hague Convention, demonstrating that every offense towards cultural property is an offense of a great scale, since it affects the interests of "every people". The victim in these cases is not understood as an individual but as a broader concept, the amount of all individuals. This concept of victim is related to the very nature of the object protected. Although we can not easily measure the consequences for the victim since the victim is not an individual person, the attack on cultural property is always considered serious. The Chamber mentions the analogy made in the *Jokić* decision: "*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* [of Dubrovnik]." The third requisite is therefore verified.[51] The fourth *Tadić* condition states that the violation of the rule must entail, under customary or conventional law, the individual responsibility of the perpetrator. To illustrate that that is the case, the Chamber noticed that article 28 of the 1954 Hague Convention states that the contracting parties must prosecute and impose penal or disciplinary responsibility on the people which actions constitute breaches of

50 *Prossecutor v. Pavle Strugar,* IT-01-42-T, Judgment, 31 January 2005, para. 229, 230

51 *Prossecutor v. Pavle Strugar,* IT-01-42-T, Judgment, 31 January 2005, para. 231, 233. Available in: http://www.icty.org/x/cases/strugar/tjug/en/str-tj050131e.pdf

the convention. The Chamber also notices that the previous case law of the ICTY shows us that individuals have been convicted for the crime of article 3(d).[52]

As we have seen, the Trial Chamber defined the elements of the crime under article 3 (d) having on the basis of its' analysis article 27 of the Hague Regulations of 1907, the Hague Convention of 1954, Article 53 of Additional Protocol I and Article 16 of Additional Protocol II.

Firstly, the property attacked must be considered as cultural property under the vision of these instruments. Although the concept is differently defined in each provision, the general idea of protection of cultural heritage is the same. Secondly, only the attacks that result in *actual destruction* of cultural property must be considered as a crime. This destruction has to be a direct result of the conduct of attacking the protected property. The third element sustains that the property under attack must not have been used for military purposes when the attack took place. The Chamber affirms that the "*military purposes exception*" is sustained by the ICTY jurisprudence, by The Hague Regulations of 1907 and by the Additional Protocols.

Regarding the proximity of a military installation or of military activities to the cultural property attacked, the Chamber considers that what matters is not the location, but rather the *use* given to the property. Thus, it follows the view defended on the "Naletilić Case" (to the detriment of the view defended in the "Blaškić Case"), which considers that cultural property must not lose its protection simply because it is located near military installations. However, in these cases, the Chamber considers that the level of protection must be different given that the attack was directed not against cultural property, but against the military installation.

The last element, known as the *mens rea* element, was also explored in the "Pavle Strugar Case*"*. The Chamber confirmed the view defended in other cases and stated that this element reflects the direct intent of the alleged perpetrator to destroy the cultural property in question with his action.[53]

52 *Ibid*., para. 233
53 *Ibid*., para 303-311

4.1.2 In the ICC Statute

After the Trials of the Second World War (Nuremberg and Tokyo) in 1948, the ILC (International Law Commission) was assigned to prepare the ICC Statute, as part of the process of establishing a permanent International Criminal Court. The first Draft Statute for an ICC was produced in 1951 and revised in 1953, and the final version was adopted in 1994. This draft dealt only with procedural and organizational subjects, leaving the notions of crimes and the associated legal principles to the Code of Crimes adopted in 1996 by the court.

These two documents were the basis for the definitive ICC Statute, which was adopted by the UN General Assembly on 17 July 1998. By 2000, the Preparatory Commission, established by the UN Assembly, had prepared the ICC Elements of Crimes. The ICC Statute entered into force on 1 July 2002. This is a permanent criminal court that exercises its jurisdiction over nationals of the State parties (*ratione personae*), and over crimes committed on the territory of the State parties (*ratione loci*). It applies to crimes committed after its entry into force (1 July 2002). The material scope (*ratione materiae*) of the Statute is constituted by genocide, crimes against humanity, war crimes and aggression.[54]

Article 8 of the ICC Statute

Article 8 of the ICC Statute provides a long list of crimes defined as "war crimes", as part of a considerable effort to cover all the infringements of international law that can be contained within its scope. There is no innovation in this article in terms of creating new crimes from those of previous sources of international law. It is well understandable, considering that the efforts in its edification were directed not for innovation, but to effectively compile international customary law infringements. Some provisions of previous instruments were left outside the article due to the different opinions about its customary law status.

However, in its various points, article 8 of the ICC statute only presents a non-exhaustive enumeration of crimes, which means that crimes that are not described in this

54 Zgonec-Rožej, M., *International Criminal Law Manual,* 2010, p. 61-64

article can also be considered as war crimes within its scope - as long as it can be proven that they constitute serious violations of the laws and customs applicable in the context of armed conflict –, since the article clearly states "namely". The enumerative nature of the crimes described in article 8 is an aspect of similarity with article 3 of the ICTY. This article also states that the violations of the laws and customs of war that fit within the scope of the article must not be limited to those expressly described in its different points. The protection of "protected objects" is secured for both international (article 8 b (ix)) and non international (article 8 e (iv)) armed conflicts.

Specifically, article 8 e) iv) states that "*For the purpose of this Statute, 'war crimes' means: (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives*.".

In addition to the general elements of a war crime: (existence of an armed conflict and nexus between the conflict and the conduct), article 8 e) iv) establishes its own elements. The first one is the action of the perpetrator: he has to *direct* an attack. The second one is the quality of the object/objects under attack: they have to correspond to the type of objects described in the article. The third one is the intention of the perpetrator to destroy those specific objects with those characteristics.[55] Also, the conduct needs to take place in the context of a conflict not of an international character, and the perpetrator must have been aware of the circumstances that established the existence of the armed conflict.[56] In addition, and according to the ICC Elements of crimes, the site under attack must not be a military objective. The presence of police forces in the protected sites for the purpose of maintaining law and order is not a reason to consider the protected place a military objective. The elements for this crime are the same as the elements for the crime under article 8 b (ix).

The origin of this crime is articles 27 and 56 of the 1907 Hague Regulations. The Hague Convention of 1954 for the Protection of Cultural Property and Additional Protocol II are also regulations that inspired this provision, specially because they apply to internal

55 Zgonec-Rožej, M., International Criminal Law Manual, 2010, p. 128
56 International Criminal Court Elements of Crimes, article 8 e) iv), p. 36

conflicts.[57]Also, article 16 of the Additional Protocol I is an important source for this crime, because it states that "*Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, it is prohibited to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort*."

The objects identified as cultural property lose their protection once they are considered "military objectives". The definition found in article 52 (2) of the Additional Protocol I to the Geneva Conventions establishes when the civilian protected objects lose their protection, explaining the concept of military objective: "*Attacks 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*." This notion of "military objective" is the same whether civil or cultural objects are in the balance and was used for both international and non-international conflicts.[58]

4.2 As a Crime Against Humanity

Another aspect mentioned indirectly in the "Blaškić Case" is the possibility of the falling of cases of destruction of cultural property within the scope of a crime against humanity: the crime of persecution, under article 5(h) of the ICTY Statute. The destruction of buildings considered as cultural property can therefore constitute a means of perpetrating the crime of persecution. Taking a very important step, the Chamber states that "*However, persecution may take forms other than injury to the human person, in particular those acts rendered serious not by their apparent cruelty but by the discrimination they seek to instil within humankind. As put forward by the Prosecutor in the indictment against the accused,*

57 Toman, Jiří (2009) 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, *World Heritage Series,* p. 785, Available in: http://unesdoc.unesco.org/images/0018/001864/186496e.pdf

58 Toman, Jiří (2009) 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, *World Heritage Series,* p. 789, Available in: http://unesdoc.unesco.org/images/0018/001864/186496e.pdf

persecution may thus take the form of confiscation or destruction of private dwellings or businesses, symbolic buildings or means of subsistence belonging to the Muslim population of Bosnia-Herzegovina."[59] This statement clearly explains the connection between the destruction of cultural property and the crime against humanity of persecution.

Considering the attack on civilian property, the Appeals Chamber stated that "*certain types of property whose destruction may not have a severe enough impact on the victim as to constitute a crime against humanity, even if such destruction is perpetrated on discriminatory grounds*".[60] We can observe that in order to consider a conduct as Persecution, the Chamber focuses on the importance of the object for the individual owner. In cases of protection of cultural property, as we were able to grasp by unveiling the concept, there is no "owner" whose "vital asset" has been destroyed. The victims are not single individuals, but *humanity* as a whole and the severe impact of the destruction of cultural property in these cases is not easily measured.

This problem is related to the importance of the intangible aspect of cultural heritage and how it is intrinsically connected to the objects that represent it. Someone who wants to attack a culture on its values and symbols usually attacks the monuments that represent them as a form of discrimination on race, religion or politics. The findings of the chamber on this case did not develop the issue on how the attack on cultural property could be considered as a crime against humanity under this criterion.

The new approach on the nature of the destruction of cultural property, in particular the destruction of religious buildings, as a crime against humanity, was also sustained in the *Prossector v. Dario Kordić and Mario Čerkez case*. In this case, the Chamber stated that the destruction of religious buildings, "*when perpetrated with the requisite discriminatory intent, amounts to an attack on the very religious identity of a people. As such, it manifests a nearly pure expression of the notion of "crimes against humanity", for all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant objects*".[61] The destruction of cultural property is, in this case, not seen as a crime against property but as a

59 *Prosecutor v. Blaškić* case, IT-95-14-A, Judgement, 3 March 2000, para. 227. Available in: http://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf

60 [60] *Prosecutor v. Blaškić*, IT-95-14-A, Judgment, 29 July 2004, para. 146. Available in: http://www.icty.org/x/cases/blaskic/acjug/en/bla-aj040729e.pdf

61 *Prosecutor v. Kordic and Cerkez,* IT-95-14/2-T, Judgment, 26 February 2001, para. 207

crime against persons, even if "persons" is not related to a specific person neither to a specific group, but to all humanity as a whole, being each human individual equally interested in the preservation of the heritage of all mankind.

The ICC Statute also has a provision for the crime of persecution. It is article 7 nr. 1, h) and nr. 2, g) of ICC the Statute, that state that: "*Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court*" ; "*Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity*;"

4.2.1. In the ICTY Statute

Article 5 of the ICTY Statute establishes a list of crimes against humanity. This article states a few requirements for its appliance: the existence of an armed conflict; the direction of the attack towards any civilian population; the discriminatory intent, the *mens rea* requirement, and the acts.

Article 5 h) provides the crime of Persecution on Political, Racial and Religious Grounds. Persecution is a "*form of discrimination that is intended to be and results in an infringement of an individual's fundamental rights. This discrimination must be on specific grounds, namely, race, religion or politics*".[62] The crime includes all kinds of acts that affect one individual's capacity of freely developing their personality, by equally enjoying his basic rights. The elements of this crime are: (i) the existence of a persecutory act or omission, described under the ICTY Statute or in other legal instrument; (ii) the existence of a political, racial or religious discriminatory basis behind that act; and (iii) the denial of a fundamental right.

62 Toman, Jiří (2009) 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, *World Heritage Series,* p. 260, Available in: http://unesdoc.unesco.org/images/0018/001864/186496e.pdf

The ICTY defined "persecution" on the "Judgment of Kupreškić and Others Case": "*the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary and treaty law, reaching the same level of gravity as the other acts prohibited under article 5*"[63].

According to the view defended in the "Blaskic Case", the *Mens Rea* requirement, common to all crimes against humanity but developed in the case of persecution with some particularities, is related to the discriminatory intent of causing harm to human beings because they belong to a determined group based on race, politics, religion, gender, culture or other grounds. It is not necessary to prove that the perpetrator intended to "extinct" that group, but only that the people whose fundamental rights were violated were targeted because the group they belonged to had some specific characteristics. Otherwise, we would fall into the scope of genocide.[64] This vision is corroborated by the Trial Chamber on *Prosecutor v. Kupreškić and Others* case which states that "*In the crime of genocide the criminal intent is to destroy the group or its members; In the crime of persecution the criminal intent is instead to forcibly discriminate against a group or members thereof by grossly and systematically violating their fundamental human rights*".[65]

4.2.2. In the ICC Statute

The ICC Statute defines persecution in a broader manner and introduces the requirement of the connection with another crime within the jurisdiction of the ICC, in order for the crime of persecution to be applicable to a specific event. However, the ICC practice is still guided by the developments of the ICTY case law on the elements of persecution.[66]

63 *Prosecutor v. Kupreskic and Others*, IT-95-16-T, Judgment, 14 January 2000, para. 621
64 Zgonec-Rožej, M., *International Criminal Law Manual,* 2010, p. 158
65 *Prosecutor v. Kupreskic and Others*, IT-95-16-T, Judgment, 14 January 2000, para. 636, 751
66 Aksar, Y., *Implementing International Humanitarian Law*, London: Routledge, 2004

General Characteristics of Crimes Against Humanity

Article 7 (1) of the ICC Statute states that "1. *For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: a) muder; b) extermination; c) Enslavement; d) Deportation or forcible transfer of population; e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; f) Torture; g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; i) Enforced disappearance of persons; j) The crime of apartheid; k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.* "

The general requirements for crimes against humanity under article 7 are: (i) the existence of an attack; (ii) that the attack must be widespread or systematic; (iii) that it must be directed against a civilian population; (iv) that the perpetrator's conduct was part of the widespread or systematic attack; and (v) that the perpetrator was aware of the link between his acts and the widespread or systematic attack.[67]

The first requisite – "*existence of an attack*" – is developed when article 7 (2) a) states that an "*attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 (murder, ...) against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack*". The attack does not have to be connected to an armed conflict and can be a non-violent attack, since the specific use of armed force is not demanded. The element of multiplicity of acts is translated into a repetition of acts that can correspond to breaches of the

67 Zgonec-Rožej, M., *International Criminal Law Manual,* 2010, p. 138

same crime or to breaches of several different crimes under paragraph 1 of article 7. Also, point 3 about article 7 of the ICC Elements of Crimes adds that "*the acts need not constitute a military attack. It is understood that "policy to commit such attack" requires that the State or organization actively promotes or encourages such an attack against a civilian population*". This policy does not need to come from official State bodies, but can also come from non-State organizations such as criminal gangs. However, some ICTY case-law defends that the "policy" element is not necessary in itself, and its' purpose is only to sustain that the attack was widespread or systematic and directed against a civilian population.[68]

The attack must be widespread or systematic. This element is introduced in order to distinguish crimes against humanity from isolated crimes against individuals. The acts that would fall into national jurisdiction are now under the interest of all international community and are therefore persecuted and judged at a superior level. "Widespread" attacks are defined as large-scale ones directed to a great number of victims. "Systematic" attacks are the ones under a consistent level of organization.[69]

Regarding the element "direction to any civilian population", "civilian population" includes not only civilians, but also members of the military forces that are outside combat due to wounds, illness, detention or surrender. The victims of crimes against humanity must be non-combatants under the Geneva Conventions (prisoners of war, wounded, sick and shipwrecked). The expression "any" civilians means that all civilians are under protection, including civilians of the nationality of the State responsible for the attack.[70]

Regarding the "link between the perpetrator's conduct and the attack", the acts must be related to the attack on a civilian population. The offense must not be isolated. As being part of the attack, it can occur in any moment immediately after, before, or during the attack.

About the *Mens Rea* requirement, the perpetrator must be aware of the factual circumstances that correspond to the *facti species* of a crime against humanity. This includes the knowledge of the existence of a widespread or systematic attack towards a civilian population and that his conduct is related to that attack. The specific act of the accused does

68 *Ibid*., p.139
69 *Ibid*., p.140
70 *Ibid.,* p. 158

not have to be directed towards the targeted population, as long as the main attack to which the act is related is. The motives of the perpetrator are irrelevant and do not have to follow the purposes behind the attack in general: it is sufficient that the perpetrator intends to further the act as part of a systematic or widespread attack, he does not have to be aware of the precise details of the plan or policy of the State or organization.[71]

The Specific Requisites of the Crime of Persecution under Article 7 (h)

The crime of persecution is provided by article 7 (1) (h) and article 7 (2) (g) of the Statute: 7 (1) (h): "*Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court"; 7 (2) (g): "persecution means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity*;"

The ICC Elements of crimes describe the elements of Persecution as: "*1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights; 2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such; 3 - Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law; 4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court; 5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population; 6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population."*

71 *Ibid.,*p.142

Element 4 of the crime of Persecution under the ICC Statute contains an additional requisite and an innovation in comparison with the elements of the same crime under the ICTY Statute: It demands that the conduct considered should have a connection with other crime or crimes against humanity or any crime provided by the Statute. This narrows the scope of article 7, by means that acts of discrimination do not fall under its scope unless they are related to other offense. This creates a dependence of the prosecution of this crime on the practice of other crimes, prejudicing its autonomy and creating a doubt about the usefulness of the provision in protecting people from persecutory acts that are unrelated to other crimes against humanity.[72] The requirement of the connection to another crime is merely objective and does not require a *mens rea*.

72 Ibid.,156

5. Al Mahdi Case

On the 17th December 2015, Mr. Ahmad Al Faqi Al Mahdi was charged for the intentional direction of attacks against ten buildings of a religious and historical character in Timbuktu, Mali, the region where he was born, between 30 June 2012 and 11 July 2012. These facts allegedly perpetrated by Mr. Al Mahdi correspond to the crime under the provision of article 8(2)(e)(iv) of the Statute of the ICC, the War Crime of attacking protected property. [73]

The trial was held between the 22nd and 24th August 2016 and the ICC Sentence dates from 27th September 2016.[74] On paragraph 13, the Trial Chamber reproduces the elements given by the ICC Elements of Crimes for the crime under article 8 (e) (iv): the direction of the attack by the perpetrator, the quality of the objects under attack, the perpetrator's intent to attack those objects with the described characteristics, the context of armed conflict and the awareness by the perpetrator of the existence of that armed conflict.

The paragraphs interpreting these elements are the first jurisprudential development on this subject, since Mr. Al Mahdi was the first person being prosecuted under article 8 (e) (iv). At the beginning of the Sentence, the Chamber contextualizes the legal background of this provision. It mentions the 1907 Hague Regulations (article 27 and 56), the Geneva Conventions and their Additional Protocols I and the Second Protocol to the Hague Convention of 1954.[75]

Regarding the element "directing an attack", the Chamber includes in this concept *any* kind of acts of violence. Regarding the moment of the attack, the Chamber considers that the acts of violence can be perpetuated in the conduct of hostilities and also after the object has fallen under the control of an armed group. There is no moment distinction, since the protection of objects with the special characteristics described is the main concern under this provision. Also, international humanitarian law protects these objects in both situations of active battle and out of it. To support this affirmation, the court explains that these cases are different from the cases of crimes that protect persons because on those ones, there is a

73 *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, Judgment and Sentence, 27 September 2016, para. 10. Available in: https://www.icc-cpi.int/CourtRecords/CR2016_07244.PDF
74 *Ibid*., para. 7
75 *Ibid.,* para. 14

distinction between clauses that are applicable during the hostilities or, for instance, after one of the parties has taken control. Article 8 (2)(e)(iv) doesn't distinguish and so, given the importance of the nature of the protected objects and the need to cover both situations, it is applied in all situations, regardless of the exact moment during the hostilities. [76]

Also in paragraph 16, the Chamber makes an interesting observation considering that the ICTY case law is not helpful in order to interpret the element of "directing an attack" because its Statute does not protect cultural property against "attacks", but only against its "destruction or willful damage". In our opinion, this distinction is not correct. There is no determinant difference of legal contexts, since destruction is verified after the occurrence of an attack, which means that these two realities are linked and only happen in different moments.

Concerning the second element described for this crime, Article 8 (e) is applied to conducts connected to armed conflicts not of an international character, that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups. The *facti species* in this case relates to an armed conflict not of an international character that occurred in Mali. The *non* internationality of the conflict in which the conduct was committed is therefore verified. The Chamber considers that the "conduct" described in the provision is the attack on cultural objects, and that this element demands that this conduct has to be only *generally* associated with the non-international armed conflict and not specifically linked to any particular hostilities.[77]

Some explaining is due regarding some of the context that surrounds the charges against Mr. Al Mahdi. In April 2012, two armed groups (Ansar Dine and Al-Qaeda in the Islamic Maghreb) took control of the north of Mali after several episodes of armed violence in the country occurring since January 2012. Mr. Al Mahdi was part of the administration of the region, being the head of the Hesbah, the institution the Court describes as a "morality brigade". Al Mahdi is charged for agreeing to conduct the attack on mausoleums and mosques of Timbuktu on receipt of the instruction of Ag Ghali (the leader of Ansar Dine) and Abou Zeid (the 'Governor' of Timbuktu under the armed groups). The mausoleums and mosques attacked were places of prayer and pilgrimage for the population of Timbuktu. The attack was

76 *Ibid.,* para. 16
77 *Ibid.*, para. 17, 18

carried out between the 30th June 2012 and the 11th July 2012. Ten of the most famous sites in Timbuktu were attacked and destroyed. These sites were dedicated to religion and were also historic monuments, not being military objectives. Nine of them had the status of protected UNESCO World Heritage sites.

Mr. Al Mahdi not only agreed to conduct the attack, but also supervised its execution, collected the means to execute it successfully, was present while the attacks were taking place, giving instructions, and participated himself in the attack of at least 5 sites. During a press interview, Al Mahdi said to journalists: "*I don't know the truth about those saints. We just know that fools [...] come and take sand from those places to get blessed [...]. That's why we consider this campaign as an effort that's exerted in collaboration with the imams [...] We only paid attention to the buildings constructed above the graves in the cemetery, and the tombs that are annexed to the mosques from the outside. [...] As for demolishing these buildings, [...] we think that we've already introduced this matter gradually, as we've spent four months explaining to the people what's right and what's wrong, and now's the time for implementation*".[78] This clearly shows that the intent of these attacks was not only to destroy the physical sites, but also to destroy the intangible element of cultural heritage, materialized in the religious practices, habits and beliefs of the population of Timbuktu. It shows disrespect in form of authoritarian imposition of a vision of what is wrong and what is right.

Following the facts of the case, the Chamber explains the findings on article 8 (2) (e) (iv) of the Statute: Firstly, it is demonstrated that Mr. Al Mahdi was put in charge of the execution of the attack on the 10 mausoleums and mosques. This means that the element "direction of an attack" is therefore verified.

Secondly, the Chamber states that the mausoleums and mosques were qualified as religious buildings and historic monuments, given their role in the life of Timbuktu's population and the fact that nine of them were classified as UNESCO World Heritage sites. Therefore, they have a special meaning by representing international cultural heritage, and the second element of the crime is verified. Mr. Al Mahdi clearly recognized this special quality of the sites in his statements during the attack, expressing contempt for their statute of cultural heritage of mankind.

78 *Ibid*., para 41

The mausoleums and mosques were clearly the object of the attack, given the "*deliberate manner in which the attackers went from one building to the next in a relatively short time period*".

The circumstances of the attack and Al Mahdi's statements demonstrate that he intended these protected buildings to be the object of the attack. This corresponds to the verification of the *Mens Rea* requirement.

The facts occurred during a non-international armed conflict between the Malian Government and two organized armed groups (Ansar Dine and AQIM) – they are considered organized armed groups because they had the kind of military capacity needed to succeed in the removing of the Malian Government of the control of its country and exercise a new form of government for 9 months –.

Also, the perpetrators were aware of the factual circumstances constituting the armed conflict, since they worked with Ansar Dine's organization and lived in Timbuktu.

These are all the elements that constitute the war crime of attacking protected objects and that according to the view of the court are established in this case.

Further up in the sentence, regarding the gravity of the crime, the Chamber affirms that crimes against persons are graver than crimes against property.[79] However, in our point of view, cultural property is more than mere property as it is inherently related to human history and so, even though it is a crime against property, it is also a crime against people, a crime against humanity, this time not seen as against people attributions and prerogatives (human rights, right to life, physical integrity, prohibition of torture, freedom of expression), but rather against the history of humanity as a whole, materialized in buildings and sites, and which preservation matters to every person as it contains part of its own history.

On damage extent, the Chamber notices that all buildings were almost completely destroyed, the attack was planned and lasted at least 10 days. The role of Timbuktu's mausoleums in reflecting the identity of and history of Timbuktu and Islam is also considered, reflecting the importance of these sites being considered cultural heritage of mankind. On paragraph 79, the Chamber clearly points to the intangible aspect of the protection of cultural

79 *Ibid.,* para. 77

property by directly describing the symbolic and emotional value of the sites for the lives of Timbuktu's habitants, considering this also as a relevant element in determining the damage extent.

The motives of the crime are also analyzed and regarded as another element on defining the damage extent. The crime was committed for religious reasons. "*They led a campaign explaining what should and should not be done with the mausoleums. In the end they decided to destroy the sites in order to stop these prohibited practices. The Chamber considers that the discriminatory religious motive invoked for the destruction of the sites is undoubtedly relevant to its assessment of the gravity of the crime*."[80]

80 *Ibid*., para 81

Conclusions

Throughout our study we were able to understand that cultural heritage is more than mere property and that there is a reason why it is protected apart from civilian property through an autonomous war crime and also, under some to be verified circumstances, through the crime against humanity of persecution.

The protection of cultural property is developed in many Conventions, especially under UNESCO's ones. The protection under international criminal law is an important complement to this protection, as it is indispensable in order to secure individual responsibility for attacks on cultural property, therefore also ensuring the most basic and fundamental goal under domestic and international criminal law: prevention.

The ICTY and the ICC Statutes constitute a huge contribution for the materialization of this concern. They are similar in their aim to provide an effective way of implementing international humanitarian law and human rights law through criminalizing some of the prohibitions described primarily in the Geneva Conventions of 1949. Still, there are some differences on how the protection of cultural property is built in these two instruments.

Both instruments require the verification of the same general elements in order to apply the crime of attacking/destroying cultural property. These elements are the existence of an armed conflict and the link between the acts of the accused and the armed conflict.

The requisites of "seriousness of the crime" and the "consequences for the victim" are also common to both prescriptions. The doctrine about article 3 of the ICTY Statute specially demands the infringement of a rule of international humanitarian law. There is no reference like this about the ICC Statute in International Criminal Law Manuals or in the ICC Elements of crimes. However, we are aware that the same requisite is also implicitly present in the infringements of the ICC Statute, since International Humanitarian Law is a very important source of International Criminal Law and, ultimately, the specific provisions that inspired the crimes provided by the ICTY Statute are the same provisions behind the crimes under the jurisdiction of the International Criminal Court.

With regards to the provisions about cultural property, both the ICC Statute and the ICTY one protect objects with the same qualities, require the mental element, or *Mens Rea*, and protect cultural property when it is not being used for military purposes. Article 3 (d) of the ICTY Statute, regarding the destruction of cultural property, is applicable to both

international and non international conflicts, while article 8(e) (iv) of the ICC Statute is applicable only to internal situations. This is a consequence of the legislative strategy underneath article 8, that covers the attacks on cultural property that occur in the context of international conflicts in its article 8 (b) (ix). In sum, these two provisions are very similar. Thus, it is reasonable to consider the findings of ICTY case law on the elements of this crime as a reliable source of guidelines for the ICC jurisprudence.

We have observed, while studying paragraph 16 of the Al Mahdi Sentence, that the Chamber observes that the ICTY Case Law is not helpful in order to interpret the element of "directing an attack" because its' Statute does not protect cultural property against "attacks", but only its' "destruction or willful damage". We have expressed that in our belief this distinction is not correct. There is no determinant difference of legal contexts, since destruction is verified after the occurrence of an attack, which means that these two realities are linked and only happen in different moments. However, it is recognizable that the term "attack" covers a bigger range of realities than the term "destruction or wilful damage" given that there are attacks that can not result in the destruction of property and still be prosecuted. Still, it is not an argument strong enough to conclude that the ICTY case-law is not of useful guidance for the first application of the crime of attacking protected objects by the International Criminal Court. We reinforce that since the elements of the crime in both statutes are similar, ICTY Case-Law is a good guideline on how to interpret them.

The destruction of cultural property can also be considered as a crime against humanity. The crime of persecution, as we analyzed, ends up protecting cultural property when these sites are attacked with a discriminatory intent, by protecting the significance and meaning of that property for a person or a group of people. When the persecution is engaged on discriminatory grounds like race, religion, nationality, ethnicity or others, what is really under attack are these characteristics that the people whose fundamental rights have been deprived possess, and not directly the property destroyed.

Comparing the crime of persecution and the war crime of attacking protected objects can give us an insight on which one is the best way of securing the most effective protection of cultural property. The element under article 7 (h) of the ICC Statute "*targeting persons by reason of the identity of a group based on political, religious, racial, national, ethnic, cultural, or other grounds that are universally recognized as impermissible under international law*" is related to the element of the "quality of the objects under protection" on article 8 (2) (e) (iv). These objects have to be dedicated to religion, education, art or science,

or be historic monuments. It can be said that these objects are targeted because of their characteristics, as people are targeted under article 7(h) because of theirs. However, it is more objective and easy to prove that the perpetrator intended such buildings with those characteristics to be attacked, than to prove the "discriminatory intent" under the second and the third elements of article 7(h).

The main advantage of the consideration of these attacks on cultural property as crimes against humanity is that this crime covers both situations of armed conflict and of peace, as long as the crime is part of a systematic and widespread attack, while article 8 of the ICC Statute only covers situations happening during an armed conflict.

A difficulty of the application of article 7 (h) is its' fourth element, which demands a connection with another act prescribed under that article, in order for the act to be considered as persecution. This is an additional element that reduces the scope of application of the article.

Yet another condition for the application of article 7 (h) is that the conduct considered has to be part of a "widespread and systematic attack", while on article 8 e) there is no distinction like this. However, the requirement of the existence of an armed conflict specifically considers the "resort to armed force between States" and "protracted armed violence between governmental authorities and armed groups". The "protracted armed violence" characteristic is similar to the systematic characteristic of the attack on the elements of crimes against humanity. Within the context of an armed conflict, we can assume that the conduct is always part of a widespread and systematic attack, given the level of consistent violence that turns all attacks within the conflict into systematic and widespread ones. However, as we have observed, crimes against humanity have the ability to also protect cultural property in situations of general peace, which means that they can cover more situations. Still, the war crime of attacking protected objects protects cultural property from isolated attacks, as long as they are performed in the context of an armed conflict, while the crime of persecution does not.

The *mens rea* requirement is also similar given that on one of the crimes, the perpetrator has to be aware of the existence of an armed conflict and its' nexus with the crime committed, whilst on the other one he has to be aware of the nexus between his conduct and the widespread or systematic attack.

We can conclude that it is easier to prosecute the attack on protected objects as a war crime, given that the elements of this crime are more easily proven than the ones of the crime of persecution, specifically the reasons (discriminatory intent) behind the deprivation of fundamental rights of the people identifiable as belonging to a political, religious, ethnical or cultural group. Also, the demand that the conduct considered must have a connection with other crime or crimes against humanity or any crime provided by the ICC Statute narrows the scope of article 7, making it more difficult to apply, meaning that cultural property can only be protected when its' attack is related to other crime. Despite the preferable application of the war crime of attacking protected objects, we recognize that the applicability of the crime of persecution in cases of destruction of cultural property helps covering situations of attacks under circumstances of peace, which is in better harmony with the goals of the consideration of some sites as Cultural Heritage Sites and of the general protection UNESCO's Conventions provide.

During our study we have noticed that there are several cases under the ICTY Case Law that apply the crime of persecution to situations in which cultural objects or sites suffer attacks. These cases are helpful in guiding the possible application of the crime of persecution provided by the ICC Statute to the same type of cases. In fact, the elements of the crime under both statutes are very similar. We have the discriminatory basis and the violation of a fundamental right. However, the ICC Statute has *an additional* requirement, demanding that the act must be committed *in connection* with another act described in the article as a crime against humanity. This is an additional requisite, and therefore does not invalidate the ICTY jurisprudence help in interpreting the other common requisites.

Would it be possible to consider Mr. Al Mahdi's conducts as corresponding to the crime against humanity of persecution? In various of Mr. Al Mahdi's statements, we notice his intent of imposing his own view of how a religion must be lived and which beliefs and practices to follow and which to quit. This imposition was carried out in a violent way, through the bombing of the mausoleums and mosques. It can be said that there was a discriminatory intent behind the destruction of these sites, because the attack was really targeted on the religious views and practices of the population of Timbuktu. Particularly, the deprivation of the fundamental human right of freedom of religion. However, we do not find enough facts in the case that can tell us that there were other acts that could be considered crimes against humanity (or other crimes within the ICC Statute) connected to the persecution. This ultimately means that the last requirement for the application of article 7 (h)

would not be fulfilled and that the conviction for the crime against humanity would not be possible.

Nevertheless, there are observations in the sentence that seem to notice and enforce the aspects of crimes against humanity and its' relation to this cases.

Firstly, thinking about the intangible aspects of cultural property, we arrive to the conclusion that these aspects are intrinsically related on a personal substrate, because the meaning and value of cultural property can only be perceived through subjective and symbolic aspects intimately related to the way a person or a group, and ultimately all humanity, see that property. This is reflected on paragraph 79 of the Sentence, where, as we have stated previously, the Chamber explores the intangible aspect of the protection of cultural property by directly describing the symbolic and emotional value of the sites for the lives of Timbuktu's habitants, considering this to be a relevant element in determining the damage extent.

As we have also pointed before, the Chamber specifically refers to the discriminatory intent behind the actions of Mr. Al Mahdi: "*They led a campaign explaining what should and should not be done with the mausoleums. In the end they decided to destroy the sites in order to stop these prohibited practices. The Chamber considers that the discriminatory religious motive invoked for the destruction of the sites is undoubtedly relevant to its assessment of the gravity of the crime.*"[81]

Our analysis allows us to understand that in these cases of destruction of cultural property as a war crime, some aspects of the crime against humanity of persecution are always present. And in fact, this new approach as a crime against people is fundamental in order to understand the real impact of the destruction of those sites globally and for all humanity.

Professor Theodor Meron, the former President of the International Criminal Tribunal for the former Yugoslavia, writes some conclusions about the way the jurisprudence of the ICTY court has been treating the problem of the protection of cultural property. He first notes that the criminal prosecution and conviction on the basis of crimes against cultural property is the proof that the protection of these sites, that instruments like the UNESCO 1954 Convention promote, can be effectively enforced. Secondly, he gives emphasis to the aspect that in some cases, when the discriminatory intent was verified, the destruction of cultural property was considered as corresponding to persecution, a crime against humanity. This does

81 *Ibid.,* para. 81

not mean that the importance of cultural property in itself is put aside by giving the new focus on the individuals who are persecuted. In fact, this new approach only means that cultural property really is a symbol of religion, history and common beliefs of a group of people, meaning that it is of great importance for the development of the identity of individuals that are a part of that group. Therefore, the attack on property can also be protected at this new level. The biggest consequence of this is that the protection of cultural property can also be effective in time of peace. This enlarges in great measure the protection of cultural property, preventing its' destruction from arbitrary attacks.[82]

The dogmatic consequence of this way of dealing with the problem is that it approximates the concepts of cultural heritage/property and humanity. It goes back to the essence behind of all crimes against humanity: the protection of human rights. By recognizing the role of cultural property in the free development of the individual's personality and therefore the importance of the preservation of these sites for human dignity, we take an indispensable step towards the goals of the international community to strengthen ties between different fields of law in order to improve the ultimate goal of mutual respect and unity between all nations, independently of race, religion, nationality and cultural differences. There are some difficulties in overcoming the concept of cultural property as just objective property, and we can see that in some cases the war crime approach is the easiest one. However, since Al Mahdi's case was the first case before the ICC Court that dealt with this situation, we can see that it is necessary to promote the necessity of the assurance of the protection of cultural property, at this and at other levels, such as condemning the attack on these special sites thorough the crime of persecution, when it is connected with other crimes also being prosecuted. The development of cultural human rights would also be an important contribution for this matter, being part of a solid and interdisciplinary effort in promoting dialogue between the different fields of law in order to fulfill a common end. Hence, this would contribute for the humanization and personalization of cultural property, a necessary step towards the promotion of the respect for these sites through the awareness of its' importance for all human individual's development.

82 Meron, T. 2005. The protection of cultural property in the event of armed conflict within the case-law of the International Criminal Tribunal for the Former Yugoslavia. *Museum International*, No. 228, pp. 41–60.

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