15 Attacks on Cultural Property

15.0. Introduction

We have discussed how law of armed conflict/international humanitarian law (LOAC/IHL) consists, at least, of 1907 Hague Regulation IV, the 1949 Geneva Conventions, the 1977 Additional Protocols, customary international law, case law, and multinational treaties. In fact, there are scores, perhaps hundreds, of treaties, conventions, declarations, compacts, and resolutions that bear on LOAC/IHL in one way or another.

Six multinational treaties are particularly significant to LOAC/IHL: the 1925 Gas Protocol Prohibiting the Use in War of Asphyxiating, Poisonous or Other Gases; the 1954 Hague Convention for the Protection of Cultural Property; the 1971 Convention on the Prohibition of Development, Production and Stockpiling of Biological and Toxin Weapons; the 1997 Ottawa Treaty Banning the Use, Stockpiling, Production and Transfer of Anti-Personnel Land Mines; the 1980 Convention on Certain Conventional Weapons; and the 1993 Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons. The 1976 Convention on Environmental Modification might reasonably be added to that list.

Of these, the 1980 Conventional Weapons and 1993 Chemical Weapons Conventions, particularly, have potential impact on warfighters. Violations of either, could lead to war crime charges against combatants in the field or, at the least, intensly negative international scrutiny.[1] In this chapter, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and its two Protocols, also receive attention. It is essentially a treaty about targeting.

> Looting the enemy's cultural treasures and religious shrines has been a regular feature of aggressive and imperial war time out of mind; it was still so for the war-lords of Germany in the Second World War. Bombarders devoted to cracking enemy civilian morale may believe, almost certainly mistakenly, that wrecking his treasures and shrines is a good way to go about it. One of the first things the Germans did on seizing Warsaw at the end of September 1939 was to destroy the Poles' most beloved national monument, the one to Chopin . . . The Dresden climax of [British] Bomber Command's offensive has acquired its peculiarly bad reputation because, in addition to being of little military

[1] See, e.g., William Bogdanos, *Thieves of Baghdad* (New York: Bloomsbury, 2005) 110–11, in which U.S. forces, during the U.S.–Iraq conflict, received international condemnation, not all deserved, for failure to prevent the looting of Iraq's National Museum, just as common Art. 2 fighting was ending.

importance, it was uniquely destructive of cultural treasures. By the time of the Second World War, however, the countervailing tendency was well in evidence.[2]

That countervailing tendency is found nine years after the war's end in the United Nations Educational Scientific and Cultural Organization (UNESCO)-sponsored Hague Cultural Property Convention.

15.1. Background: 1954 Hague Convention for the Protection of Cultural Property

In the eighteenth century, the Swiss jurist, Vattel, wrote, "For whatever cause a country is ravaged, we ought to spare those edifices which do honour to human society, and do not contribute to increase the enemy's strength . . . such as temples, tombs, public buildings, and all works of remarkable beauty. What advantage is obtained by destroying them?"[3] Indeed, LOAC has long provided for the protection of cultural objects. Article 35 of the 1863 Lieber Code provides: "Classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes . . . must be secured against all avoidable injury, even when they are contained in fortified places . . . " (Alas, in Article 36 Lieber also wrote, "If such works of art, libraries, collections, or instruments belonging to a hostile nation or government can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace.") Article 27, 1907 Hague Regulation IV, established a quite different and more lasting rule: "[A]ll necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments . . . " Hague Regulation IV, Article 56, further provides, " . . . All seizure, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings." Professor Geoffrey Best adds, "Typical of that generation's optimism about international law was the unguarded assumption that victor no less than loser would, if charged, go to court and, if found guilty, pay up."[4] The World War I free-for-all on cultural property supports Best's negative view.

Article 58 of the 1940 edition of Field Manual (FM) 27–10, *Rules of Land Warfare*, repeats the Lieber Code's prohibition,[5] of which Oppenheim, no less cynical than Best, wrote, "No bombardment takes place without the sufferers accusing the attacking forces of neglecting the rule that such places must be spared. In practice, whenever one belligerent accuses the other of having intentionally bombarded a hospital, church, or similar building, the charge is always either denied with indignation or justified by the assertion that these sacred buildings have been used improperly by the accuser."[6]

[2] Geoffrey Best, *War and Law Since 1945* (Oxford: Oxford University Press, 1994), 285.

[3] Cited in, Sharon A. Williams, *The International and National Protection of Movable Cultural Property: A Comparative Study* (Dobbs Ferry, NY: Oceana Publications, 1978), 5–6.

[4] Best, *War and Law Since 1945*, supra, note 2, at 284.

[5] War Dept., FM27–10, *Rules of Land Warfare* (Washington: GPO, 1956), para. 58, at 14. "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 that they are not being used at the time for military purposes. . . . "

[6] L. Oppenheim, *International Law: A Treatise*, vol. II, *Disputes, War and Neutrality*, 7th ed., H. Lauterpacht, ed. (London: Longman, 1952), para. 158, at 421.

Major-General A.V.P. Rogers more charitably suggests, "It is more likely, though, that such destruction is caused in the main incidental to attacks on military objectives, caused by mistake . . . "[7] Whether foreseeing incidental or purposeful damage, in World War II, the United States and United Kingdom went to considerable lengths to spare and protect cultural property "so far as war allows."[8] Today, under customary international law, the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the Rome Statute of the International Criminal Court, attacking protected cultural objects in both international and non-international armed conflicts constitutes war crimes.[9]

The protection of cultural property and places of worship receives special emphasis in the 1954 Hague Cultural Property Convention – protection from attack as well as protection from use for military purposes so an attack is not necessary or justifiable.

SIDEBAR. Throughout World War II, the area bombing of European targets by both the Allies and the Axis resulted in the loss on both sides of cathedrals, museums, historic churches, centuries-old monuments, and other irreplaceable cultural objects.

In April 1945, Soviet Army troops were approaching German-occupied central Vienna. A white flag was hoisted by Austrian resistance fighters in the south tower of the twelfth-century St. Stephan's Cathedral in an effort to save the historic landmark, one of Austria's most significant cultural treasures. Upon seeing the white flag, the senior Nazi officer in the city ordered Captain Gerhard Klinkicht, the commander of a German artillery battery, to fire one hundred rounds directly into the cathedral, to foil the efforts of the resistance and assure the cathedral's destruction. Captain Klinkicht quickly determined that the cathedral was "out of range" of his guns and he would not order his battery to fire.

Long after the war, in April 1997, Klinkicht, by then eighty-seven years old, was present when Archbishop Christoph Schönborn unveiled a plaque at the base of the south tower of St. Stephan's Cathedral, honoring Klinkicht for his refusal to obey the unlawful order to destroy one of Austria's most significant cultural objects.[10]

After World War II there were military tribunal convictions based on 1907 Hague Regulation IV for the destruction of cultural objects.[11] In the Judgment of the Nuremberg

[7] Maj-Gen. A.V.P. Rogers, *Law on the Battlefield*, 2d ed. (Manchester: Juris Publishing, 2004), 136.

[8] Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict* (Cambridge: Cambridge University Press, 2006), 74.

[9] Art. 8(2) (b) (ix) – Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; and Art. 8(2) (e) (iv), employing the same title.

[10] One account of the wartime event is available at: http://www.vienna.cc/english/stephansdom.htm.

[11] For example, *Trial of Karl Lingenfelder*, French Permanent Military Tribunal at Metz (March 11, 1947), U.N. War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. IX (London: H.M. Stationery Office, 1949), 67–8. In occupied France, the accused, acting on the order of a German official, used four horses to pull down a city's monument to local World War I dead and destroyed marble tablets bearing their names. The Tribunal admitted evidence of extenuating circumstances and sentenced him to one year's confinement.

International Military Tribunal, the Tribunal held, in regard to Alfred Rosenberg, the Nazi Party's ideologist, that "Rosenberg is responsible for a system of organized plunder . . . throughout the invaded countries of Europe . . . [H]e organized and directed the '*Einsatzstab* Rosenberg,' which plundered museums and libraries, confiscated art treasures and collections. . . . "[12] Rosenberg was sentenced to death for having plundered on a grand scale, particularly art objects.

In 1949, with the recent war's well-publicized Nazi theft of European public and private art and cultural objects, an initiative that had first been advanced by the Netherlands prior to the war led to the United Nations drafting preliminary articles that were considered by fifty-six states. "The main advantage of having special rules for cultural property is in making attacking commanders more aware of the existence of cultural property . . . "[13] Today the 1954 Hague Cultural Convention, written before the 1949 Geneva Conventions and before the 1977 Additional Protocols, has been ratified by 122 states, with new ratifiers of the basic Convention continually being added. The United States ratified the basic Convention in September 2008.

15.2. The 1954 Hague Convention for Protection of Cultural Property

"The Convention is the first comprehensive international agreement for the protection of cultural property."[14] It consists of the Convention itself, with forty articles. There also are Regulations for the Execution of the Convention appended to the Convention. Also part of the Convention are the 1954 First Protocol (fifteen articles) and 1999 Second Protocol (forty-four articles).

The 1954 Convention's definition of cultural property, in Article 1.(a), is admirably broad, "yet so vague that it is clear some measures of dissemination to inform the military . . . will be absolutely vital . . . "[15]:

> Movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular, archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above.

No code or convention can anticipate every eventuality, but vague words and terms like "important," "great importance," and "artistic" are not the Convention's only terms in need of clarification for those who are expected to apply it. In fact, two somewhat

[12] Judgment, Trial of the Major War Criminals Before the International Military Tribunal (1945–1946), in Leon Friedman, ed., *The Law of War: A Documentary History*, vol. II (New York: Random House, 1972), 922, 981.

[13] UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004), para. 5.23.3, at 71.

[14] Adam Roberts and Richard Guelff, *Documents on the Laws of War*, 3d ed. (Oxford: Oxford University Press, 2000), 371.

[15] Leslie C. Green, *Essays on the Modern Law of War*, 2d ed. (New York: Transnational, 1999), 235.

repetitive provisions, Articles 7,[16] and 25,[17] address the required dissemination to the armed forces of the Convention's protections.

The Convention, which originally applied only in international armed conflicts, does not include in its coverage charitable or educational institutions that are not themselves of historical interest. Nor does it protect items of geographic "natural heritage," as it does manmade landmarks. Unless a church is of historical or special cultural significance, it is not protected by the Convention. There is no provision addressing incidental damage, indicating that incidental damage to protected objects does not constitute a breach. The Convention does prohibit reprisals against protected objects. Unsurprisingly, any protected object that abuses its protected status loses that status.[18] The Convention also applies in periods of belligerent occupation. Notably for targeting purposes, in requiring that protected cultural objects be separated from "any important military objective" the Convention includes broadcasting stations, along with airports and seaports, as military objectives (Article 8.1. (a)).

A controversial issue was the Convention's use of the terms "**imperative military necessity**" (Article 4.2) and "**unavoidable military necessity**" (Article 11.2). The Convention's basic protection of cultural property can be waived, that is, ignored, "in cases where military necessity imperatively requires."[19] No description or definition of imperative military necessity is offered, however. The Convention's *special* protection, described in Article 8.1, can be waived in "exceptional cases of unavoidable military necessity."[20] Again, no description or definition of the term "unavoidable military necessity" is offered.

"The inclusion of the notion of military necessity was the result of fierce negotiations at the Diplomatic Conference that drew up the 1954 Convention."[21] The undefined conditions for invoking military necessity, so often the offending military commander's rote defense, made the scope for invoking the waiver very large and left its definition to the state applying the waiver. At the Diplomatic Conference, some state representatives wanted to exclude military necessity altogether, arguing that its inclusion lessens protections and invites abuse. Others insisted it remain as a commander's protection in the event of militarily unavoidable consequences. The issue was finally addressed, if not

[16] Art. 7. "The High Contracting Parties undertake to introduce in time of peace into their military regulations or instructions such provisions as may ensure observance of the present Convention, and to foster in the members of their armed forces a spirit for the culture and cultural property of all peoples. The High Contracting Parties undertake to plan or establish in peacetime, within their armed forces, services or specialist personnel whose purposes will be to secure respect for cultural property and to co-operate with civilian authorities responsible for safeguarding it."

[17] Art. 25. "The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the text of the present Convention and the Regulations for its execution as widely as possible in their respective countries. They undertake, in particular, to include the study thereof in their programmes of military and, if possible, civilian training . . . "

[18] Arts. 8.1. (b), and 11; First Protocol Arts. 8.1 (b), and 11; and Second Protocol, Art. 13.

[19] Art. 4.2. "The obligations mentioned in paragraph 1 of the present Article [respect for cultural property] may be waived only in cases where military necessity imperatively requires such a waiver."

[20] Art. 11.2. "Apart from the case provided for in paragraph 1 of the present Article, immunity shall be withdrawn from cultural property under special protection only in exceptional cases of unavoidable military necessity, and only for such time as that necessity continues. Such necessity can be established only by the officer commanding a force the equivalent of a division in size or larger. Whenever circumstances permit, the opposing Party shall be notified, a reasonable time in advance, of the decision to withdraw immunity."

[21] Jan Hladík, "The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the Notion of Military Necessity," 835 *Int'l Rev. of the Red Cross* (Sept. 1999), 621.

resolved, to the satisfaction of all Parties, in the 1999 Second Protocol. In two articles, 6 and 13, the Second Protocol specifies criteria for the invocation of military necessity. The need for workable criteria was emphasized in 1991, in the Bosnia-Herzegovina conflict in the former Yugoslavia. In Dubrovnik and Mostar, cultural objects that reflected the area's rich cultural and religious heritage were destroyed or damaged, purposely targeted as an aspect of ethnic cleansing. Military necessity was the rationalization. "If imperative requirements of military necessity can trump the protection of cultural property, no real progress has been achieved since the days of the 'as far as possible' exhortation, since the attacking force is prone to regard almost any military necessity as 'imperative'."[22] Several ICTY cases demonstrate, however, that the prohibition against attacking cultural objects has real teeth. (See Cases and Materials, this chapter.)

The 1954 Convention calls for ratifying states to prepare in peacetime for Article 8's "**special protection**" of cultural property that will be, or has already been, deposited in designated places of refuge in time of armed conflict, be it international or non-international, and in periods of belligerent occupation. There are three categories of specially protected objects: first, refuges that shelter cultural property, such as the *Alt-Aussee* refuge – an unused salt mine near Steinberg, Upper Austria;[23] second, centers containing monuments, such as Vatican City, the sole registered center; and finally, immovable cultural property of great importance is protected. No such property has been registered.

Prior to an armed conflict, immovable protected cultural property (e.g., cathedrals, palaces, mosques, national libraries) is to be marked with a distinctive emblem – a five-sided shield-like figure with alternating blue and white segments.* The placement of the emblem and its visibility are left to the Convention's state parties. In the 1991 armed conflict in Croatia, the emblem was painted on boards approximately two meters high that were placed on hundreds of protected monuments and institutions. More often, the emblem is several inches high, placed in prominent positions on protected buildings and other immovables. Special protection may be granted immovable cultural property and places of refuge and, in limited numbers, movable cultural property that is distanced from vulnerable military objects, such as airports and arms-manufacturing plants. To secure this special protection, a cultural object must be described and entered in the International Register of Cultural Property Under Special Protection. Entries may be made during an armed conflict and during belligerent occupation, as well. Misuse of protection will subject the object to attack.

Entry in the International Register initiates the Convention's special protection. The public announcement of an object's registration is thought to reduce the probability of accidental damage or destruction of the object. Less trusting individuals suggest that registration may increase the risk of deliberate destruction.

[22] Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2004), 158. Professor Dinstein provides excellent coverage of the Convention and its Protocols at 157–66, as does Gen. Rogers, *Law on the Battlefield*, supra, note 7, at 139–56.

[23] The International Register of Cultural Property Under Special Protection is available at: http://unesdoc.unesco.org/images/0015/001585/158587EB.pdf.

* Art. 16 of the Convention describes the distinctive emblem in terms that make a mental image difficult to capture: "[A] shield, pointed below, per saltire blue and white (a shield consisting of a royal-blue square, one of the angles of which forms the point of the shield, and of a royal-blue triangle above the square, the space on either side being taken up by a white triangle)."

The legal significance of special protection registration is debatable, for it adds little to the protection of cultural objects already afforded by customary international law. Professor Dinstein, with the military necessity exception in mind, writes: "[T]he stark fact is that the status of special protection does not guarantee to any cultural property – not even of the greatest importance – genuine immunity from attack and destruction . . . [I]t must be acknowledged that the construct of special protection is only marginally more satisfactory than that of general protection."[24] That viewpoint may account for the few registrations that have been made. Several ratifying States have registered several individual refuge sites and objects; only the Vatican has registered a center containing monuments.

The Register of Cultural Property is prepared and maintained by the sponsor of the 1954 Hague Convention, the Director General of UNESCO, who accepts and records applications for special protection under the Convention. "Of course, effective protection of cultural property involves much more than compliance with the treaty obligations. It requires comprehensive listing of property, coordination between ministries, local government and the armed forces, plans for protection of cultural property in peacetime including establishing refuges, duplicating important archives and the protection of electronic data."[25] Such comprehensive preparation has not yet generally occurred.

Why is UNESCO the sponsoring agency, and not the International Committee of the Red Cross (ICRC)? Because the ICRC deals with the protection of the *victims* of armed conflict. Objects, including cultural objects, are outside the ICRC's mandate.

The United States has not yet ratified the 1954 Convention because it objects to the special protection scheme. The United States fears that an enemy could make too liberal use of special protection, limiting legitimate targeting options. Even with this fear, the United States "regards its provisions as relevant to the targeting process: 'United States policy and the conduct of operations are entirely consistent with the Convention's provisions. In large measure, the practices required by the Convention to protect cultural property were based upon the practices of US military forces during World War II.' "[26] In the 1991 Gulf War, the United States was at pains to comply with the tenets of the 1954 Hague Convention:

> Planners were aware . . . that Iraq has a rich cultural and religious heritage dating back several thousand years. Within its borders are sacred religious areas and literally thousands of archaeological sites that trace the evolution of modern civilization. Targeting policies, therefore, scrupulously avoided damage to mosques, religious shrines, and archaeological sites . . . [T]arget intelligence analysts . . . produced a joint no-fire target list. This list was a compilation of historical, archaeological, economic, religious and politically sensitive installations in Iraq and Kuwait that could not be targeted.[27]

The initial 1958 U.S. decision to not ratify has been reversed, perhaps in light of the disturbing deliberate targeting of cultural property in the former Yugoslavia.[28] The 1954

[24] Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, supra, note 22, at 160. Footnote omitted.

[25] Rogers, *Law on the Battlefield*, supra, note 7, at 146–7.

[26] Maj. Marie Anderson and Emily Zukauskas, eds., *Operational Law Handbook, 2008* (Charlottesville: Judge Advocate General's Legal Center and School, 2008), 15, citing a message from the President of the United States transmitting the Convention's First Protocol to the 106th Congress for Advice and Consent, Jan. 6, 1999.

[27] Dept. of Defense, *Conduct of the Persian Gulf War* (Washington: GPO, 1992), 100.

[28] Theodor Meron, "The Time Has Come for the United States to Ratify Geneva Protocol I," in *War Crimes Law Comes of Age: Essays* (Oxford: Oxford University Press, 1998), 184. Also see: Aryeh Neier, *War Crimes*

Convention was submitted to the U.S. Senate for advice and consent to ratification in 1999. It still awaits Senate action. American armed forces need an awareness of the Convention if for no other reason than because many European NATO allies are state parties.

The issues with which the 1954 Convention is concerned are repeated, in part, in 1977 Additional Protocol I, Article 53, and in Additional Protocol II, Article 16. (See Chapter 15, section 15.3.)

15.2.1. *First Protocol to the 1954 Cultural Property Convention*

The First Protocol is unusual in that its subject is not the destruction of objects, but their preservation. It relates to the ancient practice of occupying armies carrying away the cultural objects of occupied territory. Examples range from Sweden's 1655–1660 occupation of the Polish-Lithuanian Commonwealth that left the Commonwealth in ruins, to Napoleon's captured campaign spoils brought to Paris, to World War II Nazi looting of territories occupied by the *Wehrmacht*.

During the formation of the basic Convention, conferees could not agree on issues concerning the possible export and sale of cultural property from occupied territory during periods of armed conflict. The 1954 First Protocol, which was adopted on the same date as the basic Convention, addresses these issues. It "sets forth in some detail provisions on the prevention of the export of cultural property from occupied territory, and the safeguarding and return of any such property which has been exported. In addition, in cases where cultural property has been deposited in third states to protect it from the dangers of an armed conflict, the Protocol provides for the return of such property."[29] A weakness of the Protocol is that it continues the basic Convention's military necessity escape provision. Article 53:

> Without prejudice to the provisions of the [1954 Convention], and of other relevant international instruments, it is prohibited:
> (a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
> (b) to use such objects in support of the military effort.

The term, "Without prejudice to" confirms the Protocol's adherence, and the basic Convention's continued adherence, to the inclusion of military necessity.

To date, one hundred states have ratified the First Protocol. Like the basic Convention, the United States has signed but not ratified, fearing that the Protocol could be interpreted to impose upon peace-keeping forces an obligation to prevent the unlawful export of cultural property from occupied territory. Peace-keeping forces, which often involve U.S. military units, lack the resources of an occupying force that might be used to prevent such exports. The Department of Defense has nevertheless recommended ratification of the First Protocol.

(New York: Times Books, 1998), 157–61, regarding the intentional targeting of cultural objects in the former Yugoslavia.

[29] Roberts and Guelff, *Documents on the Laws of War*, supra, note 14, at 396.

15.2.2. *Second Protocol to the 1954 Cultural Property Convention*

The 1999 Second Protocol is a result of the failure of the basic Convention to effectively protect cultural property in practice, particularly during the Iran–Iraq armed conflict. "... Iran requested a review of UNESCO's role in ensuring proper application of the 1954 Convention. The upshot was a series of studies, expert meetings, and eventually the 1999 diplomatic conference that adopted the Second Protocol."[30] The Protocol, only five operational articles in length, is intended to clarify the basic Convention's meaning of the term "military necessity" and to bring the protection of cultural objects into line with similar protections in the 1977 Additional Protocols.

The Second Protocol also clarifies that the Convention and Protocols are applicable in non-international, as well as international armed conflicts. Like the earlier 1949 Geneva Conventions, Article 15.2 of the Second Protocol also requires ratifying Parties to establish criminal punishments in their domestic law for five specific violations listed in Article 15.1. Three of the five violations are grave breaches of either the Geneva Conventions or Additional Protocol I; the other two are war crimes under the Rome Statute of the International Criminal Court.[31]

The Second Protocol creates a new category of protection: "**enhanced protection**," which is in addition to the basic Convention's "special protection." Three conditions must be met for enhanced protection:

(a) it [the protected object] is cultural heritage of the greatest importance for humanity;
(b) it is protected by adequate domestic legal and administrative measures recognizing 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.[32]

Confusingly, eligible property may be eligible for both special and enhanced protection. In such cases, only the provisions of enhanced protection apply.

Second Protocol Article 6 again allows for the waiver of enhanced protection of cultural objects in limited conditions that involve "imperative military necessity," the term from the basic Convention. The conditions for waiver, that is, for allowing the attack or targeting of a protected object, are that the object or property has been made into a military objective; that there is no feasible alternative to obtaining a military advantage regarding the object or property other than a hostile act; and the decision to waive the protection must be made, unless circumstances dictate otherwise, by the commander of a battalion or larger unit, and an effective advance warning must be given if circumstances permit. (There is no warning requirement in the basic Convention.)

[30] Ronald J. Bettauer, Book Review, 102–1 *AJIL* 220, 223 (reviewing Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict* (Cambridge: Cambridge University Press, 2006)).

[31] The "serious violations" listed in Art. 15.1 are: (1) making cultural property under enhanced protection the object of attack; (2) using cultural property under enhanced protection or its immediate surroundings in support of military action; (3) extensive destruction or appropriation of protected cultural property; (4) making protected cultural property the object of attack; and (5) theft, pillage or misappropriation of, or acts of vandalism directed against protected cultural property.

[32] 1999 Second Protocol to the Hague Convention of 1954, Art. 10.

The room for interpretation of the Second Protocol's waiver is apparent, yet it is probably as detailed an effort to narrow military necessity as can be expected.

An example of the Second Protocol's waiver of enhanced protection that would permit destruction or military use of cultural property would be an old and historic bridge which is the sole river crossing for an approaching military force.[33] Despite being a recognized cultural object, if it is used to block an enemy crossing – perhaps with gun emplacements at each end of the bridge – and there is no alternate crossing site within a feasible distance, it is being used for military purposes, it loses its protection, and it may be attacked. Another exception might be a centuries-old monastery overlooking a broad valley through which an attacking army is approaching. There is no other reasonably available avenue of advance for a unit of that size. Enemy artillery spotters, with a commanding overview of the approaching force, are wrongfully situated throughout the monastery. Radio and air-dropped leaflet warnings to the enemy spotters to withdraw have been ignored. The cultural property has been made a military objective and there is no feasible alternative to removing the threat to the advancing army other than attacking the monastery. In accordance with the Second Convention's terms, warning has been given, and we will presume that the situation constitutes an imperative military necessity, in which case the commander of the advancing army may order the bombing of the monastery. The lawful destruction of the priceless religious cultural object follows. This description, of course, is the World War II Monte Cassino case, except that the intelligence reports relied upon by Lieutenant-General Freyberg, who ordered the attack, were mistaken. There were no enemy personnel in or close to the abbey.

> This rule [provision for waiver of protection] should not be confused with the prohibition on attacking cultural property contained in Article 53 (1) of Additional Protocol I and Article 16 of Additional Protocol II, which do not provide for a waiver in case of imperative military necessity . . . [T]hese articles were meant to cover only a limited amount of very important cultural property . . . while the scope of the Hague Convention is broader and covers property which forms part of the cultural heritage of "every people". The property covered by the Additional Protocols must be of such importance that it will be recognized by everyone, even without being marked.[34]

Such protected but unmarked objects would be the pyramids, the Eiffel Tower, the Washington Monument, and similarly significant and universally recognized objects.

So far, the Second Protocol is ratified by fifty-one states. The United States has neither signed nor ratified.

15.3. Protected Cultural Property in the 1977 Additional Protocols

Going beyond the 1954 Hague Convention, Articles 50–53 of 1977 Additional Protocol I are a significant advance in the protection of cultural property. They codify that only military objectives may be attacked, they define military objects and civilian objects, they address proportionality, and they prohibit reprisals against cultural property.

Article 53(a) forbids "acts of hostility" directed against cultural objects and places of worship, a range of protection initially appearing to be narrower than that of the 1954

[33] Rogers, *Law on the Battlefield*, supra, note 7, at 145.

[34] Jean-Marie Henckaerts and Louise Doswald-Beck, eds., *Customary International Humanitarian Law*, vol. I, *Rules* (Cambridge: Cambridge University Press, 2005), Rule 38, at 130.

Hague Convention. But Article 53(a)'s protected cultural objects include "historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples." The *Commentary* confirms, "Despite this difference in terminology, the basic idea is the same,"[35] explaining that "cultural" applies to historic monuments and works of art, and "spiritual" also applies to places of worship.

As in the 1954 Hague Convention, not all places of worship are protected; those having "only a local renown or sanctity which does not extend to the whole nation"[36] are outside the protection of both the Convention and the Protocol. That language does not suggest that modest neighborhood places of worship are without protection: In addition to Additional Protocol I, Articles 53 and 85, 1907 Hague Regulation IV, Article 27 continues to protect "buildings dedicated to religion," as well as those dedicated to "art, science, or charitable purposes, historic monuments, [and] hospitals . . . " The 1954 Convention simply means to add an expanded layer of protections to churches of cultural significance. The *Commentary* further points out that "the article prohibits not only substantial detrimental effect, but all acts directed against the protected objects. For a violation of the article to take place it is therefore not necessary for there to be any damage."[37] Notably, unlike the 1954 Convention, there is no provision for waiver of protection in Article 53, and no provision for derogation for reason of military necessity. Of course, should the enemy make improper use of the protected cultural object, it loses its protection.

In a single difficult-to-follow sentence, Additional Protocol I, Article 85.4(d) complements Article 53(a). It makes "clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given . . . for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof . . . " a war crime and a grave breach. The Article's reference to "a competent international organization" presumably refers to the UNESCO trustees of the 1954 Convention. To constitute a grave breach, an attack on a protected object must be committed willfully, the object must not have been used in the military effort, the object must not have been located in the immediate vicinity of a military objective, and the attack must cause extensive destruction of the object. Additionally, the object must have been given special protection within the framework of a competent international organization (i.e., UNESCO, or the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage).[38]

Whereas the prohibition on attacking places of worship is customary international law, the 1977 Additional Protocols are not in their entirety customary law – although "the United States will consider itself legally bound by the rules contained in Protocol I . . . to the extent that they reflect customary international law, either now or as it may develop in the future."[39]

Article 85.4(d), difficult to follow as it may be, is clearly intended to link with the provisions of Article 53 and lend specific elements of behavior to Article 53's general

[35] Claud Pilloud, et al., eds., *Commentary on the Additional Protocols* (Geneva: ICRC, 1987), 646.
[36] Id., at 647.
[37] Id.
[38] The 1972 Convention Concerning the Protection of World Cultural and Natural Heritage is a second UNESCO treaty by which 878 properties and objects located in 145 states are protected. The Convention has 186 state Parties, including the United States.
[39] Mike Matheson, "Additional Protocol I as Expression of Customary International Law," 2–2 *Am. U. J. Int'l L. & Policy* (Fall 1987), 415, 425.

wording, but "[d]espite the undoubtedly good intentions of the drafters . . . one cannot but ask oneself whether it [Article 85.4] really adds much of substance to the grave breach consisting of 'the extensive destruction and appropriation of protected property . . .' as covered by Article 147 [of 1949 Geneva Convention IV] . . . "[40]

As in Article 53(a), there is no provision for waiver of protection, no provision for derogation for reason of military necessity, in Article 85.4.

For non-international armed conflicts, Additional Protocol II, Article 16, repeats verbatim the substantive wording of Additional Protocol I's Article 53.

15.4. Summary

The inviolate nature of cultural property in armed conflict has been recognized for centuries. Today, the seriousness of the combatant's obligations in relation to cultural objects is illustrated not only by its specification in 1907 Hague Regulation IV, the 1954 Hague Cultural Property Convention, and 1977 Additional Protocols I and II, but by its inclusion as a war crime in international and non-international armed conflicts in the Rome Statute of the International Criminal Court. A review of ICTY's prosecutions for the destruction of cultural property only provide further evidence of the proscription. The 1954 Cultural Property Convention is not itself customary law, but the obligations of states both to protect cultural objects by not attacking them and to not endanger them by making military use of them clearly is customary law.[41]

The widely ratified 1954 Hague Cultural Convention continues to add state Parties but, despite its 122 ratifications, its provisions have not been widely embraced. The Convention is burdened with vague terms and military necessity escape clauses. One could question if it really adds significant protections to those already applicable in customary law. "[S]tate adherence to the marking requirement has been limited. U.S. practice has been to rely on its intelligence collection to identify such objects in order to avoid attacking or damaging them."[42] Recall however, that marking is not "a precondition for the protection of cultural property. It is a method of implementing that protection."[43] The Convention remains a valuable step toward the protection of those buildings and objects that constitute the culture and history of territories in which conflicts are fought (not necessarily for the specifics of the Convention). The awareness of cultural property that the Convention raises, and the conduct it seeks to require and prohibit are valuable. Its reinforcement by Additional Protocol I should make combatants, particularly commanders, carefully consider targeting choices.

After the conflict in the former Yugoslavia, and subsequent ICTY prosecutions for targeting cultural property, it is reasonable to anticipate a greater awareness of the protections that such objects are provided. Violations that might have been overlooked in past conflicts, especially if committed by officers of the losing side, are ever more likely to result in LOAC charges.

[40] Julian J.E. Schutte, "The System of Repression of Breaches of Additional Protocol I," in, Astrid J.M. Delissen and Gerard J. Tanja, eds., *Humanitarian Law of Armed Conflict Challenges Ahead* (Dordrecht: Martinus Nijhoff, 1991), 177, 195.

[41] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, supra, note 34, Rule 38, at 129.

[42] Anderson and Zukauskas, eds., *Operational Law Handbook, 2008*, supra, note 26, at 22.

[43] ICRC, *Protection of Cultural Property in the Event of Armed Conflict: Report on the Meeting of Experts* (Geneva: ICRC, 2002), 126.

Although UNESCO is the Convention's sponsor and overseeing body, the protection of cultural property is the concern of all warfighters. "Clearly . . . although the protection of cultural objects for obvious reasons will never become a core activity of the Red Cross and Red Crescent world, it is not lost sight of either."[44]

CASES AND MATERIALS

PROPERTY VERSUS COMBATANT LIVES

Soldiers or property? Mosques or Marines? Every combat commander has two concerns foremost in her mind: her mission and her subordinates. Successful completion of the assigned mission is always the leader's first duty, the first consideration. The well-being and protection of subordinates is always the commander's next concern. Is it reasonable to expect warfighters to give consideration to cultural objects when their consideration in combat might put their men's lives at risk? Is Professor L.C. Green correct when he says, "Cynics might be excused if they regard such provisions [requiring combatants to protect cultural property] as somewhat idealist and completely out of tune with the realities of active warfare"?[45]

Historian T.R. Fehrenbach, who served as an Army infantry officer in both World War II and Korea, describes U.S. Marines fighting their way through Korean villages in September 1950, early in the U.S.–Korean conflict:

> The American way of street and town fighting did not resemble that of other armies. To Americans, flesh and blood and lives have always been more precious than sticks and stones, however assembled. An American commander, faced with taking the Louvre from a defending enemy, unquestionably would blow it apart or burn it down without hesitation if such would save the life of one of his men. And he would be acting with complete accord with American ideals and ethics in doing so. Already, in the Korean War, American units were proceeding to destroy utterly enemy-held towns and villages rather than engage in the costly business of reducing them block by block with men and bayonets, as did European armies. If bombing and artillery would save lives, even though they destroyed sites of beauty and history, saving lives obviously had preference. And already foreign observers with the United States Army . . . were beginning to criticize such tactics.[46]

In contrast to Fehrenbach's dark account of American military practice fifty years ago, is that of Sir Harold Nicholson, a noted World War II British author and politician:

[44] Frits Kalshoven, *Reflections on the Law of War: Collected Essays* (Leiden: Martinus Nijhoff, 2007), 429.
[45] Green, *Essays on the Modern Law of War*, supra, note 15, at 237.
[46] T.R. Fehrenbach, *This Kind of War* (New York: MacMillan), 1963), 223–4.

> I am not among those who feel that religious sites are as such, of more importance than human lives, since religion is not concerned with material or temporal things; nor should I hesitate, were I a military commander, to reduce some purely historical building to rubble if I felt that by doing so I could gain a tactical advantage or diminish the danger to which my men were exposed. Works of major artistic value fall, however, into a completely different category. It is to my mind absolutely desirable that such works should be preserved from destruction, even if their preservation entails the sacrifice of human lives. I should assuredly be prepared to be shot against a wall if I were certain that by such a sacrifice I could preserve the Giotto frescoes; nor should I hesitate for an instant (were such a decision ever open to me) to save St. Mark's even if I were aware that by so doing I should bring death to my sons. I should know that in a hundred years from now it would matter not at all if I or my children had survived; whereas it would matter seriously and permanently if the Piazza at Venice had been reduced to dust and ashes . . . The irreplaceable is more important than the replaceable, and the loss of even the most valued human life is ultimately less disastrous than the loss of something which in no circumstances can ever be created again.[47]

Although Sir Harold might have found describing his own execution, or that of a son, more tolerable than the reality, these excerpts illustrate the varied views of cultural property and its significance in armed conflict. Is it reasonable to expect combatants to risk – or lose – their lives for the sake of a cultural object; for the sake of property? Few commanders would respond affirmatively.

"Property or lives" is a false choice, however. If the enemy makes military use of cultural property, it loses its protection, just as any other protected property does. Upon encountering militarized cultural property, the commander must consider military necessity (a more attractive option to combatants under fire than critics of the Convention might have appreciated) and proportionality in deciding if the property should be attacked or, if tactically feasible, if it should be bypassed and dealt with later, perhaps by means other than kinetic force.

If the tactical situation is different (say advancing troops unexpectedly come under fire from the enemy's state museum), there is no question that troops in contact with the enemy may lawfully exercise proportional self-defense. No Convention expects a combatant to unthinkingly sacrifice himself just because an enemy threat emanates from a cathedral rather than a bunker. Combatants are expected to avoid targeting cathedrals, however, because an enemy threat *could* emanate from there.

PROSECUTOR V. JOKIĆ

IT-01-42-T (18 March 2004), footnotes omitted

Introduction. *In late 1991, during the armed conflict in the former Yugoslavia, Vice-Admiral Miodrag Jokić, of the Yugoslav Navy, commanded the Ninth Naval Sector. The charges against him involving the destruction of cultural objects stem from his exercise of that command. The following is extracted from the Trial Chamber opinion following his plea of guilty, pursuant to a pretrial agreement.*

[47] Cited in, John Henry Merryman and Albert E. Law Elsen, *Ethics and the Visual Arts* (London: Kluwer Law International, 2002), 80–1.

As a criminal trial forum with its own code of offenses, the ICTY looks to its Statute when charging crimes. In this extract, the Indictment's references to "Articles" are to the ICTY Statute.

21. According to the Parties, from 8 October 1991 through 31 December 1991, Miodrag Jokić, acting individually or in concert with others, conducted a military campaign, launched on 1 October 1991 and directed at the territory of the then Municipality of Dubrovnik ("Dubrovnik").

22. In the same period, during military operations directed at Srd Hill and the wider Dubrovnik Region, Yugoslav forces (JNA) under the command of Miodrag Jokić fired hundreds of shells which struck the Old Town of Dubrovnik (the "Old Town").

23. Miodrag Jokić was aware of the Old Town's status, in its entirety, as a United Nations Educational, Scientific and Cultural Organization ("UNESCO") World Cultural Heritage site pursuant to the 1972 Convention for the Protection of the World Cultural and Natural Heritage ("UNESCO World Heritage Convention"). He was further aware that a number of buildings in the Old Town and the towers of the Old Town's walls were marked with the symbols mandated by the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict ("1954 Hague Convention"). He was also aware of the presence of a substantial number of civilians in the Old Town on 6 December 1991.

24. The shelling of 6 December 1991 was preceded by military operations around the Old Town of Dubrovnik which had led to approximately three months of occupation of the areas surrounding the city. There was no investigation initiated by the JNA following the shelling of the Old Town in October and November 1991, nor were any disciplinary measures taken, to punish the violation of the standing JNA order to protect the Old Town of Dubrovnik.

26. On 6 December 1991, JNA forces under the command of, among others, Miodrag Jokić unlawfully shelled the Old Town. Notwithstanding the fact that the forces shelling the Old Town were under the *de jere* control of Miodrag Jokić, the Prosecution's expressed position is that the unlawful attack was "not ordered by Admiral Jokić". Miodrag Jokić told the Trial Chamber: "I was aware of my command responsibility for the acts of my subordinates in combat and for the failings and mistakes in the exercise of command over troops."

27. As a result of the shelling, two civilians were killed . . . and three civilians were wounded . . . 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.

42. Three of the crimes to which Miodrag Jokić has pleaded guilty entail violations of the duty incumbent upon soldiers to direct their operations only against military objectives. In order to comply with this duty, the military must distinguish civilians from combatants and refrain from targeting the former. The other three crimes [charged against Jokić] entail violations of the duty to distinguish civilian objects from military objectives and not to protect protected objects.

45. Two crimes among those to which Miodrag Jokić has pleaded guilty – 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. According to the Plea Agreement, six buildings in the Old Town were destroyed, and many more buildings suffered damage. "Hundreds, perhaps up to a thousand projectiles" hit the Old Town on 6 December 1991 . . .

46. Another crime to which Miodrag Jokić pleaded guilty is the crime of destruction or wilful damage done to institutions dedicated to religion, charity, education, and the arts and sciences, and to historic monuments and works of art and science. This crime represents a violation of values especially protected by the international community.

47. Codification prohibiting the destruction of institutions of this type dates back to the beginning of the last century, with the Regulations annexed to the Hague Convention Respecting the Laws and Customs of War on Land (the "Hague Regulations") and the Hague Convention Concerning Bombardment by Naval Forces in Time of War of 18 October 1907.

48. The 1954 Hague Convention provides a more stringent protection for "cultural property", as defined in Article 1 of the Convention. The protection comprises duties of safeguard and respect of cultural property under "general protection."

49. The preamble to the UNESCO World Heritage Convention provides "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*." The Old Town of Dubrovnik was put on the World Heritage List in 1975.

50. Additional Protocols I (Art. 53) and II (Art. 16) of 1977 to the Geneva Conventions of 1949 reiterate the obligation to protect cultural property and expand the scope of the prohibition by, *inter alia*, outlawing "any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples." According to the Additional Protocols, therefore, it is prohibited to direct attacks against this kind of protected property, whether or not the attacks result in actual damage. This immunity is clearly *additional* to the protection attached to civilian objects.

51. The whole of the Old Town of Dubrovnik was considered, at the time of the events contained in the indictment, an especially important part of the world cultural heritage. It was, among other things, an outstanding architectural ensemble illustrating a significant stage in human history. The shelling attack on the Old Town was an attack not only against the history and heritage of the region, but also against the cultural heritage of humankind. Moreover, the Old Town was a "living city" . . . and the existence of its population was intimately intertwined with its ancient heritage. Residential buildings within the city also formed part of the World Cultural Heritage site, and were thus protected.

52. Restoration of buildings of this kind, when possible, can never return the buildings to their state prior to the attack because a certain amount of original, historically authentic, material will have been destroyed, thus affecting the inherent value of the buildings.

53. The Trial Chamber finds that, since it is a serious violation of international humanitarian law to attack civilian buildings, it is a crime of even greater seriousness to direct an attack on an especially protected site, such as the Old Town, constituted of civilian buildings and resulting in extensive destruction within the site. Moreover, the attack on the Old Town was particularly destructive. Damage was caused to more than 100 buildings, including various

segments of the Old Town's walls, ranging from complete destruction to damage to non-structural parts. The unlawful attack on the Old Town must therefore be viewed as especially wrongful conduct.

55. The gravity of the crimes committed by the convicted person also stems from the degree of his participation in the crimes. Both parties have acknowledged Miodrag Jokić's awareness of the circumstances surrounding the offences, as well as his knowledge of the conduct of his subordinates from the early morning of 6 December 1991. The parties have agreed that Miodrag Jokić was aware of the protected status of the whole of the Old Town as a UNESCO World Cultural Heritage site.

56. Individual criminal responsibility attaches to persons who, in the terms of Article 7 (1) of the Statute, "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute." Moreover, according to Article 7 (3) of the [ICTY] Statute, "The fact that any of the acts referred to in articles 2 to 5 of the present Statute 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" ("superior responsibility").

Conclusion. *In deciding a sentence, the Trial Chamber takes into account the Tribunal's considerations on sentencing, but is also careful to consider the significance of the offenses in light of 1907 Hague Regulation IV (para. 47), the 1954 Convention on Cultural Property (para. 48), the UNESCO World Heritage Convention (paras. 49, 51, 55), and 1977 Additional Protocol I (para. 50).*

Vice Admiral Jokić was sentenced to seven years' confinement. That sentence was affirmed on appeal.

PROSECUTOR V. PRLIĆ, ET AL.

IT-04-74-T Second Amended Indictment (11 June 2008)

Introduction. *The Prlić case, initiated in 2004, has dragged on, delayed by numerous motions by defense counsel for the six coaccused. A trial date remains to be set.*

The accused Prlić was a professor at Mostar University until appointed to various political positions in the Socialist Republic of Bosnia and Herzegovina (SRBiH). At the time of the events charged, 1993, he was the Prime Minister of the Croatian Republic of Herceg-Bosnia, the most powerful civilian official in that short-lived secessionist government.

The internationally unrecognized Croatian Republic of Herceg-Bosna was formed in November 1991 by extremist secessionist elements of the Croatian Democratic Union of Bosnia and Herzegovina (HDZ-BiH). Its capital was Western Mostar. During its brief existence, Herceg-Bosna engaged in ethnic cleansing, eventually leading to ICTY charges of war crimes, and crimes against humanity. In January 1994, Herceg-Bosna was declared illegal by the Constitutional Court of Bosnia-Herzegovina.

The accused Stojić was the civilian head of the Ministry of Defence. Praljak was a major general in the Croatian Army and Assistant Minister of Defence of the Republic of Croatia.

Petković was a Croatian Army lieutenant colonel and Chief of the Croatian Defence Council Main Staff.

From the ICTY's Second Amended Indictment:

17.1. (u) JADRANKO PRLIĆ facilitated supported, encouraged and participated in the joint crime enterprise and crimes charged in this indictment in planning, approving, preparing, supporting, ordering, and/or directing military operations and actions during and as part of which cultural and religious property such as mosques were destroyed, and private property of Bosnian Muslims was looted, burned or destroyed, without justification or military necessity, and failing to prevent, stop, punish or redress such destruction and looting.

17.2. (m) BRUNO STOJIĆ [indicted on the same charges and in the same terms as co-accused Prlić].

17.3. (k) SLOBODAN PRALJAK [indicted on the same charges and in the same terms as co-accused Prlić and Stojić].

17.4. (h) MILIVOJ PETKOVIĆ [indicted on the same charges and in the same terms as co-accused Prlić, Stojić and Praljak].

25. By a decision dated 8 April 1992, leaders and members of the joint criminal enterprise . . . established the Croatian Defence Council (the "HVO"), as Herceg-Bosna's "supreme defence body," "to defend the sovereignty of the territories of the Croatian Community of Herceg-Bosna." On 15 May 1992, the HVO was likewise declared Herceg-Bosna's "supreme executive and administrative body," combining political, governmental and military powers. While the self-proclaimed political entity and its territory were referred to as "Herceg-Bosna," the government and armed forces of Herceg-Bosna were called the "Croatian Defence Council" or "HVO." The governmental and political leadership and administrative authorities of Herceg-Bosna and the HVO . . . were in charge of, and worked closely with the Herceg-Bosna/HVO armed forces, special units, military and civilian police, security and intelligence services, paramilitaries, local defence forces and other persons acting under the supervision of or in co-ordination or association with such armed forces, police and other elements . . . While not every member of the HVO or the HDZ-BiH was part of the joint criminal enterprise, Herceg-Bosna, the HVO and the HDZ-BiH were essential structures and instruments of the joint criminal enterprise.

39. (c) Appropriation and Destruction of Property: Herceg-Bosna/HVO authorities and soldiers forced Bosnian Muslims to abandon their homes and sign them over to the HVO. Money, cars and personal property were often taken or looted. Muslim dwellings and other buildings, including public buildings and services, were appropriated, destroyed or severely damaged, together with Muslim buildings, sites and institutions dedicated to religion or education, including mosques. Much of this destruction was meant to ensure that Muslims could not, or would not, return to their homes and communities . . .

97. On or about 9 May 1993, Herceg-Bosna/HVO forces blew up the Baba Besir Mosque (also known as the Balinovac Mosque) in the Balinovac district, in West Mostar. On or about 11 May 1993, Herceg-Bosna/HVO forces dynamited the Hadži Ali-Beg Lafo Mosque (sometimes known as the Hadji Ali-Bey Lafa Mosque) at Pijesak, also in West Mostar.

116. As part of and in the course of the East Mostar siege, the Herceg-Bosna/HVO forces deliberately destroyed or significantly damaged the following mosques or religious properties in East Mostar: Sultan Selim Javuz Mosque (also known as the Mesdjid Sultan Selimov Javuza Mosque), Hadži Mehmed-Beg Karadjoz Mosque, Koski Mehmed-Paša Mosque, Nesuh Aga Vučjaković Mosque, Ćejvan Ćehaja Mosque, Hadži Ahmed Aga Lakišić Mosque, Roznamedžija Ibrahim Efendija Mosque, Ćosa Jahja Hodža Mosque (also known as the Džamiha Ćose Jahja Hodžina Mosque), the Hadži Kurto or Tabačica Mosque, and the Hadži Memija Cernica Mosque. On 9 November 1993, the Herceg-Bosna/HVO forces destroyed the Stari Most ("Old Bridge"), an international landmark that crossed the Neretva River between East and West Mostar.

Conclusion. *The charge of destroying the sixteenth-century Old Bridge, a world-known cultural object, is notable. It was destroyed on November 9, 1993 by the Croation Defence Council, allegedly at the order of Major General Slobadan Praljak. Until Prlić, there has been no prosecution for that international offense. The bridge was rebuilt and re-opened in July 2004.*

The ICTY is ending its prosecutions, and it remains to be seen if the case will be tried in The Hague or be dealt to the criminal courts of an involved state.

PROSECUTOR V. STRUGAR

IT-01-42-T (31 January 2005), footnotes omitted

Introduction. *The Strugar case interprets the requirements of the 1954 cultural property Convention in terms of the ICTY Statute, Article 3(d), which prohibits destruction or wilful damage of cultural property. In this extract from the Decision, the Trial Chamber compares provisions of the 1977 Additional Protocols with provisions of the 1954 Hague Convention in regard to breadth of protections, and briefly discusses the nature of the protection enjoyed by cultural property and the Convention's waiver provisions.*

2. Law on destruction or wilful damage of cultural property (Count 6)

298. Count 6 of the Indictment charges the Accused with 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, punishable under Article 3 (d) of the Statute.

299. Article 3 (d) of the Statute reads:

> The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:
>
> . . .
>
> (d) 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;

300. This provision has been interpreted in several cases before the Tribunal to date. The *Blašić* Trial Chamber adopted the following definition:

> The damage or destruction must have been committed intentionally to institutions which may clearly be identified as dedicated to religion or education and which were not being used for military purposes at the time of the acts. In addition, the institutions must not have been in the immediate vicinity of military objectives.

302. Further, the *Kordić* Trial Judgment held that while this offence overlaps to a certain extent with the offence of unlawful attacks on civilian objects, when the acts in question are directed against cultural heritage, the provisions of Article 3 (d) is *lex specialis*.

307. The Hague Convention of 1954 protects property "of great importance to the cultural heritage of every people." The Additional Protocols refer to "historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples. The *Kordić* Appeals Judgment . . . stated that despite this difference in terminology, the basic idea [underlying the two provisions] is the same. Whether there may be precise differences is not an issue raised by the facts of this case. The Chamber will limit its discussion to property protected by the above instruments (hereinafter "cultural property").

309. The Hague Regulations of 1907 make the protection of cultural property dependent on whether such property was used for military purposes. The Hague Convention of 1954 provides for an obligation to respect cultural property. This obligation has two explicit limbs, *viz*. to refrain "from any use of the property and its immediate surroundings . . . for purposes which are likely to expose it to destruction or damage in the event of armed conflict", and, to refrain "from any act of hostility directed against such property." The Convention provides for a waiver of these obligations, however, but only when "military necessity imperatively requires such a waiver." The Additional Protocols prohibit the use of cultural property in support of military efforts, but make no explicit provision for the consequences of such a use, *i.e*. whether it affords a justification for acts of hostility against such property. Further, the Additional Protocols prohibit acts of hostility against cultural property, without any explicit reference to military necessity. However, the relevant provisions of both Additional Protocols are expressed to be "[w]ithout prejudice to" the provisions of the Hague Convention of 1954. This suggests that in these respects, the Additional Protocols may not have affected the waiver provision of the Hague Convention of 1954 in cases where military necessity imperatively requires waiver. In this present case, no military necessity arises on the facts in respect of the shelling of the Old Town, so that this question need not be further considered. For the same reason, no consideration is necessary to the question of what distinction is intended (if any) by the word "imperatively" in the context of military necessity in Article 4, paragraph 2 of the Hague Convention of 1954.

310. Nevertheless, the established jurisprudence of the Tribunal confirming the "military purposes" exception which is consistent with the exceptions recognised by the Hague Regulations of 1907 and the Additional Protocols, persuades the Chamber that the protection accorded to cultural property is lost where such property is used for military purposes. Further, with regard to the differences between the *Blaškić* and *Naletilić* Trial Judgments noted above (regarding the use of the immediate surroundings of cultural property for military purposes), and leaving aside any implication of the issue of imperative military necessity, the preferable view appears to be that it is the use of cultural property and not its location that determines whether and when the cultural property would lose its protection. Therefore . . . the Chamber considers that the special protection awarded to cultural property itself may not be lost simply

because of military activities or military installations in the immediate vicinity of the cultural property. In such a case, however, the practical result may be that it cannot be established that the acts which caused destruction of or damage to cultural property were "directed against" that cultural property, rather than the military installation or use in its immediate vicinity.

320. The Chamber also observes that among those buildings which were damaged in the [6 December 1991 JNA Dubrovnik] attack, were monasteries, churches, a mosque, a synagogue and palaces. Among other buildings affected were residential blocks, public places and shops; damage to these alone would have entailed grave consequences for the residents or the owners, *i.e*. their homes and businesses suffered substantial damage.

326. . . . [T]he Chamber finds that the Old Town sustained damage on a large scale as a result of the 6 December 1991 JNA attack. In this regard, the Chamber has considered the following factors: that 52 individually identifiable buildings and structures were destroyed or damaged; that the damaged or destroyed buildings and structures were located throughout the Old Town . . . and finally, that overall the damage varied from totally destroyed, i.e. burned out, buildings to more minor damage to parts of buildings and structures.

327. . . . [M]ilitary necessity can, in certain cases, be a justification for damaging or destroying property. In this respect, the Chamber affirms that in its findings there were no military objectives in the immediate vicinity of the 52 buildings and structures which the Chamber has found to have been damaged on 6 December 1991, or in the Old Town or in its immediate vicinity. In the Chamber's finding, the destruction or damage of property in the Old Town on 6 December 1991 was not justified by military necessity.

329. As to the *mens rea* element . . . the Chamber makes the following observations. . . . [T]he Chamber infers the direct perpetrators' intent to destroy or damage property from the findings that the attack on the Old Town was deliberate, and that the direct perpetrators were aware of the civilian character of the Old Town. Similarly . . . the direct perpetrators' intent to deliberately destroy cultural property is inferred by the Chamber from the evidence of the deliberate attack on the Old Town, the unique cultural and historical character of which was a matter of renown, as was the Old Town's status as a UNESCO World Heritage site. As a further evidentiary issue regarding this last factor, the Chamber accepts the evidence that protective UNESCO emblems were visible, from the JNA positions at Žarkovica and elsewhere, above the Old Town on 6 December 1991.

330. . . . [T]he Chamber finds that all elements of the offense of devastation not justified by military necessity . . . and destruction or wilful damage of cultural property . . . are established.

Conclusion. *Strugar was convicted and sentenced to eight years' confinement. Upon finding certain errors of law, that sentence was reduced by the Appeals Chamber to seven and-a-half years.*[48]

[48] *Prosecutor v. Strugar*, IT-01-42-A (July 17, 2008), para. 393.