CHAPTER TWO

THE PROSECUTION OF THE DESTRUCTION OF CULTURAL PROPERTY IN THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS

§ 1 Structures of Crimes under International Criminal Law

The following is an assessment of the relevant provisions for prosecuting the destruction of cultural property in international criminal law. Therefore, a short introduction to the concept of crimes under international criminal law has to be made first.

International criminal law distinguishes between offences that create grounds for criminal liability and defences, which rule out liability. Offences consist of a material element (actus reus) and a mental element (mens rea). The material elements include all conditions that determine the external appearance of the act: the conduct, the consequences, and the circumstances. The mental elements, on the other hand, include the required state of mind on the part of the perpetrator. Further, the offences may be categorised into three sub-elements, for each of which the material and the mental element must be established. With regard to war crimes and crimes against humanity, an assessment of the general requirements has to be made first. As a result, inter alia, the existence of an armed conflict or an attack against the civilian population as well as the knowledge of the perpetrator thereof has to be evaluated. As a second step, it has to be examined whether the elements of one or more underlying offences, i.e. of specific acts as defined by the tribunals’ statute, can be applied and whether the accused also manifests the required mental element. Finally, the individual criminal responsibility of the accused has to be determined. For the purpose of this analysis, however, the grounds for individual criminal responsibility are not relevant.

The destruction of cultural property can be prosecuted under war crimes and crimes against humanity. Therefore, these two international crimes

1 Werle, paras. 383–389.
2 Werle, para. 391.
3 Rome Statute, Article 25. See also, Werle, paras. 369–371.
will be the main focus area of the following chapters, which involves an in-depth analysis of the crime’s general requirements, as well as the requirements of the respective underlying offences concerning the destruction of cultural property will be necessary.

§ 2 War Crimes

I. Evolution and Definition

After World War I, some approaches were made to try individuals for the commission of war crimes.\(^4\) Although, the first time major violations of international humanitarian law by individuals were punished, was not until after World War II when the Allied Powers tried German war criminals in the Nuremberg Trial. In Article 6(b) of the IMT Charter, the legal basis for the Nuremberg Trial, the International Military Tribunal was granted jurisdiction over “violations of the laws and customs of war”. The IMT Chamber emphasised in its judgement that the crimes defined by Article 6(b) of the Charter were already recognised as war crimes under international law. They were covered by Articles 46, 50, 52 and 56 of the Hague Convention of 1907, and Articles 2, 3, 4, 46 and 51 of the Geneva Convention of 1929. That violations of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument.\(^5\)

Furthermore, the Chamber recalled that in Article 228 of the Treaty of Versailles, the German Government expressly recognised the right of the Allied Powers to bring persons accused of the commission of violations of the laws and customs of war before military tribunals.\(^6\) Out of the 24 defendants tried at the Nuremberg Trials, 19 were found guilty of the violations of the laws and customs of war.\(^7\) Also at the IMTFE, individuals were charged with the commission of war crimes, which was part of the tribunal’s jurisdiction.\(^8\)

---

\(^4\) United Nations War Crimes Commission, Vol. I, pp. 48. After World War I, in accordance with Articles 228–230 of the Treaty of Versailles, ten high-ranking members of the German military were sentenced for the commission of war crimes.

\(^5\) France et al. v. Göring et al., IMT, Judgement of 30 September and 1 October 1946, p. 64.

\(^6\) France et al. v. Göring et al., IMT, Judgement of 30 September and 1 October 1946, p. 41.

\(^7\) France et al. v. Göring et al., IMT, Judgement of 30 September and 1 October 1946, pp. 130–131.

\(^8\) IMTFE Statute, Article 5(b).