

Does International Criminal Law protect culture in times of trouble? Defining the scope

HIRAD ABTAHI¹

Deliberate attacks against culture have often constituted an important element of an attack against one's enemy. It will suffice to mention a few examples for the point to become clear: from the destruction of the First Temple by Babylonians King Nabuchodonosor to iconoclastic movements such as the late antiquity and seventh century's alteration of Pagan images, the icon mutilations in ninth-century Byzantium, and the Reformation's iconoclastic depredations; and, on the other hand, from the ravages inflicted by Ghenghis Khan and later Tamerlane, to the Conquistadores' annihilation of the so-called "Pre-Colombian" cultures, the French and Soviet revolutions' destruction of religious icons and the recent destruction of the twin Buddhas of Bamiyan, History abounds with cases of ravage inflicted on culture.

International criminal law is an area of international law that is developing rapidly. With the creation of the world's first permanent criminal court, all eyes are on the now active International Criminal Court (ICC) to see what developments and innovations it will bring: this is the current reality and the immediate future of international criminal law.

In order to analyse whether international criminal law provide protection for culture in times of trouble, it is necessary to define what is meant by culture. This is unusually difficult from a legal perspective, since whereas normally terms are defined in statutes and similar legal instruments, whether national, regional or international, it has proved very difficult to find a single universally accepted definition of culture.² This is no doubt because the notion of culture is inherently personal – personal to individuals and to groups and societies. It can truly be said that this is "a word that means all things to all men".³

¹ Diplôme d'Études approfondies Droit International, Robert Schuman University, Strasbourg, France; Legal Adviser to the Presidency, Office of the President, International Criminal Court; formerly Chambers Associate Legal Officer, United Nations International Criminal Tribunal for the former Yugoslavia. The views expressed in this article are those of the author in his personal capacity and not necessarily those of the Court. The author wishes to express his gratitude to Margaret McGowan-Smyth whose precious assistance, in particular on the substance, made the drafting of this article possible.

² See further L. V. Prott, "Problems of Private International Law for the Protection of the Cultural Heritage", *Recueil des Cours*, vol. V (1989) pp. 224-317, particularly at p. 224 as cited in J. Blake, "On Defining Cultural Heritage", *International and Comparative Law Quarterly*, 2000, Vol. 49, (hereinafter Blake) pp. 61-85.

Trying to establish an agreed definition of culture which refers to the interests and values of groups of people (and in some cases, the whole of mankind) is not within the scope of this paper. However, in order to progress the debate, it is crucial to set out clearly some of the definitions and establish a working definition. For these purposes, this paper will examine the most common concepts – culture, cultural property and cultural heritage (I) as well as what is meant by a victim of violations of international criminal law (II).

I. Definitional issues

A. Defining culture

This is perhaps the most difficult of all the terms to define. Should a survey be taken in the streets, there would undoubtedly be as many definitions of culture as people taking part. This is not just confined to popular opinion either; any attempt to limit the scope of the word appears to result also in academic controversy.⁴

1. Where the definitions come from

There are numerous definitions to choose from, but for the purposes of this paper, setting out definitions from two of the most commonly used English-language dictionaries will suffice. The Cambridge English Dictionary defines culture as:

The way of life, especially the general customs and beliefs, of a particular group of people at a particular time or music, art, theatre, literature etc.

The Oxford English Dictionary defines culture as:

The arts and other manifestations of human intellectual achievement regarded collectively or the customs, institutions and achievements of a particular nation, people or group.

For comparative purposes, it may be interesting to look at the definition of culture as given by an anthropologist, as many of the concepts associated with culture are not originally legal in nature:

³ Pocket Fowler's Modern English Usage, Oxford University Press, 1999, p. 151; culture: "here is a word that has had mixed fortunes in the 20th century, and means all things to all men. There are about 10 000 examples of it (including the plural forms and compounds)."

⁴ See further M. Frigo, "Cultural property v. cultural heritage: A 'battle of concepts' in international law?", *International Review of the Red Cross*, June 2004, Vol. 86, No. 854, (hereinafter Frigo), pp. 367-378 and Blake, supra note 2, pp. 61-85.

A totalising concept because everything becomes, or is considered, culture. There are material culture, ritual culture, symbolic culture, social institutions, patterned behaviour, language-as-culture, values, beliefs, ideas, ideologies, meaning and so forth. Second, not only is almost everything in a society culture, but the concept is also totalising because everything in the society is supposed to have the same culture (as in the concept of culture as shared values).⁵

2. Common elements of the definitions

Although there is no single accepted definition, it does appear that there are generally two elements involved in "culture": First of all there is the element of tangible movable and immovable property, which may be religious or secular, relating to religion, charity and education, the arts and sciences, historic monuments and works of art and science which characterise a given people. Secondly, there is a more intangible element based on ethnocentric factors which contribute to the cultural identity of that people, such as language, religion, traditions and belief systems. Culture is a very wide notion, open to unending interpretations, which is not always helpful when considering legal issues: Therefore international law has qualified the concept of culture in two different ways – cultural property and cultural heritage.

B. Defining cultural property

1. Where the definitions come from

The first place to look for definitions of specific legal terms is in legal instruments, and in this context, international legal instruments are the first port of call. Protection of cultural property in national humanitarian law can be traced back to the Lieber Code of 1863⁶ which stressed that "classical works of art, libraries, scientific collections or precious instruments such as astronomical telescopes, as well as hospitals" must be protected from injury even when fortified places were being bombarded.⁷ Similar terminology appeared in the 1874 International Declaration of Brussels which refers to "institutions dedicated

⁵ G.M. Sider, *Culture and Class in Anthropology and History*, Cambridge University Press, 1986 at p. 6 as cited in Blake, supra note 2 at p. 67.

⁶ Instructions for the Government of Armies of the United States in the Field, 24 April 1863.

⁷ Article 33; see also Article 34 which states that "as a general rule, the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observatories, museums of the fine arts, or of a scientific character – such property is not to be considered public property in the sense of paragraph 31" which means that such property cannot be seized and appropriate by the "victorious army".

⁸ Project of an International Declaration concerning the Laws and Customs of War, Brussels, 27 August 1874, Article 8.

⁹ The Laws of War on Land, Oxford, 9 September 1880, Article 34.

¹⁰ Article 27.

to religion, charity and education, the arts and sciences"⁸, and the 1880 Oxford Code which protects "buildings dedicated to religion, art, science and charitable purposes"⁹ International humanitarian law finally codified these principles in the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention) and provided a thorough definition of cultural property. Including both movable and immovable property, protection is provided for cultural property of artistic, historical, scientific, archaeological and architectural importance whether such property is religious or secular in nature. Although the term "cultural property" did not appear in an international legal instrument until the 1954 Hague Convention, earlier legal texts do contain references to what are arguably the components of cultural property.

2. International instruments referring to the components of cultural property

a) Hague Convention II and Regulations

The Convention with Respect to the Laws and Customs of War on Land 1899 (Hague Convention II) sets out its aims in its preamble as being "the desire to serve, even in this extreme hypothesis, the interest of humanity and the ever increasing requirements of civilization" and to this end, the annexed Regulations first introduced the concept of the cultural property on the larger international scene by providing that:

In sieges and bombardments all necessary steps should be taken to spare as far as possible edifices devoted to religion, art, science, and charity, hospitals, and places where the sick and wounded are collected, provided they are not used at the same time for military purposes.¹⁰

It is interesting to note that even in the very early days of international humanitarian law the protection of components of cultural property was put in the same category as the protection of hospitals and the sick and wounded, leaving no doubt as to the importance of such property.

b) Hague Convention IV and Hague Regulations

The Hague Convention (IV) Respecting the Laws and Customs of War on Land of 18 October 1907 (Hague Convention IV) and the Regulations annexed thereto (Hague Regulations) widened the definition provided by the Hague Convention II. Article 56 of the Hague Regulations provides that:

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or wilful damage done to institutions of

this character, historic monuments, works of art and science, is forbidden.

Article 27 of the Hague Regulations articulates further 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.

This definition is wider than that of the Hague Convention II as it includes buildings dedicated to education, historic monuments and works of art and science. Again the protection of components of cultural property is likened to the protection of hospitals.

c) Roerich Pact

In the preamble to the 1935 Treaty between the United States of America and the Other American Republics on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact), reference is made to "nationally and privately owned immovable monuments which form the cultural treasures of people" and the aim of the Roerich Pact is expressed as being to respect and protect the "treasures of culture" in times of war and peace. Article 1 defines the subject of such protection as "historic monuments, museums, scientific, artistic, educational and cultural institutions".¹¹ As in the aforementioned Hague instruments, movable objects are not referred to in the Roerich Pact, however it may be that those movable objects that are found within the immovable monuments enumerated, for example individual works of art in a museum, may in fact incidentally benefit from some of the protection afforded to those immovable monuments in which they are situated.

d) ICTY Statute

The ICTY Statute counts the "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"¹² as among the violations of the laws or customs of war under its jurisdiction. Like the Roerich Pact, the ICTY Statute refers only to institutions, in other words immovable objects. Again, it could be thought that those movable objects within immovable monuments may

¹¹ The Roerich Pact was signed by 21 American States in 1935 and as of 1 January 1990 had been ratified by 10 States (Brazil, Chile, Colombia, Cuba, Dominican Republic, El Salvador, Guatemala, Mexico, USA and Venezuela). <http://palimpsest.stanford.edu/bytopic/intern/roerich.html>, last visited 25 July 2006.

¹² ICTY Statute Article 3 (d).

benefit from a de facto protection, although not being acknowledged as forming cultural property as such.

e) ICC Statute

The ICC Statute adopts a similar approach to the ICTY Statute but divides its list of war crimes into those applicable in an international armed conflict and those applicable in a non-international armed conflict: Article 8(2)(b)(ix) (international armed conflict) and Article 8(2)(e)(iv) (non-international armed conflict) forbid 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.

Similarly to the Hague Regulations, the protection of cultural property is likened to the protection of hospitals.

2. International instruments defining cultural property

a) 1954 Hague Convention

The 1954 Hague Convention is the first international legal instrument in armed conflicts to use and therefore define the term cultural property. The definition enunciated in the 1954 Convention is the most comprehensive definition ever in an instrument of its kind and is set out in Article 1:

For the purposes of the present Convention, the term 'cultural property' shall cover, irrespective of origin or ownership:

- (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;
- (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);
- (c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as 'centres containing monuments'.

This definition is welcome for two reasons. Firstly, the use of the word "such" implies that the list of property enumerated therein is not exhaustive. Second,

this is also the first time that movable property has been explicitly included in the definition of cultural property, thereby expanding the legal protection.

b) 1970 UNESCO Convention

The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention), in contrast to the more general definitions of other international legal instruments, sets out a comprehensive and precise list of cultural property in Article 1:

For the purposes of this Convention, the term "cultural property" means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:

1. Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
2. property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
3. products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
4. elements of artistic or historical monuments or archaeological sites which have been dismembered;
5. antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
6. objects of ethnological interest;
7. property of artistic interest, such as:
 - (a) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
 - (b) original works of statuary art and sculpture in any material;
 - (c) original engravings, prints and lithographs;
 - (d) original artistic assemblages and montages in any material;
8. rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections
9. postage, revenue and similar stamps, singly or in collections;
10. archives, including sound, photographic and cinematographic archives;

11. articles of furniture more than one hundred years old and old musical instruments.

This list appears to be exhaustive and is of course subject to the overriding condition that the State has designated the property in question as being important. Therefore there is no guarantee that interpretation of the importance of the property in question would always favour the protection of what some people consider important cultural property. Nevertheless this definition is welcome as it explicitly includes both religious and secular cultural property.

c) 1977 Additional Protocol I

The next international legal instrument to refer to both cultural property and its components was Additional Protocol I to the four Geneva Conventions of 1949.¹³ Under the section of "Civilian Objects", Article 53, entitled "Protection of cultural objects and of places of worship", states that:

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:

- (a) To commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
- (b) To use such objects in support of the military effort;
- (c) To make such objects the object of reprisals.

This provision only refers to the 1954 Hague Convention and therefore does not take the definition of cultural property any further. However, it is a useful tool for the purpose of this study since, after using the words "cultural property" it goes on to enumerate a series of immovable objects that constitute "the cultural and spiritual heritage of people".

C. Defining cultural heritage

Cultural heritage is a more recent term, first used regularly by UNESCO.¹⁴ The resulting UNESCO Conventions contain very detailed definitions of the concept. UNESCO points to an extension of the notion of cultural heritage and explains that:

¹³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I).

¹⁴ United Nations Economic, Social and Cultural Organisation.

The term 'cultural heritage' has not always meant the same thing. Recent decades have seen the concept of heritage—much like that of culture—undergoing a profound change.

Having at one time referred exclusively to the monumental remains of cultures, heritage as a concept has gradually come to include new categories such as the intangible, ethnographic or industrial heritage. A noteworthy effort was subsequently made to extend the conceptualisation and description of the intangible heritage. This is due to the fact that closer attention is now being paid to humankind, the dramatic arts, languages and traditional music, as well as to the informational, spiritual and philosophical systems upon which creations are based. The concept of heritage in our time accordingly is an open one, reflecting living culture every bit as much as that of the past.¹⁵

Despite this explanation, international legal instruments have tended to steer clear of using the term. Regional instruments have used the term cultural heritage, but in a limited way; for example in Council of Europe Conventions, specific elements of cultural heritage are articulated in such a way that the term cultural heritage is qualified.

1. International instruments referring to cultural heritage

a) UNESCO Conventions

1) World Heritage Convention

The UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage of 1972 (World Heritage Convention) sets out a definition of cultural heritage in Article 1:

Monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;

Groups of buildings: groups of separate or connected buildings 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;

¹⁵ UNESCO, Cultural Heritage, http://portal.unesco.org/culture/en/ev.php-URL_ID=2185&URL_DO=DO_TOPIC&URL_SECTION=201.html, last visited 25 July 2006.

¹⁶ Article 1(a).

¹⁷ Blake, *supra* note 2 at p. 66.

Sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.

There is, however, no definition of what would constitute "outstanding universal value", which sounds like a relatively high threshold, nor any clear indication of who would make such a judgment. This definition also appears close to the definitions of cultural property, as it contains only tangible elements of cultural heritage.

2) 2001 UNESCO Convention for the Protection of Underwater Cultural Heritage

This Convention defines underwater cultural heritage as:

All traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as:

- (i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context;
- (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and
- (iii) objects of prehistoric character.¹⁶

This Convention establishes a minimum age requirement in order to qualify as cultural heritage, which reflects a common perception that in order to be of value, culture should be aged.¹⁷ Again it could be thought that this is close to a definition of cultural property.

3) 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage

This Convention sets out a definition of intangible cultural heritage in Article 2:

The "intangible cultural heritage" means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their

history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.

The "intangible cultural heritage", as defined in paragraph 1 above, is manifested *inter alia* in the following domains:

- (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
- (b) performing arts;
- (c) social practices, rituals and festive events;
- (d) knowledge and practices concerning nature and the universe;
- (e) traditional craftsmanship.

This convention clearly goes beyond the enumeration of tangible property. The reference to international human rights instruments is interesting in this Convention. It remains to be seen to what extent the protection afforded by this Convention will relate to the spirit of international human rights instruments, for example the right of everyone to take part in cultural life¹⁸ and the obligation on States to take steps necessary for the conservation, development and diffusion of culture.¹⁹ It is important to remember that although there is protection for the cultural life of minorities in existing human rights instruments,²⁰ every culture, including that of the majority, "has a dignity and value which must be respected and preserved"²¹.

b) Council of Europe Conventions

1) European Cultural Convention 1954

The European Cultural Convention of 1954 refers to the need to safeguard and encourage the development of the "common cultural heritage of Europe"²² and specifically mentions "languages, history and civilisations"²³ as well as "cultural objects"²⁴.

¹⁸ International Covenant on Economic, Social and Cultural Rights, Article 15 (1).

¹⁹ *Ibid.*, Article 15 (2).

²⁰ E.g. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, United Nations General Assembly Resolution 47/135 of 18 December 1992.

²¹ Declaration of the Principles of International Cultural Co-operation, Article 1, proclaimed by the General Conference of UNESCO at its 14th session on 4 November 1966.

2) 1969 European Convention on the Protection of Archaeological Heritage

Article 1 of this 1969 convention defines elements of archaeological heritage as:

All remains and objects and any other traces of mankind from past epochs: the preservation and study of which help to retrace the history of mankind and its relation with the natural environment;

for which excavations or discoveries and other methods of research into mankind and the related environment are the main sources of information; and which are located in any area within the jurisdiction of the Parties.

The archaeological heritage shall include structures, constructions, groups of buildings, developed sites, moveable objects, monuments of other kinds as well as their context, whether situated on land or under water

It is to be welcomed that this Convention offers one reason for protecting archaeological heritage, which is to "retrace the history of mankind". However this definition also encompasses only tangible elements of cultural heritage and is therefore more akin to a definition of cultural property.

3) 1985 Convention for the Protection of the Architectural Heritage of Europe

In this 1985 convention, the expression "architectural heritage" is given the following meaning:

Monuments: all buildings and structures of conspicuous historical, archaeological, artistic, scientific, social or technical interest, including their fixtures and fittings;

Groups of buildings: homogeneous groups of urban or rural buildings conspicuous for their historical, archaeological, artistic, scientific, social or technical interest which are sufficiently coherent to form topographically definable units;

Sites: the combined works of man and nature, being areas which are partially built upon and sufficiently distinctive and homogeneous to be topographically definable and are of conspicuous historical, archaeological, artistic, scientific, social or technical interest.²⁵

The use of the word "conspicuous" without any further guidance is a curious choice in this Convention, but, without such guidance, should be taken to meaning clearly visible or notable.²⁶ Once again this definition only encompasses tangible property.

²² Article 1.

²³ Article 2 (a).

²⁴ Article 4.

²⁵ Article 1.

c) 1981 Banjul Charter

The 1981 African Charter on Human and Peoples' Rights of the Organisation of African Unity (Banjul Charter) also refers to the right of all people to "economic, social and cultural development with due regard to their freedom and identity in the equal enjoyment of the cultural heritage of mankind"²⁷ but provides no definition of what is meant by the cultural heritage of mankind. The Banjul Charter is known for its linking of civil and political rights to economic, social and cultural rights as well as the notion of rights to duties owed by each individual to society. The correlating duty of individuals is to:

Preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society.²⁸

In the preamble, the Charter confirms that "virtues of their [African] historical tradition and the values of African civilization [which] should inspire and characterize their reflection on the concept of human and peoples' rights", thereby alluding to the importance of culture in civilisation.

d) 1995 UNIDROIT Convention

UNIDROIT adopted a Convention on the International Return of Stolen or Illegally Exported Cultural Objects in 1995 which refers, in its preamble, to the:

fundamental importance of the protection of cultural heritage and of cultural exchanges for promoting understanding between peoples, and the dissemination of culture for the well-being of humanity and the progress of civilisation

Cultural objects are given the definition of:

those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to this Convention.²⁹

²⁶ i.e. the Oxford English dictionary definition.

²⁷ Article 22 (1).

²⁸ Article 29 (7).

²⁹ Article 1.

³⁰ Blake, *supra* note 2 at pp. 62-63.

³¹ Frigo, *supra* note 4, at p. 369.

³² L. V. Prott and P. O'Keefe, "Cultural Heritage" or 'Cultural Property?', *International Journal of Cultural Property*, Vol. 1 (1992), pp. 307-320 as cited in Blake, *supra* note 2 at p. 67.

The annex to the UNIDROIT Convention provides the same very comprehensive list of objects covered as the 1970 UNESCO Convention. Therefore, although the UNIDROIT Convention initially refers to cultural heritage, it then reverts to the phrase "cultural objects" in its title and equates cultural objects to cultural property.

2. Common elements of definitions

The term cultural heritage clearly encompasses movable and immovable property, but also far more. As shown by the definition of intangible cultural heritage in the 2003 UNESCO Convention, traditions, practices, expressions, rituals, festivals and craftsmanship is all included in the wider expression of cultural heritage. The definition does have its limits, however, and the qualifier is that these traditions etc. provide the individual, group or community with a sense of identity and continuity. This is a way to ensure a minimum threshold for the qualification of cultural heritage, which should prevent abuse of the term. Furthermore, the importance of cultural diversity, mutual respect and sustainable development is emphasised which may mean that in some cases, a balance will need to be found.

D. Choosing between concepts

The common theme running through all three concepts examined above is that none of them appear to have a generally agreed definition.³⁰ As outlined at the beginning, it is not the purpose of this paper to even attempt to find one. However, there are certain common points to be found in the various definitions and also emerging trends.

It does seem that cultural heritage can be interpreted as being a wider concept than that of cultural property and it may be suggested that cultural property is in fact a component of cultural heritage.³¹ Perhaps this also is shown by the tendency of earlier legal texts to refer to the components of cultural property then to cultural property as a generic term and finally culminating in the current usage of cultural heritage in more recent texts. This is borne out by Additional Protocol I Article 53 which refers to cultural property constituting the "cultural and spiritual heritage of peoples". Therefore it could be considered that the term cultural heritage is now the accepted term in international law.³²

It may equally be argued that the use of cultural heritage is not yet sufficiently wide-spread – because it has not yet become the common phrase in international legal texts – to be considered as internationally accepted. Other authors argue that the concept of cultural property carries with it ideological baggage, an implicit market value and is simply too limited: for this reason it has also been suggested

that such a notion is essentially a Western legal category which has been broadened only by global influences into cultural heritage.³³

Given that culture embraces literature and the arts as well as ways of life, value systems, traditions and beliefs,³⁴ and indeed, as seen in the anthropological definition given at the beginning of this section, anything characterising a society, it is useful to consider both property and heritage as qualifying the notion of culture – to limit the notion of culture to a concept that is workable in practical terms.

It may be that in practical legal terms, using the concept of cultural property is sensible as it provides reasonably clear limitations. However, for the purposes of this paper, it is preferable to use the more inclusive concept of cultural heritage, not only because the notion of cultural heritage is, at the very least, gaining international recognition, but also because using a more restrictive concept may lead to an under-estimation of the impact upon culture of the most serious crimes of concern to the international community as a whole.

Culture as a protected subject matter under international criminal law

This paper will only use the ICC Statute as its base for international criminal law, however, it should be remembered that many international texts exist which are helpful in understanding the way in which the ICC Statute may be interpreted in the future.³⁵

Armed conflict is the usual phraseology used in international humanitarian law as it is the law of armed conflict, both international and internal. Armed conflict has been authoritatively defined as “a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”³⁶ The two aspects of the conflict that are important for such qualification are the organisation of the parties to the conflict and the level of intensity of the conflict. In terms of finding the lowest threshold, it is those criteria which “are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized

³³ L. V. Protz, “International Standards for Cultural Heritage” in UNESCO World Culture Report, Unesco Publishing, Paris, 1998 at pp. 222-236 as cited in Blake, *supra* note 2 at 66.

³⁴ UNESCO, “Cultural Diversity: a new universal ethic”; http://portal.unesco.org/culture/en/ev.php-URL_ID=2450&URL_DO=DO_TOPIC&URL_SECTION=201.html, last visited 25 July 2006.

³⁵ For example, the Statutes of other international or internationalised courts and tribunals: namely the Charter of the International Military Tribunal (IMT Charter), the Charter of the International Military Tribunal for the Far East (IMTFE), the ICTY Statute, the Statute of the International Criminal Tribunal for Rwanda (ICTR Statute), the Regulations on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences (East Timor Regulations), the Statute of the Special Court for Sierra Leone (SCSL Statute), the Law establishing the Extraordinary Chambers in the Courts of Cambodia (Cambodia Extraordinary Chambers Law), and Bosnia and Herzegovina’s Criminal Code (revised in 2003) Official Gazette Number BH 73/03 which is used in the War Crimes Tribunal in Sarajevo.

³⁶ Prosecutor v. Duško Tadić, Case No. IT-94-1, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70.

and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.”³⁷ An international armed conflict is one between States, also meeting the minimum threshold requirement of intensity.

Therefore the idea of “times of trouble” does not necessarily equate to the international humanitarian law concept of armed conflict – whether international or not – rather it is a broader notion including also other times of unrest, which would not reach the threshold of an armed conflict. This is important because there is no need for there to be an armed conflict in order to establish either genocide or crimes against humanity.

The protection afforded to culture in times of trouble is the protection against destruction of or damage to culture. The word destruction means the end result of having so badly damaged³⁸ something it no longer exists or cannot be used;³⁹ in other words, either putting something out of existence by severe damage or attack or completely ruining or spoiling it⁴⁰. This does not mean that destruction is inevitably achieved by a physical or biological act as such; it can also occur through forcible alteration. From the definitions given above, it is clearly not essential that culture be totally annihilated for it to be destroyed – ruining or spoiling culture may suffice.

Leaving aside the almost inevitable problem that during the conduct of hostilities cultural heritage, and most visibly cultural property, will suffer as “collateral damage”, the intentional targeting of culture in times of trouble is commonplace. Plunder, which has been defined as “all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international law”⁴¹ and includes pillage,⁴² is forbidden in international humanitarian law. In the same way that rape is used as a means to alter the adversary’s identity,⁴³ so too is attacking the enemy’s culture a way to erase the manifestations of the enemy’s identity.⁴⁴

Such intentional targeting of culture can happen in times of civil unrest – such as the 1992 demolition of the Babri Mosque in Ayodhya in Uttar Pradesh – in times of armed conflict (international or non-international), which occurred most notably after the collapse of the Socialist Federal Republic of Yugoslavia,

³⁷ Prosecutor v. Duško Tadić, Case No. IT-94-1, Trial Chamber Judgment, para. 562.

³⁸ Concise Oxford dictionary definition of damage: “physical harm reducing the value, operation or usefulness of something”.

³⁹ Cambridge dictionary definition.

⁴⁰ Concise Oxford dictionary definition.

⁴¹ Prosecutor v. Zejnil Delalić, “elebi I”, Case No. IT-96-21-T, Trial Chamber Judgment, para. 591.

⁴² Prosecutor v. Tihomir Blaskić, Case No. IT-95-14, Appeals Chamber Judgment, paras. 147-148.

⁴³ See Prosecutor v. Radovan Karadžić and Ratko Mladić, Case No. IT-95-5-R61 and IT-95-18-R61, Review of Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, (hereinafter Karadžić, Rule 61 Review), para. 94.

⁴⁴ See H. Abiabi, “The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia”, 14 Harvard Human Rights Journal (2001), (hereinafter Abiabi, ICTY Practice), pp. 1-32 at p. 1.

or in circumstances other than those traditional "times of troubles" such as the destruction of the Twin Towers on September 11, 2001.⁴⁵

Crimes

This paper will not enter a comprehensive discussion about crimes in international criminal law. Suffice it to say that this is an area of law that is constantly evolving. However it is necessary to set out briefly what crimes under international criminal law could have the consequence of making culture a victim. This section will deal with three of the most serious crimes of concern to the international community as a whole. War crimes, crimes against humanity and genocide have been chosen from the four crimes over which the ICC has jurisdiction.⁴⁶

War crimes

War crimes are undoubtedly the most developed of the three crimes: codification dates back over 100 years and involves detailed rules on the conduct of hostilities and the protection of civilians. War has always been the principal danger to cultural property and cultural heritage and this remains true today.⁴⁷ Perhaps it is also for this reason that the notion of destroying or attacking cultural property or cultural heritage is most developed in international humanitarian law and is therefore best covered by war crimes.

Article 8(2)(b)(ix) of the ICC Statute prohibits:

intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives in international armed conflict.⁴⁸

⁴⁵ See further H. Abiabi, "From the destruction of the Twin Buddhas to the destruction of the Twin Towers: Crimes against civilization under the ICC Statute", *International Criminal Law Review*, 2004, Vol. 4, (hereinafter Abiabi, *Twin Buddhas-Twin Towers*), pp. 1-63.

⁴⁶ As the crime of aggression is currently not defined, these three crimes are the only crimes over which the ICC currently has active jurisdiction.

⁴⁷ V. Mainetti, "Des crimes contre le patrimoine culturel? Réflexions à propos de la criminalization internationale des atteintes aux biens culturels", "Agora" Papers - Florence Founding of the European Society of International Law, European Society of International Law, 2005, available at <http://www.esil-secdi.org/english/pdf/Mainetti.PDF>, last visited 25 July 2006.

⁴⁸ Comparable provisions to Article 8(2)(b)(ix) and 8(2)(e)(iv) can be found in the ICTY Statute Article 3(d), East Timor Regulation 6(e)(iv), Cambodia Extraordinary Chambers Law Article 7, which establishes jurisdiction over breaches of the 1954 Hague Convention, and Bosnia and Herzegovina's Criminal Code Article 183.

⁴⁹ K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2003, p. 215.

⁵⁰ *Ibid.*, pp. 146-147.

⁵¹ E.g. ICC Statute Articles 8(2)(a)(iv) and (b)(iii); Article 6 (b) IMT Charter, Article 2, 3(b), 3(c) and 3(e) of the ICTY Statute, East Timor Regulations 6(a)(iv), 6(b)(ii) and (xiii) and 6(c)(xii) and Cambodia Extraordinary Chambers Law Article 9.

⁵² For a full discussion on the concepts of both direct and indirect protection of cultural property, with specific reference to the jurisprudence of the ICTY, see further Abiabi, *ICTY Practice*, supra note 44, pp. 1-32.

Article 8(2)(e)(iv) sets out exactly the same prohibition in times of non-international armed conflict. The wording is taken from Article 27 of the Hague Regulations of 1907, and with the requirement of the necessary intent, any collateral damage is essentially ruled out. It was discussed in the Preparatory Commission whether actual damage to the objects mentioned was required for this war crime to be made out. Eventually the majority position that there was no such "result requirement" was accepted.⁴⁹ The intent necessary is that of "wilfully" directing attacks, which has been taken to encompass both direct and indirect intent as well as recklessness.⁵⁰

These articles clearly set out the direct protection afforded to cultural property under the ICC Statute. There is also arguably indirect protection available for cultural property by assimilating cultural property to civilian objects. Most international tribunals elucidate in their founding statutes the general prohibition of attacking civilian objects,⁵¹ which stems from the long established principle of distinction in international humanitarian law. Of course, it must be remembered that although the practical effect in certain circumstances may be to protect cultural property, the purpose is still to protect objects because of their non-military civilian status, not their cultural importance.⁵²

Crimes against humanity

Article 7 of the ICC Statute provides that:

"crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the

jurisdiction of the Court;

- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

The crime of persecution is unique in that it requires a discriminatory intent. The ICC's inclusion of cultural grounds for the crime of persecution is an innovation,⁵³ generally thought of as making the Statute "up to date".⁵⁴ However, there does not appear to be any clearer definition of what exactly is meant by persecution on cultural grounds, and it has been suggested that the only sensible conclusion is that the word "cultural" should be given its ordinary broad meaning.⁵⁵ However, as was seen in the definitions section, this may not be as simple as thought, and undoubtedly would lead to interesting legal arguments about the scope of protection.⁵⁶

Genocide

Article 6 of the ICC Statute defines genocide as being:

- any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
 - (a) Killing members of the group;
 - (b) Causing serious bodily or mental harm to members of the group;
 - (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 - (d) Imposing measures intended to prevent births within the group;
 - (e) Forcibly transferring children of the group to another group.⁵⁷

During the drafting of the Genocide Convention the concept of "cultural genocide" was the subject of heated debate,⁵⁸ but ultimately, the only remnant of

⁵³ Discrimination on political, racial and religious grounds are the common grounds (i.e. they form the only grounds for persecution in the ICTY Statute Article 5, the ICTR Statute Article 3 and the Cambodia Extraordinary Chambers Law Article 5); the SCSL also has jurisdiction over crimes of persecution committed on ethnic grounds (SCSL Statute Article 2) and the East Timor Regulation 5 and the War Crimes Chamber in Sarajevo (Bosnia and Herzegovina's Criminal Code Article 172) as well as the ICC include ethnic grounds as well as national, cultural and gender grounds.

⁵⁴ R. Lee (ed.) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, USA, 2001, p. 95.

⁵⁵ O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court*, Nomos Verlagsgesellschaft, Germany, 1999, p. 149.

⁵⁶ For a full discussion on the connection between the crime of persecution and especially damage to cultural property, see further Altabi, *ICTY Practice*, supra note 44, pp. 1-52.

the concept to make it into the final version was Article 2(e) – the forcible transfer of children⁵⁹. Although the legal definition of the crime of genocide is limited to the extent that it does not encompass the term "cultural genocide" as such, that does not mean that there is no role at all for the notion of culture when considering the crime of genocide. Some authors have suggested two particular and important roles that cultural considerations play in defining and prosecuting genocide⁶⁰. The first is that acts of cultural genocide may well provide evidence of the particular intent for genocide, which is what makes genocide so difficult to prove⁶¹. The second role for culture in genocide is when defining the protected groups in the Genocide Convention. There is no internationally accepted legal definition of racial, ethnic, religious or national groups, and therefore cultural considerations, among others, will be important when considering whether a particular person or group of persons falls within a protected category.

"Victims"

The ICC Statute is unique in its recognition of the rights of victims. Victims can apply to be participants in proceedings in their own right, rather than being restricted to participating as a witness in proceedings. Article 68(3) of the ICC Statute enables victims to participate in all stages of the proceedings, as follows:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

What is truly ground-breaking in the field of international criminal law is

⁵⁷ This is also the definition of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) Article 2, the ICTY Statute Article 4, the ICTR Statute Article 2, East Timor Regulation 4, Cambodia Extraordinary Chambers Law Article 4 and Bosnia and Herzegovina's Criminal Code Article 171.

⁵⁸ The Secretariat Draft Convention (UN Doc. E/447) included a comprehensive provision on cultural genocide, advocated for by Raphael Lemkin, who had first coined the term "genocide" in his work *Axis Rule in Occupied Europe*; the ad hoc Committee Draft Convention (UN Doc. E/AC.25/SR.14) also included the idea of cultural genocide, although it was limited to language, monuments, institutions and objects.

⁵⁹ Common sense dictates that this actus reus is neither biological nor physical genocide and therefore must surely equate to something else; whether or not it is cultural genocide is difficult to say because, as of yet, there is no definition to assist in such classification. It should be noted that the International Law Commission, in the commentary to its 1996 Draft Code of Crimes against the Peace and Security of Mankind considered this actus reus to be biological genocide, stating that the Genocide Convention contained only acts of physical or biological genocide, not cultural genocide (cf. Report of the International Law Commission on the work of its forty-eighth session, Doc. A/50/10, p. 46, commentary to Article 17, para. 12).

⁶⁰ D. Nersessian, "Rethinking Cultural Genocide Under International Law", *Human Rights Dialogue Series* 2, No. 12, pp. 7-8 at p. 8.

⁶¹ This has been upheld in international jurisprudence in the Karadžić Rule 61 Review, supra note 43, para. 94.

the definition of a victim before the ICC. Accordingly, rule 85 (“Definitions of victims”) of the Rules of Procedure and Evidence takes victims to mean “natural person who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court”; but also may include:

organisations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

The ICC can also lay down the principles for reparation for victims, which may include restitution, compensation and rehabilitation. This is truly innovative in terms of the recognition that “direct harm” or damage done to cultural property does result in there being a victim of that harm, and that reparations may be made for the harm suffered.

Conclusion

Culture does not exist as an autonomous notion; rather it exists through human beings and the value given to it by them.⁶² A civilisation presents itself in many ways including language, religious, artistic and political components which shape and are shaped by their ethnic, racial and national human manifestations.⁶³

Cultural property has a particular importance and emotional attachment for communities, more so than other types of property. Whereas destruction of property in general could be said to affect the material possessions of individuals, albeit on a serious and even potentially life-threatening scale, the destruction of or damage to cultural property does extend beyond material possessions – it affects community ties, beliefs and the sense of belonging and identity of the group to which it belongs. Law and international law has always tended towards an ethnocentric approach which confines crimes against cultural property to a less prominent position than crimes against persons. On the occasions that crimes against cultural property are specifically dealt with, this appears to be mainly because of the perpetrators’ aim to damage the civilian population whom the cultural property characterised rather than because the perpetrator intended to destroy the cultural property, and its intrinsic value, itself.⁶⁴

⁶² Abtahi, *Twin Buddhas-Twin Towers*, *supra* note 45, at p. 55.

⁶³ *Ibid.*, at p. 59.

⁶⁴ Abtahi, *ICTY Practices*, *supra* note 44, pp. 1-32 at pp. 3 and 28.

⁶⁵ Abtahi, *Twin Buddhas-Twin Towers*, *supra* note 45, at p. 55.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

Yet attacking the culture of a people is often intended to disfigure the past, present and future of that people by creating a vacuum in that people’s culture.⁶⁵ This in turn disfigures world culture as the damage done to that people’s culture forcibly alters their reality which is inextricably linked to universal reality.⁶⁶ This forced alteration in the culture of the human community as a whole means that elements of the world cultural heritage are lost forever.⁶⁷ As such, this disfigurement may amount to a serious crime of concern to the international community as a whole even though it may involve neither loss of human life nor physical suffering,⁶⁸ thus making culture a potential victim of violations of international criminal law.
