

# The destruction of cultural heritage in armed conflict:

Clark, Janine

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# **The Destruction of Cultural Heritage in Armed Conflict: The ‘Human Element’ and the Jurisprudence of the ICTY**

*Janine Natalya Clark*  
*University of Birmingham, UK*

## **Abstract**

During the wars in the former Yugoslavia in the 1990s, extensive attacks on cultural heritage took place. Established in 1993, the International Criminal Tribunal for the former Yugoslavia (ICTY) has prosecuted some of these cultural heritage crimes, and it is the Tribunal’s work in this regard that constitutes the central focus of this article. Arguing that the ICTY’s jurisprudence has highlighted a crucial ‘human element’ of cultural heritage destruction, the article identifies two particular ‘human’ dimensions of cultural heritage crimes that can be extracted from the ICTY’s cases, namely an impact dimension and an intent dimension. If the Tribunal’s jurisprudence has thereby highlighted the powerful synergies between crimes against property and crimes against people, these synergies have wider practical implications. Adopting a functionalist view, this article ultimately seeks to show that cultural heritage has a potentially important and largely unexplored role to play in post-conflict reconciliation.

## **Keywords**

Cultural heritage; ICTY; human element; impact dimension; intent dimension; reconciliation

## **Introduction**

In July 2017, the United Nations (UN) Educational, Scientific and Cultural Organization (UNESCO) proclaimed Valongo Wharf in Brazil – which was the main arrival point for

African slaves during the nineteenth century – as a world heritage site.<sup>1</sup> As Logan and Reeves underline, ‘There is a growing interest in the heritage associated with pain and shame at both international and national levels’.<sup>2</sup> UNESCO has also long been concerned about Machu Picchu, the Inca Citadel in Peru, and recent changes introduced by the Peruvian tourism authorities aimed at controlling crowd numbers mean that from now on, visitors to Machu Picchu must purchase either a morning or an afternoon admission ticket.<sup>3</sup> These two examples illustrate dimensions – or ‘layers’ – of cultural heritage.<sup>4</sup> This article addresses a third layer. It is not about the creation or preservation of cultural heritage, but about the destruction of cultural heritage in armed conflict.<sup>5</sup>

The European Council has vigorously condemned Islamic State’s ‘deliberate destruction of archaeological and cultural heritage in Syria and Iraq and the extremist ideology behind it...’.<sup>6</sup> All of Syria’s six UNESCO world heritage sites have been destroyed or heavily

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<sup>1</sup> Lucy Pasha-Robinson, ‘Valongo Wharf: Rio de Janeiro’s “Slave Harbour” becomes Unesco World Heritage Site’ (10 July 2017), <[www.independent.co.uk/news/world/americas/valongo-wharf-rio-de-janeiro-slave-port-unesco-world-heritage-site-brazil-a7833321.html](http://www.independent.co.uk/news/world/americas/valongo-wharf-rio-de-janeiro-slave-port-unesco-world-heritage-site-brazil-a7833321.html)>, accessed 12 Jul 2017.

<sup>2</sup> William Logan and Keir Reeves, ‘Introduction: Remembering Places of Pain and Shame’, in William Logan and Keir Reeves (eds.), *Places of Pain and Shame: Dealing with “Difficult Heritage”* (Routledge, Abingdon, 2009), pp.1-14, at 3.

<sup>3</sup> Chris Leadbeater, ‘Will New Limits on Visiting Machu Picchu Save Peru’s Most Famous Inca Citadel?’ (21 June 2017), <[www.telegraph.co.uk/travel/destinations/south-america/peru/articles/machu-picchu-new-rules-for-access/](http://www.telegraph.co.uk/travel/destinations/south-america/peru/articles/machu-picchu-new-rules-for-access/)>, accessed 29 June 2017.

<sup>4</sup> Michael Leach, ‘Difficult Memories: The Independence Struggle as Cultural Heritage in East Timor’, in William Logan and Keir Reeves (eds.), *Places of Pain and Shame: Dealing with “Difficult Heritage”* (Routledge, Abingdon, 2009), pp.144-161, at 159.

<sup>5</sup> Destruction of cultural heritage, however, does not only occur in conflict situations. See, for example, Jeremy Keenan, ‘Looting the Sahara: The Material, Intellectual and Social Implications of the Destruction of Cultural Heritage (Briefing)’, 10(3-4) *Journal of North African Studies* (2005) 471-489, at 472.

<sup>6</sup> European Council, ‘Council Conclusions on the EU Regional Strategy for Syria and Iraq as well as the ISIL/Da’esh Threat’ (16 March 2015), para. 8, <[www.consilium.europa.eu/en/press/press-releases/2015/03/16-council-conclusions-eu-regional-strategy-for-syria-and-iraq-as-well-as-the-isil-daesh-threat/](http://www.consilium.europa.eu/en/press/press-releases/2015/03/16-council-conclusions-eu-regional-strategy-for-syria-and-iraq-as-well-as-the-isil-daesh-threat/)>, accessed 30 June 2017. According to Vlastic and Turku, ‘the deliberate destruction, looting, and theft of cultural property by ISIS is perhaps one of the most brutal forms of cultural cleansing in recent history’. Mark V. Vlastic and Helga Turku,

damaged,<sup>7</sup> including the Arch of Triumph in Palmyra.<sup>8</sup> In 2001, the Taliban government in Afghanistan blew up the Buddhas at Bamiyan,<sup>9</sup> a powerful illustration of the Taliban's 'cultural terrorism'.<sup>10</sup> Although the Buddhas 'were not destroyed in the fighting',<sup>11</sup> a wider context of sporadic hostility and instability within Afghanistan surrounded the Bamiyan Valley. In northern Mali, the Morals Police Brigade – or *Hesbah* – destroyed ten cultural and religious monuments in Timbuktu in 2012, after *Ansar Dine* and *Al-Qaeda in the Islamic Maghreb* took control of the area.<sup>12</sup> The head of the *Hesbah*,<sup>13</sup> Ahmad Al Faqi Al Mahdi, recently pleaded guilty to these crimes at the International Criminal Court (ICC). He was sentenced to nine years' imprisonment.<sup>14</sup>

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“‘Blood Antiquities’: Protecting Cultural Heritage beyond Criminalization’, 14(5) *Journal of International Criminal Justice* (2016) 1175-1197, at 1176.

<sup>7</sup> Emma Henderson, ‘Syria’s Six Unesco World Heritage Sites All Damaged or Destroyed during Civil War’ (16 March 2016), <[www.independent.co.uk/news/world/middle-east/syrias-six-unesco-world-heritage-sites-all-damaged-or-destroyed-during-civil-war-a6934026.html](http://www.independent.co.uk/news/world/middle-east/syrias-six-unesco-world-heritage-sites-all-damaged-or-destroyed-during-civil-war-a6934026.html)>, accessed 8 July 2017.

<sup>8</sup> Russia Today, ‘6 Out of 6: All of Syria’s UNESCO Heritage Sites Damaged or Destroyed during Civil War’, (15 March 2016), <[www.rt.com/news/335619-syria-unesco-heritage-damage/](http://www.rt.com/news/335619-syria-unesco-heritage-damage/)>, accessed 9 May 2017. The main arch ‘was originally built in the second century by the Roman emperor Septimius Severus to commemorate his victory against the Parthians’. Amr Al-Azm, ‘Why ISIS Wants to Destroy Syria’s Cultural Heritage’ (8 October 2015), <<http://time.com/4065290/syria-cultural-heritage/>>, accessed 11 May 2017.

<sup>9</sup> Barbara T. Hoffman, ‘Exploring and Establishing Links for a Balanced Art and Cultural Heritage Policy’, in Barbara T. Hoffman (ed.), *Art and Cultural Heritage: Law, Policy and Practice* (Cambridge University Press, Cambridge, 2006), pp. 1-18, at 1.

<sup>10</sup> Francesco Francioni and Federico Lenzerini, ‘The Destruction of the Buddhas of Bamiyan and International Law’, 14(4) *European Journal of International Law* (2003) 619-651, at 625.

<sup>11</sup> Roger O’Keefe, ‘World Cultural Heritage: Obligations to the International Community as a Whole?’ 53(1) *International and Comparative Law Quarterly* (2004) 189-209, at 195.

<sup>12</sup> See Sebastiaín A. Green-Martínez, ‘Destruction of Cultural Heritage in Northern Mali: A Crime against Humanity?’ 13(5) *Journal of International Criminal Justice* (2015) 1073-1097.

<sup>13</sup> ‘The *Hesbah* was entrusted with regulating the morality of the people of Timbuktu, and of preventing, suppressing and repressing anything perceived by the occupiers to constitute a visible vice’. *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, 27 September 2016, ICC, Trial Chamber, Judgment, ICC-01/12-01/15, [https://www.icc-cpi.int/CourtRecords/CR2016\\_07244.PDF](https://www.icc-cpi.int/CourtRecords/CR2016_07244.PDF), accessed 9 November 2016, para. 33.

<sup>14</sup> This case ‘marked the first time that attacks against cultural heritage constituted the principal charge in an international criminal case’. Paige Casaly, ‘Al Mahdi before the ICC: Cultural Property and World Heritage in International Criminal Law’, 14(5) *Journal of International Criminal Justice* (2016) 199-1220, at 1210.

If, as Vlasic and Turku underline, ‘International courts can and do play a role in stigmatization and bringing attention to these crimes’ of cultural heritage destruction,<sup>15</sup> the work of the International Criminal Tribunal for the former Yugoslavia (ICTY) has been particularly important in this regard. Fundamentally, it was the ICTY that made the:

...first concerted effort to establish that attacks against cultural property constituted crimes under customary international law and to hold those most responsible for these crimes, particularly senior political and military leaders, individually accountable’.<sup>16</sup>

The Tribunal’s jurisprudence is therefore the main focus of this article. Underscoring that crimes against property and crimes against people are inherently inter-linked, the article centres on the crucial ‘human element’ of cultural heritage crimes.<sup>17</sup> According to Loulanski, ‘the conceptual focus of heritage has shifted’, inter alia, ‘from monuments to people’.<sup>18</sup> Exploring this shift within the framework of the ICTY’s jurisprudence, this article has two main goals. Firstly, it seeks to develop the conceptual linkages between property and people by examining how the ‘human element’ manifests itself within the Tribunal’s jurisprudence. Secondly, adopting a functionalist view of cultural heritage,<sup>19</sup> it highlights new aspects of functionality by examining ways of practically operationalizing the human element. As a starting point, it draws on Lehrer’s work on ‘conciliatory heritage’.<sup>20</sup>

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<sup>15</sup> Vlasic and Turku, *supra* note 6, at 1197.

<sup>16</sup> Serge Brammertz, Kevin C. Hughes, Alison Kipp and William B. Tomljanovich, ‘Attacks against Cultural Heritage as a Weapon of War: Prosecutions at the ICTY’, 14(5) *Journal of International Criminal Justice* (2016) 1143-1174, at 1151.

<sup>17</sup> Francesco Francioni, ‘Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity’, 25(4) *Michigan Journal of International Law* (2004) 1209-1228, at 1220.

<sup>18</sup> Tolina Loulanski, ‘Revising the Concept for Cultural Heritage: The Argument for a Functional Approach’, 13(2) *International Journal of Cultural Property* (2006) 207-233, at 208.

<sup>19</sup> M.M. Müller, ‘Cultural Heritage Protection: Legitimacy, Property and Functionalism’, 7(2) *International Journal of Cultural Property* (1998) 395-409, at 397.

<sup>20</sup> Eric Lehrer, ‘Can there be Conciliatory Heritage?’ 16 (4-5) *International Journal of Heritage Studies* (2010) 269-288.

## 1. Conceptualizing Cultural Heritage

Wars and armed conflict leave deep imprints and scars not only on human lives, but also on landscapes. Falah, for example, argues that during the 1948 Israeli-Palestinian war, ‘Places that were the loci for Palestinian culture and national identity, the vessels of a collective memory of the region’s palimpsest-like cultural landscape, were obliterated in acts of de-signification’.<sup>21</sup> More recently, following the end of the 30-year ‘Troubles’ in Northern Ireland (1968-1998), ‘Littered across the rural and urban landscapes is the fabric of conflict, memorials, murals, defunct military installations and prisons emptied of the “political prisoners” they once housed’.<sup>22</sup> The destruction of cultural heritage is a particularly prominent and visible aspect of altered landscapes in conflict-affected societies. It is also a dimension of conflict that powerfully highlights the intersections between property crimes and crimes against people.

Two main conceptual approaches to cultural heritage can be identified. The first of these, object-centrism, focuses on the object itself and sees the object as having an intrinsic value in its own right. As Müller discusses, ‘Archaeology is a prime example of the philosophy of object-centrism. Archaeologists would prefer to leave an object untouched rather than risking its destruction through inadequate excavation techniques’.<sup>23</sup> Attributing value to objects without any regard to their ‘users’, however, is a decontextualized approach that neglects the critical importance of human-object interactions. As Loulanski underlines, ‘...protection of

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<sup>21</sup> Ghazi Falah, ‘The 1948 Israeli-Palestinian War and its Aftermath: The Transformation and De-Signification of Palestine’s Cultural Landscape’, 86(2) *Annals of the American Association of American Geographers* (1996) 256-285, at 257.

<sup>22</sup> Sara McDowell, ‘Negotiating Places of Pain in Post-Conflict Northern Ireland: Debating the Future of the Maze Prison/Long Kesh’, in W. Logan and K. Reeves (eds.), *Places of Pain and Shame: Dealing with “Difficult Heritage”* (Routledge, Abingdon, 2009), pp.215-230, at 216.

<sup>23</sup> Müller, *supra* note 19, at 397.

cultural heritage becomes meaningless if it cares only for objects instead of human beings, because “preservation is sought, not for the sake of the objects, but for the sake of the people for whom they have a meaningful life”.<sup>24</sup> Object-centrism, moreover, cannot easily operate in the absence of clear criteria and guidelines, which are not always specified. Karl, for example, discusses the Austrian *Denkmalschutzgesetz* (DMSG), or heritage protection law, that was first adopted in 1923. He argues that ‘Since § 1 (1) DMSG determines that any man-made object is a *Denkmal* (a “monument” or “cultural heritage”), and no criteria are introduced in the DMSG or have been published by the BDA [National Heritage Agency] as to what man-made objects cannot be a *Denkmal*’, it follows that ‘some additional criterion is needed to determine what man-made objects have to be protected by the law as cultural heritage and what not’.<sup>25</sup> In other words, the realities of a purist approach to object-centrism can potentially affect how people live their lives. In the absence of criteria identifying which objects are to be protected, ‘one would not be allowed to damage, change or export any man-made object without a permit by the BDA and since normal use damages and changes every object, modern life would grind to a complete halt’.<sup>26</sup>

In contrast to object-centrism, a functionalist conceptualization of cultural heritage centres on people as the pivotal referent object. The significance of cultural heritage thus derives from how people use it and from the meanings that they assign to it. Highlighting the synergies between functionalism and social-constructivism, Müller notes that ‘For proponents of functionalism, cultural heritage is a purely human construction, not only because it is made

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<sup>24</sup> T. Loulanski, *supra* note 18, at 216, citing Frank G. Fechner, ‘The Fundamental Aims of Cultural Property Law’, 7(2) *International Journal of Cultural Property* (1998) 376–394, at 378.

<sup>25</sup> Raimund Karl, ‘More Tales from Heritage Hell: Law, Policy and Practice of Archaeological Heritage Protection in Austria’, 7(4) *The Historic Environment: Policy and Practice* (2016) 283–300, at 292.

<sup>26</sup> *Ibid.*, at 292–293.

by men and women but also because it is defined by them. Our world is socially constructed, and so are the meanings and functions that are assigned to objects'.<sup>27</sup> If functionalist views of cultural heritage are widely held,<sup>28</sup> they themselves can be further categorized into two types. D'Andrade distinguishes between, on one hand, 'a high consensus code which everyone is expected to share', and, on the other, 'a proliferating number of distributed knowledge systems'.<sup>29</sup> These distributed knowledge systems can refer to local cultures and the value that particular communities attach to them. Logan, for example, underlines that heritage is 'fundamental to cultural identity; it is those things that underpin our identity as communities – national, regional, local, even family'.<sup>30</sup> Discussions of cultural heritage, however, frequently extend beyond the local and national, thereby focusing on a higher level of cultural heritage functionality. Returning to D'Andrade's 'high consensus code', a critical factor in the maintenance of this code is the notion that cultural heritage is 'part of the shared interest of humanity'.<sup>31</sup> In other words, it belongs to all of us.

Merryman refers to this shared ownership concept as 'cultural property internationalism'.<sup>32</sup> This, he argues, 'is shorthand for the proposition that everyone has an interest in the

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<sup>27</sup> Müller, *supra* note 19, at 398.

<sup>28</sup> See, for example, Müller, *supra* note 19, at 405; Brian Graham, 'Heritage as Knowledge: Capital or Culture?' 39(5-6) *Urban Studies* (2002) 1003-1017, at 1004; Loulanski, *supra* note 18, at 216.

<sup>29</sup> Roy G. D'Andrade, *The Development of Cognitive Anthropology* (Cambridge University Press, Cambridge, 1995), p.216.

<sup>30</sup> William S. Logan, 'Closing Pandora's Box: Human Rights Conundrums in Cultural Heritage Protection', in Helaine Silverman and D. Fairchild Ruggles (eds.), *Cultural Heritage and Human Rights* (Springer, New York, 2007), pp.33-52, at 35.

<sup>31</sup> Francioni, *supra* note 17, at 1210.

<sup>32</sup> John H. Merryman, 'Cultural Property Internationalism', 12(1) *International Journal of Cultural Property* (2005) 11-39. The term 'cultural cosmopolitanism' could also be used. According to Costa, 'In general terms, cosmopolitanism can be described as a form of universalism that builds on the metaphor that all human beings are "citizens of the world"'. M. Victoria Costa, 'Cultural Cosmopolitanism and Civic Education', *Philosophy of Education Archive* (2005) 250-258, at 250.



preservation and enjoyment of cultural property, wherever it is situated, from whatever cultural or geographic source it derives'.<sup>33</sup> This cultural property internationalism finds a strong expression in the key international conventions on cultural heritage, including the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict. The first international treaty that deals entirely with the protection of cultural heritage in situations of armed conflict,<sup>34</sup> the Convention's cosmopolitan ethos is especially reflected in its Preamble. According to this, '...damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind', based on the fact that 'each people makes its contribution to the culture of the world'.<sup>35</sup> It further underlines '...that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection'.<sup>36</sup> The Convention's broad definition of cultural property – contained in Article 1 – similarly conveys a distinctly internationalist logic. Cultural property is defined, inter alia, as 'movable or immovable property of great importance to the cultural heritage of every people', including works of art, archaeological sites, books and scientific collections.<sup>37</sup>

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<sup>33</sup> Merryman, *ibid.*, at 11.

<sup>34</sup> Višnja Kisić, 'From Targeted Destruction of Cultural Heritage during the Wars to Wars of Memory in Former Yugoslav Countries, or How to Understand Conflicting Potential of Cultural Heritage?' in Branka Benčić, Eugen Jakovčić and Tihana Puc (eds.), *Spomenici na nišanu: Zatiranje povjesti i sjećanja/Targeting Monuments: Targeting History and Memory* (SENSE – Transitional Justice Centre Pula, Pula, 2017), pp. 13-18, at 15. Earlier conventions did, however, mention cultural property. The Hague Regulations, for example, state that 'In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes'. *Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land* (18 October 1907), Art. 27, <<http://ihl-databases.icrc.org/ihl/INTRO/195>>, accessed 8 May 2017.

<sup>35</sup> *Convention for the Protection of Cultural Property in the Event of Armed Conflict* (14 May 1954), Preamble, <[www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/convention-and-protocols/1954-hague-convention/](http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/convention-and-protocols/1954-hague-convention/)>, accessed 31 May 2017.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*, at Art. 1(a).

That all of us have a stake in the preservation of cultural property means that States, in turn, have an obligation to ‘do no harm’. Article 4(1) of the Convention stipulates that:

The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility, directed against such property.<sup>38</sup>

Exploring the relationship between human rights and cultural heritage, Logan contends that there is a conceptual contradiction between the two. While the essence of human rights is universality – these rights should apply to everyone – ‘the concept of cultural heritage is culturally, temporally, and geographically specific’.<sup>39</sup> The crucial point is that the 1954 Convention does not conceptualize cultural heritage in these terms. Notwithstanding its cultural internationalism, however, it does contain a ‘significant concession to nationalism’.<sup>40</sup> Specifically, Article 4(2) provides that the obligations contained in the aforementioned Article 4(1) ‘may be waived only in cases where military necessity imperatively requires such a waiver’.<sup>41</sup> ‘Military necessity’ is an intrinsically vague and opaque term that is open to multiple and competing interpretations,<sup>42</sup> and its inclusion within the Convention illuminates an important distinction between ‘political realism and political idealism’.<sup>43</sup> The Convention

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<sup>38</sup> *Ibid.*, at Art. 4(1).

<sup>39</sup> Logan, *supra* note 30, at 44.

<sup>40</sup> John H. Merryman, ‘Two Ways of Thinking about Cultural Property’, 80(4) *American Journal of International Law* (1986) 831-853, at 837.

<sup>41</sup> *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, *supra* note 35, at Art. 4(1).

<sup>42</sup> Dill and Shue emphasize that ‘Historically, “military necessity” has been interpreted in profoundly pernicious ways’. Janina Dill and Henry Shue, ‘Limiting the Killing in War: Military Necessity and the St. Petersburg Assumption’, 26(3) *Ethics and International Affairs* (2012) 311-333, at 320.

<sup>43</sup> Henry C. Emery, ‘What is Realpolitik?’ 25(4) *International Journal of Ethics* (1915) 448-468, at 451.

broadly embodies the latter; and compared to the earlier UNESCO draft,<sup>44</sup> it makes fewer references to military necessity.<sup>45</sup> However, the very fact that it recognizes a military necessity exception necessarily limits ‘the fundamental duty of respect for cultural property both under general and special protection as enshrined in Articles 4 and 11...’<sup>46</sup>

The 1954 Convention also has two Protocols. The second of these, which was adopted in 1999, is noteworthy. Not only does it contain a ‘significantly narrowed down’ version of the military necessity exception,<sup>47</sup> but it also creates a new category of enhanced protection for cultural heritage. Yet, once again, this concept of enhanced protection reflects a dialectic between internationalist ideals, on one hand, and political and military realities on the other. Illustrating this, Article 10 of Protocol II states that:

Cultural property may be placed under enhanced protection provided that it meets the following three conditions:

- a. it is cultural heritage of the greatest importance for humanity;
- b. it is protected by adequate domestic legal and administrative measures recognising its exceptional cultural and historic value and ensuring the highest level of protection;
- c. it is not used for military purposes or to shield military sites and a declaration has been made by the Party which has control over the cultural property, confirming that it will not be so used.<sup>48</sup>

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<sup>44</sup> Drazewska notes that the 1953 UNESCO draft ‘contained a reference to military necessity in the preamble, and made a number of obligations conditional upon it’, including ‘the obligation to prevent or put a stop to theft and any acts of damage not justified by military necessity’. Berenika Drazewska, ‘The Human Dimension of the Protection of the Cultural Heritage from Destruction during Armed Conflicts’, 22(2-3) *International Journal of Cultural Property* (2015) 205-228, at 209-210.

<sup>45</sup> *Ibid.*, at 210.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*, at 211. See *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict* (26 March 1999), Art. 6(a) and (b), <<http://unesdoc.unesco.org/images/0018/001875/187580e.pdf>>, accessed 31 May 2017.

<sup>48</sup> *Second Protocol, ibid.*, at Art. 10.

Internationalism and cosmopolitanism are intrinsically connected with the global, and in particular with global risks. As Beck underscores, ‘Global risks tear down national boundaries and jumble together the native with the foreign. The distant other is becoming the inclusive other’.<sup>49</sup> When the risks are closer to home, however, and when they primarily affect the national, the 1954 Convention and its Protocol II make clear that military considerations take priority.

If there are necessarily practical limits – rooted in *Realpolitik* – to the idea that all of us have a vested interest in the preservation of cultural heritage, some scholars have criticized the internationalization of cultural heritage on more conceptual grounds. After the 1954 Convention, the second major international document relating to cultural heritage is the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage. The Preamble of this states, inter alia, that ‘...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’.<sup>50</sup> It further underlines ‘the importance, for all the peoples of the world, of safeguarding this unique and irreplaceable property, to whatever people it may belong’; and it states that ‘parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole’.<sup>51</sup> For Müller, the language used in the Convention is overly broad. What does it mean, for example, to speak of the ‘interest of humankind’?<sup>52</sup> Insisting that “‘Humankind” is not a manageable

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<sup>49</sup> Ulrich Beck, ‘The Cosmopolitan Condition: Why Methodological Nationalism Fails’, 24(7-8) *Theory, Culture and Society* (2007) 286-290, at 287.

<sup>50</sup> *Convention Concerning the Protection of the World Cultural and Natural Heritage* (16 November 1972), Preamble, <<http://whc.unesco.org/archive/convention-en.pdf>>, accessed at 1 June 2017.

<sup>51</sup> *Ibid.*

<sup>52</sup> Müller, *supra* note 19, at 403.

legal term’,<sup>53</sup> he also raises important questions regarding representation. Fundamentally, who is entitled to speak on behalf of ‘humankind?’<sup>54</sup>

The internationalist rhetoric which the 1972 Convention embraces potentially limits the scope for alternative voices and viewpoints to be expressed and heard. In 2001, for example, the then secretary of UNESCO, Koïchiro Matsuura, referred to the aforementioned destruction of the Bamiyan Buddhas in Afghanistan as a ‘crime against culture’.<sup>55</sup> Yet, as Williams points out, this assumes that “‘culture” has an intrinsic universal value...’.<sup>56</sup> Not everyone attaches the same value, or the same meaning, to ‘culture’, and indeed ‘the very fact of the Buddha’s destruction speaks of a counter narrative to the UNESCO mantra of universal value’.<sup>57</sup> Even when groups share a particular space, this does not necessarily mean that they will attach the same value to the cultural products within that space. As Weinert articulates, ‘Shared space does not of course imply uniformity in the ways spaces are experienced, understood, interpreted, developed, acted upon, and reimagined’.<sup>58</sup>

If the emphasis on the universal and ‘humankind’ is excessively broad, cultural heritage clearly has a quintessential human dimension. The destruction of cultural heritage during armed conflict, in short, is not simply a property crime but a crime that illuminates critical

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<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> Cited in Francesco Bandarin, ‘Editorial’, 30 *World Heritage Newsletter* (2001), <<http://whc.unesco.org/en/documents/3063>>, accessed 5 June 2017.

<sup>56</sup> Thomas J.T. Williams, ‘A Blaze in the Northern Sky: Black Metal and Crimes against Culture’, 11(2) *Public Archaeology* (2012) 59-72, at 59.

<sup>57</sup> *Ibid.*

<sup>58</sup> Matthew S. Weinert, ‘Grounding World Society: Spatiality, Cultural Heritage and Our World as Shared Geographies’, 43(3) *Review of International Studies* (2017) 409-429, at 415.

intersections between property and people. Emphasizing this point, Francioni argues that ‘...cultural heritage is linked to the human element. It represents the symbolic continuity of a society beyond its contingent biological existence’.<sup>59</sup> The very term ‘symbolic continuity’, however, is necessarily abstract and difficult to pin down. This article is precisely about trying to concretize the ‘human element’ to which Francioni alludes within an international law framework. According to Francioni, cultural heritage is ‘part of the shared interest of humanity’, and hence there is a ‘consequent need for international law to safeguard it in its material and living manifestations, including the cultural communities that create, perform and maintain it’.<sup>60</sup> The next section of the article focuses specifically on the jurisprudence of the ICTY, which has ‘broken new legal ground by prosecuting war crimes against cultural heritage...’.<sup>61</sup> It demonstrates that the Tribunal’s judgments have helped to elucidate the critical ‘human element’ in cultural heritage which, in turn, enables deeper understanding of the practical significance of cultural heritage in post-conflict societies.

## **2. The ICTY and the Destruction of Cultural Heritage in the Former Yugoslavia**

Every year, thousands of tourists flock to Dubrovnik in Croatia to explore the Old Town, to admire its eclectic mix of architectural styles and to walk along the medieval City Walls. Similarly, during the summer months, vast crowds descend annually on the Bosnian city of Mostar, a three hour drive from Dubrovnik. In the stifling Herzegovinian sunshine, they slowly make their way across the famous Ottoman bridge, *Stari Most*, frequently pausing to take photographs and to look at the swirling waters of the Neretva River below. During the

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<sup>59</sup> Francioni, *supra* note 17, at 1221.

<sup>60</sup> *Ibid.*, at 1210.

<sup>61</sup> András Riedlmayer, ‘Unprosecuted’, in Branka Benčić, Eugen Jakovčić and Tihana Puc (eds.), *Spomenici na nišanu: Zatiranje povjesti i sjećanja/Targeting Monuments: Targeting History and Memory* (SENSE – Transitional Justice Centre Pula, Pula, 2017), pp. 62-89, at 62.

1990s, when ethnic and secessionist conflict engulfed the former Yugoslavia, both the Old Town of Dubrovnik and Mostar came under fire. According to the Commission of Experts, which was established by the UN Secretary-General at the request of the UN Security Council in 1992,<sup>62</sup> ‘The shelling [of Dubrovnik] on 6 December 1991 was especially intensive. 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’.<sup>63</sup> On 9 November 1993, a barrage of shells fired by Bosnian Croat forces tore apart *Stari Most* and thus destroyed a powerful symbol of inter-ethnic unity and connectedness.<sup>64</sup>

Outside of Dubrovnik and Mostar, extensive destruction of cultural heritage accompanied the wars in the former Yugoslavia. According to Walasek, ‘... in the wider domain of heritage preservation, the impact of the devastation of the Wars of Yugoslav Succession was such that “Yugoslavia” was to become the paradigm of cultural property destruction during the so-

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<sup>62</sup> The mandate of the Commission was to provide the UN Secretary-General with ‘its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia’. *UN Security Council Resolution 780* (6 October 1992), para. 2, <[<http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/780\(1992\)>](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/780(1992))>, accessed 3 April 2017.

<sup>63</sup> M. Cherif Bassiouni, *Investigating War Crimes in the Former Yugoslavia War 1992-1994: The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)* (Intersentia Ltd., Cambridge, 2017), p.253.

<sup>64</sup> The targeting of the bridge occurred alongside widespread attacks on cultural heritage in and around Mostar. According to the ICTY, ‘BH Muslim religious sites, like the mosques in the area, were systematically destroyed’. *The Prosecutor v. Mladen Naletilić and Vinko Martinović*, 31 March 2003, ICTY, Trial Chamber, Judgment, IT-98-34-T, [http://www.icty.org/x/cases/naletilic\\_martinovic/tjug/en/nal-tj030331-e.pdf](http://www.icty.org/x/cases/naletilic_martinovic/tjug/en/nal-tj030331-e.pdf), accessed 7 June 2017, para. 238. The *Prlić et al.* judgment comprehensively documents the destruction of cultural heritage in Herzegovina. In western Mostar, for example, the Baba Bešir mosque was ‘dynamited and completely destroyed around 10 May 1993’. *The Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković and Valentin Ćorić*, 29 May 2013, ICTY, Trial Chamber, Judgment, vol. II, IT-04-74-T, <http://www.icty.org/x/cases/prlic/tjug/en/130529-2.pdf>, accessed 6 March 2017, para. 791. According to Drazewska, what is particularly noteworthy about the *Prlić et al.* judgment is that ‘...in spite of its qualification as a military objective, whose destruction would have allowed the HVO [Bosnian Croat army] to secure an important military advantage, the destruction of the Old Bridge was deemed disproportionate and hence, unlawful’. Drazewska, *supra* note 44, at 215.

called non-traditional conflicts that followed World War Two...'.<sup>65</sup> Mosques, churches and places of learning were widely targeted, including the National Library (Vijećnica) in Sarajevo, which was attacked on 25 August 1992. During his testimony in the Slobodan Milošević trial at the ICTY, András Riedlmayer – an expert on Ottoman cultural heritage – described how the library burned for three days, resulting in the destruction of 1.5 million books.<sup>66</sup>

The ICTY is not the first or only international court to deal with crimes against cultural heritage. At the post-World War Two Nuremberg Tribunal, for example, some defendants were prosecuted for crimes against cultural property. These included Alfred Rosenberg, the Nazi Party's main ideologue. As the head of the Einsatzstab Reichsleiter Rosenberg or Special Staff, which was charged with looting cultural property in German-occupied areas, Rosenberg was ultimately found guilty of these and other crimes. He was sentenced to death.<sup>67</sup> The fact that the destruction of cultural heritage was such an integral part of the wars in the former Yugoslavia, however, created an important opportunity for the ICTY to elucidate the human element of cultural heritage destruction – and to thereby demonstrate that the prosecution of these crimes is not about 'privileging buildings over people'.<sup>68</sup> While

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<sup>65</sup> Helen Walasek, 'Introduction', in Helen Walasek, with contributions by Richard Carlton, Amra Hadžimuhamedović, Valery Perry and Tina Wik, *Bosnia and the Destruction of Cultural Heritage* (Routledge, Abingdon, 2016), pp. 1-22, at 15. In a similar vein, Kisić underlines that what occurred in the former Yugoslavia was 'the greatest destruction of cultural heritage in Europe since World War II'. Kisić, *supra* note 34, at 17.

<sup>66</sup> ICTY Outreach Programme, *Dubrovnik and Crimes against Cultural Heritage* (documentary film) (2016), <<http://www.icty.org/en/in-focus/documentaries/dubrovnik-and-crimes-against-cultural-heritage>>, accessed 27 June 2017.

<sup>67</sup> According to Merryman, 'The innovation here, as elsewhere in the Nuremberg Trials, was that other nations imposed responsibility on an individual official of the offending belligerent power for acts against cultural property committed in its name. The [1863] Lieber Code [which paved the way for The Hague Conventions] and its progeny had a different basis: such offenses violated international law, but offending personnel were to be disciplined, if at all, by their own governments'. Merryman, *supra* note 40, at 836.

<sup>68</sup> Walasek, *supra* note 65, at 17.



some commentators insist that the Tribunal should have dealt with more cases involving the destruction of cultural heritage,<sup>69</sup> this section is specifically about some of the cases that it has prosecuted – and about how this jurisprudence conveys the interconnections between people and property. Firstly, the Tribunal’s case law has emphasized the many ways in which people might be affected by attacks on cultural heritage (impact dimension). Secondly, it has powerfully highlighted that crimes against cultural heritage can reflect and embody malignant intentions towards certain groups of people (intent dimension). Both of these aspects will now be explored.

### ***2.1 The Impact of Cultural Heritage Destruction***

The ICTY’s two leading cases on the destruction of cultural heritage centre on the aforementioned shelling of Dubrovnik in 1991. Pavle Strugar was the commander of the Second Operational Group, which was part of the Yugoslav National Army (JNA). The Old Town of Dubrovnik, which in 1979 was added to the World Heritage List,<sup>70</sup> was shelled on several occasions in late 1991. Although orders were issued – including by Strugar himself – which prohibited attacks on the Old Town, the Trial Chamber noted that ‘Despite these orders, on 9, 10, 11, and 12 November 1991, in the context of the JNA operations ordered on 9 November, Dubrovnik, including the Old Town, was shelled’.<sup>71</sup> During the attack on 6

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<sup>69</sup> Riedlmayer, for example, submits that ‘...the number of such incidents [destruction of cultural heritage] that have been successfully prosecuted is relatively limited, given the scale of the destruction’. Riedlmayer, *supra* note 61, at 62.

<sup>70</sup> The *Strugar* Trial Chamber pointed out that ‘The properties inscribed on the World Heritage List include those which, “because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science”’. *The Prosecutor v. Pavle Strugar*, 31 January 2003, ICTY, Trial Chamber, Judgment, IT-01-42-T, <http://www.icty.org/x/cases/strugar/tjug/en/str-tj050131e.pdf>, accessed 7 May 2017, para. 327, citing the *Convention concerning the Protection of the World Cultural and Natural Heritage*, *supra* note 50.

<sup>71</sup> Judgment, *Strugar*, *ibid.*, at para. 62.

December 1991, 52 building and structures in the Old Town were damaged or destroyed, including ‘monasteries, churches, a mosque, a synagogue and palaces’.<sup>72</sup>

According to Article 3 of the ICTY’s Statute, violations of the laws or customs of war include ‘seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science’. The Trial Chamber in *Strugar* explained that:

For the purposes of this case, an act will fulfil the elements of the crime of destruction or wilful damage of cultural property, within the meaning of Article 3(d) of the Statute and in so far as that provision relates to cultural property, if: (i) it has caused damage or destruction to property which constitutes the cultural or spiritual heritage of peoples;<sup>73</sup> (ii) the damaged or destroyed property was not used for military purposes at the time when the acts of hostility directed against these objects took place; and (iii) the act was carried out with the intent to damage or destroy the property in question.<sup>74</sup>

Adjudging that all of these elements were satisfied in the *Strugar* case,<sup>75</sup> the Trial Chamber moved on to address the defendant’s own responsibility for the shelling of the Old Town. It

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<sup>72</sup> *Ibid.*, at para. 318. Other buildings affected were ‘residential blocks, public places and shops; damage to these would have entailed grave consequences for the residents or the owners, *i.e.* their homes and businesses suffered substantial damage’. *Ibid.*, at para. 320.

<sup>73</sup> It is interesting to note that Art. 3(d) of the ICTY’s Statute requires actual damage to or destruction of cultural property. *Updated Statute of the ICTY* (September 2009), Art.3 (d), <[www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf)>, accessed 2 May 2017. In contrast, Protocol Additional I to the 1949 Geneva Conventions prohibits ‘any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples’. *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* (Protocol I) (8 June 1977), Art. 53, <<https://ihl-databases.icrc.org/ihl/WebART/470-750068>>, accessed 5 May 2017. Similarly, Protocol Additional II states that ‘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’. *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II) (8 June 1977), Art. 16, <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=23F37F921C55419EC12563CD0051E8DD>>, accessed 5 May 1977.

<sup>74</sup> Judgment, *Strugar*, *supra* note 70, at para. 312.

<sup>75</sup> *Ibid.*, at para. 330.

found that Strugar did not order the JNA's attack on the Old Town on 6 December 1991.<sup>76</sup> He had only ordered an attack on a military objective,<sup>77</sup> namely Mount Srđ. The judges also opined that Strugar was not responsible for aiding and abetting the attack.<sup>78</sup> However, Strugar was found guilty on the basis of command responsibility.<sup>79</sup> Article 7(3) of the Tribunal's Statute states that:

The fact that any of the acts referred to in articles 2 to 5 of the present Statute<sup>80</sup> was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.<sup>81</sup>

The Trial Chamber opined that Strugar was not aware prior to the start of the attack on Srđ that the forces under his command would shell the Old Town in a way that constituted an offence.<sup>82</sup> However, information that became available to Strugar during the course of the attack triggered the operation of Article 7(3). According to the Trial Chamber, news of a protest by the European Commission Monitor Mission (ECMM) against the shelling of Dubrovnik would have put the Accused: 'on notice of the clear and strong risk that already his artillery was repeating its previous conduct<sup>83</sup> and committing offences such as those

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<sup>76</sup> *Ibid.*, at para. 348.

<sup>77</sup> *Ibid.*, at para. 462.

<sup>78</sup> *Ibid.*, at para. 354, 356.

<sup>79</sup> *Ibid.*, at para. 446.

<sup>80</sup> Arts. 2-5 cover violations of the laws or customs of war, genocide and crimes against humanity respectively.

<sup>81</sup> *Updated Statute of the ICTY*, *supra* note 73, at Art. 7 (3).

<sup>82</sup> Judgment, *Strugar*, *supra* note 70, at para. 417.

<sup>83</sup> The Trial Chamber found that 'the forces in the attack on 6 December 1991 were among the forces involved at the time of the November shelling, and the unit directly located around Srđ on 6 December was 3/472 mtrb [Motorised Brigade] which, under its same commander, had been identified as in a position to have participated in the November shelling...'. *Ibid.*, at para. 415.

charged’.<sup>84</sup> Strugar was ultimately found guilty on two counts of violations of the laws or customs of war, namely attacks on civilians and destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science. His initial eight-year sentence was reduced on appeal to seven-and-a-half years, due to his deteriorating health.<sup>85</sup> Strugar was granted early release in 2009.

In its judgment, the Trial Chamber underlined that the destruction of cultural heritage constitutes a crime under customary international law. It pointed out, for example, that ‘In order to define the elements of the offence under article 3(d) [of the ICTY Statute] it may be useful to consider its sources in international customary and treaty law’, including the aforementioned 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict.<sup>86</sup> Customary international law focuses heavily on States.<sup>87</sup> The *Strugar* judgment, however, also implicitly addresses the human element of cultural heritage destruction, by referring to the human impact of cultural property crimes. It emphasizes, for example, that the Old Town of Dubrovnik ‘was, as it still is, a living town’.<sup>88</sup> Prior to 1991, between 7,000 and 8,000 people resided in the Old Town and the medieval walls were an

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<sup>84</sup> *Ibid.*, at para. 418.

<sup>85</sup> *The Prosecutor v. Pavle Strugar*, 17 July 2008, ICTY, Appeals Chamber, Judgment, IT-01-42-A, <http://www.icty.org/x/cases/strugar/acjug/en/080717.pdf>, accessed 8 June 2017, paras. 392-393.

<sup>86</sup> Judgment, *Strugar*, *supra* note 70, at para. 303.

<sup>87</sup> What Roberts has termed ‘traditional custom’, for example, ‘results from general and consistent practice followed by states from a sense of legal obligation’. Anthea E. Roberts, ‘Traditional and Modern Approaches to Customary International Law: A Reconciliation’, 95(4) *American Journal of International Law* (2001) 757-791, at 758. For their part, Goodman and Jinks draw attention to ‘debates about whether treaties or customary international law provides a better vehicle for regulating state practice’. Ryan Goodman and Derek Jinks, ‘How to Influence States: Socialization and International Human Rights Law’, 54(3) *Duke Law Journal* (2004) 621-703, at 675.

<sup>88</sup> Judgment, *Strugar*, *supra* note 70, at para. 285.

integral part of their daily lives; ‘The Old Town was a centre of commercial and local government activity and religious communities lived within its walls’.<sup>89</sup> Significantly, the walls also provided a sense of safety and security. The judgment notes that ‘...families and individuals displaced by the JNA advance on Dubrovnik had found shelter in the Old Town’;<sup>90</sup> and ‘Some people from the wider Dubrovnik [area] had also been able to take up temporary residence in the Old Town during the blockade in the belief that its World Heritage listing would give them protection from military attack’.<sup>91</sup> In a recent documentary film produced by the ICTY’s Outreach Programme, Vedran Benić – a Dubrovnik-based journalist – reinforces the idea that the walls offered safety. He recalls that for a while, people even closed the city gates at night, as if to shut out the war and the shelling.<sup>92</sup>

The ICTY’s other main case on the destruction of cultural heritage also centred on the shelling of Dubrovnik Old Town. Miodrag Jokić was the Commander of the 9th Military Naval Sector of the Yugoslav navy. After initially pleading not guilty, he subsequently pleaded guilty to six counts of violations of the laws or customs of war – including destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science (count 6). According to the Trial Chamber judgment:

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<sup>89</sup> *Ibid.*

<sup>90</sup> According to the Trial Chamber, it was also safe to assume that ‘the strength of the old stone buildings in the old Town, and the use of designated shelter areas by many of the residents, did much to minimise the loss of life and injuries in the Old Town that day [6 December 1991]’. *Ibid.*, at para. 112.

<sup>91</sup> *Ibid.*, at para. 285. Similarly, in the recent *Al Mahdi* trial at the ICC, the Trial Chamber briefly alluded to psychological aspects of cultural heritage. Discussing the destroyed mausoleums in Timbuktu and their significance to local people, it emphasized that ‘The mausoleums reflected part of Timbuktu’s history and its role in the expansion of Islam. They were of great importance to the people of Timbuktu, who admired them and were attached to them. They reflected their commitment to Islam and played a psychological role to the extent of being perceived as protecting the people of Timbuktu’. Judgment, *Al Mahdi*, *supra* note 13, at para. 78.

<sup>92</sup> ICTY Outreach Programme, *supra* note 66.

On 6 December 1991, JNA forces under the command of, among others, Miodrag Jokić, unlawfully shelled the Old Town... As a result of the shelling, two civilians were killed (Tonči Skočko, aged 18, and Pavo Urban, aged 23) and three civilians were wounded (Nikola Jović, Mato Valjalo, and Ivo Vlašica) within the Old Town. Six buildings in the Old Town were destroyed in their entirety and many more buildings suffered damage. Institutions dedicated to religion, charity, education, and the arts and sciences, and historic monuments and works of art and science were damaged or destroyed.<sup>93</sup>

Jokić did not order the shelling of the Old Town.<sup>94</sup> However, he had knowledge of the attack from the early hours of 6 December 1991;<sup>95</sup> and despite his claims that he would conduct an investigation, ‘insufficient efforts’ were made in this regard and ‘no-one on the JNA side was punished or disciplined for the shelling’.<sup>96</sup> Jokić, moreover, was aware that the Old Town of Dubrovnik, in its entirety, was a UNESCO World Heritage Site, and that ‘a substantial number of civilians’ were in the Old Town on 6 December 1991.<sup>97</sup> He was ultimately sentenced to seven years’ imprisonment for violations of the laws or customs of war, on the basis of his individual responsibility (Article 7(1)) and superior responsibility (Article 7(3)). The sentence was upheld on appeal a year later. He was granted early release in 2008.

As Jokić pleaded guilty, the judgment in this case – which is only a sentencing judgment – is short. However, while embracing the internationalist notion of cultural heritage destruction impacting all of mankind,<sup>98</sup> it also strongly conveys the idea that crimes against cultural

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<sup>93</sup> *The Prosecutor v. Miodrag Jokić*, 18 March 2004, ICTY, Trial Chamber, Judgment, IT-01-42/1-S, [http://www.icty.org/x/cases/miodrag\\_jokic/tjug/en/jok-sj040318e.pdf](http://www.icty.org/x/cases/miodrag_jokic/tjug/en/jok-sj040318e.pdf), accessed 1 June 2017, paras. 26-27.

<sup>94</sup> *Ibid.*, at para. 26.

<sup>95</sup> *Ibid.*, at para. 28.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*, at para. 23.

<sup>98</sup> It describes the Old Town as ‘an outstanding architectural ensemble illustrating a significant stage in human history. The shelling attack on the Old Town was an attack not only against the history and heritage of the region, but also against the cultural heritage of humankind’. *Ibid.*, at para. 51.

property affect individual lives.<sup>99</sup> Assessing the gravity of the crimes to which Jokić pleaded guilty, the Trial Chamber underlined that according to the Tribunal’s jurisprudence, ‘war crimes are not inherently less serious than crimes against humanity’.<sup>100</sup> It further stressed that two of the crimes to which Jokić pleaded guilty – namely devastation not justified by military necessity and unlawful attack on civilian objects – ‘are, in the present case, very serious crimes in view of the destruction that one day of shelling ravaged upon the Old Town and its long-lasting consequences’.<sup>101</sup> These passages of the sentencing judgment are noteworthy. Rather than make a distinction between crimes against people and crimes against property, the Trial Chamber recognized that the latter – like the former – leave deep long-term consequences. This, in turn, helps to reinforce the ‘human element’ of cultural heritage destruction. Like the *Strugar* judgment, for example, the *Jokić* judgment refers to the Old Town of Dubrovnik as a “‘living city” (as submitted by the Prosecution)’ and notes that ‘the existence of its population was intimately intertwined with its ancient heritage’.<sup>102</sup> As one

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<sup>99</sup> Similarly, in the *Strugar* judgment, the Trial Chamber observed that ‘As regards the seriousness of the offence of damage to cultural property (Article 3(d))...such property is, by definition, of “great importance to the cultural heritage of every people”’. Judgment, *Strugar*, *supra* note 70, at para. 232, citing the *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, *supra* note 35, at Art. 1(a). However, the judgment also underscores that ‘...even though the victim of the offence at issue is to be understood broadly as a “people”, rather than any particular individual, the offence can be said to involve grave consequences for the victim’ (para. 232).

<sup>100</sup> Judgment, *Jokić*, *supra* note 93, at para. 43. In the *Furundžija* case, for example, the Appeals Chamber reflected that ‘Since the *Tadić* Sentencing Appeals Judgment, the position of the Appeals Chamber has been that there is no distinction in law between crimes against humanity and war crimes that would require, in respect of the same acts, that the former be sentenced more harshly than the latter’. *The Prosecutor v. Anto Furundžija*, 21 July 2000, ICTY, Appeals Chamber, Judgment, IT-95-17/1-A, <http://www.icty.org/x/cases/furundzija/acjug/en/fur-aj000721e.pdf>, accessed 9 November 2016, para. 247. In the *Tadić* Sentencing Appeals Judgment, the Appeals Chamber found ‘no basis’ in either the Tribunal’s Statute or Rules for any distinction between the two categories of crimes; and it further underlined that ‘the authorized penalties are also the same, the level in any particular case being fixed by reference to the circumstances of the case’. *The Prosecutor v. Duško Tadić*, 26 January 2000, ICTY, Appeals Chamber, Judgment in Sentencing Appeals, IT-94-1-A and IT-94-1-Abis, <http://www.icty.org/x/cases/tadic/acjug/en/tad-asj000126e.pdf>, accessed 11 January 2016, para. 69.

<sup>101</sup> Judgment, *Jokić*, *supra* note 93, at para. 45.

<sup>102</sup> *Ibid.*, at para. 51.

illustration, ‘Residential buildings within the city also formed part of the World Cultural Heritage site, and were thus protected’.<sup>103</sup>

If the *Strugar* and *Jokić* judgments foreground an impact dimension of cultural heritage destruction, other judgments emphasize an intent dimension, wherein crimes against cultural heritage are interpreted as conveying harmful intentions towards groups. In this regard, the Tribunal has particularly underlined that attacks on cultural heritage can constitute persecution.

## ***2.2 Intention and Cultural Heritage Destruction***

The destruction of *Stari Most* in Mostar occurred during intense fighting between the Bosnian army (ABiH) and the Bosnian Croat army (HVO). As these former allies now turned on each other, this new phase of the Bosnian war particularly affected Central Bosnia. In the municipalities of Vitez, Kiseljak and Busovača, ‘...tensions increased between Muslim and Croatian populations’, and ‘The first acts of destruction of mosques and Muslim houses...occurred’.<sup>104</sup> On 16 April 1993, the HVO carried out an organized attack on several Bosnian Muslim towns and villages in the Lašva Valley area. One of these villages was Ahmići, where over 100 people were killed. The ICTY has stated that ‘A clearer example of “ethnic cleansing” would be difficult to find’.<sup>105</sup>

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<sup>103</sup> *Ibid.*

<sup>104</sup> *The Prosecutor v. Tihomir Blaškić*, 3 March 2000, ICTY, Trial Chamber, Judgment, IT-95-14-T, <http://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf>, accessed 10 July 2017, para. 367.

<sup>105</sup> *The Prosecutor v. Miroslav Bralo*, 7 December 2005, ICTY, Trial Chamber, Judgment, IT-95-17-S, <http://www.icty.org/x/cases/bralo/tjug/en/bra-sj051207-e.pdf>, accessed 10 June 2017, para. 30.



In the trial of Tihomir Blaškić, who was the HVO commander in the Central Bosnian Operative Zone, the Trial Chamber commented on the symbolic importance of Ahmići for Bosnian Muslims in BiH; ‘Many imams and mullahs came from there. For that reason, Muslims in Bosnia considered Ahmići to be a holy place. In that way, the village of Ahmići symbolised Muslim culture in Bosnia’.<sup>106</sup> The symbolic significance of Ahmići, in turn, meant that the destruction of the village’s mosques took on a wider meaning. Sprevak discusses the hypothesis of extended cognition (HEC), which ‘claims that important aspects of one’s mental life spill outside one’s head into objects in the environment’.<sup>107</sup> Quintessentially, HEC conveys the idea that external objects – such as laptops, phones and calendars – ‘can, just like one’s neural activity, constitute the realisation base of one’s cognitive processes’.<sup>108</sup> Using this analogy, the destruction of cultural heritage can be viewed as an ‘environmental activity’<sup>109</sup> that forms part of and reflects internal mental processes.

In the *Blaškić* case, for example, the Trial Chamber stressed that the crime of 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’.<sup>110</sup> A person’s discriminatory intent, in short, can spill over into the environment, and the destruction of cultural property is one example. The Trial Chamber noted that the Nuremberg Tribunal convicted Julius Streicher – the founder of the anti-semitic *Der Stürmer* – ‘of crimes against humanity inter alia for the boycott on Jewish businesses and the fire at

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<sup>106</sup> Judgment, *Blaškić*, *supra* note 104, at para. 411.

<sup>107</sup> Mark Sprevak, ‘Inference to the Hypothesis of Extended Cognition’, 41(4) *Studies in History and Philosophy of Science* (2010) 353- 362, at 353.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*, at 357.

<sup>110</sup> Judgment, *Blaškić*, *supra* note 104, at para. 227.

the Nuremberg synagogue'.<sup>111</sup> The Jerusalem District Court, moreover, 'stated in the [Adolf] Eichmann case'<sup>112</sup> that from the moment Hitler came to power the persecution of the Jews became manifest in the systematic destruction of the synagogues and the boycott of their businesses and shops'.<sup>113</sup> The Trial Chamber thus concluded from its analysis that 'the crime of "persecution" encompasses not only bodily and mental harm and infringements upon individual freedom', but additionally 'acts which appear less serious, such as those targeting property, so long as the victimised persons were specially selected on grounds linked to their belonging to a particular community'.<sup>114</sup> This condition was satisfied in the *Blaškić* case.<sup>115</sup>

Blaškić was found guilty of crimes against humanity, violations of the laws or customs of war and grave breaches of the Geneva Conventions. The 'destruction and plunder of property and, in particular, of institutions dedicated to religion or education' was successfully prosecuted under both Article 3 and Article 5 of the Tribunal's Statute. He was sentenced to 45 years' imprisonment. Although the Appeals Chamber subsequently overturned most of Blaškić's convictions and reduced his sentence to nine years, it noted that 'The destruction of property has been considered by various Trial Chambers of the International Tribunal to constitute persecutions as a crime against humanity'.<sup>116</sup> Significantly, it also confirmed that '...the

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<sup>111</sup> *Ibid.*, at para. 228. Streicher was sentenced to death.

<sup>112</sup> Eichmann has been described as 'one of the most pivotal actors in the deportation of European Jewry during the Holocaust'. United States Holocaust Memorial Museum, 'Adolf Eichmann' (n.d.), <[www.ushmm.org/wlc/en/article.php?ModuleId=10007412](http://www.ushmm.org/wlc/en/article.php?ModuleId=10007412)>, accessed 8 June 2017. Eichmann's trial began in April 1961 and he was found guilty, inter alia, of crimes against humanity. He sentenced to death by hanging.

<sup>113</sup> Judgment, *Blaškić*, *supra* note 104, at para. 230.

<sup>114</sup> *Ibid.*, at para. 233.

<sup>115</sup> *Ibid.*, at para. 425.

<sup>116</sup> *The Prosecutor v. Tihomir Blaškić*, 29 July 2004, ICTY, Appeals Chamber, Judgment, IT-95-14-A, <http://www.icty.org/x/cases/blaskic/acjug/en/bla-aj040729e.pdf>, accessed 15 August 2017, para. 146. The Appeals Chamber drew attention to the fact that in the ICTY's jurisprudence, a wide range of acts can potentially amount to persecution. According to the *Nikolić* sentencing judgment, for example, 'Acts found to

destruction of property, depending on the nature and extent of the destruction, may constitute a crime of persecution of equal gravity to other crimes listed in Article 5 of the Statute'.<sup>117</sup> The fact that property crimes can amount to persecution, exteriorizing a discriminatory intent towards certain groups or communities, powerfully underlines the intersections between crimes against property and crimes against people.

Of course, 'property' is a broad and diverse category. Indeed, Cribbet has stressed that 'the meaning of the chameleon-like word property constantly changes in time and space'.<sup>118</sup> It is noteworthy, therefore, that in the *Kupreškić* case, which also focused on the attack on Ahmići in April 1993, the Trial Chamber disaggregated the concept of property. Specifically, it argued that whether or not attacks on property constitute persecution depends upon the particular types of property in question. According to the judgment, 'There may be 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 a destruction is perpetrated on discriminatory grounds...'.<sup>119</sup> It gave the example of burning someone's car.<sup>120</sup> In this case,

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constitute persecution include, *inter alia*, murder, imprisonment, unlawful detention of civilians, deportation or forcible transfer, comprehensive destruction of homes and property, destruction of towns, villages and other public or private property and the plunder of property, trench-digging and the use of hostages and human shields, destruction and damage of religious or educational institutions'. *The Prosecutor v. Momir Nikolić*, 2 December 2003, ICTY, Trial Chamber, Sentencing Judgment, IT-02-60/1-S, <http://www.icty.org/x/cases/nikolic/tjug/en/mnik-sj031202-e.pdf>, accessed 7 April 2017, para. 104, n.148. See also *The Prosecutor v. Dario Kordić and Mario Čerkez*, 26 February 2001, ICTY, Trial Chamber, Judgment, IT-95-14/2-T, IT-02-60/1-S, accessed 11 June 2017, para. 205; *The Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlađo Radić, Zoran Žigić and Dragoljub Prcać*, 2 November 2001, ICTY, Trial Chamber, Judgment, IT-98-30/1-T), <http://www.icty.org/x/cases/kvočka/tjug/en/kvo-tj011002e.pdf>, accessed 8 May 2017, para. 186; *The Prosecutor v. Dragan Obrenović*, 10 December 2003, ICTY, Trial Chamber, Sentencing Judgment, IT-02-60/2-S, <http://www.icty.org/x/cases/obrenovic/tjug/en/obr-sj031210e.pdf>, accessed 23 May 2017, para. 64, n.95.

<sup>117</sup> Judgment, *Blaškić*, *ibid.*, at para. 149.

<sup>118</sup> John E. Cribbet, 'Concepts in Transition: The Search for a New Definition of Property', 1986 *University of Illinois Law Review* (1986) 1-42, at 1.

<sup>119</sup> *The Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Antić*, 14 January 2000, ICTY, Trial Chamber, Judgment, <http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf>, accessed 12 July 2017, para. 631.

however, the Trial Chamber was dealing with the comprehensive destruction of Bosniak homes and property. It found that such attacks amount to destruction of livelihoods and can therefore have ‘the same inhumane consequences as a forced transfer or deportation’.<sup>121</sup> Focusing on the burning of residential property, as occurred in Ahmići, it further underscored that this ‘may constitute a gross or blatant denial of fundamental human rights, and, if committed on discriminatory grounds, it may constitute persecution’.<sup>122</sup>

Attacks on cultural heritage are particularly significant in this regard. If, as the *Blaškić* Trial Chamber argued, attacks on property can amount to persecution ‘so long as the victimised persons were specially selected on grounds linked to their belonging to a particular community’,<sup>123</sup> the deliberate targeting of religious objects such as churches and mosques – which are part of the fabric of community life – can potentially provide strong evidence of this discriminatory selection. The particular ways in which cultural heritage is attacked, moreover, can further afford evidence of an intention to discriminate. In the *Brđanin* case, for example, which focused on north-west BiH, the Trial Chamber remarked that ‘Unlike non-Serb property, Bosnian Serb property was systematically left intact and only sporadically damaged’. It therefore found that ‘the destruction and appropriation of non-Serb property and religious buildings was discriminatory in fact’.<sup>124</sup>

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<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

<sup>123</sup> Judgment, *Blaškić*, *supra* note 104, at para. 233.

<sup>124</sup> *Prosecutor v. Radoslav Brđanin*, 1 September 2004, ICTY, Trial Chamber, Judgment, IT-99-36-T, <http://www.icty.org/x/cases/brdanin/tjug/en/brd-tj040901e.pdf>, accessed 18 July 2017, para. 1022. In the recent *Al Mahdi* trial at the ICC, the Trial Chamber considered that ‘the discriminatory religious motive invoked for the destruction of the sites [in Timbuktu] is undoubtedly relevant to its assessment of the gravity of the crime’. Judgment, *Al Mahdi*, *supra* note 13, at para. 81.

What the ICTY's jurisprudence has thus made clear is that the destruction of cultural heritage is not only a crime under international customary law<sup>125</sup> and a violation of the laws or customs of war under Article 3(d) of the Tribunal's Statute. It may also, even if it is not actually listed in Article 5, amount to persecutions – and hence a crime against humanity.<sup>126</sup> Indeed, according to the *Kordić and Čerkez* judgment – another case focused on Ahmići and the Lašva Valley – the destruction of religious buildings 'manifests a nearly pure expression of the notion of "crimes against humanity"'.<sup>127</sup> This is because such destruction, when committed with discriminatory intent, 'amounts to an attack on the very religious identity of a people' – and furthermore 'all of humanity is...injured by the destruction of a unique religious culture and its concomitant cultural objects'.<sup>128</sup> Alongside this broad reference to 'all of humanity', the Trial Chamber also made it clear that persecution is a specific category of crimes against humanity because it requires a particular intent. In short, 'This intent – the discriminatory intent – is what sets the crime of persecution apart from other Article 5 crimes against humanity'.<sup>129</sup> If, therefore, attacks against religious buildings can constitute persecution, and if the crime of persecution requires an 'elevated' *mens rea*,<sup>130</sup> this further

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<sup>125</sup> See, for example, Judgment, *Kordić and Čerkez*, *supra* note 116, at para. 206; Judgment, *Strugar*, *supra* note 70, at para. 303; Judgment, *Brđanin*, *ibid.*, at para. 594.

<sup>126</sup> See Judgment, *Blaškić*, *supra* note 104, at para. 227; *The Prosecutor v. Milomir Stakić*, 31 July 2003, ICTY, Trial Chamber, Judgment, IT-97-24-T, <http://www.icty.org/x/cases/stakic/tjug/en/stak-tj030731e.pdf>, accessed 17 June 2017, paras. 766, 768; *The Prosecutor v. Momčilo Krajišnik*, 27 September 2006, ICTY, Trial Chamber, Judgment, IT-00-39-T, <http://www.icty.org/x/cases/krajsnik/tjug/en/kra-jud060927e.pdf>, accessed 10 July 2017, para. 783; *The Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević and Sreten Lukić*, 26 February 2009, ICTY, Trial Chamber, Judgment, vol. I, IT-05-87-T, <http://www.icty.org/x/cases/milutinovic/tjug/en/jud090226-e1of4.pdf>, accessed 6 May 2017, para. 205; *The Prosecutor v. Vlastimir Đorđević*, 23 February 2011, ICTY, Trial Chamber, Judgment, IT-05-87/1-T, [http://www.icty.org/x/cases/djordjevic/tjug/en/110223\\_djordjevic\\_judgt\\_en.pdf](http://www.icty.org/x/cases/djordjevic/tjug/en/110223_djordjevic_judgt_en.pdf), accessed 1 July 2017, para. 1770.

<sup>127</sup> Judgment, *Kordić and Čerkez*, *supra* note 116, at para. 207.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*, at para. 212.

<sup>130</sup> *Ibid.*, at para. 213. The Trial Chamber commented that 'This discriminatory intent requirement for the crime of persecution is thus different from the more general level of intent required for the other crimes against

underscores the seriousness of cultural heritage crimes. Reinforcing this, the *Brđanin* Trial Chamber underlined that ‘...destruction of, or wilful damage to, Bosnian Muslim and Bosnian Croat religious and cultural buildings in the instant case occupy the same level of gravity as the other crimes enumerated in Article 5 of the Statute’.<sup>131</sup>

Expounding on the specificities of discriminatory intent, the Trial Chamber in *Blaškić* accentuated that the crime of persecution ‘must be committed for specific reasons whether these be linked to political views, racial background or religious convictions’.<sup>132</sup> In other words, ‘the perpetrator of the acts of persecution does not initially target the individual but rather membership in a specific racial, religious or political group’.<sup>133</sup> This, in turn, makes clear that there are strong overlaps between the crime of persecution and the crime of genocide, the latter requiring a specific genocidal intent aimed at destroying, ‘in whole or in part, a national, ethnical, racial or religious group, as such’.<sup>134</sup> The 2016 judgment against the former Bosnian Serb leader, Radovan Karadžić, confirms these overlaps and discusses the relationship between the two sets of crimes. Pointing out that the legal definition of genocide, as contained in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, excludes attacks on cultural or religious property or symbols of the group, the

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humanity under Article 5, when mere “knowledge of the context” of a widespread or systematic attack against a civilian population is sufficient’. *Ibid.*, at para. 212, citing Judgment, *Blaškić*, *supra* note 104, at para. 244.

<sup>131</sup> Judgment, *Brđanin*, *supra* note 124, at para. 1023.

<sup>132</sup> Judgment, *Blaškić*, *supra* note 104, at para. 235.

<sup>133</sup> *Ibid.*

<sup>134</sup> *Convention on the Prevention and Punishment of the Crime of Genocide* (9 December 1948), Art. II, <<https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf>>, accessed 6 March 2017.

*Karadžić* judgment recognizes that ‘such attacks may nevertheless be considered evidence of intent to physically destroy the group’.<sup>135</sup>

In the earlier trial of Radislav Krstić, the Chief of Staff and, subsequently, the Commander of the Drina Corps of the Bosnian Serb army (VRS), the Trial Chamber similarly noted that the legal definition of genocide is confined to acts aimed at the physical or biological destruction of a group, in whole or in part.<sup>136</sup> It also acknowledged, however, that ‘...where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group’.<sup>137</sup> In this case, therefore, the Trial Chamber considered the deliberate destruction of mosques and Bosnian Muslim homes as evidence of an intention to destroy the group.<sup>138</sup> According to Francioni, this is an important judgment because it ‘places new emphasis on the social existence of a group, as opposed to its purely biological existence...’.<sup>139</sup>

Both the *Krstić* and *Karadžić* judgments are also significant from a genocide prevention perspective. A critical part of genocide prevention is the detection of early warning signs. In

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<sup>135</sup> *The Prosecutor v. Radovan Karadžić*, 24 March 2016, ICTY, Trial Chamber, Judgment, IT-95-5/18-T, [http://www.icty.org/x/cases/karadzic/tjug/en/160324\\_judgement.pdf](http://www.icty.org/x/cases/karadzic/tjug/en/160324_judgement.pdf), accessed 1 May 2017, para. 553.

<sup>136</sup> *The Prosecutor v. Radislav Krstić*, 2 August 2001, ICTY, Trial Chamber, Judgment, IT-98-33-T, <http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf>, accessed 16 August 2017, para. 580.

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.* However, in the trial of Zdravko Tolimir – the former Assistant Commander for Intelligence and Security of the VRS Main Staff – the Appeals Chamber found that the Trial Chamber in the *Tolimir* case had committed an error by treating ‘the destruction of mosques in Srebrenica and Žepa as an additional act through which the Bosnian Serb Forces inflicted on the protected group conditions of life calculated to bring about its destruction...’. *The Prosecutor v. Zdravko Tolimir*, 8 April 2015, ICTY, Appeals Chamber, Judgment, IT-05-88/2-A, IT-05-88/2-A, accessed 16 August 2017, para. 230.

<sup>139</sup> Francioni, *supra* note 17, at 1218.

2014, the UN Office on Genocide Prevention and the Responsibility to Protect developed a ‘tool for prevention’ in the form of its Framework of Analysis for Atrocity Crimes (namely genocide, crimes against humanity and war crimes).<sup>140</sup> The Framework identifies eight common risk factors, including situations of armed conflict or other forms of instability (risk factor 1) and weakness of state structures (risk factor 3). Risk factor 7 consists of enabling circumstances or preparatory action, and the indicators of this include, inter alia, ‘Destruction or plundering of essential goods or installations for protected groups, populations or individuals, or of property related to cultural and religious identity’.<sup>141</sup> The Framework also identifies two specific risk factors for genocide. The first of these is inter-group tensions or patterns of discrimination against protected groups, indicators of which can include ‘Denial of the existence of protected groups or of recognition of elements of their identity’.<sup>142</sup> The second specific risk factor for genocide is signs of an intent to destroy in whole or in part a protected group. One such sign might be ‘Attacks against or destruction of homes, farms, businesses or other livelihoods of a protected group and/or of their cultural or religious symbols and property’.<sup>143</sup> In other words, crimes against cultural heritage should not be viewed as isolated acts. As the ICTY’s Deputy Prosecutor, Michelle Jarvis, has pointed out, they can be a harbinger of more serious crimes to come.<sup>144</sup>

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<sup>140</sup> UN, *Framework of Analysis for Atrocity Crimes – A Tool of Prevention* (2014), <[www.un.org/en/preventgenocide/adviser/pdf/framework%20of%20analysis%20for%20atrocity%20crimes\\_en.pdf](http://www.un.org/en/preventgenocide/adviser/pdf/framework%20of%20analysis%20for%20atrocity%20crimes_en.pdf)>, accessed 2 May 2017.

<sup>141</sup> *Ibid.*, at 16.

<sup>142</sup> *Ibid.*, at 18.

<sup>143</sup> *Ibid.*, at 19.

<sup>144</sup> ICTY Outreach Programme, *supra* note 66.



Taken as a whole, the ICTY's jurisprudence elucidates the crucial 'human element' of cultural heritage crimes. It has shown that crimes against property and crimes against people are closely inter-connected in two key ways, namely through the impact that cultural heritage destruction has on human lives<sup>145</sup> and through the intentions toward human lives that cultural property crimes can manifest. Conversely, these property-people linkages can be viewed more positively. Adopting a functional approach, the final section explores the potential uses of cultural heritage in post-conflict societies, specifically in relation to reconciliation.

### **3. Utilizing the 'Human Dimension' of Cultural Heritage in Post-Conflict Societies**

The *Rakuchu Rakugai Zu* are part of Japan's cultural heritage. Meaning 'scenes inside and outside the capital', the *Rakuchu Rakugai Zu* depict detailed images – painted onto folding screens – of medieval Kyoto and its surroundings.<sup>146</sup> While the paintings represent a bygone era, a part of history, they are also part of the present. They convey 'multiple meanings and messages to people, with a variety of modern social and economic roles, purposes, and functions...';<sup>147</sup> and they have been utilized in a range of contemporary contexts. As one illustration, 'the Rakuchu Rakugai theme was used in the marketing strategy of a major Japanese electronics company on its newest digital plasma television sets, launched just before the start of 2006 Fédération Internationale de Football Association (FIFA) World Cup

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<sup>145</sup> The human impact of cultural heritage crimes was also highlighted in the recent *Al Mahdi* judgment at the ICC. According to Casaly, 'Clearly, Al Mahdi saw his guilt as a product of the specific impact of his actions on the local Timbuktu community, highlighting the importance of a localized relativist approach in determining the gravity threshold for international criminal law'. Casaly, *supra* note 14, at 1218.

<sup>146</sup> According to Loulanski and Loulanski, 'The genre reached its height of popularity in the 17th century, and declined late in that century with the moving of the capital to Edo (Tokyo) and Kyoto's loss of prestige as the centre of the nation's cultural, political, and commercial life'. They add that 'At present there are only four screens dating back to the 16th century, and around 100 screens created between the 16th and 19th centuries that are known to the public'. Tolina Loulanski and Vesselin Loulanski, 'Outgrowing the Museum: The Heritage of *Rakuchu Rakugai* and its Modern Purposes', 14(6) *International Journal of Cultural Studies* (2011) 607-630, at 608.

<sup>147</sup> Loulanski, *supra* note 18, at 223.

in Germany'.<sup>148</sup> For Loulanski, therefore, the crucial point about cultural heritage is that it is a living entity that constantly evolves and develops. The past that it represents 'lives within the present and projects itself onto the future';<sup>149</sup> and this, in turn, means that 'heritage 'must be *alive* and functional to retain its worth and integrity'.<sup>150</sup> Quintessentially, heritage is about people, and it acquires meaning in this human-centred framework. Reinforcing this, Graham maintains that 'if heritage is the contemporary use of the past, and if its meanings are defined in the present, then we create the heritage that we require and manage it for a range of purposes defined by the needs and demands of our present societies'.<sup>151</sup>

In societies that have been torn apart by war and armed conflict, many of the common everyday needs that people have – for economic security, 'normality', stability – cannot be easily fulfilled in the absence of peace and some level of reconciliation, defined as the repair and restoration of relationships and the re-building of trust.<sup>152</sup> Transitional justice, the process of dealing with the past, is partly about facilitating and fostering peace and reconciliation. As defined by the UN, for example, transitional justice encompasses:

the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation'.<sup>153</sup>

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<sup>148</sup> *Ibid.*

<sup>149</sup> *Ibid.*, at 227.

<sup>150</sup> *Ibid.*, at 224.

<sup>151</sup> Graham, *supra* note 28, at 1004.

<sup>152</sup> Janine Natalya Clark, *International Trials and Reconciliation: Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia* (Routledge, Abingdon, 2014), p.6.

<sup>153</sup> UN, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice* (March 2010), M<[www.un.org/ruleoflaw/files/TJ\\_Guidance\\_Note\\_March\\_2010FINAL.pdf](http://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf)>, accessed 3 March 2017.

Within transitional justice practice, however, little attention has been given to cultural heritage – or to the possible connections between cultural heritage and reconciliation. This article maintains that these connections represent the ultimate expression of the ‘human element’ of cultural heritage.

A crucial starting point in this regard is Lehrer’s concept of ‘conciliatory heritage’. Defining reconciliation as ‘an organic process that unfolds in daily life, within and between aggrieved communities’,<sup>154</sup> Lehrer argues that heritage sites can offer invaluable opportunities for storytelling and spontaneous forms of ‘testimony’ – which, in turn, create ‘the conditions for new communities of listeners’.<sup>155</sup> She uses the example of ‘Jewish’ venues in Kazimierz, the historical Jewish quarter of Cracow in Poland. Although Kazimierz is no longer a Jewish neighbourhood, ‘Since the early 1990s in post-communist Poland, non-Jewish “heritage brokers” in Kazimierz have played key roles in cultivating conditions for the flowering and ferment of Polish-Jewish culture’.<sup>156</sup> When Jews visit Kazimierz, they often tell their stories – ‘particularly stories of pain caused *by* Poles’.<sup>157</sup> This enables the development of new understanding and empathy between Jews and Poles as they listen to each other’s stories and truths.<sup>158</sup> In this way, Kazimierz functions as a ‘nurturing’ public space, drawing ‘estranged groups together to do the hard work of practising conciliatory heritage’.<sup>159</sup>

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<sup>154</sup> Lehrer, *supra* note 20, at 272.

<sup>155</sup> *Ibid.*, at 279.

<sup>156</sup> *Ibid.*, at 271.

<sup>157</sup> *Ibid.*, at 282.

<sup>158</sup> *Ibid.*, at 284.

<sup>159</sup> *Ibid.*

Basu, similarly, has highlighted the potential relationship between cultural heritage and reconciliation. His specific focus is on Sierra Leone, which experienced a bloody civil war between 1991 and 2002. According to Pinker, culture is intrinsically a process of learning. In his words, ‘A mind unequipped to discern other people’s beliefs and intentions, even if it can learn in other ways, is incapable of the kind of learning that perpetuates culture’.<sup>160</sup> Basu’s argument is that cultural heritage can facilitate this learning process; and if people understand each other’s cultures, this provides an important basis for building inter-group understanding and respect. For him, therefore, cultural heritage is a valuable resource ‘through which to incorporate – and, indeed, confront – the conflictual past in the present as the nation endeavours to build a sustaining peace for the future’.<sup>161</sup>

If cultural heritage is quintessentially about people, it should be used in the complex process of restoring and re-building human relationships fractured by violence and armed conflict. To return to the example of *Stari Most* in Mostar, the bridge was officially re-opened in July 2004 after extensive reconstruction work. However, this should not be the end of the story, and the bridge could have a role to play in helping to narrow the continuing divides between Bosniaks and Bosnian Croats who reside in the city. Creating opportunities for Bosniaks to tell Bosnian Croats how they felt when the bridge was destroyed, what the bridge meant to them – and conversely, for Bosnian Croats in Mostar to share their own memories and feelings – could be important steps forward. In Dubrovnik, similarly, individuals and families who directly experienced the shelling on 6 December 1991 should have an opportunity to speak to Serbs about the Old Town, what it meant to them and their sense of safety and

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<sup>160</sup> Steven Pinker, *The Blank Slate: The Modern Denial of Human Nature* (Penguin Books, London, 2002), p.62.

<sup>161</sup> Paul Basu, ‘Confronting the Past? Negotiating a Heritage of Conflict in Sierra Leone’, 13(2) *Journal of Material Culture* (2013) 233-247, at 246.

security – which JNA shells destroyed – inside the City Walls. Creating the conditions for mutual understanding and empathy is a critical part of any reconciliation process.

On 10 June 1838, 28 Aboriginal men and women from the Wirrayaraay tribe were massacred at Myall Creek Station in Australia. More than a century and a half later, on 10 June 2000, a ceremony was held to inaugurate a memorial to the dead. The fact that descendants from both sides – victims and perpetrators – participated in the ceremony was important, but so too was the location. According to Batten, ‘A major factor in the significance and power of the place is its landscape: gum trees and golden grasslands. These things are a catalyst for reflection, and as such, can be a catalyst for reconciliation’.<sup>162</sup> Likewise, cultural heritage sites can be catalysts for reflection. In post-conflict societies, therefore, the emphasis should not only be on restoring damaged and destroyed heritage sites, but also on exploring and utilizing their potential to foster such reflection – and ultimately inter-human understanding.

## Conclusion

In June 2017, the author travelled to Sarajevo to take part in the ICTY’s final Legacy Conference.<sup>163</sup> Various materials produced by the Tribunal’s Outreach Programme were on display in front of the main conference room, for participants to take home with them. These materials included two documentaries. One of these focused on the atrocities (killings, tortures, rapes) committed in the eastern Bosnian town of Višegrad.<sup>164</sup> The other was about

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<sup>162</sup> Bronwyn Batten, ‘The Myall Creek Massacre: History, Identity and Reconciliation’, in William Logan and Keir Reeves (eds.), *Places of Pain and Shame: Dealing with “Difficult Heritage”* (Routledge, Abingdon, 2009), pp.82-96, at 95.

<sup>163</sup> See <http://www.icty.org/en/outreach/legacy-conferences/icty-legacy-dialogues-conference-2017>

<sup>164</sup> ICTY Outreach Programme, *Crimes Before the ICTY: Višegrad* (documentary film) (2016), <[www.icty.org/en/in-focus/documentaries/crimes-before-the-icty-visegrad](http://www.icty.org/en/in-focus/documentaries/crimes-before-the-icty-visegrad)>, accessed 9 April 2017.

Dubrovnik and crimes against cultural heritage.<sup>165</sup> On the final morning of the conference, it was striking that while all of the Višegrad DVDs had been taken, many of the Dubrovnik DVDs remained on the tables. Was this because the conference participants, many of whom were from BiH, were less interested the crimes that took place in Croatia? Was it because they attached less importance to crimes against cultural heritage than they did to crimes against people?

Stressing the inter-linkages between both sets of crimes, and embracing a functionalist view of cultural heritage, this article has sought to foreground what Francioni has termed the ‘human element’ of cultural heritage. More particularly, it has argued that the jurisprudence of the ICTY has critically helped to elucidate this human element. Through an analysis of the Tribunal’s key cases, it has shown that this human element can be conceptualized in two main ways, namely through an emphasis on impact (impact dimension) and on intention (intent dimension).

The final part of the article sought to operationalize the human element of cultural heritage, by arguing that there is an important – and unexplored – place for cultural heritage in post-conflict reconciliation processes. Creating opportunities for people to understand each other’s culture provides a strong foundation for the development of deeper forms of human understanding. According to Logan, heritage consists of:

...things about which we are usually proud; but sometimes they may be important and worthy of conservation because they are reminders of how societies can go wrong; they provide salutary lessons for present and future generations’.<sup>166</sup>

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<sup>165</sup> ICTY Outreach Programme, *supra* note 66.

<sup>166</sup> Logan, *supra* note 30, at 35.

The challenge, thus, is to functionally utilize cultural heritage to draw out and learn these important lessons.