

HUMANITARIAN AND CRIMINAL PROTECTION OF CULTURAL HERITAGE IN INTERNATIONAL LAW

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Abstract. Cultural heritage is a corpus of tangible and intangible heritage that is inherited from past generations. It includes signs and properties like places, objects, ceremonies, customs, practices, values and artistic expressions. The importance of cultural heritage is that it is not confined to a definite culture, but it belongs to the mankind as a whole. Thus, the international community has paid attention to the protection of cultural heritage all over the world. The protection has two aspects in the context of international law: humanitarian and criminal. The humanitarian protection is made during armed conflicts, whereas the criminal protection includes both peacetime and wartime. The criminalization of illicit activities against cultural heritage goes back to the Lieber Code of April 24, 1863, also known as instructions for the Government of Armies of the United States during the American Civil War. Since then, considerable developments have taken place in this regard. The two aspects of the issue are discussed in the present paper. The main purpose of this article is to provide a strict description of the two sorts of protection and evaluate the deficiencies and failure of the provisions on the subject.

Keywords: cultural heritage, tangible heritage, intangible heritage, humanitarian protection, criminal protection, war crime

Introduction. Heritage, in the complex and expanded way it is understood in the modern era, has an instrumental value serving a function as a touristic marvel, a culture industry, or commercial enterprise (of small and large scale)). But more importantly, the inherent or intrinsic value of cultural heritage is not linked to use or function that it serves but as identity, embodiment of accumulated knowledge, that bonds community to space, determining the spirit of place and source of pride that of that is of interest for future generations as a non-renewable cultural resource we have been handed down by previous generations. (Jyoti Hosagrahar et al, 2016: 9). In fact, cultural heritage is not only an essential piece of the historical identity of the country in which the heritage is located, but it is an important element of human civilization as a whole.

World cultural heritage is, by definition, of “outstanding universal value” and thus constitutes the finest category of tangible cultural property on land. (Marina Lostal, 2015: 2). The cultural heritage theme in fact embraces a wide range of issues that are difficult to unify, and involves an extremely difficult definition, given the absolute relativity of the concept of art and culture. (Stefano Manacorda, 2011: 18). The 1954 Hague Convention defines “cultural property” roughly as movables and immovables of great importance to the cultural heritage of every people, understood as “every nation”.

Over time, the meaning of cultural heritage has expanded from Single monuments identified as objects of art to cultural landscapes, historic cities, and serial properties. Moreover, contemporary practice (ratified by ICOMOS at its Madrid General Assembly more than a decade ago) extends the concept of heritage beyond “tangible heritage,” to the intangible dimensions of heritage as well. This means the entirety of the capital of knowledge derived from the development and experience of human practices, and from the spatial, social and cultural constructions linked to it that may be encapsulated in the word, “memory.” (Jyoti Hosagrahar et al, 2016: 16). For example, Nowruz (New Year Ceremony) which is celebrated by Iranians and some other nations in the Central Asia and Caucasus at the beginning of spring, inscribed in 2009 on the Representative List of the Intangible Cultural Heritage of Heritage of Humanity as a cultural tradition observed by numerous peoples. International Nowruz Day was proclaimed by the United Nations General Assembly, in its resolution A/RES/64/253 of 2010.

The Humanitarian protection of Cultural Heritage during Armed Conflicts. The protection of property and treasure during armed conflict has a long history in international law. Plunder, the wanton destruction of cities and towns, and attacks against heritage sites dedicated to religion, education, art and science, are all acts prohibited by multiple international treaties, declarations and customary practices. (Mark S. Ellis, 2017: 31). Today, the protection of cultural heritage against military actions is an important element of the common culture of mankind. From the deliberate destruction of the monumental Buddhas in Bamiyan, Afghanistan by the Taliban in 2001 to the systematic and intentional destruction of successive World Heritage sites in Syria and Iraq in 2014-2015, the motivation for such acts by the perpetrators has evolved beyond solely demoralising the local populace of the territory where the sites are located. The digital age, and the Internet and social media with it, has proliferated and globalized the propaganda potential of such acts of destruction of cultural heritage. (Ana Filipa Vrdoljak, 2016: 19). The first codification of protection of cultural property during armed conflict is found in the Lieber Code, drafted for the U.S. Army by Francis Lieber, a Prussian soldier present at the Battle of Waterloo, who later fought in the Greek War of Independence, studied the classics, and ultimately became a professor of history at Columbia University. The result was the first manual, Instructions for the Government of Armies of the United States in the Field (General Order No. 100), for the conduct of armies during war; it explicitly acknowledged a special role for charitable institutions, collections, and works of art.6

The Lieber Code distinguished such “public property” from other types of moveable public property that could be used as normal war booty. (Patty Gerstenblith, 2016: 338-339)

The first binding international obligations for the protection of cultural heritage related to the rules of war emerged from the series of international conferences held in 1899 and 1907. The Regulations annexed to the Convention (II) with Respect to the Laws and Customs of War on Land (1899 Hague II Convention) and Convention (IV) respecting the Laws and Customs of War on Land (1907 Hague IV Convention), were found to be customary international law and ‘recognized by all civilized nations’ by the International Military Tribunal (IMT) at Nuremberg in 1945. A decade earlier, jurist Charles de Visscher noted that this immunity was granted because these objects and sites were ‘dedicated to an ideal purpose’. He added that ‘international conventional law has established such acts as genuine violations of the law of nations, the perpetrators of which are marked out for collective repression by the signatory States’. Under the Hague Regulations, during hostilities ‘all necessary steps should 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’ as long as they are not used for military purposes, marked with the distinctive sign, and have been notified to the enemy (Article 27). During occupation, the ‘property of the communes, that of religious, charitable, and educational institutions, and those of arts and science’ is protected as private property with no reference to military necessity. Seizure, destruction, or wilful damage to these institutions, historical monuments, works of art or science, ‘is forbidden’, with violations ‘to be made subject to legal proceedings’ (Article 56 (emphasis added)). (Ana Filipa Vrdoljak, 2016: 3).

The law of armed conflict, a *lex specialis* in time of war, expressly regulates the protection of cultural property – that is, mainly “tangible” cultural heritage – through the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Convention). However, the Convention’s impact is insufficient to protect the cultural heritage exposed to contemporary conflicts, which also includes its “intangible” dimension. The “intangible” dimension of cultural heritage cannot in fact be protected solely on the basis of the 1954 Convention. To that end, other instruments must be applied, whether they belong to the law of armed conflict or to other legal regimes, such as international human rights law, the numerous conventions adopted within UNESCO’s framework for the protection of cultural heritage, or the various relevant norms of instruments developed by the International Labour Organization (ILO) or even the World Intellectual Property Organization (WIPO). The material scope of application of these various treaties now makes it possible to extend the concept of cultural heritage to elements other than purely cultural property, which in fact is only one of its components. (Christiane Johannot-Gradis, 2015:3-4).

An attack targeting a collectivity can also take the form of systematic and organized destruction of the art and cultural heritage in which the unique genius and achievement of a collectivity are revealed in fields of science, arts and literature. The contribution of any particular collectivity to world culture as a whole forms the wealth of all of humanity, even while exhibiting unique characteristics. Thus, the destruction of a work of art of any nation must be regarded as acts of vandalism directed against world culture. Cultural genocide extends beyond attacks upon the physical and/or biological elements of a group and seeks to eliminate its wider institutions. This is done in a variety of ways, and often includes the abolition of a group’s language, restrictions upon its traditional practices and ways, the destruction of religious institutions and objects, the persecution of clergy members, and attacks on academics and intellectuals. Elements of cultural genocide are manifested when artistic, literary, and cultural activities are restricted or outlawed and when national treasures, libraries, archives, museums, artifacts, and art galleries are destroyed or confiscated. (Patty Gerstenblith, 2016: 342-343)

However, even once the conclusion that a conflict qualifies as a non-international armed conflict is reached, this does not end the analysis as not all the same principles of cultural property protection apply as in a situation of inter-state conflict. Article 19(1) of the 1954 Hague Convention states “each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property.” One of the important elements to note is the use of “party” with a lowercase “p” and without the word “State.” Thus, this provision applies to all the parties to a non-international conflict and not merely to the State Party (or High Contracting Party, in the terminology of the 1954 Convention) that has ratified the Convention. (Patty Gerstenblith, 2016: 363).

Second Protocol to the 1954 Convention (1999) was specifically adopted to impose a higher threshold of protection for cultural property. While Article 4 of the 1954 Convention states that parties must refrain from “any act of hostility” that may damage or destroy property, it also states that this obligation may be waived “where military necessity imperatively requires.” The inclusion of “military necessity” has been described as a “serious weakness with respect to the basic principle of protection,” since it is not sufficiently clear when exactly the exception could be triggered. The Second Protocol attempted to ameliorate the problem by setting out provisions in keeping with the 1907 Hague Regulations, and by emphasising that all steps must be taken to protect cultural property unless such property is being used for “military purposes.” The terminology broadens the stringent “military necessity” criteria and offers enhanced protection of cultural property if the following criteria are met:

- i) it is cultural heritage of the greatest importance for humanity;
- ii) it is protected by adequate domestic legal and administrative measures recognising its exceptional cultural and historic value and ensuring the highest level of protection;
- iii) it is not used for military purposes or to shield military sites and a declaration has been made by the Party which has control over the cultural property, confirming that it will not be so used. (Mark S. Ellis, 2017: 38-39).

In the law governing the protection of cultural heritage in armed conflict, the exception of military necessity, which puts a strain on several provisions, does indeed mitigate the prohibition against committing an act of hostility during combat, regardless of the regime protecting the object in question. Moreover, in both the 1907 Hague Regulations and the 1954 Convention, the application of this legal reserve is left largely to the discretion of the belligerents. The attacks on cultural heritage during the conflict in the Balkans in the 1990s, such as the destruction of the Old Bridge in Mostar and the partial destruction of the Old City of Dubrovnik, demonstrated once more to the international community that various provisions of the 1954 Convention needed to be revised without further delay. A second protocol to that Convention, the 1999 Protocol, was adopted shortly after the end of this conflict. It now clarifies, among other questions, the implementation of the principle of military necessity by restating, in its Article 6, the rule contained in Article 52(2) of Additional Protocol I (AP I) concerning “military objectives”. From now on, the invocation of this exception with regard to cultural property must comply with clearly defined conditions, and the belligerents have considerably less discretion to assess its legitimacy. (Christiane Johannot-Gradis, 2015:9).

Punitive Measures for the Protection of Cultural Heritage. Punitive measures are the most effective remedies of the enforcement of legal rules. Accordingly, in the context of illicit activities against cultural heritage, custodial and fiscal penalties along with the deprivation of social rights may realize criminal justice and deter the commission and repetition of crimes against tangible and intangible heritage.

Attacks on cultural heritage should not be seen as isolated incidents but as aggression that has a wider impact on shared history and values. It is a crime that targets the richness of whole communities and thus impoverishes us all and damages universal values we are bound to protect. It is imperative that the international community acts to safeguard cultural objects. Heritage sites are indeed more than just stones. Rather, they signify the identity and history of a people for all humanity. With solid jurisprudence in this area, international courts can play a role. (Mark S. Ellis, 2017: 61).

The atrocities of WWII were investigated and adjudicated by the International Military Tribunal of Nuremberg (Nuremberg Tribunal). Top Nazi officials were held responsible for war crimes committed by themselves and their subordinates. Many verdicts contained passages with explicit references to structural plunder and seizure of cultural goods, destruction of religious sites and historic monuments or city centres. These criminal acts constituted war crimes and resulted in long prison sentences or the death penalty. (Tim Van Lit, 2016: 18-19). The International Military Tribunal for the Far East (Tokyo Tribunal) started similar proceedings against war criminals in the Far East. Contrary to the Nuremberg Tribunal, the systematic destruction, plunder and seizure of cultural property wasn't mentioned separately, but was understood to be included in “violations of the laws and customs of war”; a more concise description than the Charter of the Nuremberg Tribunal provides⁸⁶. The verdicts didn't mention these criminal acts separately either, but assumed that all war criminals were at some level guilty of these criminal acts. (Tim Van Lit, 2016: 19).

International law is currently moving towards a substantial strengthening of penal instruments that could in future lead to a notable intensification of criminal sanctions for illicit activities in the field of cultural property. Progress must be made towards a growing harmonization of the definition of crimes, through a precise identification of the objects to be protected and the constituent elements of the offences. Probably, there should be a convergence of views on the insertion in international texts of a model-offence of trafficking in works of art and archaeological artefacts, to resolve the dichotomy between import and export and to outline carefully the elements of the case and other minimum requirements from the point of view of imposing penal sanctions. Stefano Manacorda, 2011: 44-45).

Cultural heritage must be protected from theft and the deliberate destruction during times of war as well as in times of peace. The importance given to cultural heritage by the United Nations Educational, Scientific and Cultural Organisation (UNESCO) in recent years should not be construed as placing the destruction of heritage above human suffering during times of war and conflict. The effort by the UNESCO in protecting cultural relics and sites is by no means saying that human beings are less important. It is not a question of whether the loss of heritage is more or less important than human suffering during times of war and conflict. Rather the protection of cultural symbols, monuments and buildings complements the protection of human rights. (Kim Victoria Browne, 2014: 54).

The first principle is elimination of the divide between the protection given to cultural heritage during armed conflict and that given to cultural heritage outside of the context of conflict. This would permit the elevation of cultural heritage destruction to a crime against humanity, rather than as solely a war crime. The second principle, which is closely related, is that a sovereign cannot destroy the cultural heritage located within its own territory with impunity. (Patty Gerstenblith, 2016: 390). During the war in the former Yugoslavia, the old city of Dubrovnik was shelled and partly destroyed by the armed forces of the Yugoslav National Army (YNA). Following these events and the establishment of the International Criminal Court for the former Yugoslavia (ICTY), the commanding officers of these attacks were tried in two landmark cases. The first case was the Strugar case in 2005. Lieutenant-general Strugar was a commander in the YNA and was held responsible for the unlawful artillery shelling on the old town. As one of the highest ranking officers present there, Strugar had to control his forces but failed to do so. He was found guilty as a superior officer, and even after appeal and a separate and dissenting opinion of three judges, sentenced to 7/5 years in prison. In 2001, admiral Jokić surrendered voluntarily to the ICTY but initially pleaded not guilty. After he came to an agreement with the Office of the Prosecutor (OtP) in 2003, he pleaded guilty to all counts⁹¹. He was, amongst others, charged with violations of the laws and customs of war during his commanding period of the YNA Naval Forces. Jokić

failed to order a cease fire when his ships started bombarding the old town of Dubrovnik, despite the listing of the old town on the UNESCO World Heritage List. Jokić failed to sanction his subordinates after the shelling. He was sentenced to seven years imprisonment. (Tim Van Lit, 2016: 19-20).

There are two main courses of action which have been followed to penalize acts against cultural property committed in times of war: the first one is characterized by a traditional international humanitarian law orientation – I shall refer to it as the civilian-use rationale – whereas the second path was undertaken more recently and reflects what I would call a cultural-value approach, intended directly to criminalize acts against cultural property with a much higher degree of specificity and differentiation in gravity. (Micaela Frulli, 2011: 204). The divide between these two different perspectives can be traced back to the decision to develop a specific instrument dedicated to the protection of cultural property in times of armed conflict. One of the reasons lying beneath the initiative to adopt such a treaty was precisely the need to provide for penal sanctions, which were considered a decisive tool for the enforcement of international humanitarian law provisions (IHL) protecting cultural property and crucial for purposes of deterrence and prevention. (Micaela Frulli, 2011: 204-205). The cultural-value approach is obviously more deterrent and preventive, because strict criminalization of acts against cultural property is the most effective instrument for preserving cultural heritage.

The obligation to prosecute those engaged in acts of deliberate destruction of cultural property was reinforced in the twenty-first century with UN Security Council resolutions covering Iraq, Afghanistan and Syria, and UNESCO instrument covering the intentional destruction of cultural heritage. These resolutions take this obligation beyond the States Parties to the 1954 Hague Conventions and its Protocols, by articulating a legally binding obligation on all UN Member States to cooperate in preventing such acts and holding perpetrators to account. (Ana Filipa Vrdoljak, 2016: 19). The UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage was adopted in response to the deliberate destruction of the monumental Buddhas in the World Heritage listed site of Bamiyan, Afghanistan on 1 March 2001. (UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, adopted by the General Conference of UNESCO at its 31st session, 17 October 2003). The deliberate destruction of cultural heritage again became the focus of international attention in 2014 with atrocities committed by extremist groups, including Al Nusrah Front (ANF) and Islamic State of Iraq and the Levant (ISIL), in Iraq and Syria. (Ana Filipa Vrdoljak, 2016: 21). The Security Council had called ‘on all parties to immediately end all violence which has led to human suffering in Syria, save Syria’s rich societal mosaic and cultural heritage, and take appropriate steps to ensure the protection of Syria’s World Heritage Sites. (SC Res.2139 of 22 February 2014, UN Doc.S/RES/2139 (2014)

It should be noted that the ICC Statute has limitations regarding the protection of cultural property. The Statute does not clearly define what destroying moveable cultural property means, and it does not elaborate an exception for military necessity. It’s interesting that the drafters of the Rome Statute used the term “military objectives” rather than “military necessity” or “military purposes.” The former was seen as more clearly defined and could be “interpreted more restrictively.” However, absent an actual case before the ICC, it is difficult to properly assess how this subcategory might be interpreted. (Mark S. Ellis, 2017: 40-41).

The Statute of the International Criminal Court, 1998 includes in the list of serious violations of the laws and customs applicable in international armed conflict, the following acts: “Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purpose, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives” (Art. 8.2. (b) ix.). The Statute confers jurisdiction to ICC in this matter. Under the 1999 Protocol, detailed provisions about identification of crimes against cultural property, jurisdiction, prosecution and extradition have been made (Art. 15-18). But it leaves the responsibility with the States by providing, “[e]ach party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make offences punishable by appropriate penalties”. It can be seen that National Patrimony theory wields influence in this regard. (P. Ishwara Bhat, 2001).

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Under the Rome Statute, all State Parties are required to incorporate implementing legislation into their national laws. However, even when states like Mali do incorporate protective heritage laws into their domestic legislation; they often lack the ability to enforce them. Enforcement, particularly in conflict environments, can be problematic if not impossible. For instance, Syria and Iraq have national laws to prohibit looting and destruction of antiquities. Given the ongoing conflicts in both states, however, there is no practical means to enforce the law. (Mark S. Ellis, 2017: 56). In 2012 Mali developed into a conflict country. Islamic extremists from ‘Ansar Eddine’ started to engage in hostilities against local and national authorities. Instigated by a radical interpretation of Islamic teachings,

armed units started to destroy ancient tombs and mausoleums of (Islamic!) scholars, because the local community valued the contributions of these scholars too much in their daily, religious lives. This was seen as idolatry. Despite an initial rejection of the proposal to destroy these recognized UNESCO World Heritage sites, Ahmad Al Faqi Al Mahdi commanded a group to destroy the sites as ordered by his superiors. Al Mahdi was transferred to the International Criminal Court (ICC) in The Hague and first appeared before the court on 30 September 2015. He was sentenced to nine years imprisonment and has agreed not to appeal the judgment. The Al Mahdi case is a first of its kind in several aspects. Al Mahdi is the first jihadist to stand trial before an international court for his actions in a non-international armed conflict. He is also the first to plead guilty before the ICC, and the first known Jihadist to call upon his fellow Muslims in Syria and Iraq to stop destroying cultural property and heritage sites. It is highly unlikely that other jihadists will stand trial at the ICC, since many conflict countries haven't ratified the 1998 Rome Statute – the ICC doesn't have jurisdiction to try nationals of non-ratifying countries, such as Syria or Iraq. (Tim Van Lit, 2016: 20).

Conclusion. Today, cultural heritage is remarkably broad in its composition, covering places, objects, ceremonies, customs, practices, values, artistic expressions, cultural landscapes and underwater archaeological sites. At a global level, the protection of cultural property has various aspects including cultural, political, criminal, humanitarian, and also is linked with human rights discourse. Attacks on cultural heritage should not be seen as isolated actions or incidents but as aggression that has a wider impact on shared history and cultural values.

In addition to human rights dimension, cultural heritage is punishable as a war crime rather than a crime against humanity. In order to permit the elevation of cultural heritage destruction to a crime against humanity, rather than as solely a war crime, the divide between the protection given to cultural heritage during armed conflict and that given to cultural heritage outside of the context of conflict should be eliminated. It is contended that humanitarian and human rights considerations underlying the protection of cultural property may be better advanced through other international criminal law provisions, in particular through the category of crimes against humanity. It is worth mentioning that the category of crimes against humanity could also be useful to prosecute crimes against cultural heritage in peacetime. An important challenge in the international protection of cultural heritage is cross-border movement of cultural objects which causes difficulties in the protection. It denotes the transnational dimension of crimes against cultural heritage, so they can also be recognized as organized crimes. Introducing a new protocol to the United Nations Convention against Transnational Organized Crime, adopted by the General Assembly in Resolution 55/25 of 15 November 2000 (UNTOC) on artistic and archaeological assets, may be an effective step in this direction.

Significantly, preventive and punitive aspects of multilateral instruments which have included the criminalisation of deliberate acts of destruction against cultural property like those contained in the 1954 Hague Convention and its Protocols and the initiative to extend the mandate of UN peacekeepers so that they can be deployed to protect World Heritage have a potentially significant, proactive impact.

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