War on memory: International law and the destruction of cultural property in armed conflict 1979-2018

Candidate number: 219
Submission deadline: June 1st, 2018
Number of words: 40 000
Table of content

ACKNOWLEDGEMENTS ..................................................................................................................5

1 AIMS, METHODS AND LIMITS OF THE STUDY ......................................................................6

   1.1 Aims ........................................................................................................................................6
   1.2 Definitions .................................................................................................................................7
   1.3 Method ......................................................................................................................................9

2 AN OUTLINE OF THE DEVELOPMENT OF INTERNATIONAL LEGISLATION REGARDING THE DESTRUCTION OF CULTURAL PROPERTY IN ARMED CONFLICT ......................................................................11

   2.1 From Antiquity to the Enlightenment .......................................................................................11
   2.2 The beginnings of international cultural property law ...........................................................13
   2.3 The Second World War ...........................................................................................................13
   2.4 A new world order and Cold War .............................................................................................15
   2.5 After 1989: the expansion of international law ........................................................................16

3 LEGAL APPROACHES TO THE PROTECTION OF CULTURAL HERITAGE IN ARMED CONFLICT ..................................................................................................................19

   3.1 The 1954 Hague convention ....................................................................................................20
   3.2 The 1972 World Heritage Convention .....................................................................................24
   3.3 The 1977 Additional Protocols to the Geneva Conventions ..................................................26
   3.4 The International Criminal Tribunal of the Former Yugoslavia (ICTY) (1993-2017) ..28
   3.5 The 1998 Rome Statute of the International Criminal Court (ICC) .....................................29
   3.6 The 1999 Second Protocol to the Hague convention .............................................................31
   3.7 The 2003 UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage .................................................................................................................................33
   3.8 Customary international law .....................................................................................................35
   3.9 The Hague Convention and the World Heritage convention combined - a common legal framework? .........................................................................................................................................39
   3.10 Cultural heritage as a human right .........................................................................................42

4 DESTRUCTION OF CULTURAL HERITAGE IN ARMED CONFLICT: CASE STUDIES .................................................................................................................................48

   4.1 Afghanistan .............................................................................................................................48
       4.1.1 Civil war 1979-1996 ...........................................................................................................49
4.1.2 Taliban rule and the Afghanistan War 2001 – present ...........................................50
4.2 Iraq ...............................................................................................................................52
  4.2.1 Occupation of Kuwait and the Gulf War 1990-91 ..................................................53
  4.2.2 Operation Iraqi Freedom – the US invasion of Iraq 2003 and its aftermath .........56
  4.2.3 ISIS occupation of Iraq 2014-2017 .......................................................................60
4.3 Yugoslavia ....................................................................................................................62
  4.3.1 Intentional destruction (cultural cleansing) by Serb and Bosnian-Serb forces 63
  4.3.2 Intentional destruction by Croatian and Bosnian-Croatian forces ......................65
  4.3.3 Other intentional destruction ..............................................................................66
4.4 Syria ..............................................................................................................................68
  4.4.1 Civil War 2011-present .......................................................................................68
  4.4.2 Occupation by ISIS 2014-2017 ............................................................................73

5 ENFORCEMENT, PREVENTION AND IMPLEMENTATION OF
INTERNATIONAL LAW ON CULTURAL PROPERTY ...............................77
5.1 Enforcement ..................................................................................................................78
  5.1.1 The international community and the enforcement of international cultural
        property law ...........................................................................................................78
  5.1.2 The ICC and the case of Al-Mahdi .................................................................81
  5.1.3 Implementation of international cultural property law in domestic law .............83
  5.1.4 Enforcement and reconciliation processes .......................................................87
5.2 Prevention through implementation of international cultural property law .......... 89
  5.2.1 The 1972 World Heritage Convention ...........................................................89
  5.2.2 The World Heritage Convention and globalization .........................................92
  5.2.3 Implementation and democratic states: prevention during ongoing armed
        conflict in Iraq ........................................................................................................93
  5.2.4 Implementation and authoritarian states .........................................................97

6 CONCLUSIONS .............................................................................................................101
6.1 Patterns of destruction ..............................................................................................101
6.2 Legal response ............................................................................................................102
6.3 Enforcement ...............................................................................................................103
6.4 Enforcement through judicial prosecution ..............................................................104
6.5 Implementation of international cultural property law .........................................106
  6.5.1 The World Heritage Convention as a means of enforcing implementation? ...107

LIST OF REFERENCES .................................................................................................112

LIST OF TREATIES AND OTHER LEGAL INSTRUMENTS .............................121
Acknowledgements

I want to express my sincere thanks to my supervisor Stener Ekern, Professor at the Norwegian Center for Human Rights, University of Oslo, for constant good advice and interesting discussions. Thanks also to Gentian Zyberi, Professor at the same institution, for valuable comments.
1 Aims, methods and limits of the study

Cultural property is a part of the broader concept of cultural heritage, which is an expression of the cultural identity, history, memories of a people or of humanity in general. As such, it is also a symbol or marker of culture and identity and has therefore become increasingly important in an increasingly globalized world obsessed with national and cultural identity. Cultural property has become an important target in the “new”, internal conflicts after the Cold War, but can also be uniting, peace-building and nation-building, a factor in the re-unification process in a war-torn country. Undeniably, cultural heritage has today attained an importance in international politics that it did not have just a few decades ago. Consequently, it is important to better understand the motives and reasons behind the destruction of cultural property, and how the international community has responded to this threat in order to understand how it can be better protected in the future.

In recent years, a new threat to cultural heritage has appeared in the shape of Islamist fundamentalism. The Taliban, ISIS and other such extremist groups are non-state actors who aim to destroy all expressions of religion or culture that are not regarded as compatible with their extreme version of Islam. Cultural property has become a marker of cultural identity; the fundamentalists view any religious views or ideas differing from their own as abominable. Ancient remains of classical culture can probably also in their eyes be regarded as symbols of the hated western culture and its origins. In Afghanistan, Syria and Iraq, cultural heritage of immense value to the world has been brutally damaged, destroyed or looted in recent years. It could be argued that cultural heritage has become an ideological battlefield at the beginning of the 21st century.

1.1 Aims

The present study aims at analysing the different forms of destruction of cultural property in armed conflict and the response of international legislation aiming to impede such destruction over time, more specifically in the period between 1979 and 2017. Which forms do destruction take, and why is it carried out? How has the international community responded to these forms of destruction? This study wants to analyze how international law has responded over time to destruction of cultural property in armed conflict, in order to discover trends and disentangle patterns of development.
The time perspective of four decades is crucial in order to be able to identify potential trends or patterns over time; what kinds of patterns are possible to identify? Is the destruction of the same type and origin, or does it change over time? From a legal point of view, it is necessary to understand to what extent international legislation is and has been effective. To what degree is the international legal system for the protection of cultural heritage in war applicable, and in which ways can international legal protection of cultural property in armed conflict become more efficient and reliable? A major weakness of international human rights and humanitarian law is the lack of enforcement instruments. International law exists today on both regional and global levels, but “executive,” or at best embryonic, global institutions are lacking. Is continued international legislation a fruitful path to an improved protection of cultural property in armed conflict?

1.2 Definitions
Since the study concerns exclusively tangible cultural heritage, i.e. physical manifestations of culture, the legal term “cultural property” has been chosen instead of “cultural heritage”, which is a broader term which includes also intangible, non-physical heritage such as for example unrecorded cultural traditions or music. However, when cultural property is discussed within a broader context, in the capacity of human heritage, I have instead used the term “cultural heritage.” In defining ”cultural property” I have used the same definition as in the 1954 Hague convention: ”movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites, groups of building which, as a whole, are of historical or artistic interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above.”¹

Nevertheless, the study will also touch upon the question of what a cultural heritage is in a broader sense. When the term “cultural property” is used, the legal, material or economic significance is being underlined, whereas when “cultural heritage” is used, the term takes on a more universalistic meaning. It then becomes a universal heritage, “to all mankind”, something which implies additional sets of rights. Human rights are per definition universal, which means

---

¹ 1954 Hague Convention, art. 1(a).
that if World Heritage can be considered universal, then it must also be protected by international humanitarian law.

The somewhat generalizing term “destruction” also needs to be defined. Apart from the physical destruction of material objects through dynamiting, shelling, digging, bulldozing or physical violence, the term will also include the looting of archaeological sites. This form of destruction is not as visual or prone to media attention as the physical destruction of objects or buildings but has long-term consequences which may be even more serious.

The destruction of cultural property will be divided into three different categories:

1. intentional destruction aimed at “cultural cleansing”
2. destruction as “collateral damage” of warfare
3. other intentional destruction

The term “cultural cleansing” needs to be defined. It is a relatively recent term, which has its origins in the term “ethnic cleansing”. The latter term was coined in connection with the Balkan wars, where one ethnic group forced another ethnic group from their territory through violence or threats. The term “cultural cleansing” was invented as a descriptive term for the systematic destruction of cultural property in for example Afghanistan, Iraq and Syria. The scope of “cultural cleansing” is to eradicate a material and spiritual culture in order to make a territory culturally more homogeneous. It is consequently a close parallel to the term “ethnic cleansing”, the difference being only that the first regards the physical eradication or removal of people, whereas the latter concerns the eradication of the culture of a people. That both concepts to a great degree can be interconnected is illustrated by a synonym to “cultural cleansing”, which is “cultural genocide,” and thus connects culture with the existence of a people. The term “cultural cleansing” will be used here, since the destruction discussed in this study sometimes

---

2 See for example UNESCO “The struggle against cultural cleansing is a security imperative” (2015) [https://en.unesco.org/news/struggle-against-cultural-cleansing-security-imperative] [Quoted 28.05.2018]

3 The connection between ethnic or cultural cleansing and genocide was, however, rejected by the ICJ in the Bosnia-Herzegovina v. Serbia case (ICJ, Bosnia-Herzegovina v. Serbia and Montenegro). See also ICTY, Prosecutor v. Krstic, para. 580.
concerns already dead cultures, with no direct cultural or spiritual connection to the local population.

1.3 Method
Four different geographic areas of armed conflict have been chosen as case studies: Afghanistan, Iraq, Yugoslavia and Syria. Three of four areas (Afghanistan, Iraq and Syria) are located in the Middle East and correspond to the politically most unstable area in the world in this period. Yugoslavia experienced the worst armed conflict in Europe since World War II. The ad hoc-tribunal ICTY has developed a large amount of case-law connected with the destruction of cultural heritage, and the Yugoslavia wars are therefore an interesting object of study.

Each conflict represents a specific, unique, period of time and socio-cultural context, and moreover, each case provides us information regarding the legal response to destruction of cultural heritage in that given time period and context. In assessing destruction of cultural property over time, it will be possible to apprehend trends in types of destruction, the political situation, and the legal response to these circumstances. Especially during the 1990’s there has been a tendency towards an increasing “globalization” of cultural property law, with the creation of new treaties and international tribunals such as the ICTY and the ICC. As part of my exploration of legal trends in combination with an analysis of the international political situation, I will try to answer the question whether the general trend towards a globalization of cultural property law will continue despite recent challenges, or if there are limits to this development, and in that case, which.

The time period chosen for the study spans from the last decade of the Cold War to present, a period of huge change and transformation of the global community. The areas of conflict have been chosen because they all are areas that are rich in cultural heritage, this is true especially for the Middle East countries, and at the same time they have gone through severe armed conflicts and have raised important questions regarding the protection of cultural heritage in such conflicts.

Since the fall of the Berlin Wall in 1989, the world has been increasingly globalized, and national states have lost power to supra-national and international organisations on regional and global level. This, in tandem with a growth of international law, including its associated
institutional mechanisms, has made it possible to prosecute war criminals in international tribunals. Prior to the end of the Cold War, this was impossible. However, globalization encompasses also the creation of forces that oppose this radical change due to varying causes such as increasing unemployment, social insecurity, immigration and changing lifestyles. The result is the growth of nationalism, populism, extremism and terrorism since the beginning of the 21st century. In this increasingly antagonistic climate, cultural symbols, such as cultural heritage, have become progressively more important.

The international development in the beginning of the 21st century has also been characterised by an increasing number and importance of non-state actors and internal conflicts, whereas international conflicts between states have become rarer.\(^4\) At the same time, national identity has become fragmented, leading to conflicts where identity markers such as cultural heritage carry increasing weight.\(^5\) Since international humanitarian law is based on the relation between states, this growing fragmentation implies that the pace of internationalization of law which had increased significantly in the first decade and a half after the end of the Cold War, risks being halted and become increasingly irrelevant.

The case studies are of importance for understanding the unique character of every conflict and how the law has been applied in every single case. The different conflicts will be compared with each other in order to understand differences and similarities between them and the legal response to the unique challenges posed by each of them. By understanding the uniqueness of each conflict as well as resemblances between conflicts, and what they consist in, identifying changes over time in modes of destruction and the response of the legal system to it, it will be possible to draw conclusions regarding which challenges international law has faced and is facing, and which will be the best ways of solving present and future problems connected with destruction of cultural property in armed conflict.


\(^5\) van der Auwera, op. cit. n. 4, pp. 52-53.
2 An outline of the development of International legislation regarding the destruction of cultural property in armed conflict

2.1 From Antiquity to the Enlightenment

Destruction of cultural heritage is as ancient as civilization and cultural heritage itself. The first historical evidence comes from classical antiquity and is overwhelmingly rich. The Romans conducted innumerous wars in the process of building their vast empire, and traditionally displayed their booty in lavish triumphal processions. They were generally respectful towards foreign places of worship, but this is certainly a rule with several important exceptions, of which one is the Jewish Great Temple in Jerusalem, which was famously destroyed and pillaged in AD 70. Another famous example is the total destruction of the city of Carthage in 146 BC, and in the same year the important city Corinth also was destroyed and sacked. The senator Cato the elder had ended all his speeches in the senate with the famous words “Furthermore, I consider that Carthage should be destroyed”. These words reflect well the vast mental chasm that divides us from classical antiquity; to destroy an entire city could be considered as a just cause. However, although plunder and pillage were the rule, there were even in antiquity critical voices: the famous Greek historian Polybius, writing in the 2nd century BC, concluded that the


7 In Latin: “Praeterea censeo Carthaginem esse delendam.”
destruction of cultural (in contrast to merely valuable) objects or goods “might undermine the long-term governance of the conquered land and foment rebellion.”

Destruction and pillage continued to be the rule in Medieval and early modern time warfare, until at least the early 19th century and the Napoleonic wars. It was a custom to loot and plunder in war, even as a “right of the victors”, and was therefore not questioned. However, during the Renaissance and Enlightenment, the idea that certain cultural property ought to be protected was for the first time formulated. Monuments and buildings were not primarily to be spared because they were religious, but rather in their capacity as having an aesthetic or scientific value.

The first international rules regarding the restitution of war booty, in fact, already date to the Peace of Westphalia in 1648, after the 30-years War. This was one of the worst conflicts Europe had witnessed until then, and had as a consequence that innumerable works of art were plundered and looted. Some of the worst plundering of art works took place one and a half centuries later, during the Napoleonic wars, when Napoleon brought enormous art treasures to Paris and the Louvre from above all Egypt and Italy. That this was not just a French evil is illustrated by the spoliation of the frieze and sculptures of the Parthenon temple on the Acropolis of Athens by the British Lord Elgin at the same time.

---


12 Gerstenblith, op. cit. n. 6, p. 251.
2.2 The beginnings of international cultural property law

But if the beginning of the 19th century marked a peak in the plundering and spoliation of cultural heritage, the attitude towards this custom had begun to change by the middle of the same century. The first legal document which specifically aimed at protecting cultural property was the so-called Lieber Code, a code of conduct for the US military dating to 1863 and the Civil War, which protected cultural property, classified as private, such as churches, establishments of education or foundations for the promotion of knowledge, including schools, universities, museums or observatories.\(^\text{13}\) The 1874 Brussels declaration, which was the result of the conference, expanded the definition of cultural property which was considered worthy of protection; apart from religious buildings, buildings dedicated to charity or education, also "the arts and sciences, works of art and science, historic monuments."\(^\text{14}\) Although this declaration was never ratified and accordingly not binding, it had an impact on the future 1954 Hague convention.\(^\text{15}\)

By the turn of the last century, there were forces trying to create an international legal code of conduct for countries at war and how they were supposed to act in regard to cultural monuments. Two peace conferences in the Hague in 1899 and 1907 led to the first Hague conventions (1907) on laws and customs of war on land.\(^\text{16}\) They gave general instructions for how troops were to behave at war, and made it internationally prohibited to plunder and destroy religious or historical buildings or works of art.\(^\text{17}\)

2.3 The Second World War

The enormous progress in the field of weapons of destruction in the early 20th century made destruction of buildings, including churches, monasteries and other cultural heritage buildings,
possible on a scale never imagined before. World War I thus witnessed tragedies like the de-
struction of the Reims cathedral or the library of Louvain. However, it seems that these cases
were not due to intentional destruction, there is in fact very little evidence for such strategies in
World War I.18 This clearly changed with World War II. Moreover, due to the development of
technology, not least the use of air bombing, destruction reached earlier unimaginable heights.
With the advent of Nazism and Communism and new, totalitarian ideologies, atrocities like
ethnic and cultural cleansing were performed on a large scale. The invasion of Poland in 1939
became unprecedented in its destructivity.19

It seems that the ruthlessness towards the Polish cultural heritage had something to do with the
idea of Slav culture being inferior to Germanic. Intentional destruction of cultural heritage was
never undertaken by the Nazi regime in the same way in western Europe and was above all
confined to the looting of art treasures. Although many European cities like London, Dresden
and Lübeck were hit by massive and unprecedented destruction from air raids, it seems that this
kind of destruction of cultural heritage was not part of an overall strategy in western Europe.
Rather, it was the consequence of disregard for the cultural heritage of the enemy.20 Even so, it
seems that Germany at least in its raids on Britain had the intent to destroy cultural property,
such as in the so-called “Baedeker Raids” in April 1942 when cities with rich cultural heritage
of national importance such as Bath, Exeter and Norwich were bombed. German press in fact
explicitly communicated that these attacks targeted art and historical monuments.21

Apart from the destruction caused by air bombing on both sides, the Nazis made the looting of
art works a central part of their general policy. That the looting of art was part of a clearly
formulated ideology, and the sheer scale of the activities, made it unprecedented. The looted art

18 Ascherson, Neal. “Cultural destruction by war and its impact on group identities”, in Nicholas
Stanley-Price (ed.) Cultural heritage in postwar recovery (ICCR ROM conservation studies 6), Rome:
17-24.
19 See for example Ascherson, op. cit. n. 18, p. 21.
20 Ascherson, op. cit. n. 18, pp. 20-21. However, it is true that Hitler ordered the destruction of Paris
when it was realized that the city was lost, an order that fortunately never was obeyed.
21 Detling, op. cit. n. 9, p. 58, n. 90.
was transported to new locations in the “Third Reich.” The Third Reich was a dream about a new empire that would instigate a new world order; in order to realize this, everything that did not fit this ideal dream had to be destroyed. Not only was art that was attractive looted; such art that was regarded as “entartete Kunst” was destroyed. For example, the special corps Einsatzstab Rosenberg invaded in one action 69,169 Jewish homes in order to destroy such art.\textsuperscript{22}

As a response to the unprecedented destruction of art by the Nazis, the allied forces set up a fine arts and archives officer corps – “The Monuments Men”\textsuperscript{23} - which was supposed to secure art and cultural objects during the war, and later help with the restitution of the objects to their lawful owners.\textsuperscript{24} The conviction of four Nazi officers in the Nuremberg trial for the crime of plundering, made it clear that the allied forces, building on international law, wanted to mark that such crimes were not accepted.\textsuperscript{25}

2.4 A new world order and Cold War
The unprecedented destruction and the Nazi genocide on Jews and other minority groups during World War II led to a veritable revolution in the world order. The world needed a new international system that could be trusted to prevent disasters like the two world wars. The enormous scale of destruction and looting, and the “culturalised pattern” emerging from Nazi racialized warfare had showed that the existing rules like the 1907 Hague Regulations had not been efficient in impeding the criminal acts that they were supposed to prevent. As an immediate response, the United Nations was founded in 1945 and the Universal Declaration of Human Rights was adopted in 1948. Four years later, in 1949, the Geneva conventions on the conduct at war were drafted. However, regarding cultural heritage and property, it is the Hague


\textsuperscript{23} This is the subject of a recent Hollywood movie with the same name directed by George Clooney (2014).

\textsuperscript{24} Gerstenblith, op. cit. n. 6.

Convention on the protection of cultural property in the event of armed conflict and its First Protocol adopted in 1954, that define a new era in our field. This was the first international convention to exclusively deal with cultural heritage.\textsuperscript{26} A convention is a multilateral treaty, which means that it is only binding for states that have ratified it.

The rules for protection are detailed, but the great weakness with the convention is that it puts all responsibility of protection on the state party, which in many cases does not respect the convention, and there is no international authority which can put pressure on the state party. The 1954 Hague Convention has by some been regarded as an expression of universalism, mentioning “the cultural heritage of all mankind.” However, it should rather be considered as a manifestation of every state’s responsibility to protect its cultural heritage.\textsuperscript{27} This is also the most natural interpretation of the convention; it was created in a world of sovereign nation states. Consequently, the protection was not expected to reach further than the responsibility of each contracting state. The Cold War era was also a period in which generally there were relatively few major armed conflicts due to the balance of terror between the two super powers USA and the Soviet Union.

The period of the Cold War saw little change in the international legislation in this field, apart from the important UNESCO convention concerning the protection of the World cultural and natural heritage enacted in 1972.\textsuperscript{28} This convention is important in creating a legal framework for the protection of cultural heritage on a state level, also in times of peace. However, as is the case with any other treaty, the convention leaves it up to each individual state to protect their cultural heritage sites and does not include a mechanism for the enforcement of its rules.

\textbf{2.5 After 1989: the expansion of international law}

The global political arena became more unstable in parts of the world as a consequence of the fall of the Berlin wall and the ensuing dissolving of the Soviet Union and the fall of communism. The consequences of this were felt especially in Yugoslavia, where armed conflict broke out. The brutal war in Bosnia with its widespread ethnic cleansing as well as destruction

\textsuperscript{26} Gerstenblith, op. cit. n. 13, p. 346.

\textsuperscript{27} Gerstenblith, op. cit. n. 6, p. 260.

\textsuperscript{28} 1972 World Heritage Convention.
of cultural property, made it clear that the Hague Convention was not sufficient and that legislation had to be updated and modernized in order to remain effective.

In order to prosecute the war crimes perpetrated in Yugoslavia 1991-1995, an ad hoc international criminal tribunal was established by the UN Security Council in 1993, the International Criminal Tribunal of Former Yugoslavia (ICTY). The creation of the ICTY was groundbreaking, since it represents the first criminal tribunal that had its seat outside the area of conflict and was established by the UN. The first tribunal of a similar kind had been the Nuremberg tribunal (The International Military Tribunal, IMT) in 1945, but it had its seat in the area of conflict and was established by the victors, although its statutes were universally accepted later. The case law of the ICTY has had a great impact on the development of humanitarian law dealing with destruction of cultural heritage.

The war in Yugoslavia made the international community realize that international legislation to protect cultural property had to be changed in order to be efficient. In 1999, the Second Protocol to the Hague convention was adopted. This protocol wanted to clarify some of the rules in the convention that had been debated and were unclear. This was the case with for example the term “military necessity”, where the instances in which it could be used were narrowed. Importantly, the Second Protocol also clarifies the criminal responsibility. Article 22 deals with armed conflicts not of an international character, and makes clear that the protocol applies also in this kind of conflicts. This was a clear reaction to the lessons from the war in Yugoslavia, and its character of non-international conflict.

At the turn of the millennium, a significant development in international criminal law was the creation of the first permanent international criminal tribunal, the International Criminal Court in the Hague (ICC), based on the principles of the UN charter. This has made it possible to prosecute war criminals without having to establish specialized tribunals for each conflict. The

29 Ehlert, Caroline. Prosecuting the destruction of cultural property in international criminal law: with a case study on the Khmer Rouge’s destruction of Cambodia’s heritage, Leiden: Brill, 2013, p. 108.

ICC has only the authority to prosecute individuals, not states, and only the “most serious crimes of concern to the international community as a whole.”\footnote{ICC Statute, art. 3.}

In 2001, images from Afghanistan, in which the recently established Taliban rule blew up the ancient monumental Buddha statues in Bamiyan, were spread all over the world.\footnote{Francioni, Francesco and Federico Lenzerini, “The destruction of the Bamiyan Buddhas and international law”, \textit{European journal of international law} 14, issue 4, 1, September (2003), pp. 619-651.} An international outcry followed, as it immediately became clear that the world community could do little within the existing legal framework against such aggressions against cultural heritage in a territory controlled by a totalitarian regime, based on an extremist ideology with the idea of a new world order.

The international community responded quickly with the passing in 2003 of the UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage.\footnote{2003 UNESCO Declaration.} Since it is a declaration, it is not legally binding, but an instrument of soft law. It wants to reinforce the fundamental principles of the already existing legal framework and stresses the responsibility of all states for their cultural heritage, for example through ratifying the relevant international treaties.\footnote{2003 UNESCO Declaration, para. III.4.} Being an expression of a united international community, it is by some regarded as part of international customary law.\footnote{Francioni and Lenzerini, op. cit. n. 32, pp. 630-638.}

With respect to the intense development of legal instruments of importance to cultural property in the 1990’s, there has since 2003 and the UNESCO Declaration been a long period of inaction in this field. Maybe it is a sign that international law has reached a limit to its dynamic expansion. The international community is more divided in comparison with twenty years ago, and hence there are today less opportunities to establish international tribunals that can enforce cultural property law. Until now, cultural property law has been characterised by a constantly accelerating diversification, complexity and interaction with other regimes of international
regulation. Has this development only reached a temporary halt, and will it continue in the same direction in the future, or has international cultural property law reached the limits of what is possible?


3 Legal approaches to the protection of cultural heritage in armed conflict

It is now time to delve deeper into the international legal instruments for the safeguarding of cultural property that have been in existence and/or adopted during the time period studied in order to understand how they have responded to the different challenges posed by the destruction of cultural property in armed conflict over time. How has the international community acted in order to prevent or sanction these crimes?
3.1 The 1954 Hague convention

The Convention for the Protection of Cultural Property in the Event of Armed Conflict, better known as the Hague convention, was adopted in 1954 and aims at the protection and safeguarding of cultural property in times of war. It is the only specialized convention in this field. It states that

“damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world.”

The convention defines the concept of cultural property (article 1) and states that state parties to the convention are obliged to safeguard and respect cultural property, both within their own as well as other state party territories (article 3). It is interesting that religious buildings are not regarded as a category of its own but is only protected if they are “monuments of architecture, art or history.” Theft, pillage, misappropriation and vandalism are prohibited and should be prevented (article 4 (3)). The only exception from the above rules of protection is expressed in article 4(2), which states that the obligations “may be waived only in cases where military necessity imperatively requires such a waiver.” Since “imperative military necessity” is not defined anywhere in the convention text, the waiver has been regarded as one of the main weaknesses of the convention. Since a definition is missing, it is easy to interpret the rule at will, at the expense of the aim of the convention; the safeguarding of cultural property. The problem is illustrated by K. Detling, who asks: “Does a sniper in a church tower constitute imperative military necessity to bombard the entire church?” The waiver was probably added in order to attract more among the militarily powerful state parties to the convention. The word “imperatively”, however, suggests a high threshold for the waiver.

The interpretation of article 4 (3) of the Hague convention has been much debated. The article states that the State parties “undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property.” The question has been whether this responsibility lies on all parts of the state, or just on the military forces. Judging only from the text, there is no specification, and would

37 1954 Hague Convention, preamble.
38 1954 Hague Convention, art. 1(a).
39 Gerstenblith, op. cit. n. 13, pp. 368-369.
seem to apply to any agent acting within the state. However, it seems clear that the article applies exclusively on the military forces. As Gerstenblith suggests, the article must be read in the light of the Nazi crimes against cultural property in the Second World War; the aim of the article would have been to stop military forces from repeating similar acts. Secondly, all other articles in the convention regard the military forces, and provide the context for which we must interpret article 4 (3).\footnote{Gerstenblith, op. cit. n. 6, p. 309; Lostal, Marina. \textit{International cultural heritage law in armed conflict. Case studies of Syria, Libya, Mali, the invasion of Iraq and the Buddhas of Bamiyan}, Cambridge: Cambridge University Press, 2017, p. 107.}

The convention differs between international and national conflicts. Whereas the convention is primarily aiming at international conflicts, according to article 19, in conflicts “not of an international character” “each party shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property.” The only provision relating to respect for cultural property is article 4 of the convention. If we are to take article 19 literally, this would entail that article 28 regarding sanctions against individuals that commit breaches of the convention does not apply in non-international conflicts.\footnote{Ehlert, op. cit n. 29, p. 46.} However, O’Keefe has suggested that article 19 does relate to the respect for cultural property, since it deals with the sanctioning of violations against it.\footnote{O’Keefe, Roger. “The Meaning of ‘Cultural Property’ under the 1954 Hague Convention”, \textit{Netherlands International Law Review} 46 (1999), pp. 26–56, p. 22; Ehlert, op. cit n. 29, p. 47.}

In some cases, it is uncertain whether an armed conflict is of international or non-international character. This has obviously consequences for the application of the norms of the convention since some of them do not apply in non-international conflicts. Jadranka Petrovic has shown how the war between Bosnian-Croat (HVO) and Bosnian Muslim (ABH) forces in Mostar, Bosnia-Hercegovina, in 1993, which on the surface could seem as a non-international conflict, in fact was international in nature. This because the Bosnian-Croat forces were directly supplied and supported by the army of Croatia, a different state.\footnote{Petrovic, Jadranka. \textit{The old bridge of Mostar and increasing respect of cultural property in armed conflict}, Leiden and Boston: Brill, 2013.} In this study, most case studies are primarily non-international conflicts. Similarly, the Syrian conflict, from the moment of
Russian intervention in 2015, should be regarded as an international conflict. However, since this involvement began only after ISIS had perpetrated the major part of their destruction of cultural property, this fact has no influence on the interpretation of the Hague convention in the Syria case.

The meaning of a passage of the definition of what the term cultural property covers in article 1 has been discussed, since it is somewhat unclear:

“movable or immovable property of great importance to the cultural heritage of every people”

Here it is unclear what “every people means.” Some have underlined the wording “of great importance” and suggested that this would cover only the most important cultural heritage, of global importance, i.e. only property of world heritage caliber. Others reason that “the cultural Heritage of every people” must imply that cultural property which each and every state decides is worthy of this label. The latter explanation would also go best together with the preamble, where it is stated that “each people makes its contribution to the culture of the world.” Hence, “people” must be interpreted as equivalent to the inhabitants of a confined territory, a state.

A peculiar feature of the convention is that it only protects religious buildings which also are “monuments of architecture, art or history.” It is especially strange when the earlier 1907 Hague Convention does in fact protect such buildings, regardless of their cultural value. This means that any religious building which cannot be regarded as such lacks protection from the convention. Thus, if only the Hague convention had been applied in the prosecution of war crimes in former Yugoslavia, it would not have been possible to incriminate individuals for the destruction of the many mosques and churches which were not “monuments of architecture, art or history,” the same is of course true for the destruction of many churches, mosques and synagogues in Iraq at the hands of ISIS. However, such lacunae might, as has been pointed out, be

---

44 1954 Hague Convention, art. 1.
45 O’Keefe, op. cit. n. 42, p. 36; Ehlert, op. cit. n. 29, p. 49.
46 1954 Hague Convention, preamble.
47 1954 Hague Convention, art. 1(a).
48 1907 Hague Convention, art. 27: “buildings dedicated to religion.”
filled in with the help of the 1907 Hague regulations, which is considered to have become customary international law, or in the legal instruments protecting civilian objects.49

As in the case of other international treaties, the convention leaves to the state parties involved to impose sanctions when terms have been violated. No international body exists which can impose such sanctions. This in combination with the principle of “military necessity”, which can be interpreted more or less at will, makes the convention toothless in practice, except as a “conditioner” or a shaming device for states that violate its provisions. The fact that no one has ever been convicted based on the Hague convention regulations illustrates this problem eminently. The convention was adopted during the Cold War, when no aspects of the sovereignty of a state could be questioned, and accordingly there could not be any judiciary superior to the state level.

Most scholars agree that some fundamental principles of the convention can be regarded as customary international law.50 However, despite this fact it was not sufficiently strong to prevent extensive damage to cultural property during the civil war in Afghanistan, the Gulf War in Iraq or the wars in Yugoslavia. This was the reason why the Second Protocol to the convention was adopted in 1999.

It has been said that by the 1980’s, the Hague Convention suffered from “benign neglect.”51 This was not strange, since the Convention was to a great extent a failure; it had not succeeded in attracting more than 68 State Parties, it lacked the instruments to enforce its provisions, and most State Parties did not bother to implement the latter.52 Its failure was evident in the light of the destruction of cultural property that was carried out during the Iran-Iraq War, the

49 Ehlert, op. cit. n. 29, p. 50.
50 According to the ICRC study of 2005, articles 4 (respect for cultural property), 4(2) (military necessity) and 56 of the Hague Convention as well as the application of the Convention in non-international conflicts (rules 38-40) are customary international law: ICRC, IHL Database of Customary law [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul] [Quoted 26.05.2018]
52 O’Keefe, op. cit. n. 51, p. 236.
Afghanistan Civil War, the Gulf War in Iraq, the wars in Yugoslavia, and the lack of legal tools to be used in order to prevent and sanction these crimes.

3.2 The 1972 World Heritage Convention
The Convention Concerning the Protection of the World Cultural and Natural Heritage, adopted in 1972, was born as a consequence of the increasing threat that modern society had begun to pose to the world cultural and natural heritage. The convention does not use the term “cultural property”, but “cultural heritage”. This is because the convention aims to protect only heritage which is “of outstanding universal value from the point of view of history, art or science.”53 In this it differs from the Hague Convention, which protects any property which is “of great importance to the cultural heritage of every people.” Thus, the World Heritage Convention concerns heritage of global, world-wide interest, whereas the Hague Convention protects any cultural property which each state sees fit. It could thus be argued that the both conventions in this way complement each other.

The World Heritage Convention is the foundation for all cultural property management today, and, in contrast to the Hague Convention, aims at protecting cultural heritage under any circumstance, not just in war. Its main application is hence in peacetimes, but there is nothing which excludes it from being applied also during armed conflict, since the both conventions to a great extent share the same aim: to protect cultural property.54 That this is the case is evident from article 6 (3) which states that:

“Each state Party to this Convention undertakes not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage referred to in Articles 1 and 2 situated on the territory of other States Parties to this Convention.”55

53 World Heritage Convention, art. 1.
55 World Heritage Convention, art. 6(3).
The preamble stresses the universal value of cultural heritage, just as the Hague convention and international law in general:

“Considering that parts of the cultural and natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole.”

The convention uses a system where the state party “identifies and delineates the different properties situated on its territory” in order to be protected (article 3). Article 11(2) gives the foundation for the UNESCO list of World Heritage, which lists all properties that have been admitted by the World Heritage Committee as being World Heritage. In addition, article 11(4) states that the Committee shall publish a list of World Cultural Heritage in danger. Armed conflict is mentioned as one of several reasons for putting a World Heritage Site on the endangered sites list.

The Convention aims at “the establishment of a system of international co-operation and assistance designed to support States Parties to the Convention in their efforts to conserve and identify that heritage” (article 7). A state party can, according to the convention, apply for assistance from the international community (articles 19-26). However, the convention has no provision for violations, and it can therefore easily be ignored by a state party without risking any sanctions. The system of the convention rests on international co-operation by state parties; if a state is not co-operating, the international community can do little. The World Heritage Convention has been criticized for being too vague and not being a binding treaty for its state parties. However, this is certainly a misunderstanding, the convention no doubt has binding obligations, and is in fact the most successful of UNESCO’s conventions. This is probably due to the fact that most states regard it important to protect and safeguard their most important cultural heritage, which often is regarded as a pride to the country and an important asset.

---

56 World Heritage Convention, preamble.
57 World Heritage Convention, art. 11(4).
It is certain that the convention can be, and in some cases even should be applied in armed conflict; it was underlined by the ICTY in the Jokic case that the crime of destruction of cultural property in the old town of Dubrovnik was considered even more serious because the town was a World Heritage site.\(^59\) Despite this, the Hague Convention is considered as *lex specialis* in armed conflict, and there has been no state practice to apply the provisions of the World Heritage convention in armed conflict although they theoretically can be. It may thus be unclear to which extent the World heritage convention in practice can be applied in times of war, but it is the more certain that the same convention is essential for the protection of world cultural heritage in times of peace. It is the primary tool for the prevention on damage of world heritage, also for the prevention of damage in times of war. Therefore, in order to prevent destruction in times of war, its application in times of peace is probably as essential as its application in times of war.

### 3.3 The 1977 Additional Protocols to the Geneva Conventions

The 1977 Additional Protocols I and II of the Geneva Conventions were adopted in order to improve the protection of civilians in the context of armed conflict. Both article 53 in the First Additional Protocol and article 16 in the Second Additional Protocol deal specifically with the protection of cultural property.\(^60\)

The article 53 of the First Additional Protocol concerns the protection of cultural objects and places of worship. Article 53 (a) says that it is prohibited

> “To commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples.” Article 53 (b) prohibits “to use such objects in support of the military effort.”

Article 16 of the Additional Protocol II also reflects these very statements. Both articles state that the protection is “without prejudice to the provisions” of the Hague Convention.\(^61\) This

---


\(^{60}\) 1977 Additional Protocols I and II to the Geneva Conventions of 1949, art. 53 and 16 respectively.

\(^{61}\) Ibid.
means that the provisions of the Hague Convention are not altered by these articles; only if a state is Party to the Additional Protocols and not to the Hague Convention, will they apply without taking the Hague Convention into consideration.

The rules in the Additional Protocols I and II entail a sharpening of the protection of cultural property compared to that the Hague Convention, since they protect “places of worship which constitute the cultural or spiritual heritage of peoples.” This means that they in contrast to the Hague Convention protect also places of worship that are not “monuments of architecture, art or history.” However, the expression in article 53 “of peoples” contrasts with the definition of cultural property in the Hague Convention which belongs to “every people.” This has been interpreted as the Additional Protocols having only the most important cultural and spiritual heritage of all peoples, i.e. of mankind, in mind, whereas the protection of the Hague Convention applies on “every people”, that is, that of the world’s different nations. It could be said that the protection of cultural property in the Additional Protocol I is divided in two: article 52 which protects all civilian property is lex generalis, while article 53 protecting specifically cultural and spiritual property is lex specialis.

Consequently, the legal instruments concerning cultural property can be divided between a branch protecting cultural property and another protecting civilian objects. Article 53 of the Additional Protocol I concerns “Protection of cultural objects and places of worship.” According to this article it is prohibited to:

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

Article 53 thus echoes the rules in the Hague convention, but there is an important distinction here, since the rules apply to “civilian objects.” An interesting case in this connection is that of the destruction of the Old Bridge at Mostar. The ICTY court came to the conclusion that because

---

63 Ehlert, op. cit. n. 29, p. 71.
64 Ehlert, op. cit. n. 29, p. 72.
of military necessity (it served the besieged inhabitants of Mostar for transports of supplies), the bridge was a valid military object, and therefore the prosecuted were not guilty of violating ICTY statutes article 3(d) concerning historic monuments and works of art, but rather article 3(b), the wanton destruction of cities, or devastation not justified by military necessity. The tribunal here clearly followed customary international law in the form of Additional Protocol I chapter III, concerning “civilian objects”, with its article 53 cited above. In the Old Bridge case, it was thus its capacity as a civilian object - not its capacity as cultural property - which made a conviction possible.65

The Additional Protocols to the Geneva Conventions were an important step forward with regards to an improved legal protection of cultural property, especially spiritual property. Most importantly, they state a clear individual criminal responsibility for the destruction of cultural property.66 However, the main problem remained; the lack of a judiciary with the power to prosecute such criminal acts.

3.4 The International Criminal Tribunal of the Former Yugoslavia (ICTY) (1993-2017)

The International Criminal Tribunal of the Former Yugoslavia had success with indicting many war crimes, since it was not bound by treaty law, but could depart from its own statutes and customary international law. It was possible to create the tribunal through a unanimous UN security council on May 25th 1993, because the political climate for international cooperation was advantageous at that time. Today, such a tribunal would be much more difficult to establish through the UN. Through the active period of the ICTY 1993-2017, the tribunal has created a large amount of important case law regarding war crimes and crimes against humanity, some of which has become international customary law.

Article 3 of the ICTY Statute deals with violations of the customs of war, and article 3(d) prohibits

66 Ehlert, op. cit. n. 29, p. 81.
“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.”

This article was clearly a reflection of article 27 in the 1907 Hague Convention, which by then had become Customary International Law. That the destruction of cultural property, expressed in article 3 (d) of the ICTY Statutes, was also a violation of the customs of war was in 2005 confirmed by the Strugar verdict of the ICTY. The ICTY chambers, however, decided in a different judgment that article 3(d) must be supplemented with the stricter protection of cultural property through the obligations to safeguard and respect in the 1954 Hague Convention.

The ICTY statutes and the case-law of the tribunal has had great implications for the implementation of international cultural property law during armed conflict. It made clear, if there was any doubt, that destruction of cultural and religious property is a war-crime, and through its case-law it showed the way how to prosecute such crimes in the future. The acts of intentional destruction of cultural property carried out by ISIS in Syria and Iraq would according to the case-law of the ICTY and current Customary International Law be easy to prosecute, if there was a competent tribunal. The current lack of political unity in the international community makes the establishment of an ad hoc-tribunal similar to that of the ICTY very unlikely in the cases of Syria and Iraq.

3.5 The 1998 Rome Statute of the International Criminal Court (ICC)

The first permanent global criminal court was created in 1998 through the adoption of the Rome Statute which established the International Criminal Court (ICC) in the Hague. The tribunal aims at prosecuting the most serious crimes against the international community, including crimes against humanity and war crimes. It is clear that the crime of destruction of cultural

---

67 ICTY Statute, art. 3(d).
70 ICC Statute.
71 ICC Statute, art. 5(1).
property can be regarded as a crime against humanity.\textsuperscript{72} However, since the ICC is a treaty-based tribunal, a citizen belonging to a country that has not ratified the Rome statutes, cannot be prosecuted by the ICC. Since neither Syria, nor Iraq has ratified the Statute, no citizens from these states can be prosecuted by the ICC, if not referred by the UN Security Council.\textsuperscript{73}

The only case concerning destruction of cultural property that has been brought in for the ICC is the Al-Mahdi case involving the destruction of mausolea at Timbuktu, Mali.\textsuperscript{74} This ground-breaking case shows clearly, that in cases where the perpetrators are citizens of ICC state parties, crimes against cultural property can indeed be indicted and are punishable as a crime \textit{in se}. As regards the crimes perpetrated by ISIS in Syria and Iraq, it would be possible to prosecute individuals belonging to this organization that are citizens of state parties to the ICC statutes. Since ISIS to a great extent has relied on foreign volunteers, it may well be that part of the crimes were perpetrated by individuals that technically could be prosecuted by the ICC, being citizens of State Parties to the ICC Statutes.

The Al-Mahdi case was the first in which an individual was convicted for a crime at the ICC. The tribunal received some critique that the crime of Al-Mahdi was not important enough to match the aim of the 1998 Rome Statutes of prosecuting “the most serious crimes against the international community.” Al-Mahdi was by some considered as “small fish”, whereas the tribunal should instead look for the “big fish.”\textsuperscript{75} However, it is possible that the ICC here has followed the strategy of the ICTY. In the early years of the latter tribunal, it was not possible for political reasons to prosecute the most important political leaders and therefore it began to concentrate on prosecuting individuals which were lower in the political or military hierarchy. With time, a considerable case-law was created through these cases, and it was in departing from this case-law that it then became possible to prosecute and convict the most important

\textsuperscript{73} Compare ICC Statute, art. 12 (2) and art. 13 (a-b).
\textsuperscript{74} ICC, \textit{Prosecutor v. Al-Mahdi}.
political leaders when they finally became available to the tribunal.\footnote{Kersten, Mark. (2016) “Big fish or little fish. Who should the International Criminal Court target?” \textit{Justice in conflict} [https://justiceinconflict.org/2016/09/01/big-fish-or-little-fish-who-should-the-international-criminal-court-target/] [Quoted: 10.04.2018]}
Whereas it could be discussed whether al-Mahdi was high enough in the hierarchy of those responsible for the crimes at Timbuktu, the gravity of the crimes can hardly be questioned.\footnote{Although the Court regarded attacks against cultural property as less grave than attacks against humans, the crime was considered as being “of significant gravity.” ICC, \textit{Prosecutor v. Al-Mahdi}, para. 82.}

As regards the states of the present case studies, Afghanistan together with all successor states to former Yugoslavia have ratified the ICC Statute, whereas Syria and Iraq have not. Viewed in a longer time perspective, the progress of the possibilities of prosecuting individuals for destruction of cultural property in armed conflict has been considerable. The states of former Yugoslavia are now all State parties to the ICC statute, and the rule of law certainly has made progress here, diminishing the risks for something similar to the 1991-95 wars happening again. As regards Afghanistan, the situation is much more complicated. The fact that the state is still fighting a civil war, and a large part of its territory is occupied by the Taliban, the relevance of the ICC in the future for Afghanistan will depend very much on the political situation. The rule of law cannot function in a country torn by civil war, especially not when the part which may protect war criminals (the Taliban) is a major party of the civil war, key to peace negotiations, and moreover pursues an alternative world order vision which is not based on the rule of law.

Although the establishment of the ICC is a very important step forward for international criminal law, a problem is its treaty-based character. Those states which would have needed its judiciary the most are not state parties. Thus, potential war criminals which are citizens of Syria or Iraq are out if its reach.

\section*{3.6 The 1999 Second Protocol to the Hague convention}
The Balkan wars and the Gulf War in the first half of the 1990’s made it clear that the Hague convention was not able to fulfill its function, and had to be amended. In 1999 the Second
Protocol to the convention was adopted. It made two main amendments to the convention which were of importance: firstly it defined the elusive term “imperative military necessity” as concerning only cultural property which has been turned into a “military object” (article 6 (a)), and narrowed the options of interpretation of the term considerably. Secondly, it defines what a breach against the convention consists in, that individuals have criminal liability for such crimes, and that state parties are obliged to take necessary legislative measures against violations. In addition, rules for the prosecution and extradition of alleged offenders are given in articles 17 and 18.

As have been argued by several scholars, the definition of “military necessity” in article 6 of the Second Protocol to the Hague Convention can be considered to be part of customary international law. This means that “military necessity” can only be invoked if:

1. the cultural property has been turned into a military object

2. “there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective.”

3. “the decision to invoke imperative military necessity must be taken by an officer commanding a force the equivalent of a battalion in size or larger, or a force smaller in size where circumstances do not permit otherwise.”

Any situation where “imperative military necessity” has been claimed, must thus be tested with these three questions, called by Lostal “the threefold test.”

Article 6 (a) in the Second Protocol is regarded by Toman as “only the explanatory comment” to article 4 (2) of the Hague convention, and he predicts that it will necessarily be influential in the interpretation of article 4 of the convention. The definition of military necessity in article 6 (a) is based on article 53 in the Additional Protocol I of the Geneva convention, which

---

79 1999 Second Protocol, art. 15-16.
81 Lostal, op. cit. n. 40, p. 113.
82 Lostal, op. cit. n. 40, p. 113.
83 Toman, op. cit. n. 54, p. 96, note 35; Gerstenblith, op. cit. n. 13, p. 369.
is regarded as customary international law. Therefore, it can be argued that also article 6 (a) of
the Second Protocol to the Hague convention can be regarded as customary international law.

Article 22 states that the protocol shall apply in the event of an armed conflict not of an inter-
national character, that is, also internal conflicts. This is important, since the Hague convention
only states in article 19 that in non-international conflicts, a state party “shall be bound to apply,
as a minimum, the provisions of the present Convention which relate to respect for cultural
property.” This would mean that only article 4 with the heading “Respect for cultural property”
can be applied on non-international conflicts, with the most crucial regulations such as the gen-
eral respect for cultural property within a state's own territory and that of other state parties, the
waiver of military necessity and the prohibition of looting and vandalism.

The new rules in the Second Protocol reflect mainly developments in international law between
1954 and 1999, but the same problem which regards the convention and other treaties is true
also for the Second Protocol; there is no international body which can enforce its rules and
create sanctions against violations of its terms. The Second Protocol has been much less popular
than the convention and its First Protocol. It has been ratified by only 68 states, and among
them are neither Syria, Afghanistan nor Iraq, those three states where the problem with destruc-
tion of cultural heritage has been most urgent.

### 3.7 The 2003 UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage

This declaration was originally a 2001 UN resolution which was passed as a direct consequence
of the destruction of the Bamiyan Buddhas in Afghanistan the same year, and the “growing
number of acts of intentional destruction of cultural heritage.” Since the act to destroy cultural
property by a state in its own state earlier had been impossible to imagine, the destruction of
the Bamiyan Buddhas at the hands of the Taliban laid bare a loophole in international law for
this kind of crimes in times of peace. No law existed that prohibited the destruction of cultural
property during peace-time. The case with the Bamiyan Buddhas is therefore an excellent ex-
ample of how the international community responded legally to the challenge posed by the
Taliban destructions.

---

84 2003 UNESCO Declaration.
The Declaration states in its preamble:

“Reiterating one of the fundamental principles of the Preamble of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict providing that ‘damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world,”85

“Recalling the principles concerning the protection of cultural heritage in the event of armed conflict established in the 1899 and 1907 Hague Conventions and, in particular, in Articles 27 and 56 of the Regulations of the 1907 Fourth Hague Convention, as well as other subsequent agreements, “

“Mindful of the development of rules of customary international law as also affirmed by the relevant case-law, related to the protection of cultural heritage in peacetime as well as in the event of armed conflict, Also recalling Articles 8(2)(b)(ix) and 8(2)(e)(iv) of the Rome Statute of the International Criminal Court, and, as appropriate, Article 3(d) of the Statute of the International Criminal Tribunal for the former Yugoslavia, related to the intentional destruction of cultural heritage”

The 2003 Declaration thus confirms the droit acquis in the field of cultural property in armed conflict, but does not consider the World Heritage Convention, especially its article 6(3) which prohibits

“to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage…situated on the territory of other States Parties to this Convention.”86

In doing so, the Declaration has set a lower bar than necessary, referring only to “intentional destruction”, whereas the World Heritage Convention refers to “damage directly or indirectly” on cultural property.87 As we have seen, article 6(3) of the World Heritage Convention can be applied both in times of peace and in armed conflict, and would have been natural to include in this context, which dealt with a hybrid situation of both peace and armed conflict. Moreover,

85 2003 UNESCO Declaration, preamble.
86 World Heritage Convention, art. 6(3).
87 Lostal, op. cit. n. 40, p. 159.
the Declaration has been criticized for not reflecting current practice properly, and that it was a lost opportunity to formulate a much stronger document.\textsuperscript{88}

Being a declaration, it is not legally binding, but only a reiteration of fundamental principles of international law.\textsuperscript{89} As a statement of current international law, it has been regarded as an expression of customary international law.

To sum up, the UNESCO Declaration has importance as a statement by the international community of its view on current law, but its legal weight is very uncertain. What is certain is that no international legal instrument concerning the destruction of cultural property has been adopted since 2003, a time-period of fifteen years. The Declaration, the final legal instrument adopted by the international community in the field of cultural property protection, stands there almost as a symbol of the impotency of the international community when it comes to effectively prevent the destruction of cultural property with the means of creating new legal instruments. The law is there, prepared to constitute the base for the prosecution of any individual perpetrating the crimes of destruction of cultural property. The problem is how to implement it.

3.8 Customary international law

Customary international law is defined as “a general practice accepted as law.” A rule must be “state practice” and there must be a “belief that such practice is required, prohibited or allowed.... as a matter of law.”\textsuperscript{90} It is certain that parts of the Hague convention can be regarded as customary international law, together with the older Hague regulations of 1907 and the regulations in Protocols Additional I and II of the Geneva conventions on civilian objects.\textsuperscript{91}


\textsuperscript{89} O’Keefe, op. cit. n. 72, p. 391.

\textsuperscript{90} ICC Statute, art. 38 (1) (b).

\textsuperscript{91} ICRC, \textit{IHL Database of Customary law}, Rule 7 The Principle of distinction between civilian objects and military objectives, and Rule 38 Attacks against cultural property [https://ihl-
The ICRC Database over Customary Law has listed a number of rules which are commonly regarded as international Customary Law. Those which are important to our study are the following:92

Rule 7. Principle of distinction between civilian objects and military objectives

Rule 8. Definition of military objectives

Rule 10. “Civilian objects are protected against attack, unless and for such time as they are military objectives” (ICC Statute, Article 8(2)(b)(ii); see also Article 8(2)(b)(ix) and (e)(iv) (concerning attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected) and Article 8(2)(b)(v) (concerning attacks against towns, villages, dwellings or buildings which are undefended)). In case of doubt, see Additional Protocol I, Article 52(3).

Rule 14. Proportionality in attack: “Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited” (Article 51(5)(b) of Additional Protocol I, and repeated in Article 57).

Rule 38. Attacks against cultural property: “Each party to the conflict must respect cultural property (ICC Statute, Article 8(2)(b)(ix) and (e)(iv); Hague Convention, Article 4(2); Second Protocol to the Hague Convention, Article 6(a-d)).

Rule 39. Use of cultural property for military purposes: (Hague Convention, Article 4; Second Protocol to the Hague Convention, Article 6(b-c)).

Rule 40. Respect for cultural property: (Hague Regulations, Article 56; ICTY Statute, Article 3(d); ICC Statute, Article 8(2)(b)(ix), Article 8(2)(b)(xiii), Article 8(2)(e)(iv) and Article 8(2)(e)(xii)).

__________________________

92 ICRC, IHL Database of Customary law [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule38] [Quoted 25.04.2018]
The articles 4 (1) and (2) on the obligation to only attack cultural property under imperative military necessity, and article 4 (3) on the obligation to prevent one’s own military forces from engaging in vandalism, theft and misappropriation of cultural property, are all certain customary international law. The narrower definitions of these rules in article 6 (a) of the Second Protocol of the Hague convention has with time also become customary international law. In addition, we could add articles 3(b) and 3(d) of the 1993 Statute for the ICTY, and articles 8(2)(b)(ix) and 8(2)(e)(iv) of the 1998 Rome Statute of the ICC, which both reflect the above cited customary international law adopted by the international community on cultural property.

Summing up, according to customary international law, it is prohibited, in general, to attack institutions dedicated to religion, charity and education, the arts and the sciences, historic monuments (article 53, 1907 Hague rules), to respect cultural property in general, refraining from any use that could damage it or refraining from any act of hostility directed against it (1954 Hague Convention). This rule can be waived if the property has become

a. A military objective
b. No feasible alternative to obtain a similar military advantage
c. The decision has been taken by an officer commanding a force the equivalent of a battalion or larger (1954 Hague Convention and Second Protocol to the Hague Convention)

It is prohibited to attack civilian objects, to commit acts of hostility against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use such objects in support of the military effort (articles 52 and 53, Additional Protocol I to the 1949 Geneva Conventions; article 16 Additional Protocol II of the same convention). To this we could add article 6(3) of the World Heritage Convention which prohibits

93 ICRC, IHL Database of Customary law, Rule 38 Attacks against cultural property and Rule 39 Use of cultural property for military purposes [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule38] [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule39] [Quoted 11.04.2018]
94 ICRC, IHL Database of Customary law, Rule 39 Use of cultural property for military purposes [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule39] [Quoted 11.04.2018]
the damage directly or indirectly to the world cultural heritage situated on the territory of other States Parties to that convention.

Moreover, there are several provisions in the World Heritage convention, the latter also being a universally ratified convention, that may well be applied in armed conflict, but where it is more uncertain how they should be interpreted and need further discussion. This matter will be discussed in chapter 5.

Furthermore, there is no doubt that customary international law also acknowledges criminal responsibility for unlawful attacks against cultural property in both international and non-international conflicts.95

The quite substantial customary international law existing today on cultural property protection in armed conflict shows that there is a thorough foundation of rules that prohibit the destruction of cultural property, which covers up any eventual loopholes in the legal framework established on the base of treaties and state participation.

Scholars who regard parts of the international law protecting cultural property as being part of customary international law have recently been criticized by the young legal scholar Marina Lostal.96 She calls this way of reasoning “idealistic” since it according to her view reads international law much too optimistically. One of Lostal’s arguments is that since there are a few differences in the wording between the Rome Statute of the ICC and the Hague Convention, this implies that the Statute cannot confirm the Hague convention as belonging to customary international law.97 One example presented by Lostal is that the ICTY and the Hague convention have different definitions of the crime of destruction of cultural property; whereas the ICTY Statute in article 3 (d) says that destruction of the buildings or monuments enumerated should be regarded as a violation of the customs of war, the Hague convention prohibits any acts of hostility directed against such buildings or monuments.98 I would argue that this is a detail

95 ICRC, IHL Database, Customary law, Rule 40, note 7 [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule40] [Quoted 27.05.2018]; ICTY, Prosecutor v. Strugar, para. 230.
96 Lostal, op. cit. n. 40, pp. 38-47.
98 Lostal, op. cit. n. 40, p. 39.
which can be explained by the different aims and functions of these both instruments of law. One is a convention, a treaty with general rules for the protection of cultural property, whereas the other are the statutes for a tribunal whose aim it is to prosecute already perpetrated war crimes, and only the most serious. Since customary international law builds on general principles, it is doubtful if smaller differences such as this one, which can be explained by the different purposes of the legal instruments, is enough to disqualify them as being based on the same general principles of law. In the same way, Lostal argues that while the Hague convention is founded on the principle of “imperative military necessity,” the ICC statutes demand that a building/monument has been turned into a “military object” before a waiver can be allowed. This difference is not surprising, since the ICC statutes naturally reflect certain developments in international law, a development reflected also in the Second Protocol to the Hague convention, which was adopted one year later. Since the Second Protocol to the Hague Convention is by many considered to have reached the status of customary international law and the principle of “military object” today probably has to be applied on the interpretation of the principle of “military necessity” in the Hague convention, it is difficult to see that the differences between the Hague Convention and the ICC statutes regarding this problem are anything other than theoretical.

3.9 The Hague Convention and the World Heritage convention combined - a common legal framework?

M. Lostal has made an interesting case for how to combine the World Heritage Convention with the Hague Convention and other UNESCO conventions, in order to create a substantive legal framework for the protection of cultural heritage in armed conflict and a minimum common denominator in cases where states only have the ratification of the World Heritage Convention in common. According to Lostal, the World Heritage Convention would become a “sliding door” between peace- and war-contexts; at peace it constitutes a robust legal framework, at war it gives a few, but important general rules which complement the 1954 Hague convention. In fact, UNESCO and the World Heritage Committee have for some time sought a more integrated approach to the both conventions. It was by the WHC recognized in 2004 that there was a direct relationship between the both conventions, and that the “the regimes of

99 Lostal, op. cit. n. 40, p. 73.
protection provided by (these) different conventions to the same cultural heritage (are) mutually beneficial.”


It is certainly true that it seems artificial today to have a distinct dichotomy of legislation in armed conflict and in peace-time, after the experience of the destruction of the Buddhas in Bamiyan in 2001, which took place in a hybrid context of both peace and civil war. However, it has been debated whether the convention can be applied in times of war. Both arguments for and against have been presented. The most important is, I would argue, that the convention’s main aim is to protect world cultural heritage from threats of destruction; why should then its provisions terminate in times of war, when such threats are at a peak? Also, article 6 (3) states that each state party:

“undertakes not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage....situated on the territory of other States Parties to this Convention.”

This text has no sense if interpreted as if concerning times of peace; in what ways could a state damage cultural heritage in the territory of another state if not at war? Lostal accentuates the principle known as the *effet utile*; if the interpretation of a law is dubious, the interpretation should be chosen which is most consistent with the aims of the legislation in general. This idea makes in fact perfect sense when viewed from our long-term perspective. Furthermore, the Draft articles on the effects of armed conflicts on treaties (2011), elaborated by the International Law Commission (ILC) has treated the subject of whether a convention continues to be in operation in armed conflict or not. Among the criteria article 7b states:

---

100 UNESCO Doc. WHC-04/7 EXT.COM/9, pp. 1-2, l. 4.
102 Lostal, op. cit. n. 40, p. 81, note 43.
103 Article 31(2) of the Vienna Convention on the Law of Treaties states that the preamble must be included in the interpretation of a treaty (1969 Vienna Convention, art. 31(2)).
104 Lostal, op. cit. n. 40, pp. 82-83.
105 Lostal, op. cit. n. 40, p. 75.
“Treaties declaring, creating or regulating a permanent regime or status or related permanent rights, including treaties establishing or modifying land and maritime boundaries”

Since the World Heritage Convention certainly is regulating a “permanent regime” with related “permanent rights”, it is possible to conclude that the regulations of the Convention do continue also in the case of an armed conflict.

When the World heritage convention was created, it was in a context of a world where the sovereign state had not yet yielded certain areas of its sovereignty to regional or global organisations and the international community could interfere little into the internal affairs of sovereign states during times of peace. In the introduction I underlined the fact that world heritage is to a certain extent global, but that it is primarily owned by its state due to the state-centred nature of international law. With the globalization, it is apparent that the idea of a global world heritage for all mankind has gained much ground. When the passing of time makes the former interpretation of a piece of legislation outdated, it is essential that the interpretation is being adapted to the new circumstances. Therefore, in order to achieve a more global approach to the protection of world heritage, it would be necessary to complement the existing legislation with the World heritage convention.

Since there are no rules regarding world heritage of exceptional importance in the wartime regulations of the Hague convention, there is a clear discrepancy between the sets of legislation regulating peace on the one hand and war on the other. In order to overcome this discrepancy, it is vital that both instruments should be harmonized in order to create a consistent and reliable legal framework for world heritage protection. Since the World heritage convention is lex specialis concerning everything dealing with world heritage, it would entail that the regulations regarding such heritage must be interpreted according to the aims of that said convention. There is no logic whatsoever that world heritage should have special protection in times of peace, but no such special status in times of war, when it is more exposed to danger. Neither is there anything in the convention which would suggest that its rules apply only in times of peace,

---

106 ILC (2011) Draft articles on the effects of armed conflicts on treaties, art 7(b) [http://legal.un.org/docs/?path=../ilc/texts/instruments/english/draft_articles/1_10_2011.pdf&lang=EF] [Quoted 27.05.2018]
something which is confirmed by the above mentioned draft articles of the ILC. The Hague convention has of course applied only in times of war, and therefore the World heritage convention has through almost automatic antithetic reasoning often been regarded as a convention only for peace-time circumstances.

Even so, it has been argued that many states would never agree with applying the rules of the World heritage convention in times of war, since this has not been customary.107 The mere fact that the text of the convention is uncertain as regarding to the application in armed conflict means that states that are unwilling to accept its application under such circumstances can probably easily do so.

It has become evident from the above that it is certainly impossible to protect all cultural property through international legislation. This is why it is necessary to concentrate on that category of cultural property which already is regulated by an existing universal legal framework; the world heritage. The World heritage convention constitutes the highest step of global legislation on cultural property; it includes practically speaking all states in the world. In addition, the World Heritage Convention has been ratified by practically speaking all states in the world, just as the Hague Convention.

3.10 Cultural heritage as a human right
The discussion on cultural heritage has for many years been divided in two different parts: those who use the term “cultural property” and are inclined to consider it the property and domain of each sovereign state. On the other hand, those who use the term “cultural heritage” regard it mostly as a global heritage, of humankind, crossing national borders.108 In recent years, the link between the rights of a local population and their cultural heritage has become more and more evident. Since human rights are per definition global, this means that cultural property also is being regarded increasingly more globally, rather than as problems on a state level.

107 Lostal, op. cit. n. 40, pp. 88-89.
108 Francioni, op. cit. n. 36, pp. 10-11.
It has been stated that destruction of cultural property is “used as a means of continuing violence on a symbolic and ideological level, particularly in the case of civil wars.”\(^{109}\) Such a point of departure naturally moves the problem into the sphere of people and human rights. Several of the major UN conventions mention the general human rights to access to culture and religion: UDHR, article 27 (1), ICESCR art. 15 (1) (a), see also article 2 (1), ICCPR article 27, and CERD article 5 (d) (e) (vi). Traditionally, cultural rights have been regarded as being less important than civil and political rights, and the right to culture in itself is difficult to enforce since it is not criminalized.\(^{110}\) However, an intimate link between the destruction of cultural property and the violation of human rights is evident from the close relation between such destruction and genocide.\(^{111}\)

Recently, several very convincing cases have been made for the linking of cultural heritage to human rights.\(^{112}\) As we have seen, there are many links between genocide and the destruction of cultural heritage, to the point that it can be possible to speak of “cultural genocide,” for example in the cases of ISIS in Syria and Iraq. However, it can probably be ruled out that “cultural genocide” will ever be accepted as an independent category of genocide.\(^{113}\)

“Cultural cleansing” is a term that has been suggested in connection with the destruction of cultural property in Syria and Iraq, and was first used by the UNESCO director, Irina Bokova.\(^{114}\) The concept of cultural cleansing is another version of the idea that genocide and cultural

---


\(^{111}\) Gerstenblith, op. cit. n. 13, pp. 342-344; Novic, op. cit. n. 110, p. 9.

\(^{112}\) Vrdoljak, op. cit. n. 10; Gerstenblith, op. cit. n. 13, especially pp. 389-393.

\(^{113}\) Gerstenblith, op. cit. n. 13, p. 388. See also ICJ, *Bosnia-Herzegovina v. Serbia and Montenegro* regarding the interpretation of the 1948 Genocide Convention.

extinction walk hand in hand and should be treated together. The extinction of another group’s cultural identity and history is part of the crimes genocide and ethnic cleansing as well as persecution. Consequently, the crime of destruction of cultural property when perpetrated systematically should be regarded as a humanitarian crime and if possible codified as such in international law.

Persecution is a key term in combining the crime of destruction of cultural heritage with crimes against humanity, and I will discuss it in the following as a term for releasing relevant action. “Persecution” can be defined thus:

“State policy leading to the infliction upon an individual harassment, torment, oppression, or discriminatory measures, designed to or likely to produce physical or mental suffering or economic harm, because of the victim’s beliefs, views or membership in a given identifiable group (religious, social, ethnic, linguistic etc.), or simply because the perpetrator sought to single out a given category of victims for reasons peculiar to the perpetrator.”

Ehlert is discussing the use of “persecution” in case law dealing with cultural heritage but comes to the conclusion that it is not possible to prove from this case law if destruction of cultural heritage can be regarded as a crime against humanity, since all these cases, mostly from the ICTY, also dealt with other crimes, such as genocide. Those indicted were always convicted for these other crimes and not for the crime of destruction of cultural property.

The destruction carried out by ISIS has been in the main part of the cases directed against the religious and cultural identity of the local populations, an obvious case of persecution. The destruction of cultural heritage from Classical Antiquity, which has no direct religious or cultural connection with the population, is nonetheless partly part of the same phenomenon, the destruction of cultural identity. Although a direct cultural link is lacking, the local populations

117 Ehlert, op. cit. n. 29, p. 166.
no doubt may nonetheless have a sentimental relationship with world heritage sites in their vicinity, but the importance of it to them is varying and is in any case difficult to measure. The most important link between a world heritage site and the local population is probably economic. The destruction in combination with the disappearance of tourists and visitors to the site at least for as long the extremist occupation endures, will be a hard blow to the economy of the population. In the case of cultural heritage of universal importance, destruction not only deprives the local, but also human mankind in its entirety from enjoying its cultural heritage.

Marina Lostal takes a critical stance against what she calls an “anthropocentric view of cultural property.” She poses the question whether the human rights perspective is supposed to entirely replace earlier cultural property law, or if it is considered to be a complement to it. She also rightly points out the fact that if the crime of destruction of cultural property should be linked to the crime of persecution, then it is no longer a question about the cultural property itself, but the local population. However, Ana Filipa Vrdoljak has shown that this shift towards a more “anthropocentric” view of cultural heritage began already in the aftermath of the Second World War with the Nuremberg trial and the adoption of the Universal Declaration of Human Rights and the Genocide convention. The preamble of the 1954 Hague convention in fact reflects this shift: it mentions “heritage of all mankind”, “each people makes its contribution to the culture of the world”; “cultural heritage is of great importance for all peoples of the world.”

The ICTY has often linked destruction of cultural property to persecution, and regarded such destruction as the mens rea, i.e. the intent to commit the crime of genocide. However, this was due to the fact that the war in Yugoslavia, especially the Bosnian war, was to a great extent an ethnic conflict, where especially the Muslim inhabitants were systematically persecuted. This case is much harder to argue in the context of other conflicts, such as those in Syria, Iraq or Afghanistan. Lostal takes the example of the Buddhas at Bamiyan; these statues belonged to an ancient, now disappeared, Buddhist community, and cannot be linked to the present local community and its culture in the same intimate way as a mosque to the local Muslim community.

---

118 Lostal, op. cit. n. 40, pp. 43-46.
119 UDHR; 1948 Genocide Convention.
120 Vrdoljak, op. cit. n. 10, p. 272; 1954 Hague Convention, preamble.
121 Lostal, op. cit. n. 40, p. 43.
122 Lostal, op. cit. n. 40, p. 44.
in Bosnia. The statues are no doubt part of the cultural heritage of the local community, but can it be argued that the destruction of cultural property created by a long-gone ancient culture can be regarded as persecution of the local community? The same question can be posed regarding all other cases of destruction concerning buildings or monuments that belong to ancient cultures without direct cultural links to the present population. That this constitutes a real problem is underlined by the fact that the crime of persecution has by the ICTY been regarded to demand “a clear intention” to discriminate against the local population.\footnote{See e.g., ICTY, \textit{Prosecutor v. Kordić and Čerkez}, para. 199; ICTY, \textit{Prosecutor v. Kupreškić}, paras. 622–624; see also ICTY, \textit{Prosecutor v. Tadić}, paras. 650–659; Lostal, op. cit. n. 40, p. 44.} The many cases of destruction of Christian churches or Muslim sectarian shrines by ISIS would clearly fall under “persecution.” However, the intention of the Taliban at Bamiyan or ISIS at Palmyra or Nineveh has clearly not been primarily to persecute the local population, or discriminate against it, although this certainly was a consequence of their acts. Their motives concerning the destruction of ancient, non-Christian, non-Jewish or non-Muslim buildings/monuments are clearly connected primarily to religious and ideological convictions and reasons of propaganda. It seems that it will be very difficult, if not impossible, to argue that the destruction of monuments at Palmyra, Nimrud and/or the Bamiyan Buddhas were due to persecution of the local inhabitants.

Nevertheless, it is still possible to view the destruction from a human right’s perspective. There has been a trend since the 1990’s towards a general shift from using the term “cultural property” to that of “cultural heritage.” “Cultural heritage” is more inclusive and opens up a spectrum of different possibilities especially concerning the linking of cultural heritage and human rights and/or cultural identity. There is now not only the cultural property “in se”, as an object, or property, but also the populations living near it, or in it. In the context of the occupation of ISIS or the Taliban, where crimes against humanity are legion, it is natural to consider the destruction of a historic monument as “cultural heritage” and therefore as the denying of the local population its rights to culture and a cultural identity, rather than viewing the monument merely as “cultural property” in a more confined, materialistic sense. The human right of having access to one’s cultural heritage was expressed in the opinion of judge Trindade in an ICJ ruling, where it was stated that the right of a local population to a cultural heritage can be regarded as customary international law.\footnote{ICTY, \textit{Preah Vihear Temple (Cambodia v. Thailand),} para. 33.} The HRC stated in 2016 in its Resolution 33/20 on “cultural rights
and the protection of cultural heritage,” that “the destruction of or damage to cultural heritage may have a detrimental and irreversible impact on the enjoyment of cultural rights.”

The ICTY decided that a group cannot be described negatively, i.e. as something it is not. Therefore, in order to be found guilty of the crime of persecution, it would not be enough to say that ISIS in Syria and Iraq has discriminated the local populations at, for example Palmyra or Nimrud because these inhabitants do not share its religious extremist views.

Accordingly, it would seem that although the inhabitants of Bamiyan, Palmyra or Nimrud cannot be regarded as “persecuted” by ISIS or the Taliban, they can as a collective be considered as having been denied their rights and access to culture and a cultural identity. However, the cultural rights expressed in the legal instruments are very general in character, and the violation of the rights in the UDHR or ICESCR are not criminalized. Hence, it is uncertain how they should be interpreted. The recent tendency in legal theory to link cultural heritage to human rights probably is an indicator how such problems will be interpreted in the future.

The critique Lostal aims at the “anthropocentric view” of cultural property consists in that it would replace traditional cultural property law and therefore also exclude liability in a great number of cases. I would argue that this is a misdirected critique. The anthropocentric view comes into play only in cases of “persecution”, and certainly does not exclude the many legal instruments of traditional cultural property law; rather the human rights view must be regarded as an important complement to traditional cultural property law; since human rights are universal, the inclusion into the sphere of human rights would imply that cultural property law would have a further “insurance,” and the rights contained in it would be reinforced. It would in fact be unnatural not to connect cultural heritage with human rights, since they are so intimately related. There can be little doubt that the linking of cultural property to human rights has important positive implications for the possibility to prosecute individuals, especially when destruction does not take place in the context of an armed conflict. Since such situations are not codified in any law, it becomes through the linking with human rights possible to prosecute individuals on the basis of human rights that are customary international law.
4 Destruction of cultural heritage in armed conflict: case studies

4.1 Afghanistan
The case of Afghanistan is well suited for studying how cultural property is threatened by constant instability due to civil wars over an extended period of time. Afghanistan also witnessed the first example of intentional destruction of cultural property during peace time, something which is of legal interest, since this is a gray zone of international humanitarian law. It will be argued here that Afghanistan presents the most difficult case of those studied in this thesis. In a state with chronic dysfunction of the state apparatus due to constant civil war, even the most elementary protection of cultural property is impossible. Afghanistan is an example of how international humanitarian law, which is treaty-based and founded on the cooperation with a state, cannot function when the state is not capable nor willing to fulfill its duties. Those few sites that have become world heritage sites have the best prospects of being properly protected through financial and expert aid from Unesco. However, this depends entirely on to which degree the state can guarantee the safety of the site from the military threat from the Taliban.

Afghanistan has a very rich history of civilization; it was dominated by the Persian Achaemenids, Alexander the Great and Hellenistic culture, the Bactrian, the Parthian and the Kushan kingdoms prior to Islamic rule. Today however, the country is one of the best examples of a “failed state”, where incessant civil wars following the Soviet invasion and the absence of a
functioning state have led to some of the worst plundering of cultural heritage in the world. The Taliban regime in Afghanistan was the first Islamist movement to systemically destroy cultural property in 2001. Why did this destruction occur, and which forms did it take? Which was the legal response which the international community gave as a consequence of the world-wide attention this destruction received following the dynamiting of the gigantic Buddha statues at Bamiyan in 2001? Afghanistan presents one of the most formidable challenges to the international community regarding the destruction of cultural property. Does international humanitarian law have any impact at all on a failed state like Afghanistan?

4.1.1 Civil war 1979-1996

4.1.1.1 Looting and collateral damage caused by civil war

Excavations have taken place in Afghanistan since 1922, in close collaboration with a number of western countries. This cooperation with the West was broken when Soviet troops invaded the country 1979, and the ensuing civil war. Contacts with the western world were completely broken off until 1992. The Soviet-supported regime of President Najibullah was deposed in 1991, and yet another period of civil war between different mujahedin groups lasted until 1996 when the radically Islamistic Taliban gained control.¹²⁵

During the civil war, the government was too weak to control state property efficiently. Warlords and anarchy ruled, and as a consequence, the National Museum of Kabul was looted several times. In 1994 it was hit by rocket fire and severely damaged.¹²⁶ It has been stated that 70% of a collection of 100,000 objects disappeared.¹²⁷ Part of the collections, however, was moved to safety, for example the so-called Bactrian gold, a unique gold hoard from the Bactrian kingdom and dating to the 1st century BC, which in 1989 was hidden in a bank vault beneath the

¹²⁷ Feroozi and Tarzi, op. cit. n. 126, p. 2; Cassar and Noshari, op. cit. n. 125, p. 20.
presidential palace. Nonetheless, it was reported that gold objects similar to the Bactrian gold began to circulate on the international market in the 1980’s.

Due to the anarchy and chaos in the country in the early 1990’s, most archaeological sites have been severely looted; thousands of valuable artefacts were smuggled to the black market in Europe and the US via Pakistan. Ai-Khanoum is one of the sites which has been looted most intensely. It was one of the most important Hellenistic cities of the east, and has been illegally excavated for years, partly using bulldozers; today the site resembles “an artificial moonscape.” Extreme poverty in combination with the widespread lawlessness and an exceptionally rich archaeological heritage has created the perfect conditions for looting. Everything suggests that the Taliban and other different armed groups are making important economic gain on looting through taxes on looting and taking protection money for smuggling routes. The money is used for buying weapons and financing terrorism, in this way prolonging armed conflict. Looting has clearly taken place already from the beginning of the civil war, but the increasing prices of antiquities on the market from the 1980’s and on has made the looting of antiquities today almost an industry.

4.1.2 Taliban rule and the Afghanistan War 2001 – present
4.1.2.1 Intentional destruction caused by the Taliban
The Taliban is an Islamic extremist organisation that developed from the mujahedin war against the Soviet Union. From 1996 it took control of Kabul and became the de facto ruler of Afghanistan. In 2001, the supreme leader of the Taliban, mullah Mohammad Omar, issued a decree

---

129 Cassar and Noshadi, op. cit. n. 125, p. 18.
130 Feroozi and Tarzi, op. cit. n. 126, p. 2.
131 Cassar and Noshadi, op. cit. n. 125, p. 18.
that ordered the destruction of all statues in the country. Attention was soon directed towards the two famous giant Buddha statues at Bamiyan. Carved in the sandstone rock and measuring 56 and 36 meters respectively, they were created in the 3rd and 4th centuries AD. Despite pledges from a united international community, the Buddha statues were brutally blown up in March 2001. This was an unprecedented act in many ways: it took place during peacetime and was not a consequence of warfare. Moreover, it was an act directed deliberately towards another religion and culture, and completely ignoring the protests of the UN and the international community. In addition, the destruction was carefully planned and communicated through media.

It is clear that the destruction of the Buddhas was part of a major plan which aimed at eradicating the ancient pre-Islamic Afghan heritage in its entirety. But it is quite possible that the execution of this plan was a protest against the international community for not having acknowledged the Taliban state.

The fact that the destruction of the Bamiyan Buddhas took place during peacetime, and in addition by the de facto government of the country at that time, although not recognised internationally, made the Hague convention and its protocols completely toothless in this situation. This led to the 2003 UNESCO Declaration, in which each state’s responsibility to protect its cultural heritage also in peacetime was underlined. Since we are dealing with a declaration and not a convention, this is only a soft law instrument, but an important first step towards a binding treaty on the destruction of cultural heritage. Statements like this by the UN contribute in creating international customary law, and is thus another important piece in the puzzle of international legislation against the destruction of cultural heritage.

133 Wangkeo, op. cit. n. 22, pp. 245-246.
134 Francioni and Lenzerini, op. cit. n. 32, p. 625.
135 Francioni and Lenzerini, op. cit. n. 32, p. 620.
136 Francioni and Lenzerini, op. cit. n. 32, p. 627.
137 Wangkeo, op. cit. n. 22, p. 256.
140 Gerstenblith, op. cit. n. 13, p. 383.
Apart from the Bamiyan Buddhas, hundreds of ancient statues in the Kabul Museum were destroyed by the Taliban in 2001. The great Buddhist temple at Hadda near Jalalabad, a masterpiece of Gandhara art, was demolished by Soviet bombs and plundered. Another invaluable monument was the so-called “Minaret of Chakari”, neither a minaret nor Islamic, but a Buddhist pillar monument dating to the 1st century AD. It was damaged by Soviet troops during the occupation, but was completely destroyed by the Taliban in 1998.

Although the Taliban regime was ousted in 2001 after the US- and NATO-led invasion "Enduring freedom,” civil war in Afghanistan has continued, and the Taliban in early 2018 challenges state control in about 30% of the country against only 7% in 2015. The continued instability makes the situation for cultural heritage in Afghanistan still critical, and both Afghanistan's UNESCO world heritage sites - the Bamiyan valley and the Jam minaret with its archaeological area - are, not surprisingly, on the list over endangered sites.

4.2 Iraq
Some of the worst armed conflicts the last four decades have either been caused by Iraq or played out in Iraq. This in combination with Iraq’s uniquely rich cultural heritage makes it an interesting case study. The case of Iraq under Saddam Hussein illustrates well how cultural property can be used in nationalist- and war propaganda. The wars fought in Iraq give evidence of collateral damage of cultural property, and how it can be prevented. The states that have invaded Iraq from 1991 and on have been democratic, and thus the conclusions that can be drawn regard primarily such states. In addition, the Iraq example gives many examples of intentional destruction of cultural property, how it is carried out, how it can be prevented and how such crimes may be prosecuted in the future. The point of departure here is that there is great

---

141 Feroozi and Tarzi, op. cit. n. 126, p. 2.
142 Feroozi and Tarzi, op. cit. n. 126, p. 2.
143 Feroozi and Tarzi, op. cit. n. 126, p. 2.

52
potential for legally preventing collateral damage among democratic states, whereas intentional destruction is almost impossible to prevent legally.

4.2.1 Occupation of Kuwait and the Gulf War 1990-91
4.2.1.1 Intentional destruction by Iraqi forces
In August 1990, Saddam Hussein invaded Kuwait in open violation of international law. As a consequence, a coalition of UN and U.S. forces attacked Kuwait in 1991 in the so-called Operation Desert Storm. In a few weeks, the coalition forces had recaptured Kuwait and won an astounding military victory.

As a matter of fact, Iraq under Saddam Hussein had until the 1991 invasion one of the strictest and best functioning heritage protection systems in the world. The ancient empires of Babylonia and Assyria were perfect images of a glorious past with autocratic and powerful rulers like himself, and like so many dictators, he used the past in order to glorify his own regime. However, Saddam Hussein wanted to paint the UN coalition as ruthless aggressors, and therefore destroyed monuments in order to put the blame on coalition forces. Moreover, Iraqi forces clearly violated international law by intentionally placing military equipment and storing weapons in connection with cultural heritage, as well as intentionally forcing coalition forces to combat in the vicinity of cultural heritage. The policy of Saddam before and after the invasion shows clearly that he regarded the ancient heritage of his country as yet another instrument of power; he safeguarded it if it was useful to him, but did not hesitate to destroy it if it could give him political advantages.

147 Ralby, op. cit. n. 146, pp. 173-174, n. 35.
During the occupation of Kuwait by Iraqi forces, destruction of cultural heritage had occurred, which became obvious to the world only after the recapture by coalition forces: the National Museum of Kuwait had been outright plundered by the staff of the Iraqi National Museum. Most of the artefacts were returned after the victory of the UN coalition in 1991, but the collection was damaged and artefacts disappeared.\textsuperscript{148} Faced with defeat at the end of the war, Iraqi forces set fire on the National Museum of Kuwait, which burned down together with the remains of its collections. The looting of Kuwait was clearly a part of Saddam Hussein’s policy to use cultural heritage to build the image of a glorious past for the nation. At the same time, Kuwait as a nation was robbed of its national heritage, and therefore also part of its historical memory. Since Saddam wanted to erase the state of Kuwait, it was logical to also erase its historical and cultural memory.\textsuperscript{149} Although the destruction of cultural heritage was in clear violation of International humanitarian law and the Hague convention, Iraq could not be indicted for its crimes, since no mechanism for indictment existed at this time.

\textbf{4.2.1.2 Collateral damage caused by US and coalition forces}

Operation Desert Storm was remarkably well planned, and this is also reflected in the way cultural heritage was treated. During the invasion, UN coalition forces showed consideration and respect for cultural heritage. Only the most precise technology was used for bombing, and most importantly, archaeologists were invited to take part in the planning of the campaign in order to avoid destruction of cultural heritage.\textsuperscript{150} Three major recorded cases of destruction caused by US and coalition forces: an air attack on a weapon’s depot near the site of Ktesiphon caused cracks in a 4th century AD triumphal arch; Tell-el Lahm, a Chaldean centre, was partly bulldozed by US troops in order to create firing positions; in an attack on a nearby Iraqi air

\begin{itemize}
\item \textsuperscript{148} Ralby, op. cit. n. 146, pp. 170-171.
\item \textsuperscript{149} Montgomery, Bruce P. “The Rape of Kuwait’s National Memory”, \textit{International Journal of Cultural Property} 22, 1 (2015), pp. 61-84.
\item \textsuperscript{150} United States Department of defense, U.S. Central command. Cultural property training resource: Iraq. \textit{The impact of war on Iraq’s cultural heritage: Operation Desert Storm} [https://www.cemml.colostate.edu/cultural/09476/iraq08-01enl.html] [Quoted 10.04.2018]
\end{itemize}
base, the brickwork of the famous ziqqurat of Ur was damaged.\textsuperscript{151} There could have been much more potential damage at Ur, since two Iraqi jet fighters had been parked at the entrance to the temple of Ur, in violation of international law. However, the coalition command decided not to take out the planes (as it legally was allowed to do according to the principle of military necessity), but instead decided to simply pass by, since it was estimated that the fighters “were incapable of military action from their position.”\textsuperscript{152}

### 4.2.1.3 Looting by civilians

In the internal chaos following the Gulf War, nine regional museums were looted by a mob opposing the regime of Saddam Hussein. This was a serious loss, since many objects recently had been delegated to such regional museums from the Baghdad Museum; 4,000 artefacts were looted or destroyed. Many ended up on the international black market; some of the objects were found on international art auctions at London and New York.\textsuperscript{153} It is clear that antiquities from Iraq had become in very high demand in the late 80’s and early 90’s, perhaps as a consequence of three huge auctions at Christie’s and Sotheby’s of the important Erlenmeyer collection (legally acquired), which probably increased the interest of collectors significantly, and consequently also the demand for such objects on the black market. In 1994, a fragment of a frieze from the Assyrian Sennacherib’s palace at Nimrud went for 12 million dollars at an auction sales at Christie’s. The enormous prices for such pieces clearly encouraged the looting of archaeological sites in Iraq. The sanctions directed against Iraq after the Gulf War also played a fundamental role for the increasing looting of sites. The Iraqi military did no longer have the

\textsuperscript{151} United States Department of defense, U.S. Central command. Cultural property training resource: Iraq. \textit{The impact of war on Iraq’s cultural heritage: Operation Desert Storm} [https://www.cemml.colostate.edu/cultural/09476/iraq08-01enl.html] [Quoted 10.04.2018]

\textsuperscript{152} United States Department of defense, U.S. Central command. Cultural property training resource: Iraq. \textit{The impact of war on Iraq’s cultural heritage: Operation Desert Storm} [https://www.cemml.colostate.edu/cultural/09476/iraq08-01enl.html] [Quoted 10.04.2018]

\textsuperscript{153} Ramasastry, Anita. (2003) “Toppling Saddam, not his statues: why it is important to stop the looting of medical supplies, the theft of cultural artifacts and other economic war crimes”, \textit{FindLaw} [https://supreme.findlaw.com/legal-commentary/toppling-saddam-not-his-statues.html] [Quoted 16.05.2018]; Ralby, op. cit. n. 146, p. 182, n. 65.
resources to guard the sites, air patrolling of sites became impossible due to the imposed no-fly-zone, and museums lacked the material needed for documenting thefts.\textsuperscript{154}

4.2.2 Operation Iraqi Freedom – the US invasion of Iraq 2003 and its aftermath
As a consequence of the UN security council resolution which stated that the regime of Saddam Hussein possessed weapons of mass destruction, US and allied forces, mainly British, invaded Iraq in March 2003 in order to depose the dictator. The real reason behind the invasion was probably rather a combination of interests, not least the intention of George W. Bush to finish what his father had started, that is the removal of Saddam Hussein from power, but probably also interests in the oil fields and an interest to protect Israel.\textsuperscript{155} Baghdad and the regime fell within a few weeks, but the aftermath of the invasion unleashed a political chaos and civil war in this ethnically and religiously divided nation, which still after fifteen years we have not really seen the end of.

4.2.2.1 Collateral damage caused by US forces
The destruction of cultural heritage was this time mainly due to the aggressor, namely the US and UK coalition forces. This devastation of cultural property was a result of the bad planning of the invasion and the chaos that followed. Archaeologists and other cultural heritage experts went to media with concerns for the cultural heritage of Iraq and the need to protect it. Some scholars were approached by US and British military authorities and were asked to help in planning the campaign in order to avoid damage to the rich cultural heritage of Iraq.\textsuperscript{156} At least two meetings took place in the Pentagon with archaeological experts, who provided the military with maps and exact coordinates of the sites in question. The experts warned explicitly that the

\textsuperscript{154} United States Department of defense, U.S. Central command. Cultural property training resource: Iraq. \textit{The impact of war on Iraq's cultural heritage: Operation Desert Storm} [https://www.cemml.colorado.edu/cultural/09476/iraq08-01enl.html] [Quoted 10.04.2018]

\textsuperscript{155} Tanner, Stephen. \textit{Afghanistan: A military history from Alexander the Great to the war against the Taliban}, Philadelphia: Da Capo Press, 2009, p. 327; Lostal, op. cit. n. 40, p. 149.

\textsuperscript{156} Stone, op. cit. n. 8, p. 62.
Baghdad Archaeological Museum was host to a vast amount of invaluable archaeological treasures and for the risk of looting.\textsuperscript{157} Clearly, as it turned out, the advice was not listened to by those responsible for the invasion.\textsuperscript{158}

The US army built bases in the vicinity of seven archaeological sites in Iraq. Two of these were either tentative or declared world heritage sites; the ancient city of Babylon with surrounding landscape, and the archaeological site of the ancient city Samarra.\textsuperscript{159} On the site of Babylon, the camp was fortified with large earth barriers which were created through digging; bulldozers dug, levelled and scraped the site.\textsuperscript{160}

On the world heritage site Samarra barracks and a training camp for 1,500 members of the Iraqi National Police was constructed. The spiral minaret of the Great Mosque, dating to the ninth century, was used as a sniper post.\textsuperscript{161} Until now, one and a half decade later, there has been no good explanation to why the US military had to construct large military camps in the midst of two world cultural heritage sites.\textsuperscript{162} It seems that the United States violated article 6 (3) of the World Heritage Convention, which states that

\begin{flushleft}
\textsuperscript{157} United States Department of defense, U.S. Central command. Cultural property training resource: Iraq. The impact of war on Iraq’s cultural heritage: Operation Iraqi Freedom [https://www.cemml.colostate.edu/cultural/09476/iraq08-01enl.html#freedom] [Quoted 10.04.2018]
\textsuperscript{158} Stone, op. cit. n. 8, pp. 62-63.
\textsuperscript{162} Lostal, op. cit. n. 40, p. 154.
\end{flushleft}
“Each State Party to this Convention undertakes not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage referred to in Articles 1 and 2 situated on the territory of other States Parties to this Convention.”  

It remains to decide whether the construction of the military camps was a “deliberate measure” to damage the sites. There can be little doubt that the United States as a State Party to the Convention had the responsibility to understand the consequences of its actions when establishing a military camp within a World heritage site. Thus, the act can be considered a “deliberate measure” to damage the site, and the US therefore clearly violated article 6 (3) of the World heritage convention.

In retrospect, it is shocking how little the precious cultural heritage of Iraq was considered in connection with the planning. Two important factors that contributed to complete failure to protect cultural property was the lack of troops, and the failure to plan for a possible chaotic aftermath to the invasion. A third factor was that the importance of the cultural heritage to the local population had not been understood, and the dangerous consequences of the humiliation they felt when their heritage was devastated in front of their eyes. There is no doubt that a good knowledge of the local cultural heritage among the military forces is a "force multiplier", as it contributes to the goodwill of the local population, and to the overall success of the military operation. There are in fact signs that such arguments have become important among the military in recent years.

4.2.2.2 Looting by civilians

On April 8-12, the Iraqi National Museum was plundered by civilians, after the staff of the museum had been forced to leave it due to security reasons. More than a week later, on April 16, US tanks arrived and secured the museum against further looting. In the meantime, while

---

163 World Heritage Convention, art. 6(3).
164 Stone, op. cit n 8., p. 63.
165 Stone, op. cit. n. 8, pp. 63-64.
166 Stone, op. cit. n. 8, p. 66.
looting of the museum was at its peak, despite media attention and protests, US defense secretary Donald Rumsfeld called the concerns "exaggerated."\footnote{United States Department of defense, U.S. Central command. Cultural property training resource: Iraq. \textit{The impact of war on Iraq's cultural heritage: Operation Iraqi Freedom} [https://www.cemml.colostate.edu/cultural/09476/iraq08-01enl.html#freedom] [Quoted: 10.04.2018]} It can certainly be argued that the United States in this connection broke the rules of the Hague convention, but since it became a State Party to the convention only in 2009, this has not had any legal consequences. Altogether, as many as 1 million books, 10 million documents and 15,000 archaeological artefacts have disappeared during the US-led invasion in 2003.\footnote{Isakhan, Benjamin. "Targeting the symbolic dimension of Baathist Iraq: cultural destruction, historical memory and national identity", \textit{Middle East Journal of culture and communication} 4 (3) (2011), pp. 257-281; p. 266.} With the widespread looting in Iraq in the 1990’s in mind, it would have been easy for the coalition forces to predict that there would be a considerable risk for the same happening in connection with the invasion.\footnote{United States Department of defense, U.S. Central command. Cultural property training resource: Iraq. \textit{The impact of war on Iraq's cultural heritage: Operation Iraqi Freedom} [https://www.cemml.colostate.edu/cultural/09476/iraq08-01enl.html#freedom] [Quoted 10.04.2018]}

A direct consequence of the looting of the Baghdad National Museum was a UN Security Council resolution (no. 1483) passed on May 22nd, 2003, which called for all member states to cooperate in returning stolen objects and return them to the museum, as well as a ban on the trade with all objects that could be suspected to have been stolen in Iraq. Most western states, including the United States, enacted these trade restrictions.\footnote{Gerstenblith, op. cit. n. 13, 355, n. 65.}

\subsection*{4.2.2.3 The Iraqi Special Tribunal (IST)}

After the fall of Saddam Hussein and the US-led invasion in 2003, a special criminal tribunal was established, the IST, which was supposed to deal with crimes against humanity committed by any Iraqi national during and prior to the reign of Saddam Hussein, between 1968 and 2003.\footnote{Ralby, op. cit. n. 146, p. 177.} No Baath party officials have so far been prosecuted for the destruction of cultural heritage, and as Ralby has pointed out, there is no foundation in the statute of the IST for the
prosecution of the crime of destruction of cultural heritage. Consequently, it has not been possible to connect destruction of cultural heritage with crimes against humanity, and no such effort has been done either. It seems clear that this was not an issue the creators of the court had been interested in.\textsuperscript{173}

4.2.3 ISIS occupation of Iraq 2014-2017
4.2.3.1 Deliberate destruction by ISIS
In the course of 2014 and 2015, large areas of Iraq were occupied by the Islamist extremist organisation ISIS. Their original base was Syria, where it had already occupied vast territories, taking advantage of the chaotic situation following the outbreak of the civil war there in 2011. The aim of ISIS has been to create a “caliphate”, a state, in Syria and Iraq. In 2015, it was at the height of its power, but by the end of 2017, ISIS has been almost completely defeated militarily and lost 90% of its former territory.\textsuperscript{174}

From early on, it became evident that part of the strategy of ISIS was the destruction of art and monuments that according to their totalising and extremist view in any way could be regarded as an insult to the prophet and Islam. This would include all kinds of art and monuments that could be connected to other religions – a vision of a “new order”.

The archaeological site of Nimrud, an ancient city 30 km south of Mosul in Iraq, was thoroughly levelled and destroyed by bulldozers in 2015. Nimrud was the first capital of the Assyrian empire, and prospered between c. 900-612 BC. In 2015, a ziggurat, a type of pyramid built by dried bricks, which was still preserved to a height of some 40 metres, was levelled by ISIS.\textsuperscript{175} Furthermore, Assyrian frescoes and art of inestimable value from Nimrud were destroyed.

\textsuperscript{173} Ralby, op. cit. n. 146, p. 191.
\textsuperscript{174} Burke, Jason (2017) “Rise and fall of Isis: its dream of a caliphate is over, so what now?” The Guardian [https://www.theguardian.com/world/2017/oct/21/isis-caliphate-islamic-state-raqqa-iraq-islamist] [Quoted 25.05.2018]
Nimrud is since 2000 on the UNESCO tentative list of World Cultural Heritage sites. The site was liberated by Iraqi forces on November 15th 2016.  

Another site that has suffered destruction at the hands of ISIS is the Assyrian royal city of Khorsabad. It was one of three capitals in the Assyrian empire, and is famous for its sculptures and stylistic innovations. ISIS is thought to have looted the archaeological site. Late in 2016, Kurdish peshmerga forces dug trenches in the area and discovered Assyrian sculpture fragments. The trenches have made significant damage on parts of the site.

The so-called tomb of Jonah (or Nebi Yunus in Arabic) is situated east of Mosul, on the site of the ancient Assyrian capital Nineveh. In July 2014 the shrine, which is believed to contain the remains of the biblical prophet Jonah, who also is revered as a prophet by muslims, was blown up by ISIS. The act was probably directed towards this partly Christian cult, but also towards the extremist conviction that devotion of shrines of this type are against sharia law. In the same way, many Christian churches and monasteries in northwestern Iraq have been destroyed because of their supposedly heretic nature. After the recapture of Mosul by Iraqi forces, an intricate system of tunnels was discovered beneath the shrine of Nebi Yunus. The tunnels have given evidence of an Assyrian palace lying beneath the shrine, dating to around 600 BC. It is presumed that the tunnels were built by ISIS in order to excavate artefacts that could be sold.

As a consequence of the occupation of Mosul by ISIS in 2014, both its museum and library were devastated. At the archaeological museum of Mosul, sculptures and other artefacts were

---


177 Romey, op. cit. n. 174.

178 Romey, op. cit. n. 174.

179 Gerstenblith, op. cit. n. 13, p. 372.

180 Gerstenblith, op. cit. n. 13, p. 372.

181 Pettit, Harry (2017). “Revealed: 2 600-year-old-palace is found buried under the ruins of a shrine blown up by ISIS in Mosul”, Mail Online [http://www.dailymail.co.uk/sciencetech/article-4289696/600BC-palace-buried-tomb-destroyed-ISIS.html] [Quoted: 10.04.2018]
The museum had 173 original sculptures and was the second largest in Iraq. Both large statues from the World Heritage site Hatra, as well as artefacts from the area of Nineveh were destroyed. The Mosul library was burnt together with thousands of books and manuscripts, among them rare manuscripts from the 18th century and books from the Ottoman era. UNESCO called it “one of the most devastating acts of destruction of library collections in human history.”

Hatra, 110 km southwest of Mosul is an ancient city, founded in the Hellenistic period. It is a unique example of a circle-shaped, fortified city, with a perfectly preserved double-wall, and is listed on the UNESCO list of world cultural heritage since 1985. It was taken by ISIS in 2014, and used for storing weapons, for military exercise as well as site of executions. In March 2015 it was reported that ISIS had destroyed all building remains, but when Hatra was recaptured by Iraqi forces in April 2017, it was concluded that the damage was much less than feared. Mainly sculptures had been damaged or destroyed, but the buildings were generally intact. Hatra has since 2015 been included on the list of UNESCO of world cultural heritage sites in danger.

4.3 Yugoslavia
The conflict in Yugoslavia between 1991-1995 was the first large-scale and the bloodiest armed conflict in Europe since the end of World War II. Being primarily and ethnic conflict, it introduced a new term in the vocabulary of warfare: ethnic cleansing. The systematic persecution and genocide of the Bosnian Muslims did not only include the killing of tens of thousands

---

184 UNESCO World Heritage Centre (2017) “UNESCO Director-General welcomes the liberation of Hatra and will send Emergency Assessment mission ‘as soon as possible’” [https://whc.unesco.org/en/news/1658/] [Quoted 27.05.2018]  
186 A background to the wars is given in Walasek, Helen. Bosnia and the destruction of cultural heritage, Farnham: Ashgate, 2015.
of innocent civilians, but also the destruction of their places of worship, museums, libraries and archives.\textsuperscript{187} This makes the war in Yugoslavia a very interesting case study regarding the intentional destruction of cultural property in combination with the persecution of an entire ethnicity. The war crimes in Yugoslavia were prosecuted by the International Criminal Tribunal for Former Yugoslavia (ICTY), and therefore a vast amount of case law regarding destruction of cultural property is available from this conflict. The problem is, however, that the destruction of cultural property almost always is intimately connected with other war crimes, and therefore there are no isolated cases focusing exclusively on cultural property. The point of departure here is that the case-law of the ICTY is fundamental for any discussion of destruction of cultural property in the context of ethnic cleansing.

4.3.1 Intentional destruction (cultural cleansing) by Serb and Bosnian-Serb forces

The war in Bosnia 1992-1995 was essentially a conflict between the three ethnic groups living there: Serbs, Croats and Bosniaks. When communist Yugoslavia began to crack in its seams in the late 1980’s, old, earlier suppressed ethnic hate and nationalist sentiments among the different ethnicities began to surface, and were exploited by politicians like the Serb leader Slobodan Milosevic. Conflict arose when Croatia in 1991 declared its independence from Yugoslavia. Serb populations were widespread in Croatia since generations, and the nationalist government in Belgrade promised that all Serbs would be united in the same country. The Serb-dominated Yugoslavia would not allow Croatia with its many Serb inhabitants to break out, and war became inevitable. The Croatian war for liberation was, however, successful, and after a short offensive Croatia had forced all JNA troops out of its territory.\textsuperscript{188}

In 1992 the conflict which would appall Europe and the world, broke out in the heart of Yugoslavia: Bosnia-Hercegovina.\textsuperscript{189} This was the ethnically most complicated region of the country. Here lived Orthodox Serbs, Catholic Croatians, and above all Muslim Bosniaks together and had done so for centuries. Here the ethnic problem became most evident: the Serb nationalist government did not regard the Bosniaks as a people of its own and regarded Muslims as a threat to their Serbian and Christian identity. From this point of departure, a policy of ethnic cleansing

\textsuperscript{187} Walasek, op. cit. n. 186.

\textsuperscript{188} Walasek, op. cit. n. 186, pp. 2-7

\textsuperscript{189} Walasek, op. cit. n. 186, pp. 2-7
of Bosnia-Hercegovina was developed by the Serbians. Croatia soon won its independence, and was led by the staunch nationalist Franjo Tudjman, who like Serbia, saw Bosnia-Hercegovina not as a country of its own, but only as having been partly inhabited, especially Hercegovina, by Catholics of Croatian ethnicity for centuries. Tudjman’s policy was to gain as much land as possible from Bosnia in order to create an ethnically clean Catholic Croatia.

This background of ethnic sentiment is necessary to keep in mind when discussing the destruction of cultural property in Yugoslavia, since it gives the explanation and motivation behind the destruction. Destruction of cultural property was above all undertaken in the context of ethnic and cultural cleansing. The great perpetrators were the Serbian JNA army, which stood for the major part of destruction, above all of Muslim heritage, but also of Catholic. On the Croatian side, there was also destruction of Orthodox and Muslim property, but not on the same scale. The Bosniak government did hardly have an army and was the main victim of this destruction and ethnic cleansing itself. Isolated instances of destruction of cultural property was perpetrated also on the Bosniak side, but on an insignificant scale compared to that of the other parties of the conflict.\textsuperscript{190}

Sarajevo, the capital of Bosnia-Herzegovina, was probably the city which was worst hit. During the protracted siege by the Bosnian-Serb army 17 of 19 mosques were destroyed. In addition, all three Catholic churches in Sarajevo were destroyed.\textsuperscript{191} In 1992 the National Library of Bosnia-Herzegovina at Sarajevo was shelled and burned to the ground. About 155 000 valuable books in addition to 478 manuscript codices were destroyed. Also all newspapers, journals and books published since the 1850’s were destroyed.\textsuperscript{192} In May 1992 the Oriental Institute in Sarajevo was shelled and burnt to the ground with all its contents, including 5 263 codices in Arabic, Turkish, Persian and Bosnian, as well as a cadaster of ownership of land from the end

\textsuperscript{190} It is important to underline that destruction of cultural property by no means was on a similar scale on all sides of the conflict. The Bosnian Serb Republic and the JNA were responsible for the vastly greatest part of the destruction (Walasek, op. cit. n. 186, pp. 25; 58-59).


\textsuperscript{192} Walasek, op. cit. n. 186, pp. 46-48.
of Ottoman rule in Bosnia; altogether 500 years of Bosnian-Muslim history which went up in
flames.\(^{193}\)

A clear indication that the destruction of mosques was not mere collateral damage of warfare
is the fact that mosques and churches were destroyed in many places where no combat took
place.\(^ {194}\) In the areas controlled by Serb forces during the war, nearly 100% of all Muslim places
of worship and 75% of all Catholic churches were destroyed.\(^ {195}\)

4.3.2 \hspace{1em} Intentional destruction by Croatian and Bosnian-Croatian forces
On November 9\(^{th}\) 1993, artillery of the separatist Bosnian-Croatian army shelled the beautiful
old bridge (Stari Most) in Mostar, south of Sarajevo. After a few hits, the Ottoman bridge, built
in 1566, went down in the waters of the Neretva River. This was a senseless, deliberate act of
pure will of destruction,\(^ {196}\) but at the same time also deeply meaningful, since the destruction
clearly reflected a contempt for Muslim culture and history and for the bridge’s central role in
the multi-cultural life of Mostar. The bridge, which even gave the name to the city, meaning
“bridge-keeper”, had connected the Croatian, Catholic side of the river with the Muslim side
for centuries. Its destruction became a symbol of the tragic senselessness of the war, but also of
its strong cultural-ethnic overtones. Article 3(d) of the ICTY statutes states that violations of
the customs of war such as “seizure of, destruction or willful damage done to institutions dedi-
cated to religion, charity and education, the arts and sciences, historic monuments and works of
art and science” can be prosecuted. However, the ICTY tribunal did not regard the shelling of
the bridge in itself as a criminal act, since it at the time could be regarded as a military object,
given its importance for the transport of supplies. Accordingly, military necessity according to
the Hague convention, article 4(2), could be argued.\(^ {197}\) Instead, the prosecuted were found
guilty of the crime listed in the ICTY statutes, article 3(b): ”wanton destruction of cities, towns

---

\(^{193}\) Riedlmayer, op. cit. n. 191, p. 112.


\(^{195}\) Walasek, op. cit. n. 186, p. 59.

\(^{196}\) Petrovic, op. cit. n. 43; Walasek, op. cit. n. 186, pp. 49-52.

or villages, or devastation not justified by military necessity.” The totality of the widespread destruction in the siege of Mostar clearly passed the threshold for ”military necessity”, in contrast to the isolated case of the Old Bridge. The case illustrates two major problems; first the difficulty in arguing against the argument of “military necessity”. Strictly legally, it was difficult to argue that there was no military necessity in destroying the bridge in its capacity as the primary link to food supplies for the besieged Muslim Bosnian troops, and therefore even such a venerable monument as the Old Bridge did not find sufficient protection in international cultural property law. The fact that the accused were not convicted for the destruction of the bridge itself, but instead of a broader formulated war crime, shows the difficulty in separating the crimes against cultural heritage from other war crimes which usually are connected with each other.

4.3.3 Other intentional destruction
To a slightly different category belongs that cultural heritage which was not destroyed mainly as part of direct ethnic cleansing, but rather as a consequence of ruthless warfare.

The first and also prime example of this was the shelling by Yugoslav navy forces of the old town of Dubrovnik in December 1991. By the end of the shelling, about 30% of the town had been ruined or badly damaged, while 10% was set ablaze. Dubrovnik was already at that time a UNESCO-protected world heritage site. Dubrovnik's old town is uniquely well preserved with precious architecture dating from the 14th-18th century. Among the victims was the Renaissance St Anne church which burnt to the ground. Dubrovnik was under that period known as Ragusa and was one of the leading trading cities in the Mediterranean. The fact that Yugoslav forces attacked a world heritage site in this way created an international outrage and was a disaster for Yugoslav/Serbian PR around the world. The attack showed that the Yugoslav army would use any means it considered necessary in the battle for Croatia, regardless of the consequences for civilians and cultural property.

198 Gerstenblith, op. cit. n. 13, p. 372.
199 Detling, op. cit. n. 9, p. 68.
200 Detling, op. cit. n. 9, p. 67.
The 16th-century Croatian fortress at Stara Gradiska was damaged when it was taken by Serbian forces, even as it had the protective flag of the Hague convention, article 17. Several other heritage sites were damaged by Serbian forces despite this flag, including the beautiful Renaissance Sponza Palace at Dubrovnik, damaged by shelling from the Yugoslav Navy on October 23rd 1991. At the old city of Vukovar in Croatia, prehistoric and Medieval remains were also damaged by Serbian forces.201 The Eltz castle in Vukovar, a Baroque-Classicist castle from the 18th century, housing the Vukovar City Museum, was badly shelled and burned to the ground.202 In Osijek, the churches of the Assumption and St Dimitrius, were burnt.203 The Renaissance garden Arboretum, north of Dubrovnik, was burnt by Serb forces, destroying specimens of a five hundred-year old flora.204

It seems clear that one of the reasons for the Yugoslav attacks on many of Croatia's historic monuments was to hurt their great potential for attracting tourists and denying the country income from this important source of wealth.205

In Bosnia, the major part of destruction can be ascribed to destruction of cultural heritage as part of a policy of “cultural cleansing” by the Bosnian-Serbian or JNA forces. By destroying cultural heritage, an important part of the collective cultural-historical memory of the Muslim Bosniaks was erased, and consequently, also part of their identity. Similar methods were used by Bosnian-Croatian forces in the siege of Mostar.206

Other destruction, mainly in Croatia, was similarly part of a policy of “cultural cleansing” in tandem with the ethnic cleansing, but was also perpetrated in order to gain military advantages or demoralise civilians and cause harm to the Croatian tourist economy. The brutal attack on Dubrovnik, for example, can probably be regarded as having had elements of all the intentions mentioned above.

201 Detling, op. cit. n. 9, p. 66, n. 156.
202 Detling op. cit. n. 9, p. 67.
203 Detling op. cit. n. 9, p. 67.
204 Detling op. cit. n. 9, p. 67.
205 Detling op. cit. n. 9, p. 69.
206 Walasek, op. cit. n. 186, p. 43.
4.4 Syria

The combination of armed conflict and Syria’s character as an “open-air museum” with a vast number of unique cultural property sites (six sites on the World Heritage list and twelve on the tentative list), makes destruction of cultural property in the context of the Syrian civil war a particularly interesting case study. The destruction of cultural property by ISIS in Syria (and Iraq) is probably the best example of intentional systematic destruction of this kind. The destruction by ISIS of the Baal-shamin temple and other structures at Palmyra caused an international outcry. In order to understand the character of this intentional destruction, and how it can be prevented, it is necessary to look more in detail on the phenomenon. What different forms have the destruction of cultural property by ISIS taken? In addition, the Syrian conflict also gives evidence of collateral damage caused by both the Syrian regime and the rebel forces and provides an interesting background for a discussion on where the legal responsibility for such destruction lies. The point of departure here is that there is some potential to legally prevent collateral damage, whereas intentional destruction such as that caused by ISIS is much more difficult to prevent using legal instruments, since extremist organizations of this extremist, totalitarian kind defy and ignore any kind of international humanitarian law.

4.4.1 Civil War 2011-present

4.4.1.1 Collateral damage from military activity by Syrian regime forces and rebel forces

The beginning of the conflict in Syria dates to 2011 and the uprisings against the ruling Assad regime as a consequence of the “Arab spring”. The political uprising against the rule of Bashar al-Assad developed into a full-scale armed conflict in July 2012. The scale and intensity of this armed conflict in combination with the uniquely rich cultural heritage of Syria makes it a given as a case study in the field of destruction of cultural property. Syria has been described as an “open-air museum” due to its rich heritage, with six sites on the UNESCO World Heritage list, and its cultural heritage is even more vulnerable than that of Iraq, since it is often situated in important urban settlements. The civil war is still ongoing, but has the last year lost in

---


208 Lostal, op. cit. n. 40, pp. 94-95.
intensity due to two main reasons: the military success of Syrian government troops and allied Russian air force as well as the definitive military defeat of ISIS in the course of 2017.

Aleppo is the largest city in Syria, and its old town is because of its outstanding cultural heritage on the UNESCO list of World Cultural Heritage. Like all the other world heritage sites in Syria, it is since 2013 also on the list of endangered UNESCO world heritage sites. Syrian military forces occupied parts of Aleppo including the Medieval citadel, and large parts of the old town have been damaged in connection with the fighting for control of the city, including the famous souq (bazaar), which was damaged and partly destroyed by fire, the minaret of the Great Umayyad mosque of Aleppo, which was shelled and severely damaged, as well as the historical Al-Wakfya library which was destroyed.

Assad forces air-bombed the Medieval crusader fortress Crac des chevaliers near Homs in 2012 and 2013, after it had served as a military position for rebel forces. The Crac des chevaliers is inscribed on the UNESCO list of World Heritage as one of the finest examples of crusader fortress architecture, built by the Hospitaller knight order in the 12-13th centuries.

The Crac des chevaliers is an interesting case with regard to the principle of “imperative military necessity.” It can be argued that the fortress had been turned into a military object by the rebel forces at the moment of attack. It is difficult to argue against that there was no feasible alternative available to obtain a similar military advantage given that the fortress dominated the area in the vicinities of the rebel-controlled city of Homs. This makes the issue depend on the third point, whether the attack was ordered by an officer of a rank high enough. With regard to the Crac des chevaliers, it is impossible to know before a detailed investigation has been carried out, and the case whether the attack was illegal or not remains unsolved.

It is clear that ancient fortresses by their own nature are easily regarded as military objects, since they are situated on strategic points in the landscape, with good defensive qualities. The

210 Gerstenblith, op. cit. n. 13, p. 358.
citadel of Aleppo and the Crac des chevaliers are such ancient fortresses, which have been
damaged due to their use by military forces. Since the citadel was not a military objective prior
to the damages caused by the Syrian army, the military necessity waiver can clearly be ruled
out here. In the case of the Crac des Chevaliers, the fortress had been turned into a military
objective by rebel forces, and the military necessity waiver could theoretically have been used
in this context.

The church of St Simeon the stylite in Northern Syria is another victim of war activities. It is
protected as a UNESCO World heritage site being part of the North Syrian villages heritage.\textsuperscript{212}
The church dates to c. AD 500 and it was held by ISIS as a stronghold, but later recaptured by
Kurd forces. On May 8th 2016 the church and the pillar on which the hermit saint according to
legend was seated for 40 years was seriously damaged in an air strike, either by Syrian or Rus-

Since Syria has not ratified the Second Protocol to the Hague Convention, it could appear that
this protocol and its prohibition in article 6 (a) regarding the turning of cultural property into a
military object does not concern this state. However, Syria signed the instrument in 1999, and
the article 18 of the Vienna Convention on the Law of Treaties is very clear regarding which
responsibilities the signing of a convention entails: “A state is obliged to refrain from acts which
would defeat the object and purpose of a treaty.”\textsuperscript{214}

If we were to use the “threefold test” of the Second Protocol to the Hague convention on the
case of St Simeon, it could be argued that the site had been turned into a military object, first
by ISIS, then by Kurdish forces. Could a similar advantage have been obtained by attacking an
alternative location? The site is situated on a ridge, and was probably a position of some strate-
gic significance to ISIS. As a consequence it cannot be ruled out that there were no alternatives
to the attack. As in the case of the Crac des chevaliers, the question depends on if the order was

\textsuperscript{212} UNESCO World Heritage List in Danger, \textit{Ancient villages of northern Syria}
\textsuperscript{213} UNESCO World Heritage Centre (2016). “Director-general of UNESCO deplores severe damage
\textsuperscript{214} Lostal, op. cit. n. 40, p. 117.
carried out by an officer of a high enough rank. Also here, the question of military necessity remains very difficult to solve. The case, together with that of the Crac des chevaliers illustrates the difficulty of protecting even World Heritage sites with legal means against collateral military damage.

The ancient site of Bosra, a world heritage site, has also been damaged by combat. Once capital of the Roman province Arabia, it was an ancient city with continuous settlement from Roman to Muslim times. Its citadel and a part of the exceptionally well preserved Roman theatre was damaged by shelling from Syrian regime helicopters in December 2015. The site had recently been taken by rebel forces from the regime. Bosra has a strategic setting in the landscape, and the ancient remains are situated within the modern city. As a consequence, ancient Bosra is very exposed to collateral damage.

Using the threefold test on the case of Bosra, it is clear that the site had been turned into a military object; first by the Syrian regime, then by rebel forces. Could a similar advantage have been obtained by attacking an alternative location? The site has a strategic position with an ancient, still standing citadel. Therefore, it cannot be ruled out that there was no other alternative of obtaining a similar military advantage than to attack the citadel. Just as in the case of the Crac des Chevaliers, it will be a question of how high up in the command chain the decision was taken if the attack was legal according to the regulations of the Second Protocol to the Hague Convention or not. It is certain that by turning the site into a military object, the Syrian regime is culpable of having violated article 4(1) and 4(2) of the Hague Convention and article 6(a-b) in its Second Protocol. In addition it has violated article 4 of the World Heritage

Convention. It has also been concluded by the ICTY that attacking and using a world heritage site militarily makes the crime even worse.\textsuperscript{217}

In January 2018, Turkish air forces bombed and severely damaged the unique ancient, neo-Hittite temple at Ain Dara near Afrin close by the Syrian-Turkish border.\textsuperscript{218} The ancient temple, dating to the Iron-Age, about 1 000 BC, had been destroyed to an extent of c. 60%. The temple is situated on a small, very low hill just outside the Kurdish enclave of Afrin. The site has no strategic importance in itself. Since the attack involved a foreign power (Turkey), the Hague Convention rules of international armed conflict apply. Given that the more narrowly defined rules in the 1999 Second Protocol to the 1954 Hague Convention on military necessity usually are regarded as customary international law, this means that in order to attack, the temple must have had become a military object, that there was no other option to achieve the same military result, and that the order must have come from a high enough ranking officer.

\begin{itemize}
\item It has been reported that the destruction in all probability was intentional, since the site does not seem to have had any military importance and the entrance to the temple was targeted.\textsuperscript{219} If this is true, it would imply that the temple had not been turned into a military object of importance. The principle of proportionality states that the damage must be weighed against the possible military advantage gained.\textsuperscript{220} In this case, there can be little doubt that the loss of the temple by far outweighed the relative advantage the Turkish air force could have gained by taking out an eventual firing position there. The destruction must also be viewed in its context; daily air strikes during several weeks over a large area. It was thus not a battle about a very contested strategic site, such as in the cases of Crac des Chevaliers, the Aleppo Citadel or Bosra, but only one target among many. Even if – against all available evidence – the site had been
\end{itemize}

\textsuperscript{220} The principle of proportionality in attack is codified in Article 51(5)(b) of Additional Protocol I, and repeated in Article 57. See also \textit{ICRC, IHL Database}, Customary law, Rule 14 [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule14] [Quoted 26.04.2018]
turned into a military object, it seems hard to believe that the Turkish air force could not have achieved a similar advantage by attacking another object, since the low hill does not provide an especially advantageous strategic position.

The Afrin offensive has been characterized by brutal attacks and obvious war crimes against civilians.\(^{221}\) Although clear evidence is still missing, it seems probable that by targeting the Ain Dara temple, Turkey has violated customary international law and the respect for cultural property codified in article 4 of the Hague convention and its Second Protocol, since the site of the temple was not a military object.

A sad irony in this tragedy is that the damaged temple was Hittite, which means that it was built by an ancient culture that had its centre in what is today’s central Turkey. Moreover, the very strong Turkish nationalism has used the ancient Hittite culture as a “glorious past” in order to promote pride for the nation. The only alternative to an intentional destruction of the temple is the state party’s disinterest in locating cultural property prior to the attacks in order to avoid damage, in this way also ignoring its commitments in the Hague Convention. The reason for this is difficult to grasp. Either the destruction could be due to ignorance and bad military planning or, more probably, a way of terrorizing the Kurdish inhabitants.

4.4.2 Occupation by ISIS 2014-2017

4.4.2.1 Intentional destruction by ISIS

The cases of destruction outlined above can all be related to collateral damage caused by warfare, and can probably in most cases, apart from the looting of archaeological sites, not be characterised as intentional destruction. But the rise of ISIS in 2014 led to dramatic change. The following cases of destruction of cultural heritage can all be characterised as intentional and are integral to the extremist world-view of ISIS; the destruction of everything that is “heretic” in order to create a new “world order.”

The terror organisation ISIS or Daesh has directed its destruction of cultural heritage mainly against shrines of Muslim sects or Christians, and monuments from antiquity. The reason for this has been that these shrines, monuments and art represent heresy and therefore have to be destroyed.\footnote{222} In the eyes of an extremist organization such as ISIS, everything that is not compatible with their world-view has to be obliterated.

Several churches or monasteries have been destroyed by ISIS in Syria. The monastery dedicated to the sufi saint St Julian (Mar Elian in Arabic) was attacked in 2015. The saint was venerated by both Christians and local Sunnis and the monastery was the focal point of an annual festival in honour of the saint in which the local population was engaged.\footnote{223} A popular shrine, shared by different faiths which tolerate each other is regarded by extremist groups like ISIS as an especially dangerous and abhorrent type of cult, which challenges their idea of religious “purity.”\footnote{224} The archaeological site of Dura-Europos (on the World Heritage tentative list), which has been aggressively looted, housed the earliest known Christian church and a beautifully decorated ancient synagogue.\footnote{225}

When ISIS forces took control of the ancient site of Palmyra in the summer of 2015, they soon began destruction of some of the main buildings there. Palmyra was an ancient city which prospered under the Roman Empire in the 1st-3rd centuries AD as a crossroads for caravan trade. The city, which is uniquely well preserved, in an oasis in the middle of the desert, is an outstanding example of an ancient city where Greco-Roman culture has been hybridized with local cultural traditions. In August 2015, both the temple of Baal-shamin and the temple of Bel were dynamited and blown up by ISIS.\footnote{226} These ancient sanctuaries dating to the 1st century AD, outstanding examples of the cultural hybridization of the area, belonged to the most unique and
important ancient buildings in the Middle East. Later in 2015, the triumphal arch and several of the unique tower tombs of Palmyra were destroyed.\textsuperscript{227} The brutality of the attacks is underlined by the execution of the director of the archaeological museum of Palmyra, dr. Khaled al-Assad. When he refused to cooperate in telling where the finds of the museum were hidden, he was brutally beheaded and his severed body was hung outside the entrance of the museum.\textsuperscript{228}

In the case of the establishment of an international tribunal of the ICTY-type, it would be possible to prosecute crimes violating the Hague convention and its protocols under international customary law. However, such a tribunal will most likely not be possible to create as long as the Assad regime remains in power.\textsuperscript{229}

4.4.2.2 Looting

In the areas controlled by ISIS, the looting of archaeological sites has become endemic. However, it seems clear that looting is frequent also in the territory controlled by the Assad regime. Most of the looting is not carried out directly by ISIS. Instead they allow looting and enjoy the economic rewards through different forms of taxation, control of smuggling and the direct selling of artefacts. There is no doubt that ISIS has earned vast sums on this policy, but it is also probable that parts of the Assad regime have used the same methods.\textsuperscript{230} Since Syria has an enormously rich ancient heritage, the organised looting means that vast amounts of knowledge and information on a heritage that is of importance not only to Syria and its region, but to the whole world, is lost. Hugely important sites such as Dura-Europos and Mari, both tentative


\textsuperscript{229} Gerstenblith, op. cit. n. 13, p. 380.

\textsuperscript{230} Gerstenblith, op. cit. n. 13, p. 375.
world heritage sites, have been looted under ISIS. As pointed out above, looting has also occurred in territory controlled by the Assad regime: the important site of Apamea, also a tentative world heritage has been heavily damaged during the search for valuable Hellenistic and Roman mosaics. Also the site of Ebla, another tentative World Heritage site from the 3rd and 2nd millennium BC, and famous for its large numbers of ancient texts, has been damaged through military activity and looting.

The 1954 Hague convention, has only one regulation, article 4(3), regarding looting. It is probable that, as Gerstenblith argues, this regulation only refers to “the obligation of a military power to prevent its own troops from engaging in theft, vandalism and misappropriation of cultural property.” This interpretation relies on inserting the article 4(3) in the original historic context of its birth, the Second World War and the destruction and looting of cultural property committed by the Nazis. However this article is interpreted, in any case, when looting is practised on such an organised and large-scale way, the actions must be regarded as destruction of cultural heritage in general, and therefore possible to prosecute as a crime against the main rules of the Hague convention. According to O’Keefe such an interpretation would not be necessary, since in his view article 4(3) is clear on this matter. Following either view, it would follow that the Syrian regime, as a State Party to the Hague convention, has violated its article 4(3).

---

231 Gerstenblith, op. cit. n. 13, p. 375; Turku, op. cit. n. 115, p. 41.
233 Gerstenblith, op. cit. n. 13, pp. 374-375;
234 Gerstenblith, op. cit. n. 13, pp. 375-376.
235 Gerstenblith, op. cit. n. 13, pp. 375-376.
236 O’Keefe, op. cit. n. 72, p. 363, n. 123.
5 Enforcement, prevention and implementation of international law on cultural property

In the previous chapter, the international legislation concerning the destruction of cultural property and how it applies on the different cases, was studied. In this chapter we will focus on the
enforcement and implementation of this law. How and to which extent can the legal instruments presented in chapter 3 be enforced and implemented in various contexts? To what extent can international law protect cultural heritage globally, and is there any potential to improve its implementation and enforcement in the future?

We have seen that the vast majority of intentional destruction of cultural property was perpetrated by extremist Islamist terrorist organisations, primarily ISIS in Iraq and Syria and the Taliban in Afghanistan, as well as by quasi-state actors in former Yugoslavia. These crimes take place within states that are not able to control their territory such as Bosnia, Syria, Iraq or post-2001 Afghanistan, or newly created “quasi-states” such as the Taliban state or the “Caliphate” of ISIS, founded on theocracy rather than the rule of law. Since these terrorist organisations or quasi-states do not accept international law, it has no preventive effect either. Consequently, the following discussion will focus exclusively on states and their relation to enforcement and implementation of international cultural property law.

5.1 Enforcement
In a sovereign state, the enforcement of law is one of the main prerequisites for the rule of law. When a crime is perpetrated, it is essential that the state reacts so that the criminal can be prosecuted, convicted and punished. The punishment of crimes is usually regarded as having an important preventive effect on criminality. It is a given that the respect for international law in the same way is dependent on its capacity to enforce regulations.

5.1.1 The international community and the enforcement of international cultural property law
The problem with enforcing international law has been the general absence of tribunals with jurisdiction. There are three general types of international tribunals:
- Ad-hoc tribunals established by the international community (UN), with jurisdiction over a specific territory and a certain period of time. These tribunals are exclusively international in character.237

- “Mixed courts” – nationally located tribunals with both national and international elements in the organization, as well as in structure and function, procedures and application of the law. They consequently use both national and international law.238

- The International Criminal Court (ICC). Treaty-based permanent international criminal tribunal. The tribunal and its characteristics have been described in detail in Chapter 3.

The new world order which was created after World War II was based on international cooperation and the rule of law. It is symptomatic that the era began with the establishment of an ad hoc-tribunal, the Nuremberg tribunal in 1945. The idea of a universal, global unity of mankind had been born with the creation of the United Nations and its charter (1945), and the Universal declaration of human rights (1948). However, the universality and global nature of the Hague convention, just as the other UN legal instruments was only theoretical in the sense that its implementation depended on each single state party. The United Nations is founded on the cooperation between sovereign states, and the only existing global “government”, the UN Security Council, is depending on absolute consensus before it can sanction other states. The Hague Convention itself did not provide rules for criminal responsibility or sanctioning. In the beginning of the time period studied here, i.e. the 1980’s and the last period of the Cold War, there were thus hardly any options for the international community to intervene in the internal affairs of sovereign states.

With the end of the Cold War, the political situation in the world changed dramatically. The world was no longer divided into two power spheres. The 1990’s became a new period of important progress for international law thanks to the general climate of cooperation in the


238 Lenzerini, op. cit. n. 237, p. 43.
international community. However, the international community, the foundation of interna-
tional law and its enforcement, is today a very different world from that of the uni-polar world
of the 1990’s and the establishment of the legal institutions and instruments mentioned above,
most importantly the ICTY and the ICC. At present, the world is witnessing the return to
authoritarianism in many countries. Both Russia and China have an old, nationalist, “real-Poli-
tik” idea of power politics, and play a zero-sum game of geopolitics, where the strongest and
most powerful prevails. Both states regard any international interference in the internal affairs
of a state as a threat to their own sovereignty, and constitute a brake on globalization and a
liberal world order. Since the cooperation of the international community is built around the
UN and any important decision must be taken by a unanimous Security Council, the hopes
for international humanitarian law to be implemented through tribunals with global power in
today’s world are minimal.

There are spread voices which optimistically continue to plead for a stronger involvement of
the UN in international armed conflict, despite the current deadlock in the Security Council. J.
Petrovic has advanced the idea that the concept of ”Responsibility to protect” (R2P) which has
been promoted in recent years, should be enlarged to also include crimes against cultural prop-
erty. The R2P principle was formulated for the first time in 2001 as a means for the interna-
tional community to take action when a state does not want or is not capable of stopping a
humanitarian crisis, war-crimes, genocide or ethnic cleansing. It was for the first time invoked
by the UN Security Council in connection with the Libya crisis in 2011. The coupling of cultural
heritage with human rights would theoretically make it possible to consider the destruction of
cultural heritage, when being part of “persecution,” as a crime against humanity. However, the
realization of the R2P principle is completely dependent on the UN Security Council. With
today’s completely locked situation, where Russia and China with their veto obstruct any

239 For the uni-polar world in this period, see for example Fukuyama, Francis. *The end of history and
the last man*, New York: Free Press, 2006. See also Subedi, Surya P. *The effectiveness of the UN Hu-
man rights system. Reform and the judicialisation of human rights*, London and New York: Routledge,

240 For the UN Security Council, see Subedi, op. cit. n. 239.

241 Petrovic, Jadranka. “What Next for Endangered Cultural Treasures; The Timbuktu Crisis and the
initiative of the international community to intervene in the internal matters of sovereign states, it is completely unrealistic to think that the R2P principle would be a viable option. Even if it had been a realistic option to intervene, invoking crimes against humanity, destruction of cultural heritage would hardly have been the primary reason, but at best accessory to crimes such as ethnic cleansing or genocide. It is difficult to imagine the invocation of R2P by the international community other than in very serious cases where the lives of a state’s inhabitants are at stake. Consequently, to imagine that the international community would intervene in the affairs of a sovereign state merely as a consequence of the destruction of cultural heritage, seems clearly more idealistic than realistic.

5.1.2 The ICC and the case of Al-Mahdi
The potential difference the ICC can make in cultural property law is illustrated by the recent Al-Mahdi-case. A Mali citizen, Ahmad al-Mahdi, was in 2015 indicted at the ICC, whose Statute Mali has ratified, for having led and instigated the destruction of nine mausolea and one mosque at the World Heritage site Timbuktu in connection with the occupation by the extremist organization Ansar Dine of that city. The indictment stated a violation of article 8 (2) (e) (iv) of the ICC statutes which prohibits: “Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives”.

On 27th September 2016, al-Mahdi was convicted to nine years of imprisonment for having co-perpetrated the war-crime of intentionally destroying historical monuments and religious buildings. The conviction was historical, since it was the first conviction for the destruction of cultural heritage as a war-crime by the ICC, and the first in which an individual was convicted solely on these charges. Since al-Mahdi was a Mali citizen and Mali has ratified the ICC statutes, and the rule in Article 8 (2) (e) (iv) of the same statutes is very clear, the al-Mahdi case

242 Risse, Thomas, Stephen C. Ropp and Kathryn Sikkink. *The persistent power of human rights. From commitment to compliance* (Cambridge studies in international relations), Cambridge: Cambridge University Press, 2013, p. 42. The authors conclude that the R2P doctrine does not solve the conflict between the protection of international human rights and state sovereignty.


244 ICC, *Prosecutor v. Al Mahdi*, para. 11; ICC Statute, art. 8 (2) (e) (iv).

becomes a text-book example of how cases with the same or similar preconditions can be indicted in the future. It should, however, be stressed that this case is indeed a “textbook case;” the details of the destruction is very well known in detail since al-Mahdi cooperated from the first day with the prosecution.246 It is difficult to imagine a terrorist within the ranks of ISIS who is as cooperative and repentive as Al-Mahdi has been.

The Al Mahdi case is an important example of how a world heritage site may be of crucial importance to the local population. In the judgment, the close link the destroyed structures had to the cultural heritage of Timbuktu and its collective identity was stressed.247 The cultural heritage of Timbuktu belongs mainly to the 15th-16th centuries, not very distant in time and with a clear cultural and religious continuity to the present inhabitants. But how about the relationship between, say, the Buddhas of Bamiyan and the local, Muslim inhabitants, or between the Roman ruins of Palmyra and the local Muslim, Arabic-speaking population? Although the Roman culture and its religious cults at Palmyra, and the Buddhist religion and culture at Bamiyan do not exist anymore, the buildings or monuments are shared, collective memories; as such they are intimately connected to the present population as well as to the place itself. Depriving such local populations of their cultural heritage will cause great loss of cultural identity, historical memory and also great psychological pain.

The question could thus be asked: why was not the actions by al-Mahdi considered as persecution on religious grounds, and be condemned as a crime against humanity? It could certainly be argued that the destruction of the mausolea at Timbuktu was persecution on religious grounds in order to discriminate against a certain local community because they belonged to a certain religious tradition. But in addition, the attack must also be systematic and part of a larger pattern of persecution as is evident from article 7 of the Statute of the ICC:

“…any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population…”248

246 ICC, Prosecutor v. Al Mahdi, para. 95-105.
247 ICC, Prosecutor v. Al Mahdi, paras. 78-79; Gerstenblith, op. cit. n. 13, p. 387.
248 ICC Statute, art. 7(1).
This is probably where the attack does not fulfill the criteria for persecution. The attack at Timbuktu was in itself carried out systematically and in a similar context to that of ISIS in Syria and Iraq, but it was isolated and not “part of a widespread” attack or part of a larger pattern.

5.1.3 Implementation of international cultural property law in domestic law
Since international law and its conventions are based on the cooperation between states, the success of the international conventions is to a great extent dependent on whether or not the States Parties adapt their domestic legislation according to the rules of those conventions. The implementation of the conventions into domestic law has, as we shall see, encountered several obstacles in the states studied here depending on different circumstances.

Iraq is in many ways an artificially created state, which remained united only because of the brutal, dictatorial rule under Saddam Hussein. After the US invasion and the fall of the Baath regime, the country has appeared more divided than ever. Iraq is ethnically and religiously essentially divided into three parts; a northern, Kurd-dominated part, and the rest of the country divided in a Sunni- respectively a Shia-dominated part. This fact had as a consequence that the democratic state of Iraq which was created after the invasion, according to its constitution of 2005 is a federal state which balances power between the federal government and the regions.\(^{249}\) As a consequence, it is sometimes difficult to interpret where the responsibility for a certain area of government lies. This is the case with the provisions in the constitution which regulate cultural property, article 113, which states: “Antiquities, archaeological sites, cultural buildings, manuscripts, and coins shall be considered national treasures under the jurisdiction of the federal authorities, and shall be managed in cooperation with the regions and governorates, and this shall be regulated by law.”\(^{250}\) The contradiction lies in the statement that the federal authorities has jurisdiction, but that antiquities “shall be managed in cooperation with the regions and governorates.” Tess Davis’ analysis of article 113 and its constitutional context shows that “it is all but impossible to believe that the Constitution desires ‘national treasures’ under federal


\(^{250}\) Davis, op. cit. n. 249, p. 446.
jurisdiction to be controlled by the governorates or their law”.251 However, since 2005 the country has become increasingly divided between federal government and regions which struggle for increasing independence. As Davis points out, it will only be possible for Iraq to benefit from the existing legal provisions in the constitution and in international law when there is agreement regarding their interpretation.252 The difficulties in agreeing only about the interpretation of domestic law makes it of course even more difficult to agree on the interpretation and adoption of international law regarding cultural property. Consequently, the enforcement and implementation of international cultural heritage law in Iraq in all probability lies far ahead in the future. In the meantime, the important asset which the rich cultural heritage is to Iraq, falls between several chairs and becomes exposed and vulnerable to the many potential actors who wish to damage or destroy it.

The protection of cultural property in Syria is regulated by the Syrian Antiquities Law.253 The penalties for violating the provisions are quite harsh, including 15-25 years imprisonment for the smuggling of an antiquity; 10-15 years for theft of an antiquity or carrying out an excavation in violation of the law or trading in antiquities (Article 57); 5-10 years imprisonment for damaging or destroying a movable or immovable antiquity.254 Similarly to the Antiquities Law of Syria, the Antiquities and Heritage Law of Iraq provides severe punishment for destruction and damaging cultural property.255

But the domestic laws for the protection of cultural property in Syria, Iraq and Afghanistan have not incorporated provisions from international law such as the Hague Convention or the World Heritage Convention. Syria has for example not established criminal responsibility for violations of the Hague Convention.256 This is, however, understandable, since the Hague Convention itself does not impose any criminal individual responsibility for violations of its rules.257

251 Davis, op. cit. n. 249, p. 455.
252 Davis, op. cit. n. 249, p. 456.
253 Syrian Antiquities Law.
256 Gerstenblith, op. cit. n. 13, pp. 377-378.
257 Toman, op. cit. n. 54, pp. 794-795; Gerstenblith, op. cit. n. 13, p. 378, n. 166.
In Iraq, the legal problems are complicated by the uncertainty of whether the federal government or the regions are responsible for the safeguarding of cultural property. In both Syria and Afghanistan, and until very recently, also in Iraq, ongoing civil war makes it impossible to enforce the laws on cultural property, especially regarding the looting of antiquities. As regards prosecution, it is possible that in Iraq, members of ISIS can be indicted and prosecuted according to domestic law. In Syria, the situation is even more complicated; the Assad regime is in all probability guilty of numerous war crimes, including the destruction of cultural property, and is not interested in other than incriminating its enemies, i.e. the rebel factions, or ISIS. Therefore, any prosecution following domestic law would only target these groups, not the regime itself. Since there is a general agreement between Syria, Iraq and the international community about the culpability of ISIS in innumerable war-crimes and crimes against humanity, the prosecution of individuals belonging to ISIS in the domestic tribunals of Iraq and Syria would not appear to be controversial. However, international law guarantees a fair trial, in contrast to an authoritarian regime as the Syrian or even a “democratic” state like Iraq. To date, 2,900 individuals have been prosecuted in Iraq for crimes related to ISIS, with a conviction rate of 98% (!) Many of them have been sentenced to death.258 The weak rule of law in Iraq and Afghanistan, not to speak of Syria, thus presents a major problem to the enforcement of international cultural property law.

In cases where domestic law does not want to, or is incapable of, prosecuting crimes of international law, the ICC is the last option. However, if a state (as is the case with Syria and Iraq) is not a State Party to the Statutes of the ICC, prosecution can be ruled out, since the jurisdiction of the Court applies only to crimes perpetrated after the state in question ratified the statutes.259 Nevertheless, according to article 13 (b) of the Statutes, the Security Council can refer the prosecution to ICC, acting under Chapter VII of the Charter of the UN.260 The regulations in this chapter concerns action by the UN “with respect to threats to the peace, breaches of the peace, and acts of aggression”. Since the Security Council for several years has been divided – today

---

259 ICC Statute, art. 11 (2).
260 ICC Statute, art. 13 (a).
more than ever since the Cold War - and has not been able to take any significant decisions in the Syrian conflict, it is very unlikely that article 13 (b) would come to use.261

Moreover, the ICC can only prosecute “the most serious crimes of concern to the international community as a whole”.262 For example, although having provoked serious damage to Iraqi cultural heritage, it is hardly likely that individuals responsible of the 2003 Iraqi Freedom invasion and its organization could have been prosecuted at the ICC for violations of cultural property law, had the US been a State Party to the Statute at the time. The destruction was not intentional or systematic, it was mainly due to a lack of planning and interest in cultural heritage, and can therefore hardly be regarded as belonging to the category of crimes described as being within the jurisdiction of the ICC.

Since it seems impossible to prosecute crimes carried out by Syrian citizens in Syria against cultural property law at the ICC, there has been an attempt to make a draft for a hypothetic future Syrian Extraordinary Tribunal for the Prosecution of Atrocity Crimes. There are, however, problems with this draft, known as the Chautauqua Blueprint.263 To begin with, this tribunal would be located in Syria, in all probability with Syrian judges, and hence, there would be the same problem as discussed above with “victor’s justice”. Regarding cultural property, the draft echoes the ICC Statute article 8 (2) (e) (iv) of the ICC Statute, prohibiting intentional attacks on cultural property.264

M. Lostal has criticized the adoption of this article, since it does not make difference between World Cultural Heritage and other cultural property.265 It is clear that it was a mistake to adopt this rule, and that it is practically very difficult to apply it, since it covers all cultural and religious buildings, and is just like the rule in the 1907 Hague Convention over-inclusive. However, this fact was not an obstacle in the Al-Mahdi case, where the ICC also had to depart from this

261 It was attempted in 2014 to refer the situation in Syria to the ICC, but the resolution was vetoed by Russia and China: Draft Resolution, U.N. Doc. S/2014/348 (May 22, 2014).
262 ICC Statute, art. 5(1).
264 ICC, Prosecutor v. Al Mahdi, para. 11; ICC Statute, art. 8 (2) (e) (iv).
very rule. I would argue that in each single case, a tribunal has to make a judgment regarding
the severity of the violation. The status of World Heritage will naturally always be an important
aspect in such an evaluation. Hence, although the rule in the Chautauqua Blueprint is not opti-
mal, it could certainly be used either in combination with relevant case-law or departing from
an evaluation of the cultural importance of the site. In any case, since the composition of this
tribunal is yet hypothetic, and it is hard to imagine that the Assad regime would allow a hybrid
tribunal on the lines with the Special Court of Sierra Leone (SCSL), any ideas regarding how
such a tribunal would act are pure speculation.

5.1.4 Enforcement and reconciliation processes
In some conflicts, it could be argued that a reconciliation process similar to that undertaken in
South Africa would be beneficial, in order to lower the level of conflict and contribute to the
healing of the country. Such a scenario could be suggested for Syria, which has been ravaged
by civil war for six years now, and where it is very uncertain if domestic law and/or an extra-
ordinary tribunal can administer proper justice. It is certain that the recently initiated mechanic
prosecution and harsh punishment of ISIS members in Iraq hardly contributes to reconciliation
and peace.266 Cunliffe and Lostal have argued that cultural heritage should play a role in the
peace-process in Syria and other countries where the destruction of cultural property has been
integral to the conflict and where it is difficult to guarantee the rule of law.267 Transitional
justice mechanisms can be divided into four main categories: criminal justice mechanisms for
the prosecution of alleged perpetrators of human rights violations; truth-seeking bodies for the
investigation of human rights abuses; reparation programmes for compensation of the victims;
and institutional reforms.268

Drawing parallels to South Africa and Sierra Leone, instead of concentrating all efforts on pros-
ecuting potential war criminals, it would be better to aim at a process of reconciliation, where
the cultural heritage could play a central role as a common identity and point of reference. In
the view of Cunliffe and Lostal, such an approach would be more fruitful than the establishmen

266 See for example Coker and Hassan, op. cit. n. 258.
267 Lostal and Cunliffe, op. cit. n. 109.
268 Lostal and Cunliffe, op. cit. n. 109, p. 252.
of an international criminal tribunal, which would in any case not be able to cover the entirety of the destruction of cultural property in Syria. It is probably true that it is vital that the judicial system treats cases of a certain importance and ensures the rule of law. Avoiding mass prosecutions would probably also ease tensions. Trials are inherently conflictual in character; they solve the case to the extent that one of the parties wins, the other loses, but feelings of bitterness and revenge may be aggravated and remain.²⁶⁹

In former Yugoslavia, a reconciliation process was not of interest, since the country was soon divided into several different independent states, and reconciliation was therefore not as fundamental as in the rebuilding of one and the same state. It is possible that abstaining from prosecuting minor crimes of destruction of cultural property may help a peace and reconciliation process, but the terrible crimes perpetrated by ISIS are hard to ignore. Since ISIS does not recognize international law and does not participate in peace negotiations, it is difficult to imagine that ISIS could play any role in a reconciliation process. The destruction of cultural property in Iraq after the US invasion has exclusively been perpetrated by ISIS. Since ISIS is an extremist organisation which does not want to and cannot be included in a society based on the rule of law, there would be little need for a reconciliation process. A similar situation is presented by Afghanistan, which is partly controlled by the extremist Taliban, a movement which rejects all peace talks and does not recognize international law. In any case, the lion’s share of destruction of cultural property (apart from the looting of archaeological sites, which is a crime which is normally extremely difficult if not impossible to prosecute) was perpetrated during the rule of the Taliban until 2001, and cannot be prosecuted by the ICC, since Afghanistan became a State Party only in 2003. The extremist political actors which completely ignore and even despise international law today could be compared with the German Nazi regime. The latter’s totalitarian vision of a new “Reich” excluded any respect for international law; such law could only be established as a reaction to the atrocities perpetrated, in the form of the Nuremberg War Crimes Tribunal in 1945.

Cunliffe and Lostal make a convincing argument in favour of positioning Syria’s cultural heritage, and especially its World Heritage in the centre of a hypothetic reconciliation process. A

transitional justice process would concentrate on violations against World Heritage, their rebuilding and reparations, in addition to being in the centre for a nation-wide heritage reform program, involving large segments of the country, not least local communities.\textsuperscript{270}

The fact that a post-war Syria in ruins will desperately need reconciliation and given the importance of its many World Heritage sites, suggest that a reconciliation process would be of great importance and that its World Heritage could play an important role in peace building. Since ISIS would not be part of such a process, it would still be possible to prosecute the worst crimes of cultural property destruction. However, given the situation in Syria as of today, it seems fairly far-fetched to imagine a post-war reconciliation process here; the regime has all but won the war thanks to the help from Russia, and it will hardly be in its interests with a reconciliation process, since it would imply making compromises with an enemy which it has defeated.

5.2 \textbf{Prevention through implementation of international cultural property law}

We have seen above that international cultural property law is often very difficult or impossible to enforce, something which damages the faith in and the respect for the international legal system. However, there are other ways that international law may be enforced, and that is through the implementation of legal provisions that aim at the prevention of crimes. In the field of safeguarding of cultural property, prevention is the most natural strategy, given the irreplaceable nature of cultural property; once it has been destroyed, it can never be rebuilt as it once was. Of the two main conventions dealing with the safeguarding of cultural property, the 1954 Hague Convention and the 1972 World Heritage Convention, it is the latter which has most provisions regarding prevention in peace times.

5.2.1 \textbf{The 1972 World Heritage Convention}

In order to get a deeper understanding of the World Heritage Convention and its implementation, it is necessary to understand how the work of the Convention is organized.

\textsuperscript{270} Lostal and Cunliffe, op. cit. n. 109.
The World Heritage Committee is the most important body. It consists of 21 representatives elected from different states parties, and has the responsibility to:

a. Identify properties of “outstanding universal value” and publish and update the “World Heritage List” (World Heritage Convention, art. 11 (2)).

b. Examine the state of conservation of the properties (WH Convention, art. 11 (7) and 29).

c. Publish the “World Heritage in danger List” and keep it up to date (WH Convention, art. 11 (4-5)).

Furthermore, the Committee decides over the use of the Fund for the protection of the World Cultural and Natural heritage (WH Convention, art. 13 (6)), it shall report its activities at the General Conference sessions of the UNESCO (WH Convention art. 29.3).

The World Heritage Committee is assisted by a secretariat called the World Heritage Centre (World Heritage Convention, art. 14.1). It also assists and cooperates with the States Parties and the advisory bodies.

The advisory bodies to the convention are the organisations ICCROM, ICOMOS and the IUCN (art. 8.3). Both these organisations, the first intergovernmental, the second a NGO, have expertise on the conservation and preservation of cultural property, and are supposed to advise the committee on the implementation of the convention (art. 13.7), as well as assisting the World Heritage Centre (the secretariat). Furthermore, they are supposed to monitor the state of conservation and review requests for international assistance (art. 14.2).

Officially, the Committee is a board of independent experts, but in reality these representatives represent their own states. The Committee could accordingly appear as an independent global institution on the surface, but is in reality based on state interests. Accordingly, the Committee reflects not a neutral, global view, but essentially the strategic interests of the different states represented in it. The organization of the Committee illustrates how global level and state level are intertwined in the system of the World Heritage Convention.

The so-called Operational Guidelines for the Implementation of the World Heritage Convention are developed by the Committee, and are constantly updated. The guidelines are above all
precise criteria concerning the inscription of properties on the World Heritage List and the provision of international assistance under the World Heritage Fund.271

The commentary on the World Heritage Convention by F. Francioni in 2008 concluded that the great success of the convention had led to “signs of fatigue”. The World Heritage Centre cannot monitor in an efficient way the increasing number of World Heritage sites. But a halt in the listing of sites would be read as a lack of interest among the most active and contributing states, and would have serious economic and political consequences.272

According to Francioni the solution to the increasing burden of the World Heritage Committee is to transfer a larger part of the economic responsibility on the States Parties. The latter must incorporate the notion of the World Heritage into their domestic legislation, so it can be applicable to a greater extent.273 Such a practice would lead to a decentralized implementation of the convention and reduce the administrative and bureaucratic burden of the World Heritage Centre, whereas at the same time ensure an increased commitment by the state parties.274 It could be argued that the decentralization is needed in order that the World Heritage Committee can concentrate its efforts in the areas where its help is needed the most. It is difficult to imagine states in the world where the World Heritage is at greater risk and at the same time being of extreme Universal value, than Syria, Iraq and Afghanistan.275

273 Francioni and Lenzerini, op. cit. n. 58, p. 410.
274 Francioni and Lenzerini, op. cit. n. 58, p. 410.
275 Cambodia is another country which has a similar combination of important cultural heritage and political instability.
5.2.2 The World Heritage Convention and globalization

The phenomenon of globalization has not led to global “government”, but rather to increasing global cooperation between states, commonly called “global governance.” At the same time, this increasing “global governance” is often rejected by many authoritarian states. The juridical parallel to the phenomenon of “global governance” has been an increasing legal cooperation or “global law”. The 1972 World Heritage Convention is in fact a very early example of legal globalization or global governance. The Convention is based on the dual concept of “universality” and national responsibility, and functions to a great extent through the use of “soft law.” “Soft law” is a non-legal and therefore also non-binding requirement that goes through a process of legalization and with time becomes regarded by courts and other legal bodies as a factor to take into consideration.

An important role in the World Heritage Convention is given the non-governmental organization (NGO) ICOMOS (and regarding natural heritage IUCN). These are private expert networks which play an important role in advising the World Heritage Committee and assisting the World Heritage Centre, as well as monitoring conservation and review requests of international assistance from States Parties. Thus, they can be regarded as a global organization which through its activity has an important influence on the safeguarding of World Heritage while working both vertically and horizontally. The most obvious example of soft law in the World Heritage Convention are the Operational Guidelines adopted by the Committee; according to S. Galera they are “a genuine example of legal globalization”, as well as of soft law. The operational guidelines of the Convention give authoritative and important information on how to interpret the Convention. Thus, the World Heritage Convention is a good example of how law has become globalized, not through classical “hard law” from the top down, but instead more hidden and not only vertically, but also horizontally, through providing the existing legal instruments with expertise and interpretation.

The protection of World Heritage can in fact be regarded as being part of a development of “global regulatory regimes

---

277 See for example Casini, op. cit. n. 276.
279 World Heritage Convention, art. 8(3); 13(7); 14(2).
280 Galera, op. cit. n. 278, p. 240.
281 Galera, op. cit. n. 278, p. 238.
L. Casini has identified three different patterns of legal globalization in this context:

1. The creation of a global system for protecting World Heritage. This has developed from an international legal framework, i.e. between states, to a truly global one. This has been possible through the use of guidelines, policies and other “soft” mechanisms. The number and variety of actors has increased; now not only governments, but also NGO’s play an important role.

2. The establishment of international regulations on trade and the restitution of cultural property. There has been a shift from international to transnational law.

3. The institutions involved in the protection of World Heritage produces norms and standards for example for museums, that are truly global.

As we have seen, an overall, comprehensive regulatory regime that could complement the law on cultural property is lacking; instead several different regimes have been established according to the system known as “global governance.”

Thus, the World Heritage Convention can be argued to be one of the most “globalized” of all international conventions, and therefore interesting to study with respect to the phenomenon of legal globalization. Therefore, it would seem that the World Heritage Convention is the arena best adapted for international law on cultural property to exert an influence.

5.2.3 Implementation and democratic states: prevention during ongoing armed conflict in Iraq

If we begin with the US and UN invasion of Iraq in the Gulf War 1991, damage was very limited. The military campaign was well planned, and it seems that all instances were due to accident or miscalculation. Going 12 years ahead in time, to 2003 and the US invasion of Iraq, it is obvious that destruction was much more widespread and on a much larger scale. The reasons for this were clearly a lack of knowledge of, and interest in, cultural property among those responsible for the 2003 Operation Iraqi Freedom. The contrast with the great joint effort the

---

282 Casini, op. cit. n. 276, p. 369.
283 Casini, op. cit. n. 276, pp. 378-379.
284 Casini, op. cit. n. 276, p. 369.
United States and Great Britain made in protecting cultural property during the final part of the Second World War under much more difficult conditions, is especially striking. The initiative to the “Monuments’ men” was taken at the highest level by Roosevelt and Churchill, both learned men with a sense of the fundamental importance of culture and of a collective memory to a society. It is clear that the level of knowledge of culture and history among figures such as Donald Rumsfeld or George W. Bush and other key figures responsible for the Iraq invasion was on a much lower level, if not inexistent. The contrast between the destruction in the both US-led invasions of Iraq 1991 and 2003 were enormous. The great difference between the both military operations was that Operation Desert Storm was carried out in alliance with the UN. It seems probable that the cooperation with the UN forced the US to plan the operation in close cooperation with experts on cultural heritage. As a consequence, the campaign was planned much more carefully and with more respect for expert advice compared to 12 years later.

During the first conflicts covered in this study, the areas of conflict were inaccessible for media. Very little direct information was available, from Afghanistan under Soviet occupation or from Iran during the Iraqi offensive; therefore war crimes such as the destruction of cultural property could be carried out with little notice from the international community. This changed with the Gulf War in 1991, when media for the first time was “embedded” in US and coalition troops. War became mediatized, and as a consequence, actions of war became recorded directly to a much higher degree. Destruction of cultural property became more difficult to get away with without consequences of some kind. This became also evident with the bombing of Dubrovnik the same year, when the huge media attention led to the JNA having lost the war of propaganda before the war hardly had begun. Media attention had become even more intense in connection with the 2003 invasion of Iraq. The extensive looting of the Iraq National Museum and other museums and archaeological sites led to very negative media coverage of the handling of the US-led invasion.

It seems that the increased coverage of wars in media has led to greater knowledge of what is happening inside a country during combat, and therefore states generally want to avoid destruction that can give potential negative media coverage. Thus, states are less inclined to damage or destroy cultural heritage compared to only 25-30 years ago. It is clear that the Soviet and Iraqi regimes could destroy and pillage cultural property in Afghanistan and Iran respectively, without risking any media attention or legal consequences whatsoever. This is not true today.
In the Iraqi invasions, US and coalition forces fought on enemy territory and related to a cultural heritage which was not their own. Collateral damage there must be inserted in a different context than that which has been caused in the war in Syria. The Syrian regime is fighting a brutal civil war on its own territory, and has thus little interest in destroying more property than necessary. However, its use of at least two world heritage sites with strategic qualities such as the citadel of Aleppo and Bosra as military bases, shows an instrumental use of cultural property that is common to authoritarian regimes (compare for example the destruction of cultural property by Iraqi forces during the 1991 Operation Desert Storm). It is difficult to imagine such direct instrumental use of cultural property by western military forces simply because democratic states generally try to adhere to the international rule of law, and are more vulnerable to negative media attention. An authoritarian state with the intention to protect its territory against rebel groups probably has less scruples against damaging cultural property, but on the other hand also has fewer options to plan carefully than a foreign aggressor who can plan for an operation months in advance. It is therefore much more difficult to prevent collateral damage in a civil war like the Syrian war than it would have been in for example the invasions of Iraq in 1991 and 2003. Consequently, it is clear that international humanitarian law has a higher potential to function preventively in connection with a well-planned invasion than in the context of a civil war, where the opposing forces often show little respect for cultural property. The more actors involved, the greater the prospects for chaos and damage on all kinds of property.285

Based on the comparison between the US-led Iraqi campaigns in 1991 and 2003, it seems that knowledge and respect for cultural heritage among the responsible of the operation is key for avoiding damage to cultural property. Operations made up by a broader coalition of states, including the UN, probably guarantees a greater respect for international humanitarian law, since cultural heritage experts from for example UNESCO will be involved in the planning. Article 25 of the Hague Convention is key in the education of the military and the dissemination of knowledge about cultural property:

“The High Contracting Parties undertake in time of peace as in time of armed conflict, to disseminate the text of the present Convention and the Regulations for its execution as widely as possible in their respective countries. They undertake, in particular, to include the study thereof in their programmes of

285 van der Auwera, op. cit. n. 4, p. 61.
military and, if possible, civilian training, so that its principles are made known to the whole population, especially the armed forces and personnel engaged in the protection of cultural property. “ 286

We have seen that the destruction of cultural property in the context of the both invasions of Iraq were due mainly to a low level of knowledge and a general disinterest for cultural property. Accordingly, it seems probable that the best way of increasing knowledge and interest is to disseminate and communicate the Hague Convention in order that its rules become well known among all parts of the civilian and military hierarchy involved.

Although the United States signed the Hague convention in 1954, it was only after the Iraq war that it ratified it in 2009. But it has still not ratified any of the two protocols of the Convention, in contrast to its closest ally the United Kingdom. The fact that the two allies presently are not following the same instruments of law may be an obstacle for future military cooperation in this field between the both countries, and hopefully the US will follow the example of the UK. 287 It has in recent years, especially with the experience from Iraq, become increasingly clear to the US military that cultural property protection “may not be an additional burden for overstretched troops, but rather what they refer to as a ‘force multiplier’ – a positive action that makes their job easier.” 288 The Iraqi experience has made it clear that in order to win the war, it is also necessary to win the hearts of the inhabitants, or at least show humility towards their history and cultural Heritage. The only way to minimize the risk of repeating the mistakes in Iraq is to educate and train all levels within the military in the safeguarding of cultural property, and to communicate the rules of the Hague Convention in an effective way in accordance with article 25 of the same convention. There is no doubt that the kind of destruction of cultural property which is the least difficult to prevent is that which is caused by ignorance and disinterest.

---

286 1954 Hague Convention, art. 25.
288 Rush, op. cit. n. 167; Stone, op. cit. n. 8, p. 66.
5.2.4 Implementation and authoritarian states
Democratic states are founded on the rule of law and generally strive after respecting international law (albeit of course with several examples of shortcomings). The main problem here may be bad knowledge, disinterest or arrogance among political and/or military leaders. Authoritarian states tend to have a more instrumental view on cultural property, and in general they are generally more directly reluctant to follow international law if this is contrary to their interests. Iraq under Saddam Hussein, Yugoslavia under Slobodan Milosevic or Syria under Bashar al-Assad are all good examples of authoritarian states which have been reluctant to follow international law.

In the case of Syria, the authoritarian regime has wanted to depict itself as a victim of aggression from rebel forces and terrorists, and wants to act as a “responsible” state, it longs to again become a part of the international community. But when it comes to reality, the regime does whatever it wants that can give it a military advantage in an extremely cruel civil war, with little or no regard to international humanitarian law. The probable use of chemical weapons in air raids on the civilian population clearly shows that the regime ignores any international rules when in its interest. But the cultural heritage of Syria is a national pride, and something that the state usually has a strong interest to protect. Therefore, the destruction caused by Syrian government forces on its own World Heritage sites is for the most part probably difficult to describe as being intentional, and rather caused by situations where the military has regarded the cultural property as a “military object” and therefore necessary or “imperative” to attack. It is very difficult to presently decide whether the attacks on the Crac des chevaliers or Bosra were legal and in accordance with the principle of “military necessity” or not. What is clear is that these sites would not have become military targets had not rebel troops or Syrian government troops respectively taken refuge there, thereby violating the provisions in the Second Protocol to the Hague Convention, article 6(a).

It is also clear that the Syrian regime has shown disrespect and carelessness with regard to several of its world heritage sites, including Palmyra, which may not have fallen to ISIS-forces had not the Syrian army taken positions in its vicinities. The international community has great

problems when it comes to enforcing IHL on especially authoritarian state parties, which are often reluctant to respect it. In the case of Syria, the regime has a strong urge to become part again of the international community. As long as the Assad regime remains in power, it will be difficult for Syria to build normal relations with most states, but in the field of cultural heritage, there may be some opportunities. Syria wants and needs help to rebuild its cultural patrimony, and UNESCO and the international community has an interest to see it respected and rebuilt. This is an opportunity for the international community to invest in the cultural heritage of Syria and pose obligations on the country in order to make it respect and implement above all the World Heritage Convention. A possible sanction in case of reluctance to cooperate could be to delist sites from the UNESCO list of World Heritage.  

The World Heritage sites are crucial sources of economic income to a country which has been completely devastated by years of civil war. The lesson from Iraq and the UN sanctions in the 1990’s is that a “rogue state” like the Iraq of Saddam Hussein or Syria under Bashar al-Assad should not be left completely isolated. If UNESCO delists world heritage sites in Syria, and leaves it isolated, these will most certainly experience the same fate as the Iraqi archaeological sites did in the 1990’s; neglect, looting and destruction. As a consequence, it will primarily be the local populations of the world heritage sites that will suffer, not the regime. However, the World Heritage Committee has the power to decide whether a World Heritage is to be removed or stay on the list of sites in Danger. This power could be used as a shaming device, in this way damaging the non-complying state’s international reputation.

Regardless of how the World Heritage List is used as a political tool by the Committee, implementation of the Convention by exercising this kind and other kinds of “soft power” must be priority number one. Here the dual character of the World Heritage Convention becomes obvious. The Convention is one of the best examples of legal globalization; its wide-reaching system of global cooperation, expertise and influence has been compared with a “living organism”.

---

290 Operational Guidelines, paras. 192-198.  
292 Ferrucci, op. cit. n. 291.
Stefania Ferrucci has listed four main reasons for the success of the Convention: persuasion power, blacklisting, mimicry and competition.\textsuperscript{293} The Convention has persuasive power since states accept a restriction in sovereignty for the good of World Heritage in order to pursue international influence; it is this win-win situation for both state and international community that lies at the bottom of the popularity of the Convention. Blacklisting concerns the risk of losing the cherished status of World Heritage in case of lacking compliance. Mimicry regards the tendency of states to imitate other states in their behavior as the Convention becomes increasingly popular. There is also a trait of competition inherent in the Convention; since the World Heritage List is so popular, states become competitive in the field of World Heritage in order to reach status as a state that complies fully with the demands of the Convention.\textsuperscript{294}

World Heritage sites are owned by the state, and are important for their national pride. On the other hand, World Heritage sites are “universal” and belong to the heritage “of peoples”, and are controlled by the World Heritage Centre through its power to delist sites of states that do not follow the advice of the World Heritage Committee.\textsuperscript{295} This means two things: authoritarian regimes can take advantage of the World Heritage Convention since it offers their states international fame, but it also means that the international community through the Convention can demand certain action from States Parties. It is true that in the system of the World Heritage Convention “the carrots are much more evident than the almost non-existing sticks”.\textsuperscript{296} However, in the case of economically and politically weak states such as Syria, Iraq and Afghanistan, the World Heritage Committee has a certain power, since these states need its aid and expertise, as well as the international splendour given by the World Heritage status. Consequently, the World Heritage Committee can use both stick and carrot in order to move states in the direction

\begin{flushright}
\textsuperscript{293} Ferrucci, op. cit. n. 291, pp. 4, 52.  \\
\textsuperscript{294} Ferrucci, op. cit. n. 291, pp. 20, 52.  \\
\textsuperscript{295} The power to delist World Heritage sites is not regulated in the World Heritage Convention, but has been included in the Operational Guidelines since its first version in 1977: “When a property included in the World Heritage List has deteriorated to such an extent that it has lost those characteristics for which it was inscribed thereon or when further research has shown that the property is not, in fact, of outstanding universal value, that property shall be deleted from the List” (UNESCO, 1977, Para. 5, iv).  \\
\textsuperscript{296} Ferrucci, op. cit. n. 291, p. 54.
\end{flushright}
they aim at, at least to some extent. The World Heritage List and the tentative list constitute the best example of “a carrot” that the World Heritage Committee can offer to states: if they comply with certain criteria, sites will be included on the so relished World Heritage List.297

It seems clear that in order to achieve the admission criteria set up by the World Heritage Committee for being admitted to the World Heritage List, states need peace, a certain stability, and a relatively well-functioning state and economy. Syria and Afghanistan have none of these, Iraq may have relative peace for the moment, but lacks the other. Above all, the economic means are lacking in these states which have been ruined by years or even decades of war. It is usually a truism that “culture” and other immaterial goods always come at the bottom of the economic priorities of a state, and nowhere is this probably truer than when it comes to states that have been ravaged by war. However, when it comes to cultural heritage, it may be that its economic importance and value are about to change in these war-torn states. We have seen that cultural heritage has achieved greater symbolic importance in recent years, and symbols are in general always multi-valent. The inherent duality of cultural heritage in being both national and universal means that cultural heritage that has been used in a divisive way as a symbol, for ethnic or religious purposes, can also be used in uniting a nation around universal values. The cultural heritage in the Middle East has such a fundamental importance for the entire history of civilization, and is of truly great universal value and therefore also a source of national pride. Consequently, it has probably a great potential for becoming a uniting symbol and contributing in building unity and peace in countries like Syria, Iraq and Afghanistan.

The Operational Guidelines of the Convention give the procedures and priorities for all activity regarding the Convention. It is clear that priority for economic assistance is given to sites on the list of sites in Danger, i.e. sites that have already been nominated as World Heritage.298 Moreover, preference of economic assistance is given to States Parties in a post-conflict situation.299 It is natural that the World Heritage sites in Syria, Afghanistan and Iraq are prioritized when it comes to conservation and general safeguarding. However, regarding the nomination of new sites to the World Heritage List, the major responsibility lies primarily on the State Party itself.300 Needless to say, post-conflict states with an economy in ruins do not have very good

297 Ferrucci op. cit. n. 291, pp. 18-21; Operational Guidelines, paras. 120-168.
298 WHC, Operational Guidelines, para. 236.
299 WHC, Operational Guidelines, para. 239 b.
300 WHC, Operational Guidelines, paras. 120-133.
opportunities for complying with the rigid criteria indispensable for a nomination to the World Heritage List. Therefore, it is probably most realistic to expect that economic aid from the World Heritage Fund will be focused on the existing World Heritage, and that any additional nominations probably will have to wait. This will not necessarily have a negative impact on the legal safeguarding of World Cultural Heritage sites in these countries. As we have seen, those sites that are listed on the tentative list of World Heritage are also protected by the World Heritage Convention, and thus will have the same protection as World Heritage sites.

6 Conclusions

6.1 Patterns of destruction
The case studies selected for the present thesis demonstrate that there is a tendency that destruction of cultural property in warfare between states has diminished after the wars in Yugoslavia, and more generally after the end of the Cold War. On the other hand, as conflicts between states have become less common, conflicts within states have multiplied. This has led to the rise of new non-state or quasi-state agents, which often act outside the framework of international law, and deliberately ignore it. Intentional destruction on cultural property by states has become increasingly rare. In the beginning of the post-Cold War era, some authoritarian regimes such as Saddam Hussein’s Iraq and Milosevic’s Yugoslavia committed intentional destruction, but such a strategy has become increasingly obsolete with the globalization of law and the growing coverage of armed conflicts by international media. This has not prevented single acts of recent destruction in Syria by Russian and Turkish air forces in Syria. However, the vast majority of all intentional destruction in this study was done by quasi-state extremist groups such as the
Taliban and ISIS in the Middle East or the Bosnian-Serb Republic in Bosnia as a central component in ethnic and/or cultural cleansing. Looting is the single perhaps most destructive phenomenon, since it is almost impossible to prevent, and the archaeological context of the artefacts never can be reconstructed. Both terrorists, government troops and civilians use looting as a source of income, something which prolongs armed conflicts.

Non-intentional, collateral damage can be divided into two groups, unintentional damage and damage which may at least partly be intentional, as the attack is due to “military necessity”. The latter category is also the most complicated, since it is very difficult to judge whether a situation validates the legal term “military necessity” or not, the latter term being prone to be used instrumentally as an excuse for causing damage on cultural property.

6.2 Legal response
The international community has repeatedly, in the aftermath of central historical events and technical developments that have been damaging to cultural property, attempted to counter these developments through the creation of instruments of international law.

International cultural property law is complex and heterogeneous, with norms and regulations of different character and origin; a cultural property branch, a humanitarian branch and a human rights branch. This complexity is both its strength and its weakness. Strength because the different branches of law can complement each other. Weakness because a single, consistent legal framework is lacking, creating questions of interpretation. I would argue that the complexity is more an asset than a weakness; above all the combining of cultural property with human rights law gives cultural property a further “insurance,” incorporating it in the universal human rights system which is customary international law. I furthermore argue that the human rights approach to cultural property does not at all exclude the coordination between the Hague Convention and the World Heritage Convention, which would lead to a more consistent and integrated legal framework.

If World Cultural Heritage in its capacity of a specifically protected category is to play a more prominent role in the field of cultural property in general, it would certainly be preferable if the Hague Convention and the World Heritage Conventions could become more integrated. I have demonstrated that the World Heritage Convention is applicable also during armed conflict. The
division of these legal instruments into one applied in peacetime and the other during armed conflict is artificial and not according to what was originally intended. This said, I would like to emphasize that the functionality of international law on cultural property is not depending on an integration of this kind. The framework of international cultural property law is no doubt fragmented and difficult to master, but in combination with case-law its application has good prospects, as is illustrated by the Al-Mahdi case. There is a general tendency that World Heritage is achieving increasing global importance. It would therefore be natural, although it cannot be guaranteed, that national tribunals increasingly also will judge the destruction of World Heritage as a more serious crime than that of cultural property in general. Such an interpretation is furthermore underpinned by the case-law of the ICTY, and to some extent also the ICC.

When observing the development of international law on cultural property in retrospect since the Cold War era it is evident that major progress has been made. International law on cultural property could be divided into one “theoretical” part; the law itself and its instruments, and one “practical”; the political institutions that are required to enforce it. Whereas the power of judicial enforcement today has diminished due to international division in the Security Council, the progress already made in the field of international law will be lasting and cannot be turned back. The historical perspective shows us that periods of progress in the field of cultural property law have shifted with periods of political division. What is quite certain is that today’s climate of division will not last forever. In a long-term perspective, the climate for international cooperation is likely to improve, sooner or later. One of the effects of globalization is that the world becomes more uncertain and unstable; situations can change very rapidly and unexpectedly. If/when a new period with a more profitable climate for international cooperation arrives, international law and its institutions will hopefully make new progress.

6.3 Enforcement
From the discussion above, it has become clear that a well-developed framework of international cultural property law exists. Despite existing limitations, it has the potential to be applied effectively; however, the main problem with international law in general is the lack of enforcing mechanisms. In the beginning of this chapter, the difference between states and non- or quasi-state actors was underlined. However, a fundamental distinction must also be made between democratic and authoritarian states. It could be said that as a general rule, the burden of enforcing international cultural property law lies on states, not the international community. In
the cases of most democratic states, this system functions well, since their laws generally try to implement international law. And if the domestic law cannot or will not prosecute a crime, it can, if deemed serious enough, be referred to the ICC by the international community.

The system of enforcement undoubtedly functions less satisfactory when it comes to authoritarian states or states with weak law enforcement due to a short tradition of democracy and rule of law, and/or internal conflict and political instability. Authoritarian regimes tend to use cultural heritage instrumentally, in accordance with their own needs, and often disregard international law altogether. There is a huge obstacle in the implementation of international law into the respective national laws due to different political culture and the problems with legal enforcement in weak states like those studied here in the Middle East. These states most often are not States Parties to the ICC Statute, and therefore the international community stands powerless when a state refuses to comply. It seems that the only situation when the system of international legal enforcement might work is in cases where a quasi-state has placed itself distinctively outside international law, like the Taliban or ISIS. Since terrorist organisations form a threat to any state in the world, states in general, including authoritarian ones, are usually strongly motivated to put them to justice for their crimes. The only way the international community can respond to crimes committed by terrorists is in a reactive way, through the enforcement of international criminal law, hoping that punishing the criminals will have a preventive effect. But, it is clear that the fact that the prosecuted usually from the outset is guilty of the crime of belonging to a terrorist organization, a crime that is punished with the death penalty in Iraq, makes him (because it is usually a male) virtually immune to the threat of any additional penal sanctions.

The success of the enforcement and/or implementation of international cultural property law is thus to a great extent depending on to which degree the protagonists accept the rule of law. In cases where violations of international rules have been caused by western democratic states, there is a great potential for education and training through the dissemination of the Hague Convention and its related instruments in the military and related civilian branches.

6.4 Enforcement through judicial prosecution
As we have seen, the international community is currently very divided, so that international ad hoc-tribunals are very difficult to establish today. This leaves the administration of justice to
the domestic courts of these states which have little or no democratic tradition, and often have not implemented international law into their legislation, with an enhanced risk for unfair and politicized trials. And only the worst crimes against humanity can be prosecuted by the ICC if the suspected individual is a citizen of a State Party to the ICC Statute.

It is from a domestic legal point of view, and in the cases where the suspected individuals belong to States Parties of the ICC Statute, evidently possible to prosecute criminals from ISIS. But if this is done through domestic law, a fair trial and the rule of law cannot be guaranteed, since none of the states in this study (except those of former Yugoslavia) have implemented international cultural property law in their legislation. Moreover, it will be almost impossible to prosecute individuals serving in the Syrian regime whether by means of domestic law or the ICC; individuals in the service of the regime are usually well protected by authoritarian states, and risk being extradited only when the regime has fallen or is under very strong pressure from the international community. In contrast, those opposing an authoritarian regime cannot be guaranteed a fair trial due to the risk for “victor’s justice”. In any case, enforcing international cultural heritage law through prosecution will only be a necessary, minimal response to the crime committed. It will have little real influence on the motivation of future potential criminals, and will therefore never be able to solve the problem per se.

This leads to the somewhat paradoxical conclusion that international cultural property law violated by states can seem more difficult to enforce than if the violator is a member of the Taliban or ISIS, which stand completely outside the international community and the rule of law. The fact that a large number of former members of ISIS have been, and are presently prosecuted for war crimes in domestic courts in Iraq, with very harsh punishments, means that mere membership in such terrorist groups are indeed being punished severely. Nevertheless, it is very doubtful that severe punishment of terrorists in itself will have a strong preventive impact; ISIS is an extremist organization, and those who join the organisation do so to a large degree because they hate western society and certainly do not care about its laws.

---

As was the case for example with Slobodan Milosevic. He was only extradited by Serbia after his regime had fallen, and it took a further 7 and 9 years respectively before Ratko Mladic and Radovan Karadzic had been extradited, despite the fact that Serbia by then was a democracy.
Given what seems to be a general lack of power of deterrence when it comes to punishment of terrorists; has the enforcement of international cultural property law any sense? First and foremost, international law enforcement guarantees a fair trial in contrast to under domestic law. Secondly, it is important that a relatively new institution like the ICC can produce case law on the field as well as demonstrating its power of enforcement. To conclude, the enforcement of international law through prosecution will probably not have a preventive effect on potential criminals belonging to terrorist- and extremist organisations, but may have some impact on moderate armed groups.\(^{302}\) It will above all be important in creating case law for the field of cultural property as well as creating respect for international cultural heritage law and international law in general. Prosecution will in the case of terrorists usually not function as a deterrent, but will provide a guarantee that high-profile cases will be prosecuted according to the rule of law in contrast to most national courts in authoritarian states.

6.5 Implementation of international cultural property law

From the above it should have become evident that enforcement of international law by way of judicial prosecution is problematic and often has little preventive effect. The other possible legal venue that may be used in the safeguarding of cultural property against destruction is prevention through the implementation of international cultural property law. With “implementation” I intend the incorporation of such law into domestic legislation, more specifically norms regarding the training and education of military forces, the dissemination of information to the public, as well as the use of “soft law”.

We have already seen that of the three categories of actors which may participate in the destruction of cultural property, the first, the democratic states, can be regarded as generally aiming at following international law. The third category, extremist non-state actors, consider themselves as standing outside international law, and will therefore never abide to it. The second category, authoritarian states, come somewhere in between; they will follow international law only if it suits their needs. I conclude that there should be good opportunities to persuading democratic states to implement international cultural law; regarding states in the second category it will be more difficult, but still possible, whereas regarding extremist non- or quasi-state actors, the third category, such persuasion is impossible.

\(^{302}\) Risse, Ropp and Sikkink, op. cit. n. 242, p. 257.
6.5.1 The World Heritage Convention as a means of enforcing implementation?

We have seen that the World Heritage Convention has a structure that makes it one of the most successful conventions in the world. The reason for this lies in its inherent dualism, combining national and universal concerns. The conclusion must be that the lion’s share of international legal protection and prevention of destruction of cultural property must take place within the framework of the World Heritage Convention and concentrate on World Heritage sites. This is true especially for authoritarian states and states with short traditions of democracy and the rule of law. States such as Syria, Iraq and Afghanistan combine political instability and a very rich cultural heritage. It is evident that World Heritage sites in this context can play an important economic role in the rebuilding of these states.

The greater importance or value that can be attributed to World Heritage, the greater power UNESCO has to force these states to implement international law on World Heritage. Media plays an important role here, since media attention can be used by the international community in order to amplify interest and conscience concerning World Heritage around the world. The destruction of Dubrovnik, Palmyra, Nimrud, the looting of the Baghdad National Museum etc, has through media placed a major international focus on the destruction of cultural property. With increasing media attention, World Heritage becomes a more powerful symbol, and therefore also more attractive and valuable. It could be argued that the increasing coverage by media of wars since the Gulf War has led to two different consequences regarding cultural property, one positive, the other negative. The negative consequence of the increased importance of media in a globalized world is that extremist organizations such as ISIS are able to diffuse propaganda much easier and more effectively than before. The destruction of cultural property has unfortunately become an effective tool of propaganda for such organizations. For those who loath western culture, the destruction of its ancient heritage is a great symbolic victory, and an act of defiance towards the international community which it does not recognize. The international outrage caused by the dynamiting of the Bamiyan Buddhas and the destruction of the temples at Palmyra is exactly what these movements want to create. Whereas states usually are damaged by such media attention, extremist non-state actors consider instead such media attention as an important means of propaganda. Since their idea of justice is completely inverted to that of the international community, has nothing in common with it, and is completely independent of it, international law also is null and void to them. As a consequence, in their capacity
of world-wide known symbols for western culture, and potential symbols of non-Muslim culture, cultural properties have become much more exposed to the danger of damage, destruction or even complete annihilation. On the other hand, this development also constitutes a plea to the international community to focus to a greater extent on different ways of protecting cultural property. The increased media attention around cultural property and cultural heritage is an opportunity to also increase the status of world heritage around the world. An increased status would also entail more concern from all states to protect their world heritage. However, might not an increase in international status invite to even more Herostratic deeds? Such an argumentation can be disputed. In fact, most destruction on World Heritage sites in Syria and Iraq have been caused by collateral damage in the civil wars, and only two of all the sites damaged by ISIS were World Heritage sites, namely Palmyra in Syria and Hatra in Iraq. In addition, Hatra was one of the sites where the damage carried out was relatively limited.

States Parties that have suffered destruction of World Heritage will for many years be dependent on economic aid and expertise from UNESCO and states all over the world in order to repair, rebuild and safeguard these sites. This fact in addition to the increased value, economically, politically, culturally and symbolically of World Heritage means that UNESCO and the international community will have a position of power in relation to these states. Power is a key concept in the process of legal enforcement and implementation. Moreover, it is a fact that authoritarian states today have one, very important, interest in common with democratic states; the determination to defeat terrorist quasi-states and -organisations. Therefore, it should be possible for UNESCO and the international community to pose some fundamental conditions in order for a state party to receive aid. I suggest two fundamental conditions:

1. The state commits itself to educate and train its military personnel in the World Heritage Convention and the 1954 Hague Convention and how to behave in armed conflict when World Heritage and other cultural property is involved. These are legal commitments which are very clearly stated in articles 7 and 25 of the Hague Convention, in article 30 of its Second Protocol, and article 27 of the World Heritage Convention. Consequently, they are legal obligations for the States Parties adhering to these conventions. It is fundamental to communicate to the States Parties that adhering to the

---

303 1954 Hague Convention, art. 7 and 25; 1999 Second Protocol, art. 30; World Heritage Convention, art. 27.
Convention entails a legal responsibility and duty of the state to do all in its power to implement its rules. An improved understanding of the conventions would also give a better understanding of the importance of cultural property in general, i.e. also all cultural property that is not World Heritage. Such a condition would be relatively low-cost and not very complicated to fulfill for the state in question.

2. The implementation of the most central regulations of the Hague Convention and the World Heritage Convention into domestic national legislation, including those mentioned above. The functioning of international law is to a great extent depending on State Party implementation.

Would the training in cultural heritage law of the Syrian government military forces have made a difference in the civil war? It is probable that when dealing with sites such as Aleppo, Crac des chevaliers or Bosra, which are all inherently strategically important sites, and in the case of Aleppo and Bosra, where the World Heritage is situated in the midst of a heavily urbanized area, it will be very difficult in the context of a chaotic civil war to avoid damage. However, it would be expected that improving the military training and respect for cultural heritage would at least decrease the risks for major damage.

Thus, the World Heritage Convention is an important instrument in the convincing of a state to meet its obligations concerning its own World Heritage sites. But what about states that damage cultural property outside their own territory? Although inter-state conflicts may have become less common and on a smaller scale, a single air-strike may cause irreparable damage. It is more difficult to put pressure on large and powerful states such as Russia or Turkey, especially when no evidence can be presented. The only possibility is to exert pressure on such states through the international community and public opinion to keep their international obligations. From a western, democratic point of view, there is usually little for a state to win in such destruction other than negative publicity. But from an authoritarian state perspective, attacks on cultural property may give short-term benefits that are more important to the regime than positive media coverage. In any case, training and education of the military would be central in avoiding such damage.

The education and training of the military and civilians in its service is thus fundamental to the safeguarding of cultural property in armed conflict. However, the dissemination of knowledge
concerning the nation’s cultural heritage to the general population is in the long-term perspective of an equally fundamental importance. One of the core problems pertinent to the nations which are the objects of study here is the political, cultural and religious division and fragmentation of their society. Cultural heritage is deeply connected with a strong sense of belonging and pride in a shared “glorious past”. Without a shared, collective cultural identity, there can be no nation. Cultural heritage are symbols, and as such they can be used as resources in the forming of a nation. But symbols are, as we have seen, always multi-valent, they can be manipulated and adapted to different kinds of political agendas. It is therefore fundamental that the dissemination of information on cultural heritage is based on knowledge and expertise. Moreover, the complex nature of cultural property law turns the pedagogic task into a challenge. Thus, a high quality of information and its dissemination can only be guaranteed by UNESCO. Through the World Heritage Convention the international community has in the present situation a legal and political means to encourage States Parties to implement those regulations of the convention that are most fundamental to the safeguarding of cultural heritage, but also to peace- and nation-building.

At the outset of this study, the beginnings of the safeguarding of cultural property were outlined. From this historical overview it is evident that the growth of interest in cultural property and its safeguarding was intimately intertwined with increasing learning and knowledge. The link between knowledge and cultural property protection is evident when comparing the both US-led invasions of Iraq. Whereas Operation Desert Storm had interest in and used expertise on cultural property, the contrary was the case in the Operation Iraqi Freedom 12 years later. One of the most central tasks of the World Heritage Committee must be to provide information and knowledge to the states in question. This is most obviously true for the military forces, where knowledge and ensuing respect for cultural property often can be decisive for the fate of the latter. But it is only knowledge among ordinary people in combination with economic and social progress that will be able to both stop the continuous looting of the cultural heritage of these states, and which can contribute to an identification with the nation and its cultural history, in this way beginning to heal the wounds of years or decades of internal division and violence.

---

304 Turku, op. cit. n. 115, p. 79.
We must of course not be naïve about the powers of cultural heritage; there are obviously a vast number of fundamental and extremely complicated problems of economic, political, social, religious and ethnic kind that have to be solved in addition. However, these problems can only be unraveled in tandem with the construction of a solid and functioning state. And a stable state cannot be built without the creation of a shared collective identity and memory. In a long-term perspective, a strong focus on a shared history and cultural heritage as a uniting symbol may contribute to a stronger belonging and identification with the nation.

\[305\] Turku, op. cit. n. 115, p. 84
List of references

Journals and book series are referred to in accordance with the Oxford Public International List of Abbreviations.


Nahlik, Stanislaw E. *Protection internationale des biens culturels en cas de conflit armé* (Académie de droit international. Recueil des Cours 120. II), Leiden and Boston: Brill, 1967.


**Digital sources**


ICRC, IHL Database, Customary Law, Rule 14 [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule14] [Quoted 26.04.2018]


Ramasasty, Anita (2003). “Toppling Saddam, not his Statues: Why it is Important to Stop the Looting of Medical Supplies, the Theft of Cultural Artifacts and Other Economic War Crimes”, FindLaw [https://supreme.findlaw.com/legal-commentary/toppling-saddam-not-his-statues.html] [Quoted 16.05.2018]


List of Treaties and Other Legal Instruments
<table>
<thead>
<tr>
<th>Year</th>
<th>Convention</th>
</tr>
</thead>
<tbody>
<tr>
<td>1907 Hague Convention</td>
<td>Convention (IV) Respecting the Laws and Customs of War on Land (Hague Convention IV), October 18, 1907</td>
</tr>
<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights, December 12, 1948</td>
</tr>
<tr>
<td>CERD</td>
<td>International Convention on the Elimination of All forms of Racial Discrimination, December 21, 1965</td>
</tr>
<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights, December 16, 1966</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights, December 16, 1966</td>
</tr>
<tr>
<td>1972 World Heritage Convention</td>
<td>The Convention Concerning the Protection of the World Cultural and Natural Heritage, November 16, 1972</td>
</tr>
<tr>
<td>Year/Protocol</td>
<td>Description</td>
</tr>
<tr>
<td>--------------</td>
<td>-------------</td>
</tr>
<tr>
<td>1977 Additional Protocol II</td>
<td>Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977</td>
</tr>
<tr>
<td>1977 Additional Protocol I</td>
<td>Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977</td>
</tr>
<tr>
<td>ICTY Statute</td>
<td>Statute of the International Criminal Tribunal for the former Yugoslavia, May 25, 1993</td>
</tr>
</tbody>
</table>
[https://whc.unesco.org/en/guidelines/] [Quoted 25.05.2018]

List of international judgments

ICC, Prosecutor v. Al Mahdi
The International Criminal Court, The Hague, September 27, 2016

ICJ, Bosnia and Herzegovina v. Serbia and Montenegro
The International Court of Justice, The Hague, February 26, 2007

ICJ, Preah Vihear Temple, Cambodia v. Thailand
The International Court of Justice, The Hague, November 11, 2013, at 33

ICTY, Prosecutor v. Jokic
The International Criminal Tribunal for the Former Yugoslavia, The Hague, March 18, 2004

ICTY, Prosecutor v. Krstic
The International Criminal Tribunal for the Former Yugoslavia, The Hague, August 2, 2001

ICTY, Prosecutor v. Prlic et al.


