"Protected Property" and Its Protection in International Humanitarian Law

*Bing Bing Jia**

Keywords: civilian objects; confiscation; extensive or wanton destruction; military necessity; pillage.

Abstract. The issue addressed here is what types of property are protected by the law and by what qualities they are chosen for such protection. It is then proposed to consider whether it is helpful and possible to draw an analogy between the concepts of "protected persons" and "protected property." Limited space will be given to the issue of protection of cultural property. The protection of property in land warfare is the main target of examination. The focus when selecting evidence is placed on existing treaties and cases from international tribunals (including the ICTY) dealing with cases arising from international conflicts. The conclusion contains seven principles regarding the protection of property, as evidenced by practice.

1. INTRODUCTION

The concept of "protected property" does not exist in international humanitarian law,[1] whereas that of "protected persons" is commonly used in this context. Multilateral treaties like the 1949 Geneva Conventions[2] and the

* Legal Officer, International Criminal Tribunal for the former Yugoslavia, The Hague ('ICTY').

The views expressed in this paper are those of the author, and do not reflect the position of either the United Nations or the ICTY.

1. "Property" may include "property of any description, whether corporeal or incorporeal, movable and immovable, and legal documents or instruments evidencing title to, or interest in such property": Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Council of Europe, 8 November 1990, Art. 1. Similarly, *see* Art. VII(c), Law No. 52, Supreme Commander's Area of Control, Military Government Gazette Germany No. 3, 18 September 1944, amended 3 April 1945.
2. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 ('Geneva Convention I'), 75 UNTS 31 *et seq.*; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 ('Geneva Convention II'), 75 UNTS 85 *et seq.*; Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 ('Geneva Convention III'), 75 UNTS 135 *et seq.*; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 ('Geneva Convention IV'), 75 UNTS 287 *et seq.*

15 Leiden Journal of International Law 131–153 (2002)

Additional Protocols of 1977[3] approach objects or properties on a case-by-case basis, specifying protection accorded to them by way of agreement among the states that negotiated the treaties. This piecemeal treatment of property provides the theme for this paper, which is intended to deal with this feature of the law and its application in practice, including its enforcement through international prosecution.[4] The lofty ideals underpinning international humanitarian law apply equally to the material environment of mankind lest human life could be lost even after it was saved from destruction and severe damage that has been brought on by war. The philosophical question is to what extent the treatment of human life can be compared, in terms of value to human beings, with that of objects and matters composing the settings of that life. The practical query is as to what properties are protected by the law and by what qualities they are chosen for such protection. I will consider whether it is helpful and possible to draw an analogy between the concepts of "protected persons" and "protected property." In theory, this is feasible. For instance, nationality cannot only be conferred on human beings, but also on property such as medical ships. Property can generally be taken into custody or seized, just as humans can. The destruction of property can result in losses of great value which are often as irreparable as the loss of human lives: for instance, palaces, art, written records of ancient times, plants, factories, dams, civilian airports, etc., all razed to the ground or burnt to ashes, or valuables seized and looted without receipts or evidence of their whereabouts, thus irretrievable in reality to the rightful owner. The scope of this article does not allow for an extensive discussion of the issue of protection of cultural property, which is a well-studied topic,[5] save for considering it as part of the general inquiry into war crimes against property. Further, capture of enemy ships and prize law – interesting as they may be – are not the concerns of this paper.[6] The protection of property in land warfare is the main object of examination. Moreover, the focus when selecting

3. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) ('Additional Protocol I'), 1125 UNTS 3 *et seq.*; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) ('Additional Protocol II'), 1125 UNTS 609 *et seq.*
4. *Cf.* G. Draper, *The Modern Pattern of War Criminality*, *in* Y. Dinstein & M. Tabory (Eds.), War Crimes in International Law 168 (Martinus Nijhoff, 1996).
5. S. Nahlik, *La protection internationale des biens culturels en cas de conflit armé*, 120 Recueil des cours 61–164 (1967); P. Boylan, Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (UNESCO, 1993); J. Toman, La Protection des biens culturels en cas de conflit armé (UNESCO, 1994); J. Toman, The Protection of Cultural Property in the Event of Armed Conflict (Commentary on the Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocol, signed on 14 May 1954 in The Hague, and on other instruments of international law concerning such protection) (UNESCO, 1996) (hereinafter 'Protection').
6. *E.g.*, C. Colombos, The Law of Prize (Longmans, 1949); G. Hackworth, Digest of International Law, Vol. VI (1943); M. Whiteman, Digest of International Law, Vol. 10 (1968); N. Ronzitti, The Law of Naval Warfare (Martinus Nijhoff, 1988).

evidence is placed on existing treaties and cases from international tribunals (including the ICTY) dealing with cases arising from international conflicts. The discussion will revolve around several general rules as evidenced by existing practice.

2. Wanton Destruction Is Prohibited Subject to the Plea of Military Necessity

The Hague Regulations of 1907[7] embody customary law of the conduct of modern warfare on land.[8] In respect of a situation of battle, Article 23 provides thus:

> In addition to the prohibitions provided by special Conventions, it is especially forbidden –
> […]
> (g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war; […].

The important aspect of the provision is the condition that enemy property can be destroyed only when "demanded" by the necessities of war.[9] Certain other provisions specify what objects should be spared. Article 25 prohibits the "attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended." Article 28 provides for the prohibition of pillage of a town or place, even when taken by force.

At the time of the Hague Regulations, a general principle was established that, in time of battle, enemy property should not be destroyed or seized unless this was demanded by necessities of war.

The 1949 Geneva Conventions, arriving shortly after World War II, all contain a provision against the grave breaches of the Conventions.[10] This provision enumerates offences amounting to the grave breaches, under a general *chapeau* that refers to persons or property protected by the Conventions. Thus, Article 50 of Geneva Convention I refers specifically to the act of "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

This expression is repeated in Article 51 of Geneva Convention II and Article 147 of Geneva Convention IV. It is, however, interesting to note that the expression is not reiterated in Article 130 of Geneva Convention III, save that Article 130 does envisage the grave breaches listed in it

7. Regulations Respecting the Laws and Customs of War on Land (annexed to the Convention (IV) Respecting the Laws and Customs of War on Land of 18 October 1907) ('Hague Regulations'), 2 AJIL 90–117 (1908) (Supp.).
8. Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 (3 May 1993), para. 41.
9. As for the plea of military necessity, *see* Section 3, below.
10. Art. 50 of Geneva Convention I, Art. 51 of Geneva Convention II, Art. 130 of Geneva Convention III, and Art. 147 of Geneva Convention IV.

may be committed against "property." This wording of Article 130 is problematic. Geneva Convention III concerns the treatment of prisoners of war. Article 18 distinguishes between objects which are exempt from seizure and objects which are not.

Personal belongings are not totally exempt from seizure based on reasons of security, but are recoverable by the persons from whose hands they were taken away. A related provision, Article 119, provides, in part, that:

> On repatriation, any articles of value impounded from prisoners of war under Article 18, and any foreign currency which has not been converted into the currency of the Detaining Power, shall be restored to them. Articles of value and foreign currency which, for any reason whatever, are not restored to prisoners of war on repatriation, shall be despatched to the Information Bureau set up under Article 122.
>
> Prisoners of war shall be allowed to take with them their personal effects, and any correspondence and parcels which have arrived for them […].
>
> The other personal effects of the repatriated prisoner shall be left in charge of the Detaining Power which shall have the property forwarded to him as soon as it has concluded an agreement to this effect […].

Presumably such personal effects are under the protection of the grave breaches regime of the Convention, as Article 130 has anticipated that offences may be committed against property protected by the Convention. But the terms of Article 130 beg questions, for it is not easy to see how one could commit such acts as wilful killing, torture or inhuman treatment including biological experiments, wilfully causing great suffering or serious injury to body or health, and forcing a prisoner of war to serve in the armed forces of the captor against "protected property." The ambiguity of Article 130 does not, in any case, wipe out the general protection it provides for personal effects, the beneficial effect of which could be significant in practice.

The 1949 Geneva Conventions reflected the practice up to the time of their conclusion. The principle declared in the Hague Regulations, that property should be spared from ravages of war unless it was used for military purposes, was reiterated and entrenched. Another development was the greater specification of the protection of personal effects and belongings of prisoners of war.

One salient feature of the Conventions was the creation of the regime of grave breaches that opened the way for, initially, national prosecution, and later international sanction. In its Statute, Article 2(d) allows the ICTY to prosecute "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly," and Article 3 places the following three offences under the jurisdiction of the ICTY: Article 3(b) (wanton destruction of cities, towns or villages, or devastation not justified by military necessity), Article 3(c) (attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings), and Article 3(e) (plunder of public or private property).

Article 3(c) complements Article 3(b) in protecting areas of living, and throws a net of protection over properties situated in those areas.

Further, the regime of grave breaches of the Geneva Conventions has found its way into the relevant provisions of the Rome Statute.[11] Article 8 of the Statute, entitled "War Crimes," envelopes both the grave breaches regime of the 1949 Geneva Conventions and the laws and custom of war, covering both international conflicts and conflicts of a non-international character.

In *Prosecutor* v. *Tihomir Blaškić* before the ICTY, a brief discussion of offences against property under Articles 2 and 3 of the Statute was set forth in the Trial Judgement in the following order: extensive destruction (Count 11),[12] unlawful attack on civilian property (part of Count 4),[13] devastation (Count 12),[14] plunder of public and private property (Count 13),[15] and destruction or wilful damage to institutions dedicated to religion or education (Count 14).[16] One interesting point made in the Judgement is that the Trial Chamber adopted the submission of the Prosecution, which followed largely the reasoning of a Trial Chamber in a decision in *Prosecutor* v. *Ivica Rajić*, that the property of the Bosnian Muslims was protected under Geneva Convention IV because the property was in the hands of an occupying power, *i.e.*, Croatia, on the ground that Bosnian Croats, under the effective control of the Republic of Croatia, occupied areas of Bosnia and Herzegovina.[17] This is a development linking the law of occupation to the concept of protected persons established in Geneva Convention IV. It also shows that there may be vitality in a notion of protected property.

In *Prosecutor* v. *Dario Kordić* and *Mario Čerkez*, the accused were charged, under Counts 37 and 40 of the Indictment, respectively, for extensive destruction of property recognised by Article 2(d) of the ICTY Statute. They were also charged under Counts 38 and 41 with the offence of wanton destruction under Article 3(b) of the Statute.[18] The Trial Chamber recognised exceptions to the general prohibition of extensive destruction of property and discussed in some detail the exception of property located in occupied territory.[19] This Judgement set out the elements required for the crime of extensive destruction of property: (i) the property must be

11. Rome Statute of the International Criminal Court, adopted at Rome on 17 July 1998 (UN Doc. A/CONF.183/9 (17 July 1998)) ('Rome Statute').
12. Prosecutor *v.* Tihomir Blaškić, Judgement, Case No. IT-95-14-T, T.Ch. I, 3 March 2000, para. 157.
13. *Id.*, at para. 180.
14. *Id.*, at para. 183.
15. *Id.*, at para. 184.
16. *Id.*, at para. 185.
17. *Id.*, at para. 149.
18. Prosecutor *v.* Dario Kordić and Mario Čerkez, Judgement, Case No. IT-95-14/2-T, T.Ch. II, 26 February 2001 ('Kordić'), para. 329. A number of villages were destroyed: *see* paras. 805–807.
19. *Id.*, at paras. 337–340.

accorded general protection under the Geneva Conventions of 1949 and the perpetrator must have acted with intent to destroy the property in question; (ii) the property is accorded protection under the Geneva Conventions on account of its location on occupied territory; and (iii) the destruction is not justified by military necessity.[20]

As to the offence of wanton destruction, the Trial Chamber simply listed three elements: (1) destruction on a large scale; (2) destruction not justified by military necessity; and (3) destruction committed with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction.[21] The Chamber noted further that Article 3 of the Statute complemented Article 2 in protecting property.[22] Importantly, the Trial Chamber found that the destroyed property subject to Counts 37, 38, 40, and 41 "was not located in occupied territory."[23] The destruction came therefore in the midst of an armed conflict. The accused were found guilty on Counts 38 and 41 respectively.

3. The Plea of Military Necessity

As has been shown in the preceding section, the customary rule of prohibition of destruction of property is qualified by the condition of military necessity. Both the Hague Regulations (Article 23) and three of the four Geneva Conventions (Conventions I, II and IV) qualify protection of property by reference to the excuse of military necessity or necessities of war. The customary status of the plea is not questioned.[24] Its content has been given a thorough analysis through two post-World War II trials of German military commanders, where the plea of military necessity as referred to in the Hague Regulations was considered. It is admitted that the two cases to be quoted were concerned with situations of occupation. However, the notion of military necessity they expounded applies to the battleground.

In *US* v. *Wilheim von Leeb et al.*, the Military Tribunal in relation to use of slave labour, looting and spoliation, stated that military necessity does not justify the seizure of property or goods beyond that which is necessary for the use of the army of occupation.[25]

The reference in the judgement of the Military Tribunal to the view of German writers was not academic, as the view had already found its way into the German *Manual of Land Warfare*, issued in 1902, in which the doctrine was understood to justify the use of such means as would be

20. *Id.*, at para. 341.
21. *Id.*, at para. 346.
22. *Id.*, at para. 347.
23. *Id.*, at para. 808.
24. *Cf.* N. Dunbar, *Military Necessity in War Crimes Trials*, 29 BYIL 442 (1952).
25. Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Vol. XI, 541 (1950) (US Government Printing Office) (hereinafter 'Trials').

conducive to survival or to the winning of a war.[26] The manual's approach was closer to that of the earlier military law.[27] The Tribunal went on to deal with the question of devastation beyond military necessity:

> The devastation prohibited by the Hague Rules and the usages of war is devastation not warranted by military necessity. This rule is clear enough but the factual determination as to what constitutes military necessity is difficult. Defences in this case were in many instances in retreat under arduous conditions wherein their commands were in serious danger of being cut off. Under such circumstances, a commander must necessarily make quick decisions to meet the particular situation of his command. A great deal of latitude must be accorded to him under such circumstances. What constitutes devastation beyond military necessity in these situations requires detailed proof of an operational and tactical nature. We do not feel that in this case the proof is ample to establish the guilt of any defendant herein on this charge.[28]

At the close of the case, the Tribunal acquitted all those charged with spoliation and plunder except Reinecke who, for his acts in this regard and his involvement in other offences, was sentenced to life imprisonment. As for General Reinhardt, the Tribunal stated:

> The evidence on the matter of plunder and spoliation shows great ruthlessness, but we are not satisfied that it shows beyond a reasonable doubt acts that were not justified by military necessity.[29]

The statement of the Tribunal seems to suggest that the manner in which seizure was conducted was not determinative as to whether this act of plunder was illegal before an international tribunal; it was the cause of this act that counted. Plunder in occupied territories for military necessity might be legal if it did not go beyond the use of the army of occupation, and there was no distinction made in the Judgement between public and private property. But this interpretation is valid only to the extent that it is allowed by international law: Article 53 of the Hague Regulations refers to only certain categories of private property that may be seized under certain conditions. Further, once pleaded by the defence, the burden would be shifted onto the prosecution to disprove it beyond reasonable doubt. In this case, the plea was successful before the Tribunal.

In *US* v. *Wilhelm List et al.*, the Military Tribunal found that:

> Military necessity permits a belligerent subject to the laws of war, to use any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money.[30]

---

26. J. Stone, Legal Controls of International Conflict 352 (Stevens and Sons Ltd., 1954).
27. E. Kwakwa, The International Law of Armed Conflict: Personal and Material Fields of Application 34–35 (Kluwer Academic Publishers, 1992), citing to the Lieber Code.
28. Trials, *supra* note 25, at 541.
29. *Id.*, at 609.
30. *Id.*, at 1253–1254.

The Tribunal further stated that "[d]estruction as an end in itself is a violation of international law" and that there must be some reasonable connection between the destruction of property and the overcoming of the enemy forces.

It seems that the destruction of private or public property in battle was not regarded by the Tribunal as being as illegal as the looting of private property by an army in occupation of a territory. But destruction would become illegal if it was carried out for the purpose of destruction with no connection to military necessity. In this case the goal seemed to be that of overcoming the enemy. This goal, identified in the Judgement, was not different from the so-called *Kriegraison* known in the existing German practice that seemed to justify the use of whatever means that might secure a victory. On the other hand, the Tribunal stated, in relation to the case of General Rendulic, that

> the Hague Regulations are mandatory provisions of international law. The prohibitions therein contained are superior to military necessity of the most urgent nature except where the Regulations themselves specifically provide the contrary. The destruction of public and private property by retreating military forces which would give aid and comfort to the enemy may constitute a situation falling within the exceptions contained in Article 23 g.[31]

Among the group of defendants, only Lieutenant General Felmy was found guilty of Count 2 (wanton destruction and devastation and looting of public and private property),[32] in addition to his responsibility under Count 1 (reprisal). He was sentenced to 15 years imprisonment. It is not clear whether his plea of military necessity was rejected in whole or in part (the destruction was inevitable but excessive in scope).

4. Cultural Property May Be Destroyed if They Are Used for Military Purposes

Article 27 of the Hague Regulations states:

> 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.
>
> It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to enemy beforehand.

Buildings obscured from sight will not attract the protective measures envisaged by this provision. In modern wars, bombardment may be carried

31. *Id.*, at 1296.
32. *Id.*, at 1309. In one reprisal operation conducted by his subordinate officers, more than 25 Greek villages were destroyed.

out by long-distance artillery or cruise missiles launched miles away from the target.[33] While it may be true that the surveillance and monitoring equipment of modern warfare has also progressed so that prior precise targeting can be done (sometimes by satellites which are capable of locating objects in a target area with a negligible margin of error) before the shell or the missile is launched,[34] few states are capable of prior targeting with relative precision. In addition there has been a general lack of capability or will to ensure that distinctive signs of protected buildings can be recognised before they are bombarded. How the customary rules of the Hague Regulations cope with this new reality is not clear.[35]

Cultural property (relating to religion, art, science, history, and charitable purposes) is to be exempted unless it is used for military purposes.[36] This principle was not respected in World War II.[37]

The silence of the Geneva Conventions towards the protection of cultural property was quickly broken by the advent of the 1954 Cultural Property Convention, a specialist treaty dedicated to the protection of cultural property owned by both states and individuals.[38] The 1954 Cultural Property Convention contains 40 articles.[39] The definition of cultural property is that of movable or immovable property of "great importance to the cultural heritage of every people."[40] Cultural property can be either publicly or privately owned, and Article 1 of the Convention extends protection to such property "irrespective of origin or ownership." There have, furthermore, been other treaties concluded in the past century to supplement the regime of the existing laws or custom of war.[41]

Article 85(4) of Additional Protocol I provides that "making the clearly-recognized historic monuments, works of art or places of worship which

33. *See* A. Rogers, *Zero-casualty Warfare*, 82 International Review of the Red Cross 170 (March 2000), citing a senior air force officer's view that in a new era, the key requirement for air power would be "to increase stand-off capability for weapons which have pinpoint delivery accuracy to achieve maximum strategic effect."
34. *Cf.* J. Burger, *International Humanitarian law and the Kosovo Crisis: Lessons Learned or to be Learned*, 82 International Review of the Red Cross 129, at 130–135 (March 2000).
35. There exist other practical problems such as the targeting of objects of dual use (both military and civilian) and collateral damage. As for the de-emphasis on anticipating future methods of war, *see* Kwakwa, *supra* note 27, at 25.
36. Similar protection can also be found in Art. 5 of IX Hague Convention of 1907 (Naval Bombardment).
37. *Cf.* Section 7, below, which shows that the Nuremberg Trials of German war criminals dealt with plundering of cultural property in territories occupied by Germany.
38. *Cf.* Toman, Protection, *supra* note 5, at 48.
39. Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954; entered into force 7 August 1956, 249 UNTS 240–288. As of 6 July 2001, 83 states have ratified or acceded to the Convention.
40. Art. 1. *Cf.* D. Fleck, *et al.* (Eds.), The Handbook of Humanitarian Law in Armed Conflicts, Sec. 901, at 382 (Oxford University Press, 1995).
41. *Cf.* C. Greenwood, *International Humanitarian Law (Laws of War) (revised report for the Centennial Commemoration of the First Hague Peace Conference 1899)*, *in* F. Kalshoven (Ed.), The Centennial of the First International Peace Conference: Reports and Conclusions 161, at 207–208 (Kluwer Law International, 2000).

constitute the cultural or spiritual heritage of peoples [...] the object of attack, causing as a result extensive destruction thereof" could be a grave breach of the Protocol, unless certain circumstances exist.[42]

As for the meaning of "peoples," a term used in both this and other provisions, reference may be made to the interpretation given by the Organisation of African Unity, in terms of which "peoples" refer to the total population of a state, and not to minorities within the state.[43] Additional Protocol II does not reproduce the regime of grave breaches of the Conventions and Additional Protocol I, but it does provide for protection of cultural property.[44]

The ICTY Statute, Article 3(d), provides jurisdiction over 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. Article 8(2)(b)(ix) of the Rome Statute protects buildings dedicated to religion, education, art, science, or charitable purposes, historic monuments, hospitals and places where the wounded and sick are collected, such buildings not being military targets.

In *Kordić*, the two accused were charged in Counts 43 and 44, respectively, for having committed the offence of destruction or wilful damage to institutions dedicated to religion or education under Article 3(d) of the ICTY Statute.[45] The Trial Chamber considered that Article 3(d) provided for a more specialised offence than the general protection afforded civilian objects under, for instance, Article 52 of Additional Protocol I.[46] It also emphasised "the fundamental principle" that protection of whatever type will be lost if cultural property, including educational institutions, is used for military purpose, and this principle is consistent with the custom codified in Article 27 of the Hague Regulations.[47] Defendant Kordić was eventually found guilty of Count 43 (destruction or wilful damage to institutions), whilst defendant Čerkez was held responsible for acts charged in Count 44 (destruction or wilful damage to institutions).

5. Usage of Medical Equipment of the Enemy

Certain provisions of the Geneva Conventions select property for protection. Thus, under Geneva Convention I, Article 20 protects hospital ships which "shall not be attacked from the land." Article 33 of Geneva Convention I protects the material of mobile medical units of the armed forces and the buildings, material and stores of fixed medical establishments of

42. Art. 53(b) refers to where the protected property is used in support of military effort.
43. *See* Kwakwa, *supra* note 27, at 54.
44. Art. 16 (cultural objects and places of worship).
45. Kordić, *supra* note 18, at para. 354. Destruction occurred involving mosques and educational institutions: *see* para. 807.
46. *Id.*, at para. 361.
47. *Id.*, at para. 362.

the armed forces. The protection provided is in terms of the relevant protected materials being reserved for the care of wounded and sick, without, however, forbidding the forces which seized them in the field from using them, as long as the wounded and sick nursed in them are cared for continually. The article prohibits the destruction of the material and stores mentioned therein. Article 34 covers "the real and personal property of aid societies." Further, transports, including aircraft, or vehicles carrying wounded and sick or medical equipment shall be protected by virtue of Articles 35 and 36.

Geneva Convention II provides protection for military hospital ships or medical ships "utilised" by national Red Cross Societies, officially recognised relief societies, or private persons of neutral countries.[48]

Under Geneva Convention IV, civilian hospitals "organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack, but shall at all times be respected and protected by the Parties to the conflict."[49] Vehicles, aircraft, and ships conveying the wounded and sick civilians, the infirm and cases of maternity, shall be respected and protected as are hospitals under Article 18.[50]

Additional Protocol I of 1977 requires that medical vehicles "shall be respected and protected in the same way as mobile medical units under the Conventions and this Protocol."[51] Article 23 protects "medical ships and craft other than those referred to in Article 22 of this Protocol and Article 38 of the Second Convention." Article 24 requires that medical aircraft be respected and protected, subject to the provisions of Part II of the Protocol in which the article is included.

Article 8(2)(b)(xxiv) of the Rome Statute upholds the protection of buildings, material, medical units and transport using distinctive emblems of the Geneva Conventions. All this protection is then repeated in Article 8(2)(e) in respect of cases of armed conflicts of a non-international character.

6. Immunity of Civilian Objects

Additional Protocol I of 1977, intending "to reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application,"[52] also contains a list of grave breaches.[53] In reference to the Geneva Conventions of 1949, Article

48. Arts. 22–25.
49. Art. 18.
50. Arts. 21 and 22.
51. Art. 21.
52. Preamble of the Protocol.
53. *Cf.* Y. Sandoz, C. Swinarski & B. Zimmermann (Eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, 992–1004 (International Committee of the Red Cross/Martinus Nijhoff, 1987).

85(3)(b) provides, *inter alia*, that "launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects" constitutes a grave breach of the Protocol.

"Civilian objects" are defined in the Protocol as "all objects which are not military objectives as defined in paragraph 2" of Article 52.[54] Article 52(2) reads:

> Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.[55]

The criticism that may be levelled against this definition seems to be that the provision could have been accompanied by an illustrative, if not exhaustive, list of military targets.[56] Additional Protocol I also proscribes reprisals or hostilities directed against cultural objects, works of art or places of worship "which constitute the cultural or spiritual heritage of peoples."[57] Article 54 of the Protocol shields from attack or destruction objects indispensable to the survival of the civilian population, such as foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works. Interestingly, Article 55 requires care to be taken in warfare to protect the natural environment against widespread, long-term and severe damage.[58] Article 56 exempts works or installations containing dangerous forces, "namely dams, dykes and nuclear electrical generating

---

54. Art. 48 sets forth the basic rule of protection of civilian population and civilian objects and requires the parties to a conflict to always distinguish between, *inter alia*, military objectives and civilian objects.
55. Sandoz, Swinarski & Zimmermann, *supra* note 53, at 635–637.
56. *Cf.* I. Detter, The Law of War, 2nd Ed., 283 (Cambridge University Press, 2000).
57. Art. 53. However, this prohibition of reprisals may encounter some resistance from the states in practice: C. Greenwood, *Customary Law Status of the 1977 Geneva Protocols*, *in* A. Delissen & G. Tanja (Eds.), Humanitarian Law of Armed Conflict (Challenges Ahead) (Essays in Honour of Fritz Kalshoven) 110–111 (Martinus Nijhoff, 1991).
58. According to one commentator, the concern for environmental damage was not brought to the fore until relatively recent times: A. Rogers, Law on the Battlefield 107–108 (Manchester University Press, 1996). There is in force a Convention on the Prohibition of Military and any other Hostile Use of Environmental Modification Techniques, 1108 UNTS 151–178.

As to private property, the Tribunal found that:

> Where private individuals, including juristic persons, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action, not being expressly justified by any applicable provision of the Hague Regulations, is in violation of international law. The payment of a price or other adequate consideration does not, under such circumstances, relieve the act of its unlawful character. Similarly where a private individual or a juristic person becomes a party to unlawful confiscation of public or private property by planning and executing a well defined design to acquire such property permanently, acquisition under such circumstances subsequent to the confiscation constitutes conduct in violation of the Hague Regulations.

stations."[59] Unlike other provisions of the Treaty, such exemption from attack remains valid even if these works have become military objectives, because their attack or destruction "may cause the release of dangerous forces and consequent severe losses among the civilian population."[60] The non-derogable nature of the protection is consistent with the ultimate purpose of the Treaty. There is, however, the sense that the protection set forth in the provision intends, above all, to safeguard the right to life of a civilian population, and that protection of property as identified in the provision is secondary.

Additional Protocol I includes in the list of grave breaches the following: the launching of attacks resulting in damage to civilian objects; attacks on works or installations containing dangerous forces that will cause excessive loss of life, injury to civilians or damage to civilian objects; and attacks on "clearly-recognised" historic monuments, works of art or places of worship with the result of their extensive destruction in spite of lack of evidence such were used for military purposes. The Treaty also provides for a blanket definition of "civilian objects." Further, the powerful plea of military necessity in justifying an attack on civilian objects cannot be sustained if the objects in question are works or installations containing dangerous forces that, if unleashed, could cause excessive loss of life, injury and damage to other civilian objects.

Article 8(2)(b)(ii) of the Rome Statute relates to the intentional attacks on civilian objects which are not military objectives (as declared in Additional Protocol I), whilst Article 8(2)(b)(iii) is directed against intentional attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peace-keeping mission in accordance with the UN Charter, as long as they are entitled to protection accorded civilians and civilian objects under international law (following various provisions under the Geneva Conventions, Additional Protocol I, and other relevant treaties). Article 8(2)(b)(iv) deals with attacks that will cause, among others, incidental damage to civilian objects, or widespread or long-term, severe damage to the natural environment beyond what is necessary for gaining overall military advantage (as envisaged in Additional Protocol I). Article 8(2)(b)(v) protects undefended towns, villages, dwellings or buildings which are not military objectives (which is reminiscent of the Hague Regulations).

The significance of Additional Protocol I's definition of civilian objects is its comprehensiveness. The elastic wording of Article 52(2) was seemingly attempted at covering all corners in this regard.

---

59. *See* Sandoz, Swinarski & Zimmermann, *supra* note 53, at 670–671.
60. *Cf.* E. David, Principes de droit des conflits armés, 2nd Ed., 614–615 (Brussels, 1999).

7. Public and Private Property in Time of Occupation

In situations of occupation, Article 46 of the Hague Regulations stipulates:

> Family honours and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.
>
> Private property can not be confiscated.

The language of the provision is both clear and unclear. It is clear as far as the protection of private property is concerned; it is not if attention turns to the other matters subject to protection, as these will be "respected." Article 47 reads: "Pillage is formally forbidden."

Article 52 provides:

> Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.
> […]
> Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.

This article describes the differences between confiscation and requisition. Both methods of depriving property of the rightful owner can take place in occupation, but the ways in which they are applied are different.[61] Confiscation is not necessarily followed by compensation by the army of occupation;[62] whereas requisition is.[63]

Article 53 reads:

> An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.
>
> All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.

---

61. *Cf.* Stone, *supra* note 26, at 708–709.
62. S. Petrén, *La confiscation des biens étrangers et les réclamations internationales auxquelles elle peut donner lieu*, 109(II) Recueil des cours 493 (1963).
63. L. Oppenheim, International Law, H. Lauterpacht, 7th Ed., Vol. II, Sec. 147 (Longmans, Green and Co., 1952) (hereinafter 'Lauterpacht-Oppenheim'): "Requisition is the name for the demand for the supply of all kinds of articles necessary for any army, such as provisions for men and horses, clothing, or means of transport"; "The principle that requisitions must be paid for by the enemy is thereby absolutely recognised."

The differential treatment of state property and private property is elaborate.[64] State properties may be seized and possessed by the army of occupation. Private properties (which may be used for military operations) may be seized (not possessed) and "must" be restored – a sort of *restitutio in integrum* – and compensation fixed when peace is concluded.

Presumably, the issue of compensation arises only if the properties in question were used up or destroyed following the seizure. This presumption can be tested by looking at other relevant articles of the Convention.

Article 54 protects submarine cables connecting an occupied territory and a neutral territory from destruction and seizure except in the case of absolute necessity. Once peace is made, cables seized shall be restored or the owner shall be compensated if the cables were destroyed.

Article 55 defines an occupying state as an administrator and usufructuary of "public buildings, real estate, forests and agricultural estates belonging to the hostile state, and situated in the occupied country," and requires the state to "safeguard the capital of these properties, and administer them in accordance with the rules of usufruct." Thus, the possession of public immovable properties is not allowed, whereas state movable properties may be.

Further, Article 56 provides:

> 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, and should be made the subject of legal proceedings.

A particular type of movable property, such as belongs to certain institutions, cannot be confiscated or possessed, and must be restored or have compensation fixed at the conclusion of peace. Further, the immovable properties of those institutions cannot be seized, destroyed or wilfully damaged; presumably not even on grounds of military necessity. The last sentence seems to threaten violators of that injunction with not only civil litigation for compensation, but perhaps criminal prosecution.[65] This slightly optimistic view is quickly dampened by the provision of Article 3 of the 1907 Hague Convention IV to which the Hague Regulations are annexed. Article 3 provides:

> A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

---

64. For the origin of this approach, *see* G. Schwarzenberger, International Law as Applied by International Courts and Tribunals, Vol. II, 259 (Stevens and Sons Ltd., 1968).
65. *Cf. id.*, at 244.

This is hardly the call for a judicial solution to violations of the Hague Regulations and in particular, of Article 56. If a state could never be brought before any jurisdiction to be judged as having criminally violated the laws of war, it surely follows that Article 56 was meant to be enforced by the state of which the persons in breach of the article were nationals and which had to be a party to the Convention and the Regulations.[66] For a state suffering the damage envisaged in Article 56, it would be left with the remedy to seek compensation from the state whose nationals incurred the damage; and it could pursue this option only if the latter state was also a contracting party to the Convention and the Regulations. This limitation has duly been noted in literature.[67]

In relation to cases of occupation, the Hague Regulations plainly stated that private property was inviolable, in the sense that it could not be confiscated.[68] However, that principle allowed for temporary use of such property after seizure as long as compensation was provided in cash or in receipts.[69] Further, in the event that military necessity demanded appropriation or waste of private property, compensation at the close of the conflict must be provided in peace treaties and where possible, restitution would be the first option.[70] The Hague Regulations treated public property differently. An army of occupation was allowed to take possession of (or confiscate) the property of the occupied state. This means that it could proceed with the destruction of such property if it liked. However, the property of municipalities and of institutions dedicated to religion, charity and education, the arts and sciences, even when they are state property, "shall be treated as private property," thus being inviolable.

During the Nuremberg Trials of the major German war criminals, the International Military Tribunal ('IMT') considered offences relating to property in occupied territory.[71] Recalling Articles 48, 49, 52, 53, 55 and 56, the IMT found that

> The evidence in this case has established, however, that, the territories occupied by Germany were exploited for the German war effort in the most ruthless way, without consideration of the local economy, and to further a deliberate design and policy. There was in truth a systematic 'plunder of public or private property,' which was criminal under Article 6(c) of the Charter […]. The methods employed to exploit the resources of the occupied territories to the full varied from country to country. In some of the occupied countries in the East and the West, this exploita-

66. Stone, *supra* note 26, at 16.
67. Draper, *supra* note 4, at 141 and 148.
68. *Cf.* T. Barclay, *La propriété privée*, *in* Le séquestre de la propriété privée en temps de guerre (Enquête de droit international), Vol. II, 40–44 (Paris: Marcel Giard, 1930).
69. Lauterpacht-Oppenheim, *supra* note 63, Sec. 141.
70. *Cf.* A. McNair, Legal Effects of War, 3rd Ed., Chapter 19 (Cambridge University Press, 1948). *See also* Schwarzenberger, *supra* note 64, Part 4, Chapters 22 and 23, where the learned author gives a full treatment of the topic of requisition, reparation, and seizure.
71. The Trial of German Major War Criminals (H.M. Stationery Office, London, 1950), Part 22, Judgement, 30 September 1946.

> tion was carried out within the framework of the existing economic structure. The local industries were put under German supervision, and the distribution of war materials was rigidly controlled. The industries thought to be of value to the German war effort were compelled to continue, and most of the rest were closed down altogether. Raw materials and the finished products alike were confiscated for the needs of the German industry.[72]

The criticism of the IMT was levelled at the way the occupied territories were stripped of materials and finished products without regard to the local economy and without compensation. In addition, Germany confiscated agricultural products, raw materials needed for its factories, machines, transports, other products, and foreign securities and holdings of foreign exchange and sent them onto Germany. The IMT considered that such "requisition" was out of proportion to the economic resources of those occupied countries and resulted in famine, inflation and an active black market.[73] In respect of property seized from occupied territory, Germany kept a false pretence that it was paid for; yet in truth, it was never so.[74] The IMT put it simply that "economic exploitation became deliberate plunder."[75] In the territory of the USSR, looting was premeditated and systematic, and seizure of art treasures, furniture, textiles and similar articles were pervasive in all invaded countries.[76]

Among the major war criminals before the IMT, Rosenberg was charged with war crimes and crimes against humanity for his role in the system of organised plunder of both public and private property throughout the invaded countries in Europe.[77] He directed the so-called "Einsatzstab Rosenberg" to plunder museums and libraries, confiscated art treasures and collections, and pillaged private houses. The IMT noted that in December 1941, at Rosenberg's suggestion, 69,619 Jewish homes were plundered in the West.[78] After his appointment as Reich Minister for Occupied Eastern Territories in July 1941, he directed that the Hague Regulations did not apply to the occupied Eastern Territories.[79] He was found guilty for all this, in addition to other atrocities in the territories. He was sentenced to death by hanging. Another co-accused, Bormann, responsible for the administration of the entire civilian war effort in Germany and the occupied territories, was found guilty for war crimes and crimes against humanity in the form of, *inter alia*, ruthless economic exploitation of the subjected populace.[80] He was sentenced to death by hanging. Before an American military tribunal operating pursuant to

72. *Id.*, at 457–458.
73. *Id.*, at 458.
74. *Id.*
75. *Id.*
76. *Id.*, at 458–459.
77. *Id.*, at 496.
78. *Id.*
79. *Id.*
80. *Id.*, at 527.

Control Council Law No. 10, defendant Flick alone was found guilty of Count 2 of the Indictment for spoliation and plunder of public and private property in occupied territories.[81] The Tribunal considered that no crimes against humanity were involved, but there were war crimes in terms of the Hague Regulations.[82] Flick was found to have violated Article 46 of the Hague Regulations in respect of certain private property known as "Rombach," the initial seizure of which might not be unlawful but the subsequent retention of which from the rightful owner was wrongful.[83] Flick was sentenced to a term of seven years imprisonment for Count 1 (enslavement and deportation to slave labour), Count 2 (spoliation and plunder of private property), and Count 4 (criminal organisations). Whatever the respective shares of criminality for these counts might be, Count 2, even when proved beyond reasonable doubt, seemed not to carry a weighty penalty. Another noteworthy point of the Judgement is that there was the reference to military necessity in relation to the initial seizure of Rombach, implying that the plea of military necessity erased the culpability for the seizure.[84]

In *US* v. *Carl Krauch et al.*, plunder and spoliation of plants or factories in occupied territories were considered as Count II of the Indictment.[85] The Tribunal noted that offences against property had been subject to a principal codification of the laws and customs of war, which was to be found in the Hague Regulations.[86] Considering that Articles 46, 47, 52, 53, and 55 of the Hague Regulations were aimed at preserving the inviolability of property rights to both public and private property during military occupation, the Tribunal recognised that these rules "admit of exceptions of expropriation, use, and requisition, all of which are subject to well-defined limitations set forth in the Articles."[87,88]

There may be a point in emphasising that seizure is not equivalent to confiscation, in that seizure is temporary and will end with the restoration of the seized goods or compensation at the conclusion of peace. Confiscation of private property by an occupying army is, however, always prohibited.

The Tribunal regarded the terms of "plunder" and "exploitation" as interchangeable.[89] It further interpreted the term "spoliation" to mean "the widespread and systemized acts of dispossession and acquisition of property in violation of the rights of the owners, which took place in territories under the belligerent occupation or control of Nazi Germany

81. *Id.*, Vol. VI, at 1214.
82. *Id.*, at 1203.
83. *Id.*, at 1207–1208.
84. *Id.*, at 1206.
85. *Id.*, Vol. VIII, at 1131.
86. *Id.*
87. *Id.*, at 1132.
88. *Id.*, at 1132–1133.
89. *Id.*, at 1133.

during World War II."[90] It considered the term "spoliation" synonymous with the word "plunder."[91] These terms were applied in the case in this manner:

> In our view, the offences against property defined in the Hague Regulations are broad in their phraseology and do not admit of any distinction between 'plunder' in the restricted sense of acquisition of physical properties, which are the subject matter of the crime, and the plunder or spoliation resulting from acquisition of intangible property such as is involved in the acquisition of stock ownership, or of acquisition of ownership or control through any other means, even though apparently legal in form. We deem it to be of the essence of the crime of plunder or spoliation that the owner be deprived of his property involuntarily and against his will.[92]

However, private individuals of the nationality of the occupying state could not be faulted for entering into an agreement to which the rightful owner gave his free consent.[93] The Tribunal found the following persons guilty of Count II: Schmitz, von Schnitzler, ter Meer, Buergin, Haefliger, Ilgner, Jaehne, Oster and Kugler. Defendant ter Meer was found guilty only on this count and was given a seven-year term of imprisonment. Their respective terms of imprisonment, exclusive of that for ter Meer, were: four, five, two, two, three, one and a half, two, and one and a half years.[94]

The United Nations War Crimes Commission drew certain conclusions from the reports of the military trials:[95]

> a) The war crime of pillage, plunder, or spoliation was defined with frequent reference to two factors:
>
> i) that private property rights were infringed; and
> ii) that the ultimate outcome of the offence was that the economy of the occupied territory was injured and/or that that of the occupying State benefited;
>
> b) Some invasions of private property rights are permissible under the law relating to occupied territories;
> c) Property offences recognised by modern international law are not, however, limited to offences against physical tangible possessions or to open robbery in the old sense of pillage, but include the acquisition of intangible property and the securing of ownership, use or control of all kinds of property by many ways other than by open violence;
> d) Consent obtained from the owner by threats, intimidation, pressure or by exploiting the position and power of the military occupant would make a transfer illegal under international law;

90. *Id.*
91. *Id.*
92. *Id.*, at 1134.
93. *Id.*, at 1135.
94. *Id.*, at 1205–1208.
95. 15 Law Reports of Trials of War Criminals 126–130 (published for the United Nations War Crimes Commission by the H.M. Stationery Office, 1949).

e) If property has been acquired without the consent of the owner, the proof of having paid consideration is no defence;
f) Theft of personal property and wanton destruction of inhabited buildings were also war crimes;
g) If wrongful interference with property rights has been shown, it is not necessary to prove that the alleged wrongdoer was involved in the original wrongful appropriation;
h) As for public property, the occupying power had only usufruct over such property for only the period of occupation; and
i) To debase the currency of an occupied territory was also a war crime.

The Commission seemed to draw (a) to (g) in respect of private property only. The basis for the position taken by the majority of the tribunals was the provisions of the Hague Regulations, strongly indicating the declaratory nature of the regulations.[96] Another noteworthy point is that the law applied in the military trials was mostly connected with the state of occupation, whilst the instances in which property was destroyed in battles were not prominent.

In *Prosecutor* v. *Delalić et al.* Before the ICTY, Count 49 of the Indictment charged the accused Zdravko Mucić and Hazim Delić with plundering private property of the detainees of the Čelebići camp.[97] Recognising that Articles 46 through 56 of the Hague Regulations formed part of customary law, the Trial Chamber noted that the accused did not challenge the criminality of plunder as a war crime, but that they disputed the type and the requisite degree of severity, of acts that amounted to a war crime.[98] The Trial Chamber found that individual acts motivated by personal greed could incur criminal responsibility.[99] Further, the Trial Chamber decided that plunder as used in the Statute should "embrace all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international law, including those acts traditionally described as 'pillage'."[100] The Chamber noted that it did not here attempt a complete analysis of the existing legal framework for the protection of public and private property.[101] In applying its legal findings to the fact, the Chamber recognised the importance of the prohibition against unjustified appropriation of public property but concluded that the evidence before the Trial Chamber failed to demonstrate that any property taken from the detainees in the Čelebići prison-camp was of sufficient monetary value for its unlawful appropriation to involve grave consequences for the victims.[102]

96. *See also* Lauterpacht-Oppenheim, *supra* note 63, Secs. 140-154.
97. Prosecutor *v.* Zejnil Delalić *et al.*, Judgement, Case No. IT-96-21-T, T.Ch. II, 16 November 1998, at para. 584.
98. *Id.*, at para. 589.
99. *Id.*, at para. 590.
100. *Id.*, at para. 591.
101. *Id.*
102. *Id.*, at para. 1154.

As a result, Count 49 was dismissed and both accused were acquitted thereunder. There has been no appeal from this conclusion.[103]

In *Prosecutor* v. *Goran Jelisić* before the ICTY, the accused was found guilty of Count 44 for plundering personal effects of prisoners in the Luka camp.[104] The Judgement endorsed the finding of the *Čelebići* Judgement that individual acts of plunder motivated by greed could also constitute the offence of plunder under Article 3(e) of the Statute.[105] No appeal has been raised on the finding of the Judgement in this regard.[106] Given the set of offences for which the accused was found responsible, it is not clear what share of liability arose from his acts of plunder.

8. CONCLUSION

The existing treaties protect specific property by reference to three criteria: origin, use and ownership. They regulate the protection in time of battle (or armed conflict) as well as in time of occupation. The ultimate protection seems to be that conferred upon private property in time of occupation.[107] However, this is subject to the condition that failure in its protection may be remedied by way of restitution or compensation, even though the failure to protect remains illegal. The general notion of civilian objects used in Additional Protocol I is the closest equivalent to the notion of protected persons, save that it does not provide for the category of protected military property that has been mentioned in Geneva Convention II.

Customs of war enjoyed a separate existence before the codification efforts of the late 19th century that resulted in the conclusion of, among others, the Hague Regulations, applicable in land warfare. The Regulations proved to be both progressive and codificatory. The impact of the regulations can be seen plainly from the wide use of them in the military trials conducted after World War II. The case-law from that era did no more than interpret the terms of the Treaty. Since then, international humanitarian law has become more comprehensive to cover incidents which have not previously been known. The obvious example is the long list of war crimes inserted in the Rome Statute which is on its way to enter into and influence practice. However, the provisions of that Statute are plainly taken from existing treaties, making the Statute an instance of codification.

The contribution of the ICTY in this process of development of the

103. Prosecutor *v.* Zejnil Delalić *et al.*, Judgement, Case No. IT-96-21-A, Appeals Chamber, 20 February 2001.
104. Prosecutor *v.* Goran Jelisić, Judgement, Case No. IT-95-10-T, T.Ch. I, 13 December 1999, para. 49.
105. *Id.*, at para. 48.
106. Prosecutor *v.* Goran Jelisić, Judgement, Case No. IT-95-10-A, Appeals Chamber, 5 July 2001.
107. *Cf.* Lauterpacht-Oppenheim, *supra* note 63, at Sec. 133.

law consists in its efforts in clarifying existing conventional rules in relation to the protection of property. Notable examples are the findings that plunder can be constituted by individual acts motivated by greed for personal gain, that protected property may yet exist as a legal concept in reference to such objects that fall in the hands of an occupying power, that plunder in the context of the ICTY Statute embraces all forms of illegal appropriation of property in armed conflict for which individual criminal responsibility attaches under international law, including those acts traditionally described as "pillage," and that to merit punishment under the Statute, the value of plunder should be such that it produces grave consequences for the rightful owner.

On the whole, there is the impression derived from the past cases that spoliation, plunder or even pillage as a war crime seems to have resulted in relatively light punishment. This may have to do with the nature of property. Irretrievable losses attach to human life, but objects of great value are often recoverable when peace is concluded: either by way of restitution or of pecuniary compensation. There is of course the exception of historic monuments, arts, scientific objects and similar matters that possess great importance to the cultural heritage of a particular people.

It is proposed to list below certain principles drawn from the preceding examination of both treaties and practice in relation to the protection of property in armed conflicts:

(1) in time of battle, enemy property, public or private, should not be destroyed or seized wantonly unless this is imperatively demanded by necessities of war, and restoration of personal property may be effected at the release of prisoners of war;
(2) military necessity permits a belligerent, subject to the laws of war, to use any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money;
(3) in time of battle, cultural property (relating to religion, art, science, history and charitable purposes), public or private, is to be exempted unless such is used for military purposes;
(4) hospitals, medical equipment and transports, and medical stores, or places to nurse the wounded or sick, shall be respected rather than destroyed, although use of such things may be allowed subject to certain conditions;
(5) civilian objects not protected specifically by the preceding rules are to be exempted from attacks or reprisals, such objects including works or installations containing dangerous forces that, if unleashed, could cause excessive loss of life, injury and damage to other civilian objects. This type of works cannot be destroyed even on the pretence of military necessity;
(6) in time of occupation, private property is inviolable, but temporary use of such property is permissible as long as the property is

restored to the owner or compensation is to be provided at the conclusion of peace; and

(7) in time of occupation, an army of occupation was allowed to take possession of the property of the occupied state, except for the property of municipalities and of institutions dedicated to religion, charity and education, the arts and sciences, which, even when state property, "shall be treated as private property," thus being inviolable. The occupying power had only usufruct over seized public property for only the period of occupation.

The seven propositions listed above present a manageable set of principles for the protection of property. Additional Protocol I seems to have provided a notion of protected property, *i.e.*, civilian objects.[108] To this it is necessary to add the protection for medical equipment, buildings, transports, stores and material, irrespective of whether they are owned by the military or civilian authorities. All this may be spoken of as a category of civilian property or simply "protected property" in international humanitarian law. The protection of these kinds of objects is mostly subject to the requirement of military necessity (which may in turn be qualified by existing law in relation to a particular type of property). The complexity of the system of protection in respect of property is shown by the existence of the seven principles involving diverse issues of use, ownership and origin of property and stages of war, which is not resolved by the new tag of protected property introduced in this paper. The subtle ramifications in the system manifest most conspicuously in practice. Thus, to give but a few examples to round off our inquiry, it is noted that the terms of plunder, spoliation and pillage are interchangeable, containing a common aspect of the illegality of the taking of property against the will of the rightful owner. Further, property offences are not limited to offences against tangible possessions, but include the acquisition of intangible property and the securing of ownership, use or control of all kinds of property by many ways other than open violence. Finally, consent obtained from the owner by threats, intimidation, pressure or by exploiting the position and power of the military occupant would make a transfer illegal under international law, regardless of whether compensation is provided or promised.

108. *Cf.* however, Kwakwa, *supra* note 27, at 141–143.