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SANTANDER ART & CULTURE LAW REVIEW

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ART& CULTURE LAW

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EDITORIAL

Dear Reader,

We are delighted to present you with the first English issue of the new biannual Santander Art and Culture Law Review (SAACLR).The publication of this journal was initiated in 2015 as a part of the project: *Creating and Managing an Interdisciplinary Legal Journal Dealing with Culture-Related Issues*, an individual grant of the Santander Group awarded to the Kazimierz Wielki University in Bydgoszcz within the Programme Santander Universidades. The main objective of this project is to disseminate innovative research relating to current problems arising from the intersection of law, culture and cultural heritage. The SAACLR is addressed to scholars, practitioners, non-governmental organizations, public authorities and policy makers dealing with legislative approaches to the protection and management of cultural heritage. The journal is also aimed at students within a broad range of disciplines which encompass or touch upon the vast number of issues referring to art, cultural heritage and law. Each odd-numbered issue of SAACLR is published in Polish and each even-numbered issue is issued in English. The contributions published in the Polish issues also include the summary and keywords in English.

Each issue is divided into eight sections: interviews, research articles, commentaries, varia, debuts, cultural heritage law and policy, events and conferences, and book reviews. The first section of the present issue includes an interview with Grażyna Kulczyk, one of the most important art collectors in Poland and patron of a number of cultural and artistic initiatives. The interviewee addresses the issues of management and curatorship of a private art collection. She also reveals her plans to establish the first private museum of modern and contemporary art in Warsaw.

The second section of this issue is dedicated to the leading theme: the role of international law in the protection of cultural heritage in the event of armed conflicts and/or terrorism. The eight contributions in this section explore the variety of problems relating to the current threats to cultural heritage. The images of destruction and pillage of many cultural sites, including those which enjoy protected status under the World Heritage Convention, have outraged the international community. Moreover, a renewed series of recently published reports has connected the looting of antiquities, or more precisely illicit excavations, to terrorism. In particular, there is credible evidence that trafficking in looted artefacts plays a significant role in the funding of Daesh (ISIL). In response to this worsening situation, various legal and technical measures aimed at preventing the international circulation of 'blood antiquities' are now being discussed. Taking this into account, Leila A. Amineddoleh in her article analyzes the ethical considerations with respect to the role of public institutions and private collectors in counteracting the illicit transfer of cultural objects and providing asylum to such materials. In turn, the articles by Derek Fincham and Alessandro Chechi discuss domestic legal measures aimed at preventing and prohibiting illicit art trafficking. The next article, by Alberto Figerio, deals with the controversial topic of humanitarian intervention aimed to halt the intentional destruction of cultural heritage. The two following contributions by Kristin Hausler and Andrzej Jakubowski explore the current legal regime governing the responsibility of states, non-state actors and individuals for serious violations of international cultural heritage obligations. Finally, Jaspreet K. Sandhar discusses the topic of cultural genocide in Tibet, while Carlos Jaramillo examines the problems of memory and post-war transitional justice in Cyprus.

The third and fourth sections include other articles not connected with the leading theme of this issue. In particular, Budislav Vukas and Katarina Peročević deal with the process of establishment of a cultural policy in Croatia since 1990, and Uwe Scheffler, Dela-Madeleine Halecker, Robert Franke and Lisa Weyhrich discuss the issues surrounding evidence in art-related criminal cases, while Karol Dobrzeniecki presents the history of scales as symbols of metaphysical judgement in Netherlandish paintings.

The fifth section is dedicated to debuts by postgraduate and doctoral students. We present an article by Alice Lopes Fabris from the Universidade Federal de Minas Gerais (UFMG) and Belo Horizonte (Brazil) on the topic of military necessity under the 1954 Hague Convention. In turn, the sixth section contains two short contributions presenting the private law aspects of cultural property owned by Polish public institutions (article by Monika Drela) and a summary of criminal threats to cultural heritage in Poland (comments and chronicles by Olgierd Jakubowski).

The two final sections provide reports on select cultural heritage conferences held in 2014-2015, as well as a book review. Importantly, this part of the issue includes an invitation for the conference entitled *The Return of Cultural Goods within the European Union – Implementing the Directive 2014/60/EU*, co-organized by SAACLR and the Research Team of the project "HEURIGHT – The Right to Cultural Heritage – Its Protection and Enforcement through Cooperation in the European Union", and a call for papers for the forthcoming issue of SAACLR devoted to the topic of the movement of cultural objects within the European Union.

Last but not least, we would like to acknowledge the work of many people involved in the preparation of this issue. We are very grateful to the authors of individual articles who replied to our call for papers and generously prepared their contributions. We would like to thank the reviewers of this issue for their most thoughtful and precious feedback. We are all indebted to the entire team of SAACLR for language revisions and meticulous editorial assistance.

We encourage you to contact us if you wish to reply to the call and submit a paper, or just to express your opinion regarding the usefulness or content of SAACLR (saaclr@ukw.edu.pl).

Alicja Jagielska-Burduk & Andrzej Jakubowski

INTERVIEW

Grażyna Kulczyk*
talks to Marta Smolińska and Wojciech Szafrański

"My new things to do as *Art* project ripens"

Wojciech Szafrański: Grażyna, we are glad we can have a talk with you now, one of the reasons being that the magazine to publish the interview has the name Santander in its title. The 2014 show at the Santander Art Gallery – the collection was entitled *Everybody is Nobody for Somebody* – was one of the major projects for you as an art collector.

Marta Smolińska: I am very curious of how it all happened: Santander calling you one day, asking you to display the collection, and so on.

Grażyna Kulczyk: Paloma Botin, Art Advisor with the Banco Santander Foundation, has decided that, along with West European or American collections, the Foundation would be ready to provide room for the art from Central and Eastern Europe. She was advised about my collection by Joanna Mytkowska, Director of the Modern Art Museum in Warsaw. Paloma visited me in Poland and saw my collection; she offered me to organise, in February 2014, an exhibition at the gallery owned by the Santander Bank Foundation, and I felt particularly distinguished by her offer. Although we had only six months to go about preparing the exhibition, I didn't resist the task as I believed the Foundation team were able to take well organised and efficient joint action.

* **Grażyna Kulczyk** is a Polish investor, art collector, and contemporary art lover. She is member of the Modern Women's Fund Committee of the Museum of Modern Art in New York and of the Tate Modern Russian and Eastern Europe Acquisition Committee. Her collection was exhibited at the Santander Art Gallery in 2014 ("Everybody is Nobody for Somebody", Boadilla del Monte, Madrid).

MS: Oh yes, the pace was really frenetic.

Given my personal character and the challenges I am used to pose to myself, I am aware that you need to work fast to achieve the goal. The time available for the preparation was short, and pretty intense. We needed to have a curator in place soonest. I considered Timothy Persons an ideal choice: we had met before and, most importantly, he had partly known my collection. Timothy's approach to what he does is exceptional; moreover, he sets strict requirements for himself and for those he works with. Additionally, he is open to a dialogue and making suggestions. This is always really important. Soon it turned out we could understand each other very well. It's because of Timothy's and my own input, and that of the Foundation people, that everything finally came to a marvellous end.

WS: As a collector, how much of a say did you have as far as the choice of the works to be shown went?

My influence was considerable. All in all, I am pretty independent in the choices I make, never completely yielding to what even a most experienced curator or associate of mine might suggest. Timothy Persons has identified two major threads about my collection: a large group of Conceptual and Minimal artists and a considerable representation of female artists. As for myself, I found such grouping of the collection by an expert very interesting, opening a new way of perceiving my own collection of art.

MS: Given the context of this particular exhibition, Polish art, as related to international art, probably acted as a "third force" of the sort as well – am I right? I mean, this must have been a great asset.

My intention was throughout to make a presentation of Polish artists in the context of creative artists of the world. It was the first opportunity ever for works of Polish artists to be shown on this scale along with some great individual names, and I am greatly proud to state that the Poles performed excellently in this "contest". I am convinced that it was the event's greatest success.

WS: Today, as I take it, your collection is completely formed as regards Polish artists, foreign artists being appended to it from time to time, so to put it. Isn't that right?

Well, not quite: the directions along which I have decided to develop my collecting activity have been shaped up, yes. And I never cease discovering artists I did not know before. One such artist being Julian Stańczak, whom I have discovered, to an extent, through Marta and, partly, thanks to some other people too. Artists such as Anuszkiewicz or Mieczkowski have become part of my collection as well.

MS: In fact, the entire Anonima Group is represented, as we can see a consistency to it: you have bought your Mieczkowski and then on go Francis Hewitt and Ernst Benkert.

True. Therefore, I cannot tell I have closed the Polish chapter, not ever intending to resume it. Let me give you an example: my last purchase of a Jerzy Nowosielski work. I have already got some works by this painter, and it could seem this was a "complete" representation. Now, I have added this new purchase to those previous works, taking delight in it. Moreover, I have bought a small-sized painting – an icon – painted by Nowosielski. I should think the finest place for its display would be some small church, in the mountains, Switzerland, perhaps. So, I haven't been freed from purchasing Polish works! I think I would find it really hard to resist a new good painting by Wojciech Fangor, although the prices are really high nowadays. But I primarily take interest in works of those artists who have not joined my collection yet.

WS: Do you follow some name list?

I sure do.

WS: How often do you rule an item off?

Well, pretty often. Items are not diminishing, though, as I continually add new names of artists whose works I should like to have within my collection.

WS: Is there any specific item numbered one?

Fontana has been there, not perhaps as "number one", but certainly part of the top ten. Recently, my dream came true and I've finally bought a Fontana.

MS: You have? Marvellous!

Yes, the painting is rather late-dated, but I believe it perfectly renders the idea behind this artist's creative work and his revolutionary approach toward space and surface of the painting. I was not quite looking for one of those boldly coloured pictures with the canvas cut across, for something tells me they are valued primarily because of their decorative qualities, rather than of what is essential to this art.

MS: A scholar has used an excellent phrase with respect to Fontana's works: a "glamour of violence" is how she puts it. Part of it is, inherently, a decorative quality, isn't it.

Well, there's probably a grain of truth to it. The work I have bought gives you an impression, I should admit, as if it were painted the moment he began firmly grasping the canvas and interfering with it, as if he was discovering his way to Spatialism at that very moment. The way Fontana makes you aware of the existence of matter though the lack of matter is out-of-the-ordinary; the same is true for how he feels the space beyond the canvas by using simple but very firm gestures. I am delighted to have a Fontana work, that is representing all these aspects of his art.

WS: Once you have purchased a new piece of painting, would it accompany you in some special moment in your life, or would it rather be put in a storeroom?

Well, it varies by case. I do not have an opportunity in each case to display the new acquisition, as there is not enough space. But I do take the opportunity to commune for some time with the newly purchased work, so I can make the best of it. The last purchase I concluded a couple of days ago was a wonderful work by Louise Bourgeois.

MS: You already had one Bourgeois in your collection before, right?

Indeed. The first object I had was a large bronze cast entitled *C.O.Y.O.T.E.*; the new one I've got is made of fabric. I've daydreamed of such a piece!

WS: This makes the representation of females even stronger.

Yes, but at the same time, a work by César impressed me extraordinarily recently. When Chamberlain crashed metal elements of cars in the United States, César did the same, at the same time, in France. He enjoyed a great esteem there. I still have in my memory the characteristic thumb of his. Once, when in a fair event, I spotted among the works displayed there an unusual object: a tit! A beautiful one! I am using the word "tit" [*cyc*] as the gallery's owner is a Jewish woman; *cyc* means breast in Yiddish. And, she moreover said, in Polish: "I've got a *cyc*!" And I said, "I can see it! And I want it!".

MS: What is the *cyc* made of?

Polyester resin. In addition, there's an interesting history behind it. It is a cast of the breast of a model named Hélène Rochas, who at that time in Paris was widely known, and considered an extraordinary beauty. Later on, she got married to the owner of Rocher, the cosmetics company.

MS: What is the size of the object?

Ninety centimetres, roughly. It is a white cast, a most beautiful one. Carl Andre is also on my list, but so far I have not found his work that I could bear financially and could fancy it, that I would be really moved by.

WS: When you're buying a work of art, what is it that makes you do it: the mind, or the heart?

The heart, mostly – and rather unfortunately so, 'cause afterwards, once I've bought a work of art, I start pondering how I can get the money to pay for yet another work of art. For the time being, things have been functioning all right.

MS: This is marvellous: when you're talking about your collection, it's not only that you're telling the story almost with your whole body – how big the joy, and

what a passion there is when buying a work, and then another one, to add to the collection: you moreover use words such as "appetite", "I've gone nuts for", "been moved", and the like. You're describing your unbelievable desire. Tell us, please, and be frank: it that an addiction yet?

Yes, it is an addiction.

WS: And the sickness is getting even worse?

Yes, I become concerned about the prices I've entered. It is changing these days. On a December auction, a Szapocznikow work will be offered, as I've heard – and it will probably be sold for more than one million zloty. A Fangor painting has now been sold for nearly a million. Thus, also Polish artists are becoming dear, which is a good trend.

WS: Poles tending to buy Polish collectibles abroad and draw them back to their home country: this is, all in all, a rather unusual process. The buyers seek for such *polonica* in foreign auctions as works of Polish artists are still available there at cheaper prices than in Poland.

The prices of Wojciech Fangor's works are soaring, outside Poland as well. One gallery I am on friendly terms with has sold all the Fangor works it exhibited during the Frieze fair in London. They had a beautiful stall there, quite an ascetic one. All the paintings were of the same size. They came from a certain American collection and represented an early stage in Fangor's biography as an artist; their prices were significant.

WS: It was this particular gallery that offered a Fangor painting for the Art Basel. The price was really extraordinary.

That's true. But I still am of opinion – and I've had many opportunities to observe this – that, related to the other artists from this part of Europe, the prices of Polish artists have been growing rather slowly. The Slovak artist Maria Bartušova has entered the market with very high prices. There's the Romanian Ana Lupas, who has been exhibited at the Tate, with pretty high prices to her credit. Roman Opałka, who for me is an outstanding, unapproachable artist, has hit a price ceiling and cannot top one-million zloty. And I do regret this, since the other good artists become successful in the art market rather soon, whilst the Poles – apart from Fangor – are very seldom as successful. Abakanowicz, who has really excelled on the worldwide stage and has proved that she is a great artist, featured in many collections, still makes it at a medium level, given the international circumstances.

WS: Is there a chance that your activity may cause the foreign museums to have Polish artists as part of their collections, and to exhibit them? Would they appear in all those important places such as Tate Modern, or the MoMA? For, once you have donated a Krasiński, this might be considered an act of promotion on your part.

I should hope so. Otherwise, what would be the point of being there, with those assemblies? Speaking of the Tate, I could see how important was the role played by the Romanian team in promoting Ana Lupas. In our body, the Russia and Eastern Europe Acquisitions Committee, several Romanians are represented, and it was them who have prepared the defence excellently. Although the work by Lupas, an exquisite large installation, was very expensive given the budget we had at our disposal, their resolute attitude and solidarity finally convinced the other members and all supported the acquisition, as a result. What it shows is that our influence on what may be added to the collections of those eminent institutions is significant. My donation to the MoMA was not insignificant, either: Edward Krasiński owes to it his noted appearance at the exhibition *Transmissions: Art in Eastern Europe and Latin America*, *1960-1980* in New York City. We've got a Polish artist amidst an international group of his peers in one of the world's major art institutions, so this is certainly an important thing.

WS: You can say, the first element in the process is the individual who can display the artist; then come the institutions, and then on, the market or other collectors that imitate these institutions. In our opinion, who of the Polish artists has a chance to "spring into being" in large institutional collections?

Krasiński is already there. There is certainly Fangor, too. I think that the Zofia Kulik acquisition into Tate, which was approved in April 2015, paves a new way open for this artist. It is important that an artist's works form part of the collections of important institutions and be exhibited to a broad public. The art market responds virtually instantly in such cases. I think of Opałka, whose art has been in international circulation for years now. Althamer is widely recognised, particularly in the States. He is known everywhere, for he comes out to the public with his art, and this is very important. He creates happenings in certain districts and has the public reacting spontaneously to his art. Wilhelm Sasnal has achieved a stabilised position, too.

I am pretty moved by a meeting I last had with the young artist Agnieszka Kurant. I first met her via a foreign gallery. She is represented by Tanya Bonakdar, the gallery I once bought an Ólafur Elíasson from. At the N.Y.C. Frieze event, I saw sculptures that drew my attention owing to the material they were made of. As it turned out, they were made by a Polish artist whose name was Agnieszka Kurant. Still not too well known in Poland, she is moving on abroad. I recall the meeting with her, and a very interesting conversation we had on this occasion, with joy. There certainly are Polish artists whose potential we have not discovered yet in Poland.

MS: Agnieszka Kurant had an individual exhibition at the Centre for Contemporary Art in Torun in 2012, which was called *Phantom Capital*. It was an excellent exhibition. I can remember it very well, as I was heavily impressed by it. Joanna Sandell of the Botkyrka Konsthall was the exhibition's curator. This means that the project

was suggested by a foreign team: at the time, a cycle *Focus Poland* was being held at the Centre, according to the idea proposed by Dobrila Denegri. The foreign curators invited by Dobrila proposed works of Polish artists. Rainer Fuchs from Austria showed Marzena Nowak then; Joanna Sandell chose Agnieszka Kurant. Presently, a Jarosław Kozłowski exhibition is being held in Torun.

I talked to Jarosław Kozłowski and he reminded me of his exhibition, which you described as a big retrospective overview. Based on what I know, it will be shown at the MOCAK Centre for Contemporary Art in Krakow in 2016. In my opinion, Kozłowski is one of the best and most interesting artists, not only in Polish cultural sphere.

MS: This exhibition is unbelievable. I think gallery operators are looking around in there, for Jarosław Kozłowski has drawn out from his atelier things that have not yet been displayed or were exhibited back in the seventies, and never documented. These works are gorgeous! I think the market will very quickly respond to what is shown there – and I wonder whether it is the home or a foreign market to respond.

WS: Have you come across anyone of a foreign gallery team travelling across Poland and taking a closer look at Polish artists?

I do not know what representatives of foreign institutions are travelling the country and taking a look at someone. What I know is that more and more Polish artists are represented by galleries which are really well-thought-of – and these galleries have a significant say in the shaping of our contemporary artistic world.

WS: Your own collection is rather specific, as it has been created by a single individual, who is a woman, rather than by a whole team of people. I reckon you probably receive a plenty of offers to buy.

In spite of appearances, the number of offers I receive is not that big. I buy the works mostly at fairs, sometimes through auctions. I frequent galleries which can offer me something I would like to have. There are galleries I consider my favourite: there I go with pleasure, or they contact me. There is not a throng of offers that I would be getting, but some do come over to me from time to time.

WS: There are pretty many collections created by married couples and, possibly, by males. While talking to other collectors, do you get the impression that their perception of a woman-made collection is different? Is the gender of any importance in this case?

No, it is of no importance. There are other women creating art galleries – or at least such who are known as the only makers. One example I can quote is Sandretto Re Rebaudengo, the Italian from Turin, and her exquisite collection.

MS: But there are not too many females: the business is continually, definitely, a "male" one.

Indeed. And this is why meeting Re Rebaudengo was so important for me. When I visited the fair in Turin last year [2014], I could see the space she had created to display her collection. Her foundation building excels with its extraordinary functionalism, elegance, and nobility of form. I also drew my attention to the quite deliberate strategy of how to shape the gallery space and how to create exhibitions to make them attractive to the public. For me, this is a model that sets an interesting direction of thinking about modern art of arranging exhibitions.

WS: Collections basically reject the option to be mobile. They would stay where they are, rather than move from one place to another, not only for preservation-related reasons but also because they are settled in a specific place.

MS: You are selling the Stary Browar. This means there will be nothing left in Poznan.

Stary Browar will stay there, I am not going to dislocate it!

MS: OK, but what about the exhibitions, the gallery there?

I don't know what future will bring. There will be no more exhibitions run by Art Stations Foundation in Stary Browar, that's for certain. The *Nieczytelność* [Illegibility] exhibition for which Marta is the curator, due in February 2016, will be the last one. But my involvement in the exhibition business is not coming to an end, because I still hope I will have a museum in Warsaw built. My museum building project in Switzerland is underway: the locality is called Susch, it is where I have bought an old brewery building. My idea is to make a possibly best use of the potential offered by the space I have come across at that place, and to make this space available to artists. This is one of the reasons I recently kept in touch with Jarosław Kozłowski, whom I would like to offer to develop a space within the museum building. The Switzerland museum is a very interesting project, also because of the venture's pioneering nature. It is for the first time ever that a Polish woman is to build a museum in Switzerland whose number-one task would be to promote Polish art. I wouldn't say it is a "Polish" museum, one that would function "under the white-and-red banner, full stop". Rather than that, the project will provide one more opportunity to exhibit Polish artists in an international context.

MS: All right then, Jarosław Kozłowski – and, who else?

Piotr Uklański and Mirosław Bałka will certainly be there.

WS: Ah, just male artists.

MS: Any women?

There'll be Paulina Ołowska and Monika Sosnowska, the latter already preparing a piece fitting within the space. Rosemarie Trockel, highly valued in Switzerland, will join them. I have bought an installation she has authored, already exhibited by

a Cologne museum; in Susch, it will occupy a dedicated space. I cannot tell you all the names yet. In total, there are about ten rooms to be used.

MS: What size are those rooms?

Various. To give an example, one of them is five metres high, sixty square metres of floor area, and is chiselled in rock. I thought that Mirosław Bałka might develop a space like this, since it is gloomy, harsh and humid, and his works may fit in such an environment very well. The project makes me pretty satisfied but calls for extraordinary concentration and is time-consuming. The museum will offer 1,200--1,300 metres of exhibition space. There is no larger cultural institution in that part of Switzerland.

WS: How about the surroundings of the museum?

They are beautiful. To expand the museum's activity, I have bought an adjacent building, in which ateliers for artists will be arranged, for them to come over and make their works on the spot. Now, I am about to plan a promotion strategy and the activities related to the functioning of this institution on the demanding, though fascinating, arena of Swiss culture. On the initial stage, care should be taken about creating some artistic havoc in the new milieu, so that people start sharing the news that in Engadina, the region where Susch is located, a museum is being developed which will be open to various suggestions. I have already employed curators from Switzerland to work on the core programme.

MS: How would the curators influence the selection of what you are going to exhibit there? Is the final decision yours?

As for the permanent space, I have made the decision. I obviously have influenced the character of the museum's programme, one reason being that my collection forms the basis. The space dedicated to temporary exhibitions will alter twice in a year, and will be managed by the curators. The old section of the brewery I have mentioned, where the core exhibition will be housed, is my homage to the artists I respect and believe they ought to be memorised by those who will visit the museum. Incessant change and astonishing artistic experiment is what section needs. I will certainly be open to the genre of performance art as well as a number of other actions.

MS: Do you think this concept can be reconciled with the idea to build the museum in Warsaw? How will you manage to be here and there, controlling both projects at the same time?

I already am in different places simultaneously, these activities, and more, being well organised and supported by a trusted team of professionals. This has also been the case with the Stary Browar, which I have left in good hands – and I do believe it will continually be managed to a top standard, excelling with its creative and ex-

traordinary approach. I never feared new challenges and oftentimes entered into several projects at the same time, as action and activity is my element. I have with me a well-prepared group of associates who, like I do, are capable of finding their way in new situations. The two major challenges I am facing now include, precisely, the museum in Switzerland and the museum in Warsaw.

WS: I think, the time has come to sum up. What is it that you find the most successful, about Stary Browar and the exhibition?

I am convinced that the Poznan downtown area has changed, as has the locals' way of thinking about public spaces. I consider this to be the Stary Browar's greatest achievement. This venue has showed people how to make use of public space, opened the new opportunities and perspectives for proactive participation in public, or social, life. The exhibitions held by my Foundation were ever more interesting; the events, just to mention the Art & Fashion Forum, was of ever better quality. I spared no effort on making the projects and undertakings more and more attractive every year.

WS: Your projects hit the target in virtually every single segment. What I'm referring to is public space as a general concept, not just your art project. You've found your way to children, for instance: the sandpits, the colour sand!

This is what I'm talking about while referring to creating public space: a completely new quality of using common places. Stary Browar has a programme targeted and tailored to every social and age group.

MS: Tell us, please, what will happen with the Tarasewicz columns, for that matter?

The works of art will remain there, within the Stary Browar space, as a deposit. While they are, and will be, part of my collection, I wouldn't like to take the columns you mention away from that place.

WS: Which is also probably true for the Mitoraj work.

The Mitoraj is rather hard to remove, as the work has been installed at the Atrium, before the roof was constructed. I think it is good it will stay where it is.

WS: An understanding has been signed recently between Gdansk and Warsaw for setting up a Modern Art Museum in Gdansk. Poznan would probably not expect an agreement like this in many years to come. I know that your Warsaw project is a different museum of modern art – based on what I know, it is to function under such a slogan. How powerful your own narrative would be in that particular place? You have a way to narrate art of your own, because if we walk across the museums in Warsaw, we would never meet a Stańczak, or a Mieczkowski, or any Minimal Art pieces there.

This is true also for Judd, Jenny Holzer, or Agnes Martin; or, for Albers. For quite many, as a matter of fact.

WS: And you're not taking those pieces with you to Switzerland?

No, I'm not. My collection is big enough to form on its basis, without any problem, a museum in Warsaw and plan a core exhibition for Switzerland. For the time being, I am waiting till the decision is made to enable the development of the institution in Warsaw.

MS: Are you still waiting to get the reply? Poznan has discredited itself entirely in this respect, and the museum project never became true there; now, Warsaw seems to be protracting the process.

We are in the middle of talks right now.

WS: Is there any limit of your patience?

There is one, for certain. I am focused on the talks now, not willing to make things unnecessarily hasty. It might be that the institutions or the authorities need more time to make their decisions. But on the other hand, the situation doesn't seem much complicated to me. I should like to donate to Warsaw a museum with an unusual collection I have been building over the years. My activities as a collector have implied the idea that the collection should be made publicly available: my intention is to share with the others what I have managed to create. My plans would not curtail the public budget; I want to organise all this with my own money.

WS: Some decision-makers think, perhaps, that constructing this museum in Warsaw would significantly debilitate some of the public institutions from the standpoint of visitors, recognisability, and so on. I know an example from Bavaria where the emergence of a private museum brought about the fall of a local public museum, for the private enterprise had a more attractive architectural form and more interesting objects on display. Would you say this is part of the context too?

No, I wouldn't; this is the first time I come across such a point of view. In Poland, a very small fraction of the public are interested in contemporary art, and thus we still have a lot of work to do, particularly with respect to education. The institution I have devised will be no competition for the National Museum, or the Modern Art Museum, or to any other cultural centre. Each of these places has a programme of its own and a determined scope of action, which determine the specificity and the character of the respective institutions. I am positive that the broader the choice is, the better for the public. In my opinion, the diversity and the choice offered is what this country's society needs in the context of artistic education.

WS: Have you considered the fact that if you are not successful in building the museum and it becomes apparent that you are taking your collection away, to another

country, then administrative or legal obstacles might appear with respect to the objects that require a permit for them to be moved across borders, due to their age and value?

I haven't thought about this, either, for I do constantly believe that all these works will remain in Poland. I still believe we are a society that, apart from the mundane and basic issues of everyday life, feels the need for an art that makes one think. I wouldn't like to figure out the entire collection going abroad: it is needed in this country, and not elsewhere. I have managed to form a collection that is really worth remaining here in its entirety, non-diffused.

WS: "What happens after I go?", is the problem normally faced by art collectors. "What will happen to/with my collection then?" I meet collectors who tell me, "Wojtek, go find some affluent thirty- or forty-year-olds for me, so they repurchase from me the *clou* of my collection." This is impossible in your case. So, what will follow afterwards?

I don't know. I ask myself the question every day. I reckon the only solution would be to place the entire collection in a museum, so as to prevent the works from spreading out across the world. When I read auction catalogues and it turns out that a whole chapter is dedicated to a collection that was created over years by a family, it really distresses me. I can figure out the emotions and endeavours that accompanied the collecting over the years; then, the hard work is brought to naught, the collection losing its cohesiveness and shape.

MS: I still cannot get past the fact that Tadao Andō's design, whose model I saw at your home, was not delivered near the park adjacent to Stary Browar. I think that the status of Poznan would change then, as the city would gain something unique on the East Central European scale, which would attract visitors. The short-sightedness of local municipal authorities is terrifying. I am curious what Warsaw will do now. Let's hope the decision will be positive. Have you got an architect already, the one you would demand for your project?

There are a few names coming to my mind, but not until I have got the place and the certainty that the museum will finally be there, I am not going to talk to eminent architects and get them involved in the project. I am aware that those great architects (and I would like the project to be done by someone of a significant name and considerable experience in creating objects of the sort) are pretty time-poor and free time in their schedule is a rare occurrence.

WS: In your personal history as a collector, you must've met hundreds, and thousands, of people. Marta and I can feel that the story called "Stary Browar" is coming to an end. Among those who worked on the project, or who you have accidentally met there, is there anybody special, someone who would have impressed some extraordinary stigma on you?

Let me shun naming anybody in specific, for there have been many such extraordinary persons, every one of them inspiring me in his or her peculiar way, and we exchanged our perceptions and thoughts for a good many years. This has all remained within the walls of Stary Browar. People are afraid that Stary Browar will change, but I do not share these fears. Those with whom I built Stary Browar will stay there; an excellent operational team remains in place, of those who have won my trust and, primarily, the trust among Poznan people. I should think Stary Browar is a wonderful adventure that I have come across in my life.

WS: I have recently seen new mappings of art in Poland, with localities plotted and descriptions of what is going on. When it comes to Poznan, we are told that everybody is moving the house, the only thing remaining is the Stary Browar and the Grażyna Kulczyk collection remaining (the decision was not made yet).

This is pretty unfortunate.

MS: It is, but on the other hand, you have done everything to have it right here! To no avail, regrettably. I write on a monthly basis my recommendations to the municipal publisher IKSA about the must-sees in Poznan. And I recommend every single exhibition held at your place. Ever since I took over the column, I have written of *The Second Autumn* and *Let's Dance*; most recently, I have covered Iza Gustowska, as these materials are prepared in advance. This means that I will soon have nothing else to write about!

WS: Indeed, ever since the gallery appeared, your art and the choices you make have been present in Poznan. Now, the story is at its end, for not too many people would be able to watch these works at your home.

I find this particularly regrettable as this is my family town. I have attached myself personally and business-wise to Poznan; it seemed at some point that I would live there till my very last days. It was after years and years of my exhibition organising activity that I managed to create a broad public at the Stary Browar. Together with the Foundation, I performed a pioneering work and discovered a number of new phenomena to the public. At the outset of the performative scheme, we had a few spectators coming to see our spectacles; today, there are often no seats available. It was all achieved through hard work. In Warsaw, where the public is larger and responds more spontaneously to any event appearing, the situation is different.

WS: The *Art* project will still be underway; this is probably not true for the *Dance* project, right?

Using the tentative name "Museum of Contemporary and Performance Arts" in the title of my application to the Municipality of Warsaw, I remarked that performance art would be part of the programme.

MS: You are perfectly making yourself part of what is described these days as a performative turn in visual arts – and, in humanities at all. Your museum would then become a perfectly fitting part of such a most modern trend.

To support my presentation at the Warsaw town hall, I requested to prepare a demonstrative design. I wanted to make the officials aware of how I imagined the space of this building and the role it was to play as far as delivery of the basic assumptions behind the institution are concerned. There was, obviously, a stage to perform modern dance, a performative theatre, a large library, and educator's props. I should hope these ideas will be delivered, their germs having appeared based on the best cultural institutions worldwide.

MS: How large would be the area, in square metre terms, that you would like to make an exhibition space?

I earlier on had various ideas about it: ten, or even fifteen thousand square metres. But certainly a part of the space will be used as a storeroom. The area would certainly be quite large, with several thousand metres of exhibiting space.

WS: I think quite a lot of people will frequent the place precisely for the reason you've mentioned: part of the Warsaw society will consider it fit to show off there.

MS: Certainly, no big effort would have to be made to make people come over, contrary to what was the case in Poznan or, for instance, at the Torun Contemporary Art Centre. In Torun, it has become en vogue even for lower-secondary-school students to attend opening parties: you simply have to turn up at the Centre. The art exhibited there obviously somehow penetrates into the minds of those young people; so, the effort yields a good result.

WS: And in your museum, works not only by Polish but by top world artists will be seen, in the first place.

This is true: in fact, no Polish museum has shown some of these artists yet.

MS: Grażyna, thank you very much for having talked to us.

Thank *you* so much.

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RESEARCH ARTICLES

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Cultural Heritage Vandalism and Looting: The Role of Terrorist Organizations, Public Institutions and Private Collectors

Abstract: The destruction and looting of cultural heritage in the Middle East by terrorist organizations is well-documented by social media and the press. Its brutality and severity have drawn international criticism as the violent destruction of heritage is classified as a war crime. Efforts have been made to preserve objects against bombing and destruction, as archaeologists and other volunteers safeguard sites prior to assault. There is also precedent for prosecuting heritage destruction *via* national and international tribunals. In term of looting, black-market antiquities provide a revenue stream for ISIS; therefore, efforts must be made to stop this harmful trade. Governmental agencies have taken actions to prevent funding through antiquities. Public institutions have a role in safeguarding looted works by providing asylum to them without fueling the black market. At the same time, private collectors must also not purchase

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any items from the black market. Through education and enforcement of legislation intended to protect cultural heritage, it may be possible to reduce the market for looted antiquities.

Keywords: cultural heritage vandalism, terrorism, collectors, museums, cultural objects

Introduction

The recent and well-documented looting and destruction in the Middle East at the hands of the Islamic State of Iraq and al-Sham ("ISIS")[1] has stunned people around the world. The United Nations (UN) has categorized the actions as the "most brutal, systematic" since the Second World War.[2] ISIS and their network have vandalized some of humanity's greatest achievements, and have celebrated these destructive actions with the dissemination of heart-wrenching videos and photos. Each time an update is released concerning ISIS destruction, the scenarios seem to escalate. ISIS is not satisfied with mere destruction, but its members use murder and violence in their regime. With the use of social media,[3] destruction has been more widely observed and knowledge of its occurrence has spread globally, allowing terrorist organizations to create global fear within an instant. There have been attempts made by other ruling parties to annihilate the past, but the use of media to publicize atrocities sets these crimes apart.[4]

There is no doubt that looted antiquities are a source of revenue for ISIS, and thus looting must be stopped. The Federal Bureau of Investigation and other governmental agencies and international organizations have taken actions to target looting and prevent funds from reaching terror syndicates. In the effort to reduce looting and protect antiquities, museums and public institutions play a vital role. At the same time, private buyers must not purchase illicit objects and fuel the demand for loot. Through education and enforcement of legislation intended to protect cultural heritage, it may be possible to reduce the market for looted antiquities.

[1] The terrorist group is known as the Islamic State of Iraq and ash-Sham ("ISIS"), the Islamic State or Iraq and the Levant ("ISIL"), Islamic State ("IS"), or Daesh. For purposes of this paper, the abbreviation "ISIS" will be used for consistency in all instances.

[2] *U.N. warns of IS attacks on ancient sites*, "THOnline", 22 August 2015, http://www.thonline.com/news/national_world/article_31974b6e-67a5-5583-9dae-d1feb373e792.html [accessed: 15.11.2015].

[3] *Islamic State photos 'show Palmyra temple destruction'*, "BBC News", 25 August 2015, http://www.bbc.com/news/world-middle-east-34051870 [accessed: 15.11.2015].

[4] *The Crimes of Palmyra*, "New York Times", 25 August 2015, http://www.nytimes.com/2015/08/26/opinion/the-crimes-of-palmyra.html?smid=tw-share&_r=1 [accessed: 15.11.2015].

The Devastation of Cultural Vandalism

A Brief History of Cultural Vandalism

Cultural vandalism has occurred since the early eras of human civilization. Ancient art bears proof of this vandalism, providing us with knowledge that ancient civilizations used destruction to exert power and symbolically destroy enemies. Today's region of upheaval in the Middle East has endured many destructive periods. The Hittites sacked and looted Babylon around 1700 BC and were subsequently displaced by other dynasties. One of the earliest known destructions of a city occurred in Ebla, in modern day Syria. The city was occupied prior to 3000 B.C. and was destroyed multiple times during its existence.[5] Decorative objects have also been vandalized. For example, the Royal Portrait Head ("Head of Sargon the Great") from around 2250-2200 B.C. in Nineveh was a sculptural representation of the Akkadian king.[6] The copper sculpture was intentionally mutilated, possibly at the time of Nineveh's fall in the early seventh century BCE. It was selectively disfigured suggesting that it was not intended to be completely destroyed, but rather retained and damaged to symbolize defeat.[7] Ancient sculptural friezes include the erased faces of rulers, not as wanton vandalism, but as targeted destruction of cultural identity.[8] The risk of vandalism was understood and thus artists attempted to discourage it. A 13th century B.C. Elamite statue of Queen Napir-Asu included an inscription stating, "He who would seize my statue, who would smash it, who would destroy its inscription, who would erase my name, may be smitten by the curse […]."[9]

Vandalism continued through the centuries and was celebrated in Ancient Rome as emperors erected processional arches and columns to commemorate brutal victories. The Arch of Titus brazenly celebrates Rome's Sack of Jerusalem. But perhaps Rome's greatest monument to looting is the towering Trajan's Column which pays homage to the woeful destruction of Dacia.[10] The column was funded by the spoils from the Dacian Wars, a bloody conflict waged in early second cen-

[5] I. Thuesen, *The City-State in Ancient Syria*, in: M.H. Hansen (ed.), *A Comparative Study of Thirty City-State Cultures: An Investigation*, Historisk-filosofiske skrifter, Vol. 21, Det Kongelige Danske Videnskabernes Selskab, København 2000, pp. 55-66.

[6] F. Kleiner, Ch.J. Mamiya, *Gardner's Art Through the Ages*, *The Western Perspective*, Vol. 1, 12th edn., Thomson Wadsworth, 2006, p. 26.

[7] E. Varner, *Mutilation and Transformation: Damnatio Memoriae and Roman Imperial Portraiture*, Brill, Leiden 2004, p. 12.

[8] M. Seymour, *Vanished Images*, Metropolitan Museum of Art, Assyria to Iberia, 6 October 2014, http://www.metmuseum.org/exhibitions/listings/2014/assyria-to-iberia/blog/posts/vanished-images [accessed: 15.11.2015].

[9] F. Kleiner, Ch.J. Mamiya, op. cit., p. 31.

[10] A. Curry, *A War Diary Soars Over Rome*, September 2012, http://www.nationalgeographic.com/trajan-column/article.html [accessed: 15.11.2015].

tury campaigns that obliterated the Dacian Empire.[11] In addition to land gains, loot seized during the plunder was staggering, estimated to include a half million pounds of gold and a million pounds of silver.[12] As for propaganda, "It [the column] was for Roman citizens, to show the power of the imperial machinery, capable of conquering such a noble and fierce people."[13] Rome's glory came to an end and the empire took its final gasps after invasions by northern Germanic tribes. The Vandal tribes were so barbaric in their destruction of Rome and its provinces that we now use the term "vandalism" to refer to all deliberate destruction of property.[14]

The practice of vandalism after conquest or in opposition to conflicting ideology continued through the centuries, with cross-continental destruction committed during the Crusades. From the early years of Christianity, destruction of religious symbols was widespread and became known as iconoclasm (referring to the destruction of Christian icons). Government-led iconoclasm began with the Byzantine Emperor Leo III in the early 8th century. Another period marked by iconoclastic destruction was the Protestant Reformation when the removal of religious images was encouraged throughout many areas in Europe during the 16th century.[15] The English Civil War saw massive destruction, as it is estimated that at best 10% of medieval British art survived that period.[16] However religious and ethnic destruction was not unique to Europe, as heritage destruction occurred around the world.[17]

In more modern times, heritage has been systematically plundered. During Napoleon's reign, he aimed to transform Paris into a "New Rome".[18] The following century, one of history's most ruthless rulers did the same – Adolf Hitler created the Third Reich, intended as a successor to the Roman Empire. Hitler revered Imperial Rome and emulated its art and heritage. He used art and architecture as a way to connect Nazi Germany with the power of the past. One aspect of its architecture was to use massive size to impress, symbolize victory, and intimidate. Like the Romans, Hitler erected architectural monuments like triumphal arches,

11 *Trajan's Column in Rome*, 14 July 2015, http://www.trajans-column.org/ [accessed: 15.11.2015].

12 A. Curry, op. cit., p. 11.

13 Ibidem.

14 "Vandalism", in: *Mirriam-Webster Dictionary*, 2015, http://www.merriam-webster.com/dictionary/vandalism [accessed: 15.11.2015].

15 See generally C.M.N. Eire, *War against the Idols: The Reformation of Worship from Erasmus to Calvin*, Cambridge University Press, Cambridge 1989.

16 E. Graham-Harrison, *From Parthenon to Palmyra: a history of cultural destruction*, "The Guardian", 3 September 2015, http://www.theguardian.com/culture/2015/sep/03/palmyra-isis-history-cultural-destruction-parthenon [accessed: 15.11.2015].

17 *Destroyed During Invasion*, http://www.worldheritagesite.org/tags/tag183.html [accessed: 15.11.2015].

18 M. Miles, *Art as Plunder: The Ancient Origins of Debate About Cultural Property*, Cambridge University Press, Cambridge 2008, p. 320.

columns, and trophies.[19] In addition to creating works to spread propaganda, the Nazis also destroyed art for self-promotion. They gathered art that did not speak to their sensibilities and labeled it as "degenerate". This degenerate art, anything modern or that the Nazis deemed was not "Germanic", was seized, displayed as lacking merit or destroyed by fire. (In some cases, Nazi officers recognized the economic value and seized the art for its financial value.) Nazis used art as a way to display their power, degrade demographic groups, raise funds for a growing force, and propagate their ideology. Cultural vandalism is powerful propaganda because it instills fear.[20] As destruction degrades enemies and suppresses opposition, the objects become symbols of the ways in which the degraded group can, and will, be destroyed. The objects come to symbolize the irrelevance of the past or the weakness of an enemy.[21] Displays of destruction are powerful images that reverberate in society's collective consciousness. Moreover, through all of these uses, destruction is a means of punishment and a way to eradicate the past.[22]

ISIS Uses Cultural Heritage as a War Tool

ISIS uses cultural vandalism as a powerful tool to systematically murder the past.[23] Just as the Nazis used art as a type of cultural cleansing, ISIS is following suit. During the summer of 2014, global media sources noted the destruction of ancient tombs and sites laden with religious significance. The actions continued through the year and in early 2015 ISIS released videos of militants toppling and smashing statues and carvings in the Mosul Museum, followed by the bulldozing of an archaeological site dating back to 900 B.C. at the ancient capital of the Assyrian Empire.

ISIS espouses the view that shrines and statues implying the existence of other deities are idolatrous and subject to destruction.[24] ISIS claims that it considers his-

[19] A. Speer, *Inside The Third Reich*, The Macmillan Company, New York 1970, pp. 133-134 ("The Romans built arches of triumph to celebrate the big victories won by the Roman Empire, while Hitler built them to celebrate victories he had not yet won").

[20] C. Jones, *In Battle Against ISIS, Saving Lives or Ancient Artifacts*, Hyperallergic, 17 April 2015, http://hyperallergic.com/200005/in-battle-against-isis-saving-lives-or-ancient-artifacts/ [accessed: 15.11.2015].

[21] See K. Romey, *ISIS Destruction of Ancient Sites Hits Mostly Muslim Targets*, "National Geographic", 2 July 2015, http://news.nationalgeographic.com/2015/07/150702-ISIS-Palmyra-destruction-salafism-sunni-shiite-sufi-Islamic-State/#.VbY60e20bho.facebook [accessed: 15.11.2015].

[22] K. Shaheen, *Outcry over Isis destruction of ancient Assyrian site of Nimrud*, "The Guardian", 6 March 2015, http://www.theguardian.com/world/2015/mar/06/isis-destroys-ancient-assyrian-site-of-nimrud [accessed: 15.11.2015].

[23] T. Velozo, L. Bento, *ISIS Is Destroying Priceless Artifacts. Here's How to Stop Them*, "The Diplomat", 17 March 2015, http://thediplomat.com/2015/03/isis-is-destroying-priceless-artifacts-heres-how-to-stop-them/ [accessed.15.11.2015].

[24] *Palmyra's Baalshamin temple 'blown up by IS'*, "BBC News", 24 August 2015, http://www.bbc.co.uk/news/world-middle-east-34036644 [accessed: 15.11.2015].

tory expendable and blasphemous.[25] They pronounce that significant sites were hidden and forgotten by the era of the Prophet Muhammad, but have since been excavated and re-venerated by "Satanists".[26] In addition to cultural and religious cleansing, the militants are obliterating the memory and identity of populations across the Middle East.[27] It is psychological warfare;[28] destruction causes fear, indicating the might of ISIS, warning citizens as to the extent of ISIS barbarism.[29] Even against international condemnation, ISIS continues its destructive campaign. In fact, individuals protecting heritage have been targeted. The world mourned the loss of one of Palmyra's greatest champions, Palmyra's Antiquities Chief, Dr. Khaled al-Asaad. ISIS beheaded the octogenarian antiquities scholar labeled as an "infidel"[30] and hung his body on a column in the main square of historic Palmyra.[31] The symbolism invoked in hanging him from the spot where he devoted his life was not lost on anyone. He has been internationally recognized as a martyr for humanity.[32]

Although sickening to most, videos of beheadings and destruction are used to further ISIS objectives. Shockingly, ISIS uses highly publicized destructive actions to recruit members.[33] Recruitment is linked to the destruction of culturally significant places; allegedly the number of recruits surges upon the release of disturbing images.[34] In early 2015, ISIS obliterated the remains of Hatra, a UNESCO World

25 M. Hay, *Stopping ISIS's Destruction of Historical Sites: What Can and Can't Be Done*, "Good", 1 September 2015, http://magazine.good.is/articles/stopping-the-destruction-of-historical-sites-isis-syria-palmyra?utm_source=thedailygood&utm_medium=email&utm_campaign=dailygood [accessed: 15.11.2015].

26 Ibidem.

27 D. Soguel, *Why ISIS blew up Syria's iconic Bel temple*, "The Christian Science Monitor", 31 August 2015, http://m.csmonitor.com/World/Middle-East/2015/0831/Why-Islamic-State-set-off-explosives-at-Syria-s-ancient-Bel-temple [accessed: 15.11.2015].

28 See generally A.P. Schmid, *Terrorism as Psychological Warfare*, "Democracy and Security" 2005, Vol. 1, pp. 137-146.

29 *Louvre showcases antiquities as Palmyra is destroyed*, "CNN News", 8 September 2015, http://www.cnn.com/videos/world/2015/09/08/pkg-amanpour-louvre-unesco-irina-bokova.cnn [accessed: 15.11.2015].

30 A. Withnall, *Isis executes Palmyra antiquities chief and hangs him from ruins he spent a lifetime restoring*, "Monitor", 19 August 2015, http://www.independent.co.uk/news/world/middle-east/isis-executes-palmyra-antiquities-chief-khaled-asaad-and-hangs-him-from-ruins-he-spent-a-lifetime-restoring-10461601.html [accessed: 15.11.2015].

31 *Islamic State militants behead archaeologist in Palmyra – Syrian official*, "Reuters", 18 August 2015, http://uk.mobile.reuters.com/article/idUKKCN0QN24I20150818 [accessed: 15.11.2015].

32 T. Holland, *A martyr for civilisation: The 83-year-old archaeologist who devoted his life to saving Syria's sublime ruins… and who refused to flee even when he knew ISIS savages would behead him*, "Daily Mail", 26 August 2015, http://www.dailymail.co.uk/news/article-3212140/A-martyr-civilisation-83-d-devoted-life-saving-sublime-ruins-refused-flee-knew-ISIS-savages-behead-him.html [accessed: 15.11.2015].

33 C. Knight, *The Mosul Museum video from Islamic State could be a staged drama*, "Los Angeles Times", 28 February 2015, http://www.latimes.com/entertainment/arts/la-et-cm-mosul-museum-knight-notebook-20150228-column.html [accessed: 15.11.2015].

34 S. Almukhtar, *The Strategy Behind the Islamic State's Destruction of Ancient Sites*, "New York Times", 31 August 2015, http://www.nytimes.com/interactive/2015/06/29/world/middleeast/isis-historic-sites-control.html?_r=0 [accessed: 15.11.2015].

Heritage Site in Iraq.[35] The city had become a symbol of multi-culturalism, with a blend of Roman, Hellenistic, and Arabic architecture.[36] In the summer of 2015, the militants damaged significant structures in Palmyra, a site of "outstanding universal value",[37] a crossroads of civilizations where East met West.[38] When the site was uncovered in the 17th and 18th centuries, it helped to spark the revival of classical architecture in the West.[39] Due to its history, Palmyra is archaeologically and historically rich, with temples, an aqueduct, and colonnaded streets.[40] And possibly most heartbreaking was the destruction of the Temple of Bel, a structure recognized as an architectural treasure as significant as the Parthenon and the Pantheon.[41] The destruction of sites within the "Pearl of the Desert" hit the archaeological community heavily. Like the brutal Khmer Rouge who reset the clocks to Year Zero, ISIS attempts to rewrite history by destroying the past.[42] The acts of destruction are symbolic as ISIS forcefully tries to convince the world of its legitimacy as a powerful caliphate requiring conversion or death.[43]

Cultural Heritage is a Human Right

Access to cultural heritage is a human right. This right has not always been explicitly stated, but the concept of heritage as a right has been implicit since early efforts to protect heritage.[44] Preservation of heritage is crucial to a community's sense of importance and respect.[45] Current ideology about human rights traces its origins to 1948 when the United Nations, motivated by the horrors of the Holocaust during the Second World War, promulgated the Universal Declaration of Human Rights.[46] Article 27 asserts that culture is a human right, stating "Every-

35 Ö. Harmanşah, *ISIS, Heritage, and the Spectacles of Destruction in the Global Media*, "Near Eastern Archaeology" 2015, Vol. 78, pp. 170-177.

36 W. Liebeschuetz, *East and West in Late Antiquity: Invasion, Settlement, Ethnogenesis and Conflicts of Religion*, Brill 2015, pp. 227-229.

37 J. Jokilehto, *The World Heritage List. What is OUV? Defining the Outstanding Universal Value of Cultural World Heritage Properties*, Monuments and Sites, Vol. 16, Hendrik Bäßler Verlag, Berlin 2008.

38 J. Sebesta, L. Bonfante, *The World of Roman Costume*, University of Wisconsin Press, 1994, p. 164.

39 See generally J.M. Crook, *The Greek Revival*, Country Life Books, Feltham 1968.

40 See generally A.M. Smith II, *Roman Palmyra: Identity, Community, and State Formation*, Oxford University Press, Oxford 2013.

41 G. Bowersock, *Syria under Vespasian*, "Journal of Roman Studies" 1973, Vol. 63, pp. 133-140.

42 See generally G. Chon, S. Thet, *Behind the Killing Fields: A Khmer Rouge Leader and One of His Victims*, University of Pennsylvania, Philadelphia 2010.

43 J. Moore, *Defying ISIS: Preserving Christianity in the Place of Its Birth and in Your Own Backyard*, Thomas Nelson, 2015, p. 31.

44 J. Blake, *International Cultural Heritage Law*, Oxford University Press, Oxford 2015, pp. 271-283.

45 Ibidem, p. 275.

46 Universal Declaration of Human Rights, 10 December 1948, UNGA Res 217 A(III), see H. Silverman, D.F. Ruggles (eds.), *Cultural Heritage and Human Rights*, Springer, New York 2007, pp. 3-4.

one has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits".[47] More recently, the significance of cultural heritage was expressed in UNESCO's Declaration Concerning the International Destruction of Cultural Heritage (2003), asserting that heritage is linked to human dignity and identity, and access to and enjoyment of cultural heritage has a strong legal basis in human rights norms,[48] stating "cultural heritage is an important component of the cultural identity of communities, groups and individuals and or social cohesion, so that its intentional destruction may have adverse consequences on human dignity and human rights".[49] In 2011, the Special Rapporteur at the UN submitted a report extensively outlining arguments in favor of this treatment. The report articulates that cultural heritage is important not only in itself, but also in relation to its human dimension, as it holds significance for individuals and groups for their identity and development.[50]

Regional and national proclamations and accords have also posited statements concerning human rights and destruction. The Turkish government innovatively used human rights as the basis of an attempt to demand restitution of a group of sculptures.[51] The sculptures from the Halicarnassus Mausoleum were removed from within the borders of modern Turkey in 1846 by a British ambassador.[52] Turkish authorities believe that the items were illegally removed, and that they are in Britain illegally. "The British Museum says [it has] permission, but [it does] not. There is no valid documentation", said Turkish attorney Remzi Kazmaz.[53] Turkey planned to petition the European Court of Human Rights for the return of sculptures from the British Museum, on the basis that the unlawful taking of cultural items is a human rights violation. According to human rights lawyer Gwendolen Morgan, the most probable course of action is to allege a breach by the United Kingdom of Article 1 of the First Protocol to the European Convention of Human Rights, which States: "Every natural or legal person is entitled to the peaceful enjoyment of his posses-

47 H. Silverman, D.F. Ruggles (eds.), op. cit.

48 Ibidem.

49 17 October 2003, UNESCO Doc. 32 C/Res. 33 (2003).

50 F. Shaheed, *Report of the independent expert in the field of cultural rights*, A/HRC/17/38, United Nations, General Assembly, Human Rights Council Seventeenth Session Agenda Item 3 Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/images/Report%20of%20Farida%20Shaheed.pdf [accessed: 15.11.2015].

51 D. Alberge, *Turkey turns to human rights law to reclaim British Museum sculptures*, "The Guardian", 8 December 2012, http://www.theguardian.com/culture/2012/dec/08/turkey-british-museum-sculptures-rights [accessed: 15.11.2015].

52 Ibidem.

53 C. Yeginsu, *Turkey's New Spin on Human Rights: They Can Be Used to Recover Art*, "International Business Times", 14 January 2013, http://www.ibtimes.com/turkeys-new-spin-human-rights-they-can-be-used-recover-art-1004248 [accessed: 15.11.2015].

sions".[54] The European Court of Human Rights will be informed by domestic laws of the Ottoman Empire at the time that the objects were taken, while considering that the European Convention on Human Rights ("ECHR")[55] has only been in force since the 1950s.[56] Well-known cultural heritage lawyer Norman Palmer stated, "I have not heard of it [human rights] being used to raise a claim for the specific restitution of particular tangible objects […] This would be a novel claim".[57]

Although cultural heritage professionals have been anxiously awaiting the outcome of the world's first case demanding restitution based on human rights grounds, the statues are still in the British Museum.[58] The European Court of Human Rights, established in 1959 by the ECHR, has not yet agreed to hear the case. The court has jurisdiction over cases concerning human rights submitted by individuals or groups or one or more of the contracting States.[59] The court has jurisdiction to resolve human rights issues, not public international law regarding property ownership. For this reason, the proper venue for this case may be the International Court of Justice in The Hague.[60] Interestingly though, Greece appears to have taken notice of Turkey's novel actions as the Greek Ministry of Culture hired an international human rights attorney, Amal Clooney, in a cultural heritage matter, the demand for restitution of the Parthenon Marbles.[61]

What Can Be Done?

How can terrorists be stopped from destroying cultural heritage?

Heritage professionals and government officials have suggested that military forces should be involved in preventing destruction.[62] With the use of art professionals, as with the Monuments, Fine Arts, and Archives program during the Second World War (members of the group are now famously known as "The Monuments

54 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, 213 UNTS 262.

55 4 November 1950, 213 UNTS 221.

56 D. Alberge, op. cit.

57 Ibidem.

58 *Mausoleum of Halikarnassos (Room 21)*, The British Museum, http://www.britishmuseum.org/explore/galleries/ancient_greece_and_rome/room_21_halikarnassos.aspx [accessed: 15.11.2015].

59 J.G. Merrills, A.H. Robertson, *Human Rights in Europe: A Study of the European Convention on Human Rights* Manchester University Press, Manchester 2001, p. 3.

60 *Jurisdiction*, International Court of Justice, http://www.icj-cij.org/jurisdiction/index.php?p1=5 [accessed: 15.11.2015]

61 J. Stanton, *Amal Clooney Advises Greece to Take British Museum to international court to win back Elgin Marbles, saying: 'It's now, or never'*, "DailyMail", 13 May 2015, http://www.dailymail.co.uk/news/article-3079325/Amal-Clooney-advises-Greece-British-Museum-international-court-win-Elgin-Marbles-saying-s-never.html [accessed: 15.11.2015].

62 *Culture under Threat: Antiquities Trafficking & Terrorist Financing – NY Forum*, 24 September 2015, https://www.youtube.com/watch?v=WFsAf7Dslq8 [accessed: 15.11.2015].

Men"),[63] it may be possible to protect some sites prior to destruction. In light of extensive damage, several groups have come forward to prevent further destruction. Corine Wegener, an Army reservist, served as an Arts, Monuments, and Archives Officer to help protect the Iraq National Museum as part of Operation Iraqi Freedom. Her expertise led her to found the US Committee of the Blue Shield, a nonprofit organization that supported ratification of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention),[64] trains troops, and creates lists of culturally important sites for the Department of Defense to avoid striking.[65] Volunteers on the ground risk their lives to protect sites before attacks. Due to the effort of volunteers, some of the priceless mosaics in Syria's Ma'arra Mosaic Museum were saved earlier this year.[66] Of course there are many questions that remain concerning the safety of volunteers, the role of force used in preservation, and the damage that may result from placing troops and military equipment near sensitive sites.[67]

Cultural Heritage Destruction Should Be Treated as a War Crime

Heritage destruction has been classified as a war crime, and ISIS's actions have been categorized as criminal.[68] Earlier this year, UN Secretary-General Ban Ki-moon aptly stated, "The deliberate destruction of our common cultural heritage constitutes a war crime and represents an attack on humanity as a whole".[69] The UN 1954 Hague Convention explicitly prohibits using monuments and sites for military purposes and harming or misappropriating cultural property in any way (Article 8). The convention applies to immovable and movable cultural heritage, including monuments of architecture, art or history, archaeological sites, works of art, manuscripts, books and other objects of artistic, historical or archaeological interest, as well as scientific collections of all kinds regardless of their origin or ownership (Article 1). The stated purpose of the 1954 Hague Convention is to safeguard heritage by establishing an agreement among States Parties to respect cultural prop-

[63] B. Witter, R.M. Edsel, *The Monuments Men: Allied Heroes, Nazi Thieves, and the Greatest Treasure Hunt in History*, Center Street, New York 2009.

[64] 14 May 1954, 249 UNTS 240.

[65] United States Committee of the Blue Shield, http://uscbs.org/about-us.html [accessed: 15.11.2015].

[66] *Emergency Preservation Activities Completed at Syria's Ma'arra Mosaic Museum*, "Smithsonian", 5 March 2015, http://newsdesk.si.edu/releases/emergency-preservation-activities-completed-syria-s-ma-arra-mosaic-museum [accessed: 15.11.2015].

[67] See generally R. Teijgeler, *Preserving Cultural Heritage in Times of Conflict*, in: G. Gorman, S. Shep (eds.), *Preservation Management for Libraries, Archives, and Museums*, Facet Publishing, London 2006, pp. 133-165.

[68] *Destruction of Palmyra's Baalshamin Temple 'a war crime'*, "BBC News", 24 August 2015, http://www.bbc.com/news/world-middle-east-34043676 [accessed: 15.11.2015].

[69] *Calling Attacks 'a War Crime', Secretary-General Strongly Condemns Destruction of Cultural Heritage Sites in Iraq*, United Nations Meetings Coverage and Press Releases, 6 March 2015, http://www.un.org/press/en/2015/sgsm16570.doc.htm [accessed: 15.11.2015].

erty in their own territory as well as that of other Parties.[70] The Parties consent to abstain from exposing cultural property to damage, except in cases of military necessity[71] (a loophole that has unfortunately allowed destruction of significant sites, but was necessary to include due to security interests of State Parties) and to prohibit theft or vandalism, including those actions by domestic and foreign military forces. The convention prohibits nationals from "any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property".[72]

Just as the 1954 Hague Convention was prompted by destruction and looting during the Second World War, nations convened in 1991 partly due to damage during the late 1980s and early 1990s, in the Balkans.[73] The Second Protocol to the Hague Convention, which was adopted in 1999, further expounds the provisions of the Convention relating to safeguarding of and respect for cultural property and conduct during conflict.[74] The protocol requires general provisions for protection that includes preparatory measures in times of peace and nurturing respect for culture through education. Article 10 of the protocol also provides for enhanced protection status for cultural heritage property and immunity in this category. Article 14 describes the circumstances under which enhanced protection status can be lost, suspended or cancelled, and importantly outlines instances in which protection can be removed for sites being used in furtherance of military objectives. Importantly, it defines individual criminal responsibility and jurisdictional procedures in the event of violations, with specification of sanctions to be imposed for grave violations with respect to cultural property. Article 15.2 of the protocol and Article 28 of the 1954 Hague Convention state that individuals may be criminally responsible, and that this culpability extends to persons other than individuals who directly commit acts in defiance of the Convention and its Second Protocol.

Both Syria and Iraq are States Parties to the 1954 Hague Convention,[75] meaning that they are responsible to criminally prosecute violators after resolution of a conflict. State Parties are also responsible for protecting their own domestic heritage during conflict, as stated in Chapter 1, Article 3 of the 1954 Convention, "The High Contracting Parties undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate".[76] In the case that nations cannot properly address these issues, international bodies may pursue looters. The UN may find it appropriate to seek and prosecute individu-

70 1954 Hague Convention, Preamble.

71 Ibidem, Article 4.

72 Ibidem.

73 A. Jakubowski, *State Succession in Cultural Property*, Oxford University Press, Oxford 2015, p. 244.

74 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, 2253 UNTS 212.

75 Yet, they are not parties to the Second Protocol to the 1954 Hague Convention.

76 1954 Hague Convention, Article 3.

als responsible for vandalism and looting as crimes against humanity, potentially in conjunction with the International Criminal Court ("ICC").[77] Under Article 5 of the Rome Statute,[78] the ICC has jurisdiction to try individuals for war crimes.[79] The ICC considers the destruction of cultural property a war crime.[80] Under the Rome Statute, ICC can exercise jurisdiction in the following circumstances: (1) A State Party refers the case to the ICC Prosecutor in accordance with Article 14; (2) the Security Council of the UN refers the case to the ICC Prosecutor in according with Chapter VII of the Charter of the United Nations; or (3) the ICC Prosecutor initiates an investigation under Article 15 of the Rome Statute.[81] In the instance that the ICC does not exercise jurisdiction, the UN Security Council may establish an *ad hoc* tribunal for "grave breaches" of the Geneva Conventions of 1949.[82] In fact, the International Criminal Tribunal for the Former Yugoslavia (ICTY), an *ad hoc* international criminal tribunal, has already held individuals accountable for damage done to religious, artistic, scientific or historic institutions and structures. The ICTY's prior rulings on protection of cultural heritage during conflict have precedential effect. Importantly the ICTY has confirmed that obligations in this regard have already risen to the status of customary international law; thus, they enforceable, even against States not parties to international humanitarian treaties.[83]

There Are Inherent Difficulties in Prosecuting Cultural Heritage Vandals

The UN condemns the gravity of heritage vandalism and destruction, however treating cultural destruction as a war crime is fraught with challenges. Nations targeted by vandals may not be adequately equipped to prevent destruction; they may not have the resources to properly police sites or transport objects to safe areas. Moreover, many culturally significant objects are part of larger architectural structures or are too bulky or fragile to move without compromising the integrity of the underlying structures.[84] Essentially, pre-conflict protective measures may not have been enact-

[77] The ICC was established by the Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90 (Rome Statute); as of May 2015, there are 123 State Parties to this treaty, http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx [accessed: 15.11.2015].

[78] Rome Statute, Articles 5, 8.

[79] Ibidem.

[80] *Cyprus: Destruction of Cultural Property in the Northern Part of Cyprus and Violations of International Law*, The Law Library of Congress, April 2009, http://www.loc.gov/law/help/cultural-property-destruction/cyprus.php [accessed: 15.11.2015].

[81] G. Waltman, *Prosecuting ISIS*, 17 October 2014, pp. 18-19, http://ssrn.com/abstract=2537044 [accessed: 15.11.2015].

[82] Geneva Conventions for the Protection of War Victims, 12 August 1949, 75 UNTS 31.

[83] G. Waltman, op. cit.

[84] A. Leask, I. Yeoman, *Heritage Visitor Attractions: An Operations Management Perspective*, Thomson, London 2004, p. 44.

ed due to practical limitations. In regard to post-conflict remedies, it may be unrealistic to expect Syrian and Iraqi officials to prosecute criminals. These nations have faced horrific violence, not only to material objects, but to their populations; citizens are targeted by bombers and suicide martyrs, members of select religious groups are being beheaded, entire communities have abandoned cities and towns, and non-governmental ruling parties are laying claim to property, tax revenue, and land.[85] Even if the current conflicts are resolved, it will be difficult to remedy and rectify issues.

Prosecuting heritage criminals is problematic. One challenge associated with prosecution relates to jurisdiction and haling criminals into court. It is difficult to gain custody over ISIS members. As supporters of a multi-national crime syndicate, vandals are not State fighters, but anonymous thugs. ISIS combatants are not official representatives or military personnel of any sovereign State,[86] but rather subversive terrorists. It is difficult demanding extradition from non-State actors hell-bent on destruction. Furthermore, a syndicate that values martyrdom likely will not surrender its fighters, but would condemn them to death rather than avail itself to a domestic or Western-led tribunal. With atrocities occurring around the world and the lack of legitimate State representatives from ISIS, exercising jurisdiction over ISIS is problematic.

Fortunately there has recently been a glimmer of hope for those pursuing prosecution. The ICC exercised jurisdiction over a member, Abou Tourab, of an al-Qaeda affiliated group responsible for destroying religious monuments in Timbuktu.[87] It is the first case brought before the ICC for the "destruction of buildings dedicated to religion and historical monuments".[88] These cases are not frequent, probably due to financial limitations and impracticalities that make prosecution itself difficult, particularly after evidence of destruction is wiped out during war. Western nations would presumably be asked to bear the burden of funding criminal proceedings and detaining culpable parties. In light of the loss of human life, it is arduous to encourage governments to provide financial support for prosecuting heritage destruction. One of the underlying challenges surrounding the difficulty of prosecuting heritage vandalism is that it is often not viewed as significant.[89]

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85 G. Waltman, op. cit., pp. 12-15.

86 H. Lozano Bielat, *Islamic State and the Hypocrisy of Sovereignty*, E-International Relations, 20 March 2015, http://www.e-ir.info/2015/03/20/islamic-state-and-the-hypocrisy-of-sovereignty/ [accessed: 15.11.2015].

87 *Mali: The hearing of Abou Tourab before the ICC is a victory, but charges must be expanded*, Worldwide Movement for Human Rights, 30 September 2015, https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/mali-the-hearing-of-abou-tourab-before-the-icc-is-a-victory-but [accessed: 15.11.2015].

88 *Timbuktu mausoleum destruction suspect sent to ICC*, "BBC News", 26 September 2015, http://www.bbc.com/news/world-africa-34368108 [accessed: 15.11.2015].

89 See B. Williams, *What Is Art Crime?*, Damforst Museum, 14 October 2010, www.damforstmuseum.org/what_is_art_crime.html [accessed: 15.11.2015]; see also B. Dobovšek, B. Slak, *The Significance of Studying and Investigation Art Crime: Old Reasons, New World*, Varstvolslovje, "Journal of Criminal Justice and Secu-

When human life is at stake, prosecution against mass murders, rapists, and human traffickers is deemed a higher priority than vandals. Resources will likely be used to prosecute violent criminals and provide assistance to refugees, rather than pursue vandals. But the case against Abou Tourab provides hope that members of terrorist regimes will one day face justice for their cultural crimes. The head of UNESCO, Irina Bokova, hailed the case for breaking "new ground for the protection of humanity's shared cultural heritage and values".[90] It is important to remember that preserving heritage in the Middle East and elsewhere should be a concern for the entire civilized world as it is the birthplace of humanity.[91]

Antiquities are a Source of Revenue for Terrorist Groups and thus Looting Must be Reduced

There is No Doubt that Antiquities are a Source of Revenue for Terrorist Groups

Whereas preventing cultural vandalism may seem unfeasible and require military intervention, it may be easier to reduce the looting. ISIS profits from loot. "They loot what they can sell and they will destroy what they cannot", says Amr Al-Azm, professor of Middle East history and anthropology.[92] ISIS does not have the funding of other militant groups like al-Qaeda so they sell antiquities internationally to raise funds.[93] ISIS even has laws that regulate black market profits. The ISIS regulating agency is allegedly based in Manjij, Syria;[94] it provides permits to civilian looters, and charges them a tax of 20% to 50% of their profits.[95] There is conflicting information about ISIS's reliance on antiquities sales, but looting may become a more significant source of income as oil revenue is targeted by enemies.[96] Dr. Joris D. Kila, a researcher with the University of Vienna and a specialist in heritage studies, noted that ISIS destroys antiquities and sites only after they remove the items that can

rity" 2011, No. 4, p. 398, http://www.fvv.uni-mb.si/rV/arhiv/2011-4/03_Dobovsek_Slak.pdf [accessed: 15.11.2015] (noting that the art world is seen as an elitist world and not of import to the general public).

90 *Cultural Destruction as a War Crime*, "New York Times", 8 October 2015, http://www.nytimes.com/2015/10/09/opinion/cultural-destruction-as-a-war-crime.html?_r=1 [accessed: 15.11.2015].

91 K. Shaheen, op. cit.

92 *Destroy, sell, hide: How Islamic State exploits antiquities*, PBS Newshour, 19 August 2015, http://www.pbs.org/newshour/bb/destroy-sell-hide-islamic-state-exploits-antiquities/ [accessed: 15.11.2015].

93 M. Hay, op. cit.

94 Ibidem.

95 S. Cox, *The men who smuggle the loot that funds IS*, "BBC News", 17 February 2015, http://www.bbc.com/news/magazine-31485439 (noting that "ISIS taxes everything") [accessed: 15.11.2015]; C. Ward, *Following the trail of Syria's looted history*, "CBS News", 9 September 2015, http://www.cbsnews.com/news/isis-looted-syrian-ancient-artifacts-black-market-us-and-europe/ [accessed: 15.11.2015].

96 M. Hay, op. cit.

sell, as this type of commodity gains importance as oil prices drop.[97] Some believe that ISIS sells more than it destroys, as higher-quality objects vanish on the market. Even if these sales move the objects out of war zones, they continue to fuel the market and encourage looting, leading to more archaeological destruction.[98] The market is largely hidden, however the market, in general, for Near Eastern antiquities is on fire.[99] High end sales are exorbitant with astounding prices realized during the past decade, providing further incentive to loot.[100] When single objects at legal sales reach astronomical prices, the illegal market prospers as a consequence.[101]

Antiquities Have Been Used to Fund Terrorist Organizations for Over a Decade

Heritage Experts Confirm the Existence of a Black Market Funding ISIS

What isn't destroyed is being sold on a black market that reaches Europe and the US.[102] This is nothing new as US officials have reported this pattern for years as antiquities were looted during the Iraqi War to fund crime syndicates. Furthermore, there are first hand reports on the ground of objects coming out of Syria and entering the black market. US Marine Col. Matthew Bogdanos, who led the investigation into the 2003 looting of the National Museum of Iraq and who now prosecutes antiquities cases as an assistant district attorney in the US, has long noted the problem with blood antiquities, stating that the illicit traffic buys bombs and weapons used by terrorist groups.[103] He also warned that the objects leaving conflict zones reach the international market very quickly aided by forged documentation.[104] He states that he and his colleagues have seen ISIS loot on the markets in New York and London.[105] One recent example involved a group of objects including an authentic mosaic freshly ripped out of the ground in Syria and being sold in Turkey.[106] According to UNESCO representatives, the market for looted antiquities

97 See A. Seiff, *Looted Booty Bolstered by A Growing Body of International and Domestic Law, More Countries Are Successfully Gaining the Return of Looted Cultural Treasures*, "ABA Journal" July 2014, p. 32, 41.

98 M. Hay, op. cit.

99 D. Kohn, *ISIS's Looting Campaign*, "The New Yorker", 14 October 2014, http://www.newyorker.com/tech/elements/isis-looting-campaign-iraq-syria [accessed: 15.11.2015].

100 Ibidem.

101 C. Renfrew, *Loot, Legitimacy and Ownership: The Ethical Crisis in Archaeology*, "Duckworth Debates in Archaeology", 20 October 2000, p. 90.

102 C. Ward, op. cit.

103 M. Bogdanos, *Thieves of Baghdad*, Bloomsbury, London 2005.

104 D. Wiser, *The Link Between the Islamic State and the Western Art Trade*, "The Washington Free Beacon", 14 September 2015, http://freebeacon.com/culture/the-link-between-the-islamic-state-and-the-western-art-trade/ [accessed: 15.11.2015].

105 C. Ward, op. cit.

106 Ibidem.

is estimated to be worth billions of dollars, and a recent report by the Wall Street Journal notes that antiquities are second only to oil for funding for ISIS (although admittedly no dollar figures are given due to the classified nature of the supporting documents).[107]

Matthew Levitt, a senior fellow and expert in counterterrorism and intelligence, has been following IS finances for over a decade, since its previous existence as part of Al Qaeda. He opines that antiquities were not initially a major funding source, but have gained significance with time.[108] In fact, in late September 2015, the US government unclassified documents and provided definitive proof of these claims.[109] The government seized objects and records during a raid on a property belonging to ISIS's chief financial officer in the spring of 2015.[110] There were extensive records kept by the kingpin which reveal that he took part in over $100 million in transactions involving looted antiquities.[111] The documents included an elaborate organization chart revealing the complex nature of the crime ring and its global reach.[112]

Documentation and Photo Images Support Claims of Extensive Looting

Syrian officials, including Syria's Directorate-General of Antiquities and Museums, recognize the robust black market.[113] Their claims are supported by satellite images of thousands of looting pits across Syria.[114] Objects enter the black market with Turkey serving as the gateway, with many sources confirming that objects are smuggled out of Syria and into the neighboring nation destined for the Gulf States, Europe, and the US.[115] The number of historic artifacts seized by Turkish

107 M.V. Vlasic, H. Turku, *How can we stop ISIS and the trafficking of our cultural heritage?*, "World Economic Forum", 31 August 2015, https://agenda.weforum.org/2015/08/isis-trafficking-cultural-heritage/ [accessed: 15.11.2015].

108 H. LaFranci, *What Syrian antiquities reveal about Islamic State's billion-dollar economy*, "The Christian Science Monitor", 25 August 2015, http://www.csmonitor.com/USA/Foreign-Policy/2015/0825/What-Syrian-antiquities-reveal-about-Islamic-State-s-billion-dollar-economy [accessed: 15.11.2015].

109 C. Jones, *New Documents Prove ISIS Heavily Involved in Antiquities Trafficking*, "Gates of Nineveh", 30 September 2015, https://gatesofnineveh.wordpress.com/2015/09/30/new-documents-prove-isis-heavily-involved-in-antiquities-trafficking/ [accessed: 15.11.2015].

110 Ibidem.

111 Ibidem.

112 Ibidem (the existence of the organization chart is reminiscent of the documents that accompanied the discovery of the looting ring in Italy organized by illicit antiquities dealer Giacomo Medici recounted in Peter Watson and Cecilia Todeschini's Medici Conspiracy).

113 C. Amanpour, *Syrian antiquities chief: Palmyra taken hostage by ISIS*, "CNN News", 31 August 2015, http://www.cnn.com/videos/tv/2015/08/31/intv-amanpour-maamoun-abdulkarim-palmyra-isis.cnn/video/playlists/amanpour/ [accessed: 15.11.2015].

114 D. Coldewey, *Satellite Images Show Widespread Looting At Syrian Landmarks*, "NBC News", 19 December 2014, http://www.nbcnews.com/science/science-news/satellite-images-show-widespread-looting-syrian-landmarks-n272161 [accessed: 15.11.2015].

115 J. di Giovanni et al., *How Does ISIS Fund Its Reign of Terror?*, "Newsweek", 6 November 2014, http://www.newsweek.com/2014/11/14/how-does-isis-fund-its-reign-terror-282607.html [accessed: 15.11.2015];

authorities rose tenfold in 2014 compared to 2013.[116] Some representatives of collectors claim that there is no proof that loot enters the US, stating that there is "no credible evidence that looted art is coming from Syria to [the] U.S."[117] However customs figures suggest something very different. There has been a 145% increase in American imports of Syrian cultural property and a 61% increase in American imports of Iraqi cultural property between 2011 and 2013, suggesting that illicit trade is 'piggybacking' on the legal trade.[118] The increase in objects is impossible to deny. Foreign sources also report the high value of loot.[119] Moreover, the Western desire for Classical antiquities from war-torn regions seems to suggest that these objects are destined for the US and Europe, with investigative sources supporting those claims.[120] The looters and middlemen themselves work under the belief that looted objects are destined for the Western market.[121]

The FBI and Other Government Agencies Have Taken Action to Protect Cultural Heritage

On September 29, 2015 the State Department held an event at the Metropolitan Museum of Art. One of the themes was the importance of best practice in the art trade.[122] Best practice includes extensive due diligence.[123] Those involved in arts transactions should not facilitate the trade in loot, buyers should know their dealers, and lawyers should advise their clients on acquisition practices.[124] There are instances in which documents are falsified, but thorough due diligence may help buyers avoid this pitfall.[125] Art market professionals must apply robust due dili-

S. Hardy, *How the West buys 'conflict antiquities' from Iraq and Syria (and funds terror)*, "Reuters", 27 October 2014, http://blogs.reuters.com/great-debate/2014/10/27/how-the-west-buys-conflict-antiquities-from-iraq-and-syria-and-funds-terror/ [accessed: 15.11.2015]; S. Cox, op. cit.

116 *More than 3,000 artifacts seized in Istanbul raid*, "Daily Sabah Turkey", 1 September 2015, http://www.dailysabah.com/nation/2015/09/02/more-than-3000-artifacts-seized-in-istanbul-raid [accessed: 15.11.2015].

117 S. Hardy, op. cit.

118 Ibidem.

119 M. Hay, op. cit. (some Iraqi intelligence officials suggest that the looting at just one site, al-Nabek in Syria, provided ISIS with $36 million).

120 S. Hardy, op. cit.

121 M. Giglio, M. al-Awad, *Inside the Underground Trade to Sell Off Syria's History*, "Buzzfeed", 30 July 2015, http://www.buzzfeed.com/mikegiglio/the-trade-in-stolen-syrian-artifacts#.pwkNMxVd9 [accessed: 15.11.2015].

122 *Conflict Antiquities*, Panel 1, United States Department of State, Bureau of Educational and Cultural Affairs, http://eca.state.gov/video/conflict-antiquities-panel-1-video [accessed: 15.11.2015].

123 Ibidem.

124 See ibidem.

125 F. Francioni, J. Gordley, *Enforcing International Cultural Heritage Law*, Oxford University Press, Oxford 2013, p. 161.

gence; purchasers should buy objects from reputable sources, investigate an object's history, and procure all required documentation, including licenses and customs forms.[126] Dr. Mauro Miedico of the United Nations Office on Drugs and Crime emphasized the fact that due diligence encourages legitimate and responsible trade.[127] While government officials emphasized the importance of diligence, other art world professionals have suggested an outright moratorium on the purchase of any artifacts from Syria and Iraq.[128]

The Federal Bureau of Investigation ("the FBI") issued a warning on August 26, 2015 to art collectors and dealers trading in Near Eastern antiquities that looted artifacts are on the market.[129] The August 26, 2015 FBI statement warned collectors of terrorist-plundered antiquities entering the market. Manager of the FBI Art Theft Program, Bonnie Magness-Gardiner stated, "We now have credible reports that U.S. persons have been offered cultural property that appears to have been removed from Syria and Iraq recently".[130] The report "ISIL Antiquities Trafficking" warns buyers that objects from Iraq are subject to Office of Foreign Assets Control ("OFAC") sanctions under the Iraq Stabilization and Insurgency Sanctions Regulations,[131] purchasing objects looted by ISIS provides funding to terror organizations and those guilty of this crime are vulnerable to prosecution under 18 USC § 233A, and that thorough due diligence is necessary for Iraqi or Syrian antiquities.[132] Additionally, the International Council of Museums (ICOM) launched the updated Emergency Red List of Iraqi Cultural Objects at Risk in June 2015. The list identifies the endangered categories of archaeological objects or works of art in the most vulnerable areas of the world, in order to prevent them being sold or illegally exported.[133]

126 See N. Brodie, *The Concept of Due Diligence and the Antiquities Trade*, "Culture Without Context" Autumn 1999 ("In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any step that a reasonable person would have taken in the circumstances"); D. Grant, Is It Possible to "Collect" Antiquities These Days?, "Huffington Post", 5 April 2011, http://www.huffingtonpost.com/daniel-grant/antiquities-collecting-due-diligence_b_844838.html [accessed: 15.11.2015].

127 *Conflict Antiquities*, op. cit.

128 *Culture under Threat*..., op. cit.

129 *ISIL and Antiquities Trafficking, FBI Warns Dealers, Collectors About Terrorist Loot*, Federal Bureau of Investigation, 26 August 2015, https://www.fbi.gov/news/stories/2015/august/isil-and-antiquities-trafficking [accessed: 15.11.2015].

130 Ibidem.

131 31 Council on Foreign Relations (CFR), Part 576, Iraq Stabilization and Insurgency Sanctions Regulations.

132 *ISIL and Antiquities Trafficking*, Federal Bureau of Investigation, 26 August 2015, https://www.fbi.gov/news/news_blog/isil-and-antiquities-trafficking [accessed: 15.11.2015].

133 *The Red List*, International Council of Museums, http://icom.museum/programmes/fighting-illicit-traffic/red-list/ [accessed: 15.11.2015].

(A similar list for Syrian objects at risk was released in September 2013.[134]) With buyers advised of the necessary diligence, it is essential that all purchasers, including public institutions, complete research, particularly because those establishments have the greatest resources for researching to avoid acquisition of loot.

International Effort Is Necessary to Stop Funding Terrorism

In an effort to halt looting in the Middle East, the UN Security Council unanimously passed Resolution 2199 in February 2015.[135] The resolution's accompanying report notes that terror groups are generating income from directly and indirectly engaging in the looting and smuggling of heritage items.[136] It notes that cultural goods are used to support ISIS recruitment efforts and strengthen its operational capability to organize and carry out attacks. The resolution explicitly states that it intends to limit the "active or passive" support of terrorist syndicates, including financing.[137] The resolution reaffirmed the pre-existing ban on looted goods from Iraq, and presented a new prohibition on black market antiquities from Syria,[138] and it formally recognizes that black market antiquities fund terrorism. The Resolution calls for financial barriers to disrupt terror syndicates, and declares UN condemnation of any trade with ISIS.[139] The resolution necessitates member States to take preventative measures to stop terrorist groups from receiving donations and from benefiting from trade in antiquities (amongst other goods). The Security Council called on UNESCO, Interpol, and other international organizations to assist in such efforts, while noting that any type of prohibited purchase would lead to penalties from the applicable Sanctions Committee. The resolution not only prohibits the purchase of items directly from terrorist groups, but aims to block ISIS from access to funding from the private sector and black market.

The Tangled Relationship between Museums and Loot

Due to widespread destruction and looting, some opine that it is acceptable for museums and public institutions to purchase objects from the black market to protect them. Proponents of acquiring black market goods assert that it is better for

134 *The Red List*, United States Department of State, Bureau of Educational and Cultural Affairs, http://eca.state.gov/cultural-heritage-center/iraq-cultural-heritage-initiative/red-list [accessed: 15.11.2015].

135 *Unanimously Adopting Resolution 2199 (2015), Security Council Condemns Trade with Al-Qaida Associated Groups, Threatens Further Targeted Sanctions*, United Nations Meetings Coverage and Press Releases, 12 February 2015, http://www.un.org/press/en/2015/sc11775.doc.htm [accessed: 15.11.2015].

136 United Nations Security Council Resolution No. 2199 (2015), UN Doc. S/RES/2199 (2015). CL/4100, http://unesdoc.unesco.org/images/0023/002321/232164e.pdf [accessed: 15.11.2015].

137 Ibidem.

138 United States Mission to the United Nations, Fact Sheet: UN Security Council Resolution 2199 on ISIL, 12 February 2015, http://usun.state.gov/briefing/statements/237432.htm [accessed: 15.11.2015].

139 United Nations Security Council Resolution No. 2199 (2015), op. cit.

objects to be housed in museums than destroyed in their home countries.[140] Those in support of encyclopedic, or universal, museums maintain that art is best seen within large collections that aim to contextualize objects in the spectrum of world history. They suggest that museums expose visitors to a wide variety of cultures, fostering a sense of a shared human history.[141] Others refute this view as encyclopedic museums have historically been assembled by the removal of objects from their original cultural setting, losing their context; context is what provides humanity with value through archaeology.[142]

Famed and controversial curator James Cuno has long been an outspoken supporter of encyclopedic museums, arguing that museums should express pluralism, diversity, and the idea that culture should not stop at borders.[143] Supporters of encyclopedic museums justifiably tout the benefits of presenting art in a broad context, allowing access to art history to people all over the world. However this argument must be tempered as it can miss the mark when it is considered that the world's major encyclopedic museums are located in areas where colonialism and plunder have transplanted art objects from their homes during times of conflict or weakness.[144] In fact, Mr. Cuno recently urged the museum world to view heritage through a very warped lens recalling colonial times; he wrote that property belongs to the current parties in power, stating "Cultural property should be recognized for what it is: the legacy of humankind [...] subject to the political agenda of its current ruling elite".[145] If this is true, then shouldn't the global community surrender its protective efforts and allow ISIS to destroy territories that it seizes? Are powerful nations and parties to be given free rein to pillage? To view property as belonging to the current ruling parties reverts heritage to being property available for pillage by aggressors. Under Cuno's view, ISIS' looting is not a war crime, but rather the exercise of power by a dominant group. Rather than protect property, the ruling class can do as it wishes, whether that is destruction or pillage. However not all people in support of encyclopedic museums take a stance as extreme as Mr. Cuno's. The current situation in the Middle East has made many reputable art professionals pause to consider the proper role of public institutions during conflict. Gary Vikan, former Director of the Walters Art Museum and now owner of

140 G. Vikan, *The Case For Buying Antiquities To Save Them*, "Wall Street Journal", 19 August 2015, http://www.wsj.com/articles/the-case-for-buying-antiquities-to-save-them-1440024491 [accessed: 15.11.2015].

141 J. Cuno, *Museums Matter: In Praise of the Encyclopedic Museum*, University of Chicago Press, 2013.

142 J. Thomas (ed.), *Interpretive Archaeology*, Leicester University Press, 2000, p. 170.

143 J. Cuno, *Culture War: The Case Against Repatriating Museum Artifacts*, "Foreign Affairs", November/December 2014, https://www.foreignaffairs.com/articles/africa/culture-war [accessed: 15.11.2015].

144 See generally L. Prott, *The International Movement of Cultural Objects*, "International Journal of Cultural Property" 2005, Vol. 12, pp. 225-248.

145 Ibidem.

Vikan Consulting,[146] suggests that museums should never buy from ISIS, but that principle should not exclude purchase of antiquities from conflict zones. Rather, he advocates the purchase of looted antiquities from troubled regions, even if doing so "encourages looting".[147] He reasons that purchasing loot is better than destruction by ISIS.[148]

Arguing that the works are better in a museum than in conflict zones is troubling because it ushers museums into the foray of acquiring loot.[149] This suspiciously echoes the defenses recently articulated by disgraced former Getty Museum curator, Marion True. True received international attention after the discovery of her role in the acquisition of looted antiquities by the Getty Museum. In 2005, True was indicted by the Italian government for conspiracy to traffic antiquities,[150] as she purportedly laundered stolen objects through private collections to create fake paper trails that served as provenance. She resigned from the Getty that same year, and has not been active in the museum community since.[151] After a decade of silence, True spoke to the press on the heels of releasing an autobiography. She admits that she knowingly acquired stolen art, but maintains she was not part of a trafficking ring. Her reasoning is dangerous: the illicit objects were everywhere, so how couldn't she acquire them?[152] She argues that there are objects on the market without provenance, and they are better in museum collections until they can be returned.[153] This is vexing as it is easy for museums to hide the true history of the objects and never return them; it is impossible to ignore the fact that objects are in storage and are not subject to public scrutiny, making their return anything but guaranteed. But most troubling is the fact that museums should be held to a higher standard – they must only acquire or accept donations with clear provenance. Accepting loot is dangerous as it encourages donors to acquire illicit works, create fake provenance information, and further muddy the market with inaccurate information.

146 Vikan Consulting is a consulting service for museums, museum directors and trustees, collectors, and art dealers.

147 G. Vikan, op. cit.

148 Ibidem.

149 See A.A. Bauer, *Editorial: The Destruction of Heritage in Syria and Iraq and Its Implications*, "International Journal of Cultural Property" 2015, Vol. 22, p. 2.

150 *Italy v. Marion True and Robert E. Hecht*, Trib. Roma, sez. VI pen. 13 ottobre 2010, n. 19360/10.

151 The civil charges against True were dropped in 2007, and the criminal matter was dismissed in 2010 (although the case was dismissed, the action against Marion True led to the restitution of antiquities to Italy from museums across the United States).

152 G. Edgers, *One of the world's most respected curators vanished from the art world. Now she wants to tell her story*, "The Washington Post", 22 August 2015, https://www.washingtonpost.com/entertainment/museums/the-curator-who-vanished/2015/08/19/d32390f8-459e-11e5-846d-02792f854297_story.html [accessed: 15.11.2015].

153 Ibidem.

The belief that unprovenanced works should be purchased or accepted by museums unwinds the achievements made in the last couple of decades – a period in which museums were held responsible and sometimes forced to restitute objects with incomplete histories. Marion True stated, "The art is on the market. We don't know where it comes from [...] when we know where it comes from, we will give it back".[154] This is disingenuous because many museums have not cooperated or been forthright in property legitimately entitled to be restituted.[155] A museum organized as a public trust has the fiduciary duties to use trust property for designated charitable purposes.[156] Some museums have strong policies against deaccessioning objects (the process of permanently removing an object from a museum's collection[157]), and thus it may be dangerous for objects without provenance to enter into permanent collections. One reason that museums fight to retain objects relates to their role as public trusts, safekeeping objects for the public while collecting, preserving, and making objects available for viewing.[158] Many cases have arisen during the past few decades in which museums zealously fought against repatriation.[159]

To properly serve the public, museums must refrain from illegal acquisitions and protect cultural objects.[160] Failing to establish policies that respect the history of an object and its scientific value, breaches a museum's fiduciary obligation of due care.[161] By reason of their educational missions, museums should be the most

154 A. Martinez, *Disgraced Getty Curator Marion True Roars Back With Tell-All Memoir*, "Observer", 25 August 2015, http://observer.com/2015/08/disgraced-getty-curator-marion-true-roars-back-with-tell-all-memoir/ [accessed: 15.11.2015].

155 A.A. Bauer, op. cit.

156 Restatement (Second) of Trusts § 348 (1959).

157 M.C. Malaro, I. De Angelis, *A Legal Primer on Managing Museum Collections*, Smithsonian Books, 1998, p. 217.

158 G.D. Lowry, *A Deontological Approach to Art Museums and the Public Trust*, in: J. Cuno (ed.), *Whose Muse? Art Museums and the Public Trust*, Princeton University Press and Harvard University Press, Princeton – Cambridge (MA) 2004, p. 143.

159 *Republic of Turkey v. Metropolitan Museum of Art* 762 F. Supp. 44 (SDNY 1990). (Turkey sued the Metropolitan Museum of Art for the return of looted objects, and a nine year battle ensued before the rightful restitution); the Republic of Turkey demanded the return of the Weary Herakles from Boston's Museum of Fine Arts (although obvious to everyone viewing the top-half of the statue, the museum took nearly three decades to return the looted object); museums across the US agreed to return objects to Italy after protracted negotiations following damning proof that they possessed loot (see generally J. Felch, R. Frammolino, *Chasing Aphrodite: The Hunt for Looted Antiquities at the World's Richest Museum* (2nd edn., Houghton Mifflin Harcourt, New York 2011); some museums even claim that they have an obligation to the public to retain looted art because of their role as "public trusts"; http://www.artnews.com/2013/09/11/the-restitution-struggle/ [accessed: 15.11.2015].

160 I. DeAngelis, *How Much Provenance is Enough? – Post-Schultz Guidelines for Art Museum Acquisition of Archeological Materials and Ancient Art*, PA American Law Institute American Bar Association, Philadelphia, 2005, cited in: B.T. Hoffman, *Art And Cultural Heritage: Law, Policy And Practice*, Cambridge University Press, New York 2006, p. 407.

161 P. Gerstenblith, *Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public*, "Cardozo Journal International and Comparative Law" 2003, Vol. 11, p. 453.

passionate advocates for the preservation of antiquities.[162] By acquiring loot, museums may be rewarding cultural destruction.[163] Acquisition of loot leads to further destruction by fueling the illicit market.[164] Objects are placed on the market for sale because they have economic value.[165] Allowing museums to purchase items increases the demand for unprovenanced antiquities.[166] It signals museums' willingness to accept loot. Allowing collectors to benefit from tax refunds for charitable donations to museums provides collectors with financial incentive to buy loot and then donate it to museums.[167] This demand creates value and raises prices on these objects, further incentivizing ISIS to loot and sell objects through illicit channels. In fact, there is evidence that ISIS acts with the market in mind.[168]

Museums Have a valuable Role in Protecting Antiquities at Risk

As public institutions, museums are important in the fight against looting

In the United States, attempts have been made to curb the illicit trade. In November 2014, the Protect and Preserve International Cultural Property Act (HR 5703) was introduced in the US House of Representatives. The bill would have created a cultural property protection czar and established import restrictions to prevent looted objects from Syria from entering the US. The legislation did not pass, but a new version of the act was introduced in March 2015, HR 1493. HR 1493 was passed by the House of Representatives in June 2015 and it is currently in the Senate.[169] Under the Act's "Under Emergency Protection for Syrian Cultural Property", Section 8(C) (1), the US President has the authority to waive import

[162] See A.L. Taberner, *Cultural Property Acquisitions, Navigating the Shifting Landscape*, Left Coast Pr, 2011, p. 55 (positing that curators are the professionals most likely to recognize problematic issues related to illicit excavations and archaeological site destruction).

[163] I. DeAngelis, op. cit.

[164] N. Brodie, *Analysis of the Looting, Selling, and Collecting of Apulian Red-Figure Vases: A Quantitative Approach*, in: N. Brodie, J. Doole, C. Renfrew (eds.), *Illicit Antiquities: The Destruction of the World's Archaeological Heritage*, McDonald Institute, Cambridge 2001, pp. 145-153.

[165] See generally N. Brodie, *Archaeological Looting and Economic Justice*, in: P.M. Messenger, G.S. Smith (eds.), *Cultural Heritage Management, Policies and Issues in Global Perspective*, University Press of Florida, Gainesville 2010, pp. 261-277.

[166] M. Miller, *Looting and the Antiquities Market*, "Athena Review", Vol. 4, pp. 18-26.

[167] P. Gerstenblith, *Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past*, "Chicago Journal of International Law" 2007, Vol. 8, p. 193.

[168] S. Salaheddin et al., *Iraq Says ISIS Demolishes Ruins To Cover Up Massive Looting Of Cultural Heritage*, "Huffington Post", 12 May 2015, http://www.huffingtonpost.com/2015/05/12/isis-demolishes-ruins-looting_n_7264792.html [accessed: 15.11.2015]; H. Swains, *Terrorists Looting Antiquities On "An Industrial Scale"*, "Town and Country", 21 August 2015, http://www.townandcountrymag.com/society/money-and-power/a3609/isis-creates/ [accessed: 15.11.2015].

[169] The Protect and Preserve International Cultural Property Act, HR 1493, 114th Congress (2015-2016), https://www.congress.gov/bill/114th-congress/house-bill/1493/text [accessed: 15.11.2015].

restrictions for objects at risk so that they may be temporarily located in the US for safeguarding. The Act allows "cultural or educational institutions" to possess these objects to protect, restore, conserve, study, or exhibit them without profit. The law specifies that only these institutions may house the object – private collectors are not granted the same role as heritage guardians. The drafters of the bill wisely had the foresight to prohibit private collectors from taking advantage of looting to build their private, unregulated, and frequently hidden collections.[170] The Act requires that the property be returned to the foreign owner or custodian upon request, and further notes that the wavier is only granted when it does not contribute to illegal trafficking or financing of terror.[171] The law allows the waiver to provide a safe haven, an asylum that does not provide a source of terror funding. It should be noted that asylum is very different from purchase as it does not involve the transfer of title, but rather provides protection in a temporary home. It is necessary for museums safeguarding shared cultural items not to make any ownership claims.

Museums have taken action to protect heritage

The museum community itself has passed internal guidelines related to safeguarding objects. On the heels of high-level talks at the UN in September 2015, the Association of American Museum Directors ("AAMD") announced guidelines for museums accepting temporary possession of antiquities at risk from conflict, terrorism, or natural disasters.[172] The "Protocols for Safe Havens for Works of Cultural Significance from Countries in Crisis" establishes a system for museums to provide safe havens until objects can be safely returned to their origin nations. While in the museums, the works will be treated as loans. The Protocols establish a system for the protection of works during the loan process, as it provides a framework for transport, storage, scholarly access, legal protections, exhibition, conservation, and the safe return of objects as soon as possible.[173] To maintain transparency, AAMD member museums participating in this loan program must register works on AAMD's publicly available online "Object Registry".[174] This shared knowledge will reasonably prevent museums from absconding objects and later laying claim to them.

170 Ibidem.

171 HR 1493, Section (c)(2).

172 *AAMD Protocols for Save Havens for Works of Cultural Significance from Countries in Crisis*, 1 October 2015, https://www.aamd.org/for-the-media/press-release/aamd-issues-protocols-to-protect-works-of-cultural-significance-in [accessed: 15.11.2015].

173 Ibidem.

174 Ibidem.

What Measures should Member States enact to abide by Resolution 2199?

The importance of completing due diligence

The UN's Resolution 2199 reaffirms an existing ban on the illicit trade of antiquities from Iraq and imposes a new ban on the illicit trade of antiquities from Syria. Member States should be enforcing the prohibitions to ensure that their citizens and institutions are not funding terror syndicates. This requires strict rules against the purchase of loot by all buyers, and prohibition against custody of these objects by private collectors. Private collectors have no role in safeguarding objects, and they must be penalized to the fullest extent to discourage unethical purchase or possession. Private collectors continue to drive the demand for looted antiquities,[175] and it is necessary to curb this market to prevent further development of a market funding terrorism and destruction.

US laws prohibit the trade in loot, however violations often go without consequence

Buyers of looted antiquities may be criminally and civilly liable under various federal statutes. In 1983, Congress passed the Cultural Property Implementation Act ("CPIA") in order to implement the 1970 UNESCO Convention.[176] The CPIA prohibits the importation of stolen cultural material from other State Parties, and applies import controls over a State's patrimony in danger of pillage.[177] The legislation has been used to seize and return objects to foreign nations with which the US has agreements.[178] But herein lies its limitation in terms of Syrian and Iraqi objects. During times without diplomatic relationships between governments, it is not possible for the US to return goods to the legitimate party. In this case, there is not a proper mechanism for seizing and returning objects to legitimate parties in Syria and Iraq, and thus the CPIA's application is difficult.

In terms of criminal penalties, both the National Stolen Property Act ("NSPA") and the US smuggling statute provide the basis for prosecution. The NSPA, codified as 18 USC § § 2314-2315, has been used since its passage in 1934 to prosecute individuals dealing in stolen property. It has more recently been used in antiquities cases[179] as it provides that a person is guilty of a crime if he "receives, possesses, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise […]

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175 A.A. Bauer, op. cit., p. 2.

176 See Pub. L. No. 97-446, 96 Stat. 2350-2354 (codified at 19 USC § 2601 et seq.) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, 823 UNTS 231.

177 See 19 USC §§ 2607-2610 (2012).

178 *United States v. An Antique Platter of Gold*, 184 F.3d 131 (2d Cir. 1999).

179 *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003); *Republic of Turkey v. OKS Partners*, (D. Mass. 1994); *Republic of Turkey v. Metropolitan Museum of Art*, 762 F. Supp. 44 (SDNY 1990); *United States v. McClain*, 593 F.2d 658 (5th Cir. 1979); *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974).

which have crossed a State or United States boundary after being stolen […] knowing the same to have been stolen […]".[180] The Second Circuit ruled that the NSPA applies to individuals who remove cultural objects from countries with patrimony laws.[181] Customs regulations may also be used to prosecute violators. 18 USC § 545 ("Smuggling goods into the United States") carries a criminal penalty of a fine or imprisonment of up to twenty years for anyone smuggling or importing stolen goods into the country.[182] However, both of these criminal statutes have a major shortcoming as they require knowledge on the part of the defendant. Proving that an individual had knowledge of the illegality of their actions is a tremendous hurdle.[183] Other customs laws related to the import of illicit antiquities item include 18 USC § 541 (Entry of Goods Falsely Classified), 18 USC § 542 (Entry of Goods by Means of False Statements), 18 USC § 1001 (False Statements), and 19 USC § 1595a(c) (Importation contrary to Law).

Federal prosecutors have also used the Archaeological Resources Protection Act ("ARPA")[184] to pursue looters. Although the Act was intended to protect objects originating from within the US,[185] the Act's reach has been extended to apply to foreign objects as well.[186] Prosecutors rely on 16 USC § 470ee(c), a provision in ARPA prohibiting the sale, purchase, exchange, transport, or receipt of "any archaeological resource excavated, removed, sold, purchased, exchanged, transported, or received in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law". Prosecutors purported to satisfy § 470ee(c) by

180 18 USC § 2315 (2012).

181 See *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003), 416. The indictment of criminals for cultural heritage theft has a precedent dating back to the 1970s. In the late 1970s in *United States v. McClain*, antiquities dealers were prosecuted under NSPA for dealing in Mexican antiquities subject to a 1972 Mexican patrimony law that vested national ownership to antiquities discovered in Mexican soil. 545 F.2d 988, 991--992 (5th Cir. 1977). This case established the "McClain Doctrine" that established US courts' recognition that foreign patrimony laws may create ownership of undocumented antiquities in the national government.

182 18 USC § 545.

183 J.A. Kreder, *The Choice between Civil and Criminal Remedies in Stolen Art Litigation*, "Vanderbilt Journal of Transnational Law" 2005, Vol. 38, pp. 1199-1252, at p. 1207, referencing C. Fox, Note, *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property*, "American University Journal of International Law and Policy" 1993, Vol. 9, p. 233 (citing P.M. Bator: "noting that difficulties in proving that an object was stolen hindered the prosecution of art thieves"; see P.M. Bator, *The International Trade in Art*, University of Chicago Press, Chicago 1983, pp. 68-69).

184 16 USC § 470ee(c).

185 See *United States v. Gerber*, 999 F.2d 1112, 1115 (7th Cir. 1993) (explaining that § 470ee(c) was "designed to back up state and local laws protecting archaeological sites and objects […]"; A. Adler, *An Unintended and Absurd Expansion: The Application of the Archaeological Resources Protection Act to Foreign Lands*, "New Mexico Law Review" 2008, Vol. 38, pp. 149-150 & n. 118, pp. 152-153.

186 Thus "resembl[ing] […] a host of other federal statutes that affix federal criminal penalties to State crimes that, when committed in interstate commerce, are difficult for individual States to punish or prevent because coordinating the law enforcement efforts of different States is difficult"; see *United States v. Gerber*, op. cit., p. 1115.

coupling State theft laws with foreign patrimony laws.[187] Under this theory, the illegal export of archaeological resources from a nation with a patrimony law rendered those objects stolen; it was a violation of State theft laws to receive stolen property; and it was therefore a violation of § 470ee(c) to sell, purchase, exchange, transport, or receive such objects, regardless of their country of origin.[188]

In addition to legislation focused on the objects themselves, money laundering legislation may be used to halt the trade in black market antiquities as there is a proven link between the antiquities trade and money laundering.[189] Besides customs laws, purchasers of illicit goods may face sanctions by the US Department of Treasury's Office of Foreign Assets and Control ("OFAC"). The sanctions are typically punitive and most often used to prevent money laundering and weapons trafficking.[190] OFAC currently has sanctions for select materials coming from Iraq and Syria. According to US Department of Treasury, sanctions against Syrian objects are intended to stop human rights abuses and other illicit activities.[191] This arguably applies to the illicit trade in antiquities and the human rights violation of cultural heritage destruction.

Harsher Laws May Not Halt the Illicit Trade, Except when Done in Concert with Education

It has been suggested that buyers should face harsher penalties with a law stating that anyone receiving stolen property is culpable, irrespective of a buyer's knowledge.[192] If collectors purchase objects from the conflict zones, they must conduct extensive due diligence prior to an acquisition, and not claim lack of knowledge. The legal doctrine of "conscious avoidance" provides that a defendant who intentionally shields himself from evidence of critical facts is as liable as an individual who has actual knowledge.[193] With increased education and regulations, it becomes difficult for buyers to claim ignorance about the illegal origin of an object. For this reason, it is imperative to educate all collectors as to the dire situations in the Iraq and Syria. There is an important role for the media and social networks as they are powerful tools in the dissemination of information. Just as ISIS uses the media to display their

187 A.L. Adler, S.K. Urice, *Resolving the Disjunction Between Cultural Property Policy and Law: A Call for Reform*, "Rutgers Law Review" 2011, Vol. 64, pp. 136-137.

188 Ibidem.

189 See generally F.M. De Sanctis, *Money Laundering Through Art. A Criminal Justice Perspective*, Springer, Cham, Heidelberg 2013.

190 See H. Wolff, *Unilateral Economic Sanctions: Necessary Foreign Policy Tool or Ineffective Hindrance on American Businesses*, "Houston Business and Tax Law Journal" 2005, Vol. 6, p. 329.

191 http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_other.aspx#syria_whole [accessed: 15.11.2015].

192 *Conflict Antiquities*, op. cit.

193 D. Luban, *Contrived ignorance*, "Georgetown Law Journal" 1998, Vol. 87, p. 957.

acts of destruction, mainstream media should educate the public and warn collectors about the origin of looted antiquities. In fact, with the increasing information about the situation in the Middle East and an increasing number of tools available to art buyers, it should be overwhelmingly difficult for collectors to convincingly claim lack of knowledge. Just as investors complete due diligence before making real estate or business purchases, so should art buyers bear the responsibility for their purchases. If relevant due diligence documents are unavailable, then buyers must refrain from purchasing antiquities. The balance of enforcing current laws, educating buyers, and encouraging due diligence will be most effective solution for reducing the illicit market.

Conclusion

The escalating harm from vandalism in the Middle East is hard to comprehend as millennia of history are being senselessly erased. The destruction is accompanied by shocking violence, senseless tragedy, and intolerant ideology. Halting this type of behavior is a daunting task as it requires the use of preemptive measures, military involvement, and the judicial, moral, and financial commitment to bring terrorist groups and violent individuals to justice. For most of the world, this destruction occurs in a foreign faraway place filled with fear.

On the other hand, looted antiquities are traded globally. It is necessary for nations, public and private institutions, and individuals around the world to stop purchasing illicit antiquities. Museums have a role in protecting art by not purchasing or accepting unprovenanced antiquities, as doing so will only fuel the market for loot. Rather these public institutions are in the best possible position to protect and safeguard heritage by following guidelines set forth by the Association of American Museum Directors and acquiring only licit materials. For collectors and actors in the private market, the solution is simple: commit to completing and facilitating due diligence and refrain from buying antiquities when faced with insufficient information about the objects. Social media and the press have important roles in educating buyers as to the source of black market goods, and the dissemination of this information may prevent buyers from claiming ignorance about the looted nature of antiquities from conflict zones. For buyers unwilling to ignore their thirst for acquisitions, the law must step in to protect our collective human history and historical legacy. The collaboration between archaeologists, media, the press, and the law is the best way to tackle the illicit market that is murdering our shared cultural past.

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RESEARCH ARTICLES

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The Syrian Conflict and the Proposed "Protect and Preserve International Cultural Property Act"

Abstract: The United States Congress is considering adding new legislation to its current scheme regulating Cultural Property. The proposed law, the Protect and Preserve Cultural Property Act, would create a new Coordinator and Committee and charge them with harmonizing the cultural heritage policing efforts of the United States. These changes do not alter American law in a fundamental way, but rather mark instead the subtle move towards a dedicated group tasked with enforcing, educating, and evaluating this body of cultural property law and policy in the United States.

Keywords: Syria, USA, archaeological heritage, illicit traffic, looting, art trade

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Introduction

With the looting and destruction currently being inflicted on cultural objects and ancient sites in Northern Iraq and Syria,[1] those interested in stemming the looting of cultural heritage sites now find themselves at a regulatory moment. The crisis presents an opportunity to strengthen any weaknesses in the web of laws and policies that the United States government uses to combat the illicit trade in cultural objects. An important potential strengthening can be seen in a piece of legislation which offers some improvements to the Federal regulatory framework targeting illicit cultural property. Titled "The Protect and Preserve International Cultural Property Act", the law has surprisingly received scant attention in the cultural heritage policy community.[2]

The changes are motivated in part by the damage and destruction perpetrated mainly, but not exclusively, by the so-called ISIS militants operating in Northern Iraq and Syria.[3] The bi-partisan legislation offers some reforms that could add cohesiveness to the regulatory apparatus which implements the domestic and international law governing art and antiquities, the most important of these reforms include a new committee bringing together the myriad federal agencies which regulate art and antiquities, and call for the appointment of a new International Cultural Property Coordinator who would work to coordinate the cultural property protection roles of the seven different Federal agencies in their diplomatic, military and law enforcement activities.

At the time of writing this legislation has passed the House of Representatives, and still needs approval by the Senate and President before it becomes law. As such the proposed legislation may perhaps not even achieve enactment. But similar proposals have been debated in the Congress and this seems to be a reform favoured by those members of Congress addressing cultural property issues.[4] Even if the Protect and Preserve International Cultural Property Act does not achieve enactment, there seems a good chance that legislation of some kind and in a similar form will be proposed in the near future.

This article will first provide a brief overview of the current Federal law which applies to cultural property. The aim of this paper is not to summarize all of the strengths and weaknesses of federal cultural property regulation in the United States, but rather to show how the proposed legislation fills a gap in the current

1 See A.A. Bauer, *Editorial: The Destruction of Heritage in Syria and Iraq and Its Implications*, "International Journal of Cultural Property" 2015, Vol. 22, pp. 1-6.

2 HR 1493 114th Congress (2015).

3 For a current estimate of the damage in Syria caused by looting and conflict, see J. Casana, *Satellite Imagery-Based Analysis of Archaeological Looting in Syria*, "Near Eastern Archaeology" 2015, Vol. 78, pp. 142--152; M.D. Danti, *Ground-Based Observations of Cultural Heritage Incidents in Syria and Iraq*, "Near Eastern Archaeology" 2015, Vol. 78, p. 132.

4 HR 5703 113th Congress (2014).

cultural property enforcement regime. The article then offers a brief commentary on the main aspects of the legislation, and reproduces the text itself in an appendix.

An Overview of Regulation of Cultural Property in the United States

Federal regulation of cultural property focuses primarily on returning illicit objects, while also establishing prosecution for egregious violations of the law. The primary regulatory tools at the federal level are import restrictions, the civil forfeiture of illicit material, and prosecutions under the National Stolen Property Act.[5] The proposed legislation offered would not amend this law, rather it would allow federal agencies to implement and enforce this law more effectively. It aims to better coordinate the efforts across several federal agencies. In a seminal 1983 article Professor Paul Bator aptly laid out the challenge for regulators by describing the different segments of the illegal trade in antiquities: "[looting] is carried out in the first instance by local diggers, who then sell their finds through a black market to middlemen, who in turn resell to local or foreign dealers".[6] Allowing for information sharing, promoting cooperation, avoiding inter-agency squabbling, and coordinating in general could allow for more effective regulation of cultural property.

An important regulatory hurdle for handlers of cultural property are the import restrictions for certain objects which enter the United States from abroad. The framework for these import restrictions is established in the Convention on Cultural Property Implementation Act ("CCPIA").[7] This law represents the implementing legislation of the 1970 UNESCO Convention. In a useful critique of executive branch actions with respect to cultural property, Stephen Urice and Andrew Adler argue that because it took the United States more than ten years after signing the 1970 UNESCO Convention to implement its provisions into law, the text of the law reflects a compromise: while the United States will impose import restrictions for at-risk objects, requesting nations must also police domestically.[8] For a nation in the midst of sectarian conflict such as Syria, these domestic measures may not be possible.

Import restrictions have proven to be effective at returning illicit material. We can assume that returning objects to the nations of origin does help to disincentivize the illicit trade.[9] But by only returning a looted object, other parts of the illicit art

[5] 18 USC §§ 2314-2315 (2012).

[6] P.M. Bator, *An Essay on the International Trade in Art*, "Stanford Law Review" 1982, Vol. 34, pp. 275, 292.

[7] 19 USC §§ 2601-2613 (2012).

[8] A.L. Adler, S.K. Urice, *Resolving the Disjunction Between Cultural Property Policy and Law: A Call for Reform*, "Rutgers Law Review" 2011, Vol. 64, pp. 117, 139-140.

[9] See P. Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, "Connecticut Journal of International Law" 2000, Vol. 16, p. 197.

trade are free to move on to the next site or type of object that the market values. Criminal penalties should be used to tackle these looting and smuggling networks – and criminal penalties can be brought against those who knowingly violate the national ownership declarations of nations of origin. Yet these investigations are lengthy and expensive. Large-scale investigations and prosecutions of individuals involved in the illicit antiquities trade have occurred, though they are relatively rare.[10] One of the biggest signal prosecutions in the art trade was the prosecution of two of the key market-end participants in an illicit antiquities smuggling network which moved illicit material from Egypt through England to North America.[11] Fred Schultz was a prominent antiquities dealer with a gallery in Manhattan. He was also a vocal critic of the growing enforcement in the United States of foreign ownership declarations. His co-conspirator was Jonathan Tokeley-Parry, an English citizen who had contacts with looters in Egypt. Tokeley-Parry was convicted of handling stolen goods. In 1992 Schultz purchased a statue of Amenhotep III which had been illegally handled by Tokeley-Parry in Egypt, and smuggled on to New York. Tokeley-Parry disguised the head by dipping it in wax and painting it to resemble a cheap souvenir.

Tokeley-Parry then devised elaborate histories for these objects. He would use old typewriters, affix labels which had been stained after soaking in tea, and created a backstory for these objects inventing a fictitious ancestor, Thomas Alcock, as the collector of this material. As a result of effective policing and cooperation between the authorities in Egypt, the United Kingdom, and the United States, Tokeley-Parry was tried and convicted in the United Kingdom under the Theft Act for handling stolen goods in a trial in 1997.[12] By smuggling looted objects out of Egypt, Tokeley-Parry was handling stolen goods because Egypt had declared ownership rights to that country's undiscovered archaeological resources.

This prosecution in the United Kingdom led to the prosecution of the market end of this network in New York. Fred Schultz was convicted of conspiracy to violate the National Stolen Property Act.[13] The prosecution was no doubt aided considerably by Tokeley-Parry serving as a witness for the prosecution, which revealed a number of details about their working relationship. Indeed, Tokeley-Parry's documentation and letters were instrumental in his prosecution and the prosecution of Schultz. The trial of Schultz is perhaps the best known use of theft acts and their at-

[10] Those cases include *United States v. Hollinshead*, 495 F2d 1154 (9th Cir. 1974) and *United States v. McClain*, 593 F2d 658 (5th Cir. 1979). For a discussion of the evolution of the federal criminal laws as applied to national ownership declarations see D. Fincham, *Why U.S. Federal Criminal Penalties for Dealing in Illicit Cultural Property are Ineffective, and a Pragmatic Alternative*, "Cardozo Arts and Entertainment Law Journal" 2007, Vol. 25, pp. 597, 611-617.

[11] For a discussion of the illicit antiquities trade as a transnational criminal network, see P.B. Campbell, *The Illicit Antiquities Trade as a Transnational Criminal Network: Characterizing and Anticipating Trafficking of Cultural Heritage*, "International Journal of Cultural Property" 2013, Vol. 20, p. 113.

[12] *R. v. Tokeley-Parry*, [1999] Crim. LR 578.

[13] *United States v. Schultz*, 333 F3d 393 (2d Cir. 2003).

tendant offenses to prosecute the dealers of illicit antiquities. But its success relied on a series of investigations and cooperative arrangements that have been difficult to duplicate. Facing as large an obstacle as cooperating across three different nations – Egypt, the United Kingdom, and the United States – the Federal governments enforcement and policing regime with respect to illicit antiquities is similarly blocked and impeded by the seven different federal agencies which all have the responsibility of policing segments of the cultural property trade.

Without a coordinated effort, illicit networks will continue to evade regulation. The criminologist Simon Mackenzie in an important ethnological analysis of the trade came to the conclusion that legal restraints in the antiquities trade are much less effective than in other criminal markets.[14] Mackenzie argued white-collar criminals especially are heavily influenced by the risk of detection and the likelihood and severity of punishment. This coupled with the reality that many antiquities are sold without sufficient ownership history means criminal penalties are irregular and unpredictable. Professor Patty Gerstenblith, the current Chair of the State Department's Cultural Property Advisory Committee has argued that "market participants deny the causal connection between the funds they put into the market and site looting" and that the relative scarcity of criminal punishment and the difficulty in establishing the required elements for a criminal conviction often mean that the government's most likely remedy are civil forfeitures[15] of the antiquities at issue, or even private suits brought by the nation of origin.[16] As a result the cycle of looting continues, causing harm to our museums, destroys unique and irreplaceable archaeological contexts, undermines international relations, and harms our collective cultural heritage. Given the current regulatory framework, the proposed legislation aims to harmonize the Federal approach.

Threats to Cultural Property

The first three sections of the proposed legislation set out the definitions and connect the legislation to the three most widely adopted Cultural Property Conventions.[17] Section three of the proposed legislation offers a number of findings and

[14] S.R.M. Mackenzie, *Going, Going, Gone: Regulating the Market in Illicit Antiquities*, Institute of Art and Law, Leicester 2007, pp. 32-50.

[15] See J.A. Kreder, *The Choice between Civil and Criminal Remedies in Stolen Art Litigation*, "Vanderbilt Journal of Transnational Law" 2005, Vol. 38, p. 1199.

[16] P. Gerstenblith, *Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past*, "Chicago Journal of International Law" 2007, Vol. 8, p. 169, 178-180.

[17] These are the: Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 240; Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, 14 November 1970, 823 UNTS 231; Convention Concerning the Protection of the World's Cultural and Natural Heritage, 16 November 1972, 1037 UNTS 151.

statements of Congressional policy. There are many estimates of the size of the illicit art market which attempt to compare heritage crime to other major criminal markets like drugs and arms, even though these estimates have little data to support them. The scale of looted antiquities presents its own problems, as estimating the kind of object taken by looters will be difficult, and there is of course the difficulty in calculating the value of the loss of archaeological context. Though archaeological context has little value to the art market, its value to future researchers and future generations is in many ways even more precious than the marketable antiquities looters seek. Without records and the skilled expertise of an archaeologist to record scientific and contextual information, a tremendous amount of raw information and knowledge is lost, not to mention the amount of material which is damaged and cast aside because it may not be saleable.[18]

Though it is short on concrete data, the proposed legislation underscores the destruction taking place. These statements amount to official Congressional recognition of the threats to cultural property and describes how it has been "looted, trafficked, lost, damaged, or destroyed" as a result of "political instability, armed conflict, natural disasters, and other threats". It continues by taking note of individual nations and areas which have suffered, including: Cambodia under the Khmer Rouge, the Bamiyan Buddhas, the Iraq Museum in Baghdad, the Haitian city of Jacmel, Mali, Egypt, Syria, the destruction done by ISIL in both Iraq and Syria, and noted the United Nations Security Council Resolution No. 2199 (2015).

These recognitions are plain statements of policy which may prompt concrete action. The illicit art trade combines two main classes of objects: stolen artworks and recently excavated (i.e. "looted") antiquities. So how large is the volume of this material? The answer to that question will only be, at best, a rough estimate. Sandro Calvani, a former director of the United Nations Interregional Crime and Justice Research Institute has argued that while the trade in illicit art has reached "epidemic proportions"; many obstacles prevent the precise quantification of these crimes, as "every year, the Interpol General Secretariat asks all member countries for statistics on theft of works of art" yet on average only 60 out of 187 member countries provide statistics.[19] So the Congressional recognition of threats to cultural heritage, coupled with other coordinating efforts discussed below, amount to an opportunity to convert the heightened awareness into tangible resources for cultural property protection.

[18] See K. Hanson, *Why Does Archaeological Context Matter*, in: G. Emberling, K. Hanson (eds.), *Catastrophe! The Looting & Destruction Of Iraq's Past*, The Oriental Institute, Chicago 2008, p. 45.

[19] S. Calvani, *Frequency and Figures of Organised Crime in Art and Antiquities*, in: S. Manacorda (ed.), *Organised Crime in Art and Antiquities*, ISPAC Courmayeur Mont Blanc, Italy 2008, p. 28.

A New Cultural Property Coordinator and Committee

The proposed legislation in sections four and five creates two new mechanisms to protect cultural property from these threats: a coordinator and a supporting committee. First, a new position at the State Department would be created to "serve concurrently as the United States Coordinator for International Cultural Property Protection". That Coordinator would have the responsibility of spearheading the efforts to protect cultural property internationally, primarily among Federal agencies. This position would have the potential to harmonize and direct the efforts of the disparate Federal agencies which are presently tasked with protecting cultural property. Should the legislation achieve enactment, it would indicate that the Congress considers cultural property protection important, and that protecting it needs a strong and decisive leader. To understand why this position would be needed, it may be useful to reflect on the curious absence in the United States of a Culture Ministry. The absence of a department of culture most likely hinders the efforts of cultural policy advocates in the United States. This situation would be remedied at the Federal level with a new coordinator, at least with respect to the regulation of Cultural Property at the Federal level.

Though predicting the efficacy of the coordinator is difficult at this stage, the position does seem well-placed to ensure that the array of Federal agencies which police the art and antiquities trade do not fall prey to interagency strife. It is possible that the Cultural Property Coordinator would be able to oversee and assist investigations across federal agencies, promote successful investigative strategies, and would generally inform and strengthen federal cultural property protection overall. One of the struggles in successfully carrying out large-scale investigations of antiquities trafficking networks are the limitations of budgets and time imposed on the investigators and attorneys who do the policing and prosecuting. By appointing a coordinator it is possible that more resources could be lobbied for, and the impact could be substantial. In addition, a strong coordinator could centralize and rationalize policy formulation in the area of cultural property protection. It would seem that the coordinator would have to simultaneously lobby citizens, Congress, and other agencies to invest in cultural property protection initiatives. As a policy planner though, the Coordinator would also need to evaluate these efforts.

That evaluation function would be served with the creation of the new Coordinating Committee which would meet at least annually to "coordinate and inform Federal efforts to protect international cultural property". Membership of the Committee would include representatives from the department of State, Department of Defense, the Department of Homeland Security, including US Immigration and Customs Enforcement and US Customs and Border Protection, the Department of the Interior, the Department of Justice, the Federal Bureau of Investigation, and the United States Agency for International Development, the Smithsonian Institution, and others. In practice, the Committee would most likely function to assist

the coordination of Federal efforts to regulate the protection of cultural property internationally. Both the Coordinator and Committee would be responsible for reporting on their activities to appropriate Congressional Committees.

The current policy of the Federal government seeks to return as many looted and stolen objects as possible to their country of origin. As an example of this, in a recent repatriation ceremony Thomas Winkowski, acting director of the Department of Homeland Security's Immigration and Customs Enforcement (ICE) agency spoke about the importance of art and the beauty of the 25 objects being returned, but there were no arrests by US officials, only the return of objects.[20] Too often the measures to prevent antiquities smuggling have been about the objects; not enough good policing and prosecution has been directed at dismantling looting networks and targeting key individuals in these networks. The government press release marking that ceremony noted that since 2007, an estimated 7,150 objects have been returned to 27 countries.[21] At this stage, predicting accurately how effective the coordinator and committee would be is difficult, especially given that the legislation has yet to be taken up by the Senate. These steps may be of limited use. But given the piecemeal features of at least some of the Federal government's response to cultural property, a coordinator coupled with a working committee may perhaps be able to encourage better regulation and policy initiatives.

Outreach to Protect At-Risk Heritage

The Smithsonian Institution is the only national cultural institution poised to assist with outreach. Most of the other major museums in the United States are nonprofit institutions which receive government support, but are not subject to government oversight. Section 7 of the proposed legislation would authorize federal agencies to make use of staff at the Smithsonian Institution to protect cultural property. This has been taking place already in the absence of the law; for example Corinne Wegener, a Cultural Heritage Preservation Officer with the Smithsonian Institute has already been involved in efforts to protect the cultural heritage of at-risk areas, including Iraq and Syria.[22] In this regard facilitating the efforts to help protect and preserve sites that are at risk should be applauded. So when Congress authorizes these staff members to assist, it should be seen mainly as Congressional encouragement of outreach to at-risk sites.

[20] *25 Peruvian cultural treasures returned to the government of Peru*, 22 October 2014, https://www.ice.gov/news/releases/25-peruvian-cultural-treasures-returned-government-peru [accessed: 12.09.2015].

[21] Ibidem.

[22] D. Amos, *In Syria, Archaeologists Risk Their Lives To Protect Ancient Heritage*, National Public Radio, 9 March 2015, http://www.npr.org/sections/parallels/2015/03/09/390691518/in-syria-archaeologists-risk-their-lives-to-protect-ancient-heritage [accessed: 12.09.2015].

Emergency Import Restrictions for Syrian Cultural Property

The legislation concludes with a section which would enable the President to impose emergency import restrictions on Syrian cultural property. Because of the unique way in which the United States signed on to the 1970 UNESCO Convention, Congressional action can streamline the imposition of emergency import restrictions when a requesting nation has difficulty making that request.

The United States requires, under the CCPIA, that a nation of origin make a request for import restrictions through the Cultural Property Advisory Committee (CPAC).[23] The Convention on Cultural Property Implementation Act (CCPIA) implements articles 7(b) and 9 of the 1970 UNESCO Convention. The CCPIA under 7(b) sets up a committee and a public comment process by which nations can request that the United States impose import restrictions on antiquities. However, because the legislation requires Syria to do that, and because in 2012 the White House recognized the Syrian rebels as the legitimate governing authority of the Syrian Arab Republic,[24] the mechanics of seeking these restrictions is convoluted. Article 9 allows for States Parties to the 1970 UNESCO Convention to enter into agreements when cultural property is at risk in an emergency situation. Under the CCPIA, even the emergency import restrictions would still require a request by Syrian officials.[25] Section 8 of the proposed legislation would authorize the President to impose emergency import restrictions without the need for a formal request from the government of Syria. The provision bears many similarities to the Emergency Protection of Iraqi Cultural Antiquities Act of 2004,[26] which allowed the imposition of emergency import restrictions on Iraqi cultural property when there was a similar difficulty in Iraq putting together a formal request.

Conclusions

The international trade in cultural property presents a series of unique challenges. Congress has offered some important new tools with the proposed "The Protect and Preserve International Cultural Property Act". One of the core components of regulatory intervention in the art and antiquities market is to increase the deterrent impact of the resources available, and to muster more regulatory resources. The threat of criminal penalty can alter the behaviour of potential criminals, this

23 19 USC 2603 (2012).

24 M. Landler, M.R. Gordon, A. Barnard, *U.S. Will Grant Recognition to Syrian Rebels, Obama Says*, "New York Times", 11 December 2012, http://www.nytimes.com/2012/12/12/world/middleeast/united-states-involvement-in-syria.html [accessed: 12.09.2015].

25 19 USC 2602(a)(3) (2012).

26 Emergency Protection for Iraqi Cultural Antiquities Act of 2004, Pub. L. No. 108-429, § 3002, 118 Stat. 2434 (2004); Import Restriction Imposed on Archaeological and Ethnological Material of Iraq 19 CFR pt 12 (30 April 2008).

is after all a cornerstone of criminal law.[27] Deterring individuals from committing crimes through the threat of negative repercussions is one of the most useful policy tools regulators have. But when it comes to works of art at risk during armed conflict, or that cross national borders, those deterrents can become much more difficult to attach to individual actors. Increasing effective prosecution will require a robust policy framework, and considerable resources. Considerable, but compared to the resources devoted to other criminal activities, relatively modest.

Mustering the appropriate resources and policy framework may be difficult, but the rhetoric of prosecutors, Assistant US Attorneys, and State Department officials reveals the importance of combating the illicit trade.[28] The proposed law would coordinate those efforts. Without the credible threat of penal sanctions, buyers and dealers can continue doing business with only intermittent interruption. At present customs agents are not well-suited to conduct long-form investigations which result in prosecutions. They mainly seize objects and return them to nations of origin. An agency like the FBI does have this kind of expertise, but it has no jurisdiction over many of these kinds of offences. Few of the far more important prosecutions and arrests have been successful. The wave of seizures and returns conducted by Customs and Border Patrol Agents only focuses on the objects. Perhaps with a more unified Coordinator, who has the resources to oversee this effort, the efficacy of these provisions may be increased. It seems difficult to imagine a robust investigative and prosecutorial effort that does not have the benefit of effective coordination. Whether this proposed legislation will achieve enactment, or will achieve what its drafters intend remains to be seen, but it appears to be a solid step in the right direction.

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[27] See S. Manacorda, D. Chappell, *Crime in the Art and Antiquities World: Illegal Trafficking in Cultural Property*, Springer-Verlag, New York 2011.

[28] J. Kerry, *Remarks at Threats to Cultural Heritage in Iraq and Syria Event*, 22 September 2014, http://www.state.gov/secretary/remarks/2014/09/231992.htm [accessed: 12.09.2015].

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Appendix

114th CONGRESS, 1st Session
United States Library of Congress
HR 1493
Engrossed in House

June 01, 2015

HR 1493
AN ACT

To protect and preserve international cultural property at risk due to political instability, armed conflict, or natural or other disasters, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 1. SHORT TITLE.

This Act may be cited as the 'Protect and Preserve International Cultural Property Act'.

SEC. 2. DEFINITION.

In this Act:

(1) Appropriate congressional committees. The term 'appropriate congressional committees' means the Committee on Foreign Affairs, the Committee on Ways and Means, the Committee on Armed Services, and the Committee on the Judiciary of the House of Representatives and the Committee on Foreign Relations, the Committee on Finance, the Committee on Armed Services, and the Committee on the Judiciary of the Senate.

(2) Cultural property. The term 'cultural property' includes property covered under-

(A) the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, concluded at The Hague on May 14, 1954 (Treaty Doc. 106--1(A));

(B) Article 1 of the Convention Concerning the Protection of the World's Cultural and Natural Heritage, adopted by UNESCO on November 23, 1972 (commonly referred to as the '1972 Convention'); or

(C) Article 1 of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, adopted by UNESCO on November 14, 1970 (commonly referred to as the '1970 UNESCO Convention').

SEC. 3. FINDINGS AND STATEMENT OF POLICY.

(a) Findings. Congress finds the following:

(1) Over the years, international cultural property has been looted, trafficked, lost, damaged, or destroyed due to political instability, armed conflict, natural disasters, and other threats.

(2) During China's Cultural Revolution, many antiques were destroyed, including a large portion of old Beijing, and Chinese authorities are now attempting to rebuild portions of China's lost architectural heritage.

(3) In 1975, the Khmer Rouge, after seizing power in Cambodia, systematically destroyed mosques and nearly every Catholic church in the country, along with many Buddhist temples, statues, and Buddhist literature.

(4) In 2001, the Taliban destroyed the Bamiyan Buddhas, ancient statues carved into a cliffside in central Afghanistan, leading to worldwide condemnation.

(5) After the fall of Saddam Hussein, thieves looted the Iraq Museum in Baghdad, resulting in the loss of approximately 15,000 items, including ancient amulets, sculptures, ivories, and cylinder seals. Many of these items remain unrecovered.

(6) The 2004 Indian Ocean earthquake and tsunami not only affected 11 countries, causing massive loss of life, but also damaged or destroyed libraries, archives, and World Heritage Sites such as the Mahabalipuram in India, the Sun Temple of Koranak on the Bay of Bengal, and the Old Town of Galle and its fortifications in Sri Lanka.

(7) In Haiti, the 2010 earthquake destroyed art, artifacts, and archives, and partially destroyed the 17th century Haitian city of Jacmel.

(8) In Mali, the Al-Qaeda affiliated terrorist group Ansar Dine destroyed tombs and shrines in the ancient city of Timbuktu a major center for trade, scholarship, and Islam in the 15th and 16th centuries and threatened collections of ancient manuscripts.

(9) In Egypt, recent political instability has led to the ransacking of museums, resulting in the destruction of countless ancient artifacts that will forever leave gaps in humanity's record of the ancient Egyptian civilization.

(10) In Syria, the ongoing civil war has resulted in the shelling of medieval cities, damage to five World Heritage Sites, and the looting of museums containing artifacts that date back more than six millennia and include some of the earliest examples of writing.

(11) In Iraq and Syria, the militant group ISIL has destroyed numerous cultural sites and artifacts, such as the Tomb of Jonah in July 2014, in an effort to eradicate ethnic and religious minorities from contested territories. Concurrently, cultural antiquities that escape demolition are looted and trafficked to help fund ISIL's militant operations.

(12) On February 12, 2015, the United Nations Security Council unanimously adopted resolution 2199 (2015), which 'reaffirms its decision in paragraph 7 of resolution 1483 (2003) and decides that all Member States shall take appropriate steps to prevent the trade in Iraqi and Syrian cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from Iraq since 6 August 1990 and from Syria since 15 March 2011, including by prohibiting cross-border trade in such items, thereby allowing for their eventual safe return to the Iraqi and Syrian people.'.

(13) United Nations Security Council resolution 2199 (2015) also warns that ISIL and other extremist groups are trafficking cultural heritage items from Iraq and Syria to fund their recruitment efforts and carry out terrorist attacks.

(14) The destruction of cultural property represents an irreparable loss of humanity's common cultural heritage and is therefore a loss for all Americans.

(15) Protecting international cultural property is a vital part of United States cultural diplomacy, showing the respect of the United States for other cultures and the common heritage of humanity.

(16) The United States Armed Forces have played important roles in preserving and protecting cultural property. In 1943, President Franklin D. Roosevelt established a commission to advise the United States military on the protection of cultural property. The commission formed teams of individuals known as the 'Monuments Men' who are credited with securing, cataloguing, and returning hundreds of thousands of works of art stolen by the Nazis during World War II.

(17) The Department of State, in response to the Convention on Cultural Property Implementation Act, noted that 'the legislation is important to our foreign relations, including our international cultural relations. The expanding worldwide trade in objects of archaeological and ethnological interest has led to wholesale depre-

dations in some countries, resulting in the mutilation of ceremonial centers and archaeological complexes of ancient civilizations and the removal of stone sculptures and reliefs.'. The Department further noted that 'the United States considers that on grounds of principle, good foreign relations, and concern for the preservation of the cultural heritage of mankind, it should render assistance in these situations.'.

(18) The U.S. Committee of the Blue Shield was founded in 2006 to support the implementation of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and to coordinate with the United States military, other branches of the United States Government, and other cultural heritage nongovernmental organizations in preserving international cultural property threatened by political instability, armed conflict, or natural or other disasters.

(b) Statement of Policy. It shall be the policy of the United States to-

(1) protect and preserve international cultural property at risk of looting, trafficking, and destruction due to political instability, armed conflict, or natural or other disasters;

(2) protect international cultural property pursuant to its obligations under international treaties to which the United States is a party;

(3) prevent, in accordance with existing laws, importation of cultural property pillaged, looted, stolen, or trafficked at all times, including during political instability, armed conflict, or natural or other disasters; and

(4) ensure that existing laws and regulations, including import restrictions imposed through the Office of Foreign Asset Control (OFAC) of the Department of the Treasury, are fully implemented to prevent trafficking in stolen or looted cultural property.

SEC. 4. UNITED STATES COORDINATOR FOR INTERNATIONAL CULTURAL PROPERTY PROTECTION.

The Secretary of State shall designate a Department of State employee at the Assistant Secretary level or above to serve concurrently as the United States Coordinator for International Cultural Property Protection. The Coordinator shall-

(1) coordinate and promote efforts to protect international cultural property, especially activities that involve multiple Federal agencies;

(2) act as Chair of the Coordinating Committee on International Cultural Property Protection established under section 5;

(3) resolve interagency differences;

(4) develop strategies to reduce illegal trade and trafficking in international cultural property in the United States and abroad, including by reducing consumer demand for such trade;

(5) support activities to assist countries that are the principle sources of trafficked cultural property to protect cultural heritage sites and to prevent cultural property looting and theft;

(6) work with and consult domestic and international actors such as foreign governments, intergovernmental organizations, nongovernmental organizations, museums, educational institutions, and research institutions to protect international cultural property; and

(7) submit to the appropriate congressional committees the annual report required under section 6.

SEC. 5. COORDINATING COMMITTEE ON INTERNATIONAL CULTURAL PROPERTY PROTECTION.

(a) Establishment. There is established a Coordinating Committee on International Cultural Property Protection (in this section referred to as the 'Committee').

(b) Functions. The full Committee shall meet not less often than annually to coordinate and inform Federal efforts to protect international cultural property and to facilitate the work of the United States Coordinator for International Cultural Property Protection designated under section 4.

(c) Membership. The Committee shall be composed of the United States Coordinator for International Cultural Property Protection, who shall act as Chair, and representatives of the following:

(1) The Department of State.

(2) The Department of Defense.

(3) The Department of Homeland Security, including U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection.

(4) The Department of the Interior.

(5) The Department of Justice, including the Federal Bureau of Investigation.

(6) The United States Agency for International Development.

(7) The Smithsonian Institution.

(8) Such other entities as the Chair determines appropriate.

(d) Subcommittees. The Committee may include such subcommittees and taskforces as the Chair determines appropriate. Such subcommittees or taskforces may be comprised of a subset of the Committee members or of such other members as the Chair determines appropriate. At the discretion of the Chair, the provisions of the Federal Advisory Committee Act (5 U.S.C. App.) and section 552b of title 5 of the United States Code (relating to open meetings) shall not apply to activities of such subcommittees or taskforces.

(e) Consultation. The Committee shall consult with governmental and nongovernmental organizations, including the U.S. Committee of the Blue Shield, museums, educational institutions, and research institutions on efforts to promote and protect international cultural property.

SEC. 6. REPORTS ON ACTIVITIES TO PROTECT INTERNATIONAL CULTURAL PROPERTY.

Not later than 1 year after the date of the enactment of this Act and annually thereafter for the next 6 years, the Secretary of State, acting through the United States Coordinator for International Cultural Property Protection, and in consultation with the Administrator of the United States Agency for International Development, the Secretary of Defense, the Attorney General, and the Secretary of Homeland Security, as appropriate, shall submit to the appropriate congressional committees a report that includes information on activities of-

(1) the United States Coordinator and the Coordinating Committee on International Cultural Property Protection to protect international cultural property;

(2) the Department of State to protect international cultural property, including activities undertaken pursuant to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and other statutes, international agreements, and policies, including-

(A) procedures the Department has instituted to protect international cultural property at risk of destruction due to political instability, armed conflict, or natural or other disasters; and

(B) actions the Department has taken to protect international cultural property in conflicts to which the United States is a party;

(3) the United States Agency for International Development (USAID) to protect international cultural property, including activities and coordination with other Federal agencies, international organizations, and nongovernmental organizations regarding the protection of international cultural property at risk due to political unrest, armed conflict, natural or other disasters, and USAID development programs;

(4) the Department of Defense to protect international cultural property, including activities undertaken pursuant to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and other cultural property protection statutes and international agreements, including-

(A) directives, policies, and regulations the Department has instituted to protect international cultural property at risk of destruction due to political instability, armed conflict, or natural or other disasters; and

(B) actions the Department has taken to avoid damage to cultural property through construction activities abroad; and

(5) the Department of Homeland Security and the Department of Justice, including the Federal Bureau of Investigation, to protect both international cultural property abroad and international cultural property located in, or attempted to be imported into, the United States, including activities undertaken pursuant to statutes and international agreements, including-

(A) statutes and regulations the Department has employed in criminal, civil, and civil forfeiture actions to prevent and interdict trafficking in stolen and smuggled cultural property, including investigations into transnational organized crime and smuggling networks; and

(B) actions the Department has taken in order to ensure the consistent and effective application of law in cases relating to both international cultural property abroad and international cultural property located in, or attempted to be imported into, the United States.

SEC. 7. AUTHORIZATION FOR FEDERAL AGENCIES TO ENGAGE IN INTERNATIONAL CULTURAL PROPERTY PROTECTION ACTIVITIES WITH THE SMITHSONIAN INSTITUTION.

Notwithstanding any other provision of law, any agency that is involved in international cultural property protection activities is authorized to enter into agreements or memoranda of understanding with the Smithsonian Institution to temporarily engage personnel from the Smithsonian Institution for the purposes of furthering such international cultural property protection activities.

SEC. 8. EMERGENCY PROTECTION FOR SYRIAN CULTURAL PROPERTY.

(a) Presidential Determination. Notwithstanding subsection (b) of section 304 of the Convention on Cultural Property Implementation Act (19 U.S.C. 2603) (relating to a Presidential determination that an emergency condition applies with respect to any archaeological or ethnological material of any State Party to the Convention), the President shall apply the import restrictions referred

to in such section 304 with respect to any archaeological or ethnological material of Syria, except that subsection (c) of such section 304 shall not apply. Such import restrictions shall take effect not later than 120 days after the date of the enactment of this Act.

(b) Annual Determination Regarding Certification.-

(1) Determination.-

(A) In general. The President shall, not less often than annually, determine whether at least one of the conditions specified in subparagraph (B) is met, and shall notify the appropriate congressional committees of such determination.

(B) Conditions. The conditions referred to in subparagraph (A) are the following:

(i) The Government of Syria is incapable, at the time a determination under such subparagraph is made, of fulfilling the requirements to request an agreement under section 303 of the Convention on Cultural Property Implementation Act (19 U.S.C. 2602).

(ii) It would be against the United States national interest to enter into such an agreement.

(2) Termination of restrictions. The import restrictions referred to in subsection (a) shall terminate on the date that is 5 years after the date on which the President determines that neither of the conditions specified in paragraph (1)(B) are met, unless before such termination date Syria requests to enter into an agreement with the United States pursuant to section 303 of the Convention on Cultural Property Implementation Act, in which case such import restrictions may remain in effect until the earliest of either-

(A) the date that is 3 years after the date on which Syria makes such a request; or

(B) the date on which the United States and Syria enter into such an agreement.

(C) Waiver.-

(1) In general. The President may waive the import restrictions referred to in subsection (a) for specified cultural property if the President certifies to the appropriate congressional committees that the conditions described in paragraph (2) are met.

(2) Conditions. The conditions referred to in paragraph (1) are the following:

(A) The foreign owner or custodian of the specified cultural property has requested such property be temporarily located in the United States for protection purposes.

(B) Such property shall be returned to the foreign owner or custodian when requested by such foreign owner or custodian.

(C) Granting a waiver under this subsection will not contribute to illegal trafficking in cultural property or financing of criminal or terrorist activities.

(3) Action. If the President grants a waiver under this subsection, the specified cultural property that is the subject of such waiver shall be placed in the temporary custody of the United States Government or in the temporary custody of a cultural or educational institution within the United States for the purpose of protection, restoration, conservation, study, or exhibition, without profit.

(4) Rule of construction. Nothing in this Act shall prevent application of the Act to render immune from seizure under judicial process certain objects of cultural significance imported into the United States for temporary display or exhibition, and for other purposes (22 U.S.C. 2459; Public Law 89-259) with respect to archaeological or ethnological material of Syria.

(d) Definitions. In this section-

(1) the term 'archaeological or ethnological material of Syria' means cultural property of Syria and other items of archaeological, historical, cultural, rare scientific, or religious importance unlawfully removed from Syria on or after March 15, 2011; and

(2) the term 'State Party' has the meaning given such term in section 302 of the Convention on Cultural Property Implementation Act (19 U.S.C. 2601).

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RESEARCH ARTICLES

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Rescuing Cultural Heritage from War and Terrorism: A View from Switzerland

Abstract: Several reports reveal that trafficking in antiquities has become one of the sources of funding of the "Islamic State of Iraq and Syria". Switzerland, which is one of the principal markets for articles of archaeological interest, has adopted two pieces of legislation that may play an important role in countering the illicit trade of antiquities smuggled from Iraq and Syria. These are the *Federal Law on the Protection of Cultural Objects in the Event of Armed Conflict, Catastrophe and Emergency Situations* and the *Order Establishing Measures against Syria*. The objective of this article is twofold: first, to examine the most relevant aspects of these measures and their implications for art trade professionals and collectors; and second, to demonstrate that Switzerland is now keen to support foreign States' efforts to protect their cultural patrimony when threatened by war, terrorism, pillage and natural or human-induced disasters.

Keywords: illicit trade, cultural heritage, terrorism, Islamic State of Iraq and Syria (ISIS), Switzerland, refuge (safe haven)

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Introduction

The massive destruction of, or damage to, historic monuments and sites and the plundering of works of art that occurred during the wars of the 20th century led the international community to develop an international legal regime for regulating and safeguarding cultural heritage in times of armed conflict and occupation. The Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 (hereinafter the "1954 Convention")[1] was adopted in order to rectify the failings of the law of war as demonstrated by the massive losses which occurred during the Second World War. The First Gulf War and the atrocities committed during the Balkan Wars provoked a further strengthening of international rules. In 1999, the 1954 Convention system was completed by the adoption of its Second Protocol.[2] The gratuitous demolition of the monumental statues of the Buddhas of Bamiyan committed by the Taliban in 2001 prompted another development in international law. In 2003, the UNESCO General Conference unanimously adopted the Declaration Concerning the Intentional Destruction of Cultural Heritage in order to condemn the destruction of the Buddhas and to confirm that international law sanctions the inviolability of cultural heritage. Arguably, a further development in the international law concerning cultural heritage will be prompted by the assaults on archaeological treasures committed in Syria and Iraq by the militants of the self-proclaimed "Islamic State of Iraq and Syria" (ISIS), the al-Qaida breakaway group whose objective is the establishment of a State – a caliphate – under its interpretation of Islamic rule.

As is well known, the deliberate and widespread destruction of archaeological sites and monuments is motivated by ideological reasons: "central to ISIS ideology and action is the desire to rid the world of a [...] cosmopolitan past. [...] Any monument or motif, any artefact or architecture, any shrine, church or mosque that contradicts their strict and austere vision must be torn down and destroyed."[3] In other words, ISIS terrorists seek to purge society of pagan or idolatrous items that do not conform to their interpretation of Islam. Even Islamic heritage is not spared by ISIS. Inasmuch as it promotes a fiercely purist school of Sunni Islam, ISIS militants deem the other Muslims to be heretics and seek to destroy places of worship venerated by Shi'ites and Sufis. From this perspective, the assaults against cultural objects by ISIS echoes not only the Taliban's destruction of the Bamiyan Buddhas, but also the targeting of religious monuments during the Balkan Wars. In the latter case, the warring factions not only committed

1 14 May 1954, 249 UNTS 240.

2 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, 2253 UNTS 212.

3 B. Isakhan, cited in: M. Bailey, *Iconoclasm Reborn with Islamic State Fanaticism*, "The Art Newspaper", September 2014, No. 260, p. 6.

the most atrocious violations of the most elementary rules of humanity. In pursuit of the goal of eliminating the enemy ethnic groups, they deliberately desecrated or destroyed places endowed with religious beliefs in order to weaken the resistance of the enemies.[4]

Various gruesome propaganda videos document ISIS's cultural crimes. In July 2014, ISIS militants blown up the tomb of the prophet Jonah in Mosul (Iraq).[5] In February 2015, ISIS terrorists attacked the Public Library in Mosul, sending 10,000 books and more than 700 rare manuscripts up in flames.[6] In March 2015, the Iraqi Ministry of Tourism and Antiquities reported that ISIS militants bulldozed monuments in Nimrud, Hatra and Khorsabad.[7] In August 2015, an ISIS group razed Palmyra's monumental ruins.[8] In addition, several reports reveal that trafficking in antiquities has become one of ISIS's sources of funding, along with oil and kidnapping. Experts say that temples and other buildings are destroyed for the camera in order to conceal the evidence of what has been looted. Not only does the terrorist group smuggle looted artefacts via Turkey, Jordan and Lebanon to sell them to dealers in Europe and elsewhere, but it also requires that looters buy licenses to excavate in its territories.[9] In sum, ISIS now controls and profits from the smuggling of antiquities.[10]

This article aims to examine the legal responses deployed by Switzerland to counter the illicit trafficking of antiquities from Iraq and Syria. In particular, it focuses on the Federal Law on the Protection of Cultural Objects in the Event of Armed Conflict, Catastrophe and Emergency Situations[11] and the Order Establishing Measures against Syria.[12] The objective of the article is to shed new light on the Swiss actions in the field of cultural heritage. As is well known, Switzerland has long been considered as a major hub of the art trade – both licit and illicit. Indeed,

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4 M. Bailey, op. cit.

5 *Isis Militants Blow Up Jonah's Tomb*, "The Guardian", 24 July 2014.

6 T. Thornhill, *ISIS Burn 10,000 Books and More than 700 Rare Manuscripts as They Destroy Library in Mosul in Latest Attack on Civilisation and Culture*, "Mailonline", 25 February 2015.

7 M. Bailey, *Cultural Heritage at Heart of Propaganda Battle in Iraq*, "The Art Newspaper", April 2015, No. 267, p. 8.

8 S. Jeffries, *Isis's Destruction of Palmyra: 'The Heart Has Been Ripped Out of the City'*, "The Guardian", September 2015, No. 2.

9 R. Fisk, *Isis Profits from Destruction of Antiquities by Selling Relics to Dealers – and Then Blowing Up the Buildings They Come From to Conceal the Evidence of Looting*, "The Independent", 3 September 2015; D. D'Arcy, *Isil Holds Heritage to Ransom to Fund Fighters, US Expert Warns*, "The Art Newspaper", 2 July 2015.

10 However, it must be said that the looting of Syrian heritage commenced in 2012, when Syrian rebels fighting against President Bashar al-Assad resorted to the illicit trade to finance their effort. See A. Baker, M. Anjar, *Syria's Looted Past: How Ancient Artifacts Are Being Traded for Guns*, "Time", 12 September 2012.

11 Loi fédérale sur la protection des biens culturels en cas de conflit armé, de catastrophe ou de situation d'urgence, 20 June 2014, RO 2014 3545.

12 Ordonnance instituant des mesures à l'encontre de la Syrie, 8 June 2012, RO 2012 3489.

available reported cases demonstrate that many objects stolen, clandestinely excavated or illicitly exported from source countries[13] have been bought in Switzerland under dubious circumstances by collectors and collecting institutions of market countries.[14]

The Federal Law on the Protection of Cultural Objects in the Event of Armed Conflict, Catastrophe and Emergency Situations

In 1966, the Swiss Confederation adopted the Federal Law on the Protection of Cultural Property in the Event of Armed Conflict (hereinafter "Federal Law 1966" or "LPBC 1966")[15] to give effect to the 1954 Convention and its First Protocol.[16] Nearly fifty years later, in 2013, the Swiss Federal Council requested the Federal Defence Department to launch a consultation procedure on the total revision of this act.

The Swiss Federal Council's decision to revise the LPBC 1966 was grounded on the following reasons. The first relates to the circumstances that threaten cultural heritage. The Confederation, the cantons and the municipalities expressed concern that today cultural heritage must be protected from hazards other than war, namely natural disasters and emergency situations such as floods, fires, volcanic eruptions, earthquakes, and other climate change-related weather events. In sum, the Federal Council intended to address the absence of specific rules on the protection of cultural heritage in the event of disasters or other emergencies unrelated to situations of armed conflict. Interestingly, in its message of 13 Novem-

[13] "Source nations" are the countries that possess a very valuable – yet inadequately protected – patrimony of movable cultural objects that "market nations" demand for various social and economic reasons. J. Warring, *Underground Debates: The Fundamental Differences of Opinion that Thwart UNESCO's Progress in Fighting the Illicit Trade in Cultural Property*, "Emory International Law Review" 2005, Vol. 19, pp. 227-303, at 233, fn 32. The distinction between "source" and "market" countries was first depicted by J.H. Merryman, *Two Ways of Thinking about Cultural Property*, "American Journal of International Law" 1986, Vol. 80, pp. 831-853.

[14] Here it suffices to mention two cases. The first is the case *Autocephalous Greek-Orthodox Church of Cyprus and Cyprus v. Goldberg & Feldman Fine Arts and Goldberg* (717 F.Supp., 1374, S.D.Ind. (1989), *aff'd*, 917 F.2d 278, 7th Cir. (1990)). This case originated in the 1980s when Peg Goldberg, a US art dealer, acquired four 6th century mosaics in Geneva. The second is the criminal case against Giacomo Medici, a Geneva-based art dealer that sold numerous antiquities illicitly exported out of Italy to prominent museums and collectors in Europe and the United States. See P. Watson, C. Todeschini, *The Medici Conspiracy*, PublicAffairs, New York 2006.

[15] Loi fédérale sur la protection des biens culturels en cas de conflit armé, 6 October 1966, RO 1968 1065.

[16] First Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 358.

ber 2013,[17] the Federal Council provided some examples of natural or man-made catastrophes and emergency situations that hit Switzerland in recent times: the landslide in the village of Gondo of 2000, which reduced most of the 17th century Stockalper Tower to rubble; the floods in 2005 that damaged the precious collection of the Sarnen convent and the archives in Argovie; the fires that damaged the Chapel Bridge in Lucerne in 1993 and the Old City of Berne in 1997.[18] Secondly, the revision of the Federal Law was motivated by the fact that since 1966 Switzerland had ratified other relevant treaties in the field of international humanitarian law and international cultural heritage law, most notably the 1977 Additional Protocols to the 1949 Geneva Conventions[19] and the 1999 Second Protocol to the 1954 Convention.[20] The third reason related to the need to coordinate existing national legislation. Indeed, the revision was necessary to take account of the amendments to the Swiss Constitution[21] and to the Federal Law on the Protection of the Population and Civil Protection.[22]

In compliance with existing federal legislation,[23] the consultation procedure involved the Federal Council, the Federal Defence Department, the cantons, political parties, associations of municipalities and cities, universities,[24] and non-governmental organizations.[25] Generally speaking, all these institutions praised the expansion of the scope of the law to include natural disasters and emergency situations and the introduction of specific rules and procedures aimed at realizing the preventive protection of cultural heritage. At the same time, negative reactions were focused on the financial responsibilities related to the implementation of the law.[26]

The LPBC 1966 was replaced in 2014 as a result of the entry into force of the Federal Law on the Protection of Cultural Objects in the Event of Armed Conflict,

17 Message concernant la révision totale de la loi fédérale sur la protection des biens culturels en cas de conflit armé, 13 November 2013, *Feuille Fédérale* 2013 (13.090), pp. 8051-8079.

18 Ibidem, p. 8055.

19 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, 8 June 1977, 1125 UNTS 3; and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609. These have been ratified by Switzerland on 10 February 1982.

20 This was ratified by Switzerland on 9 July 2004.

21 Constitution fédérale de la Confédération suisse, 18 Avril 1999, RO 1999 2556.

22 Loi fédérale sur la protection de la population et sur la protection civile, 4 October 2002, RO 2003 4187.

23 Loi fédérale sur la procédure de consultation, 18 March 2005, RO 2005 4099.

24 Including the Art-Law Centre of the University of Geneva.

25 Including the International Committee of the Red Cross, and the Swiss branch of the International Council of Museums (ICOM).

26 In particular, all cantons criticized the cancellation of the financial contribution of the Federal Government for the documentation of cultural heritage items.

Catastrophe and Emergency Situations (hereinafter "Federal Law 2014" or "LPBC 2014").[27] As demonstrated by the new title and its Article 1(a),[28] the LPBC 2014 has a broader scope of application in comparison with the previous law. As said, this enlargement is due to the perception that today cultural heritage items are threatened not only by the direct or unintended effects of armed conflicts, but also by natural or man-made disasters.

In this respect, it is worth mentioning a few initiatives adopted by certain specialized organizations in the past few years. In 2010, ICCROM,[29] ICOMOS,[30] IUCN[31] and the UNESCO World Heritage Centre published a resource manual on "Managing Disaster Risks for World Heritage".[32] This manual demonstrates that the growing number of natural disasters around the world increasingly affects the cultural and natural sites inscribed in the list set up under the UNESCO World Heritage Convention.[33] Previously, the Swiss branch of the International Council of Museums (ICOM) had addressed the issue of disaster preparedness with regard to museums through the adoption of two documents: the "Guidelines for Disaster Preparedness in Museums"[34] and "Cultural Heritage Disaster Preparedness and Response".[35]

In sum, the adoption of Federal Law 2014 allowed to overcome the narrow perspective inherent in the 1954 Convention and, consequently, in the LPBC 1966, which were imbued with the memory of the massive destruction and loss of cultural heritage which occurred during the Second World War.

"Refuge": A Tool to Protect Cultural Heritage from War, Terrorism and Disasters

The Federal Law 2014 is noteworthy in many respects, not least in how it respects the principles of sovereignty and subsidiarity as set forth in the Swiss Constitu-

[27] The LPBC 2014 was completed by the Ordonnance sur la protection des biens culturels en cas de conflit armé, de catastrophe ou de situation d'urgence, 29 October 2014, RO 2014 3555.

[28] "La présente loi définit: (a) les mesures de protection des biens culturels à prendre en cas de conflit armé, de catastrophe ou de situation d'urgence".

[29] International Centre for the Study of the Preservation and Restoration of Cultural Property.

[30] International Council on Monuments and Sites.

[31] International Union for Conservation of Nature.

[32] Available at: http://whc.unesco.org/en/activities/630/ [accessed: 7.11.2015].

[33] Convention Concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972, 1037 UNTS 151.

[34] Adopted in 1993, available at: http://icom.museum/professional-standards/standards-guidelines/ [accessed: 7.11.2015].

[35] Adopted in 2004, available at: http://archives.icom.museum/disaster_preparedness_book/ [accessed: 7.11.2015].

tion.[36] On the one hand, the new law confirms that cultural protection is a cantonal responsibility.[37] On the other hand, it establishes that the sovereignty of the cantons must be coordinated with the power of the central government in matters of civil protection.[38] This means that the Federal Council has full responsibility with respect to the protection of cultural heritage in the event of armed conflict and other emergency situations.

For the purposes of the present study, however, it is necessary to focus on Article 12 of the LPBC 2014, which regulates the granting of "refuge" (or "safe haven") to foreign States wishing to protect their cultural patrimony from the threats posed by war, terrorism, and disasters.[39]

According to Article 12 LPBC 2014, the Swiss Federal Government may provide a refuge for the cultural objects of foreign countries if they are threatened by armed conflicts, disasters, or emergency situations. The LPBC 2014 defines "refuge" as any protected space established and managed by the Federal Government pursuant to national law where movable artefacts belonging to the cultural patrimony of a foreign State can be stored temporarily for safekeeping, provided that such assets are seriously threatened in the territory of that foreign State.[40] Article 12 LPBC 2014 makes clear that the fiduciary safekeeping of threatened artefacts is provided under the auspices of UNESCO, and that the Swiss Federal Council has the exclusive competence to conclude international treaties with requesting States in order to implement this provision. The LPBC 2014 is silent on the question of the assessment of the situations (allegedly) threatening the cultural patrimony of the requesting State.[41] Nevertheless, it can be argued that a formal assessment is not necessary in those cases where UNESCO (or another international organization) has issued one or more statements declaring that the cultural patrimony of the requesting State is in danger. In all other cases, an assessment can be carried out by the Swiss Government on the basis of the information supplied by the requesting State and of the reports received through diplomatic channels.

36 See Articles 5(a) and 69 of the Constitution.

37 Article 69 of the Constitution.

38 "The legislation on the civil defence of persons and property against the effects of armed conflicts is the responsibility of the Confederation" (Article 61(1) Constitution); the "Confederation shall legislate on the deployment of civil defence units in the event of disasters and emergencies" (Article 61(2) Constitution).

39 This issue was not covered by the LPBC 1966, even if the concept of refuge is contained in the 1954 Convention (Articles 1(b), 8, and 11).

40 Article 2(c). Besides, Article 2(b) provides for "shelters" ("abris") for the protection of cultural materials belonging to the Swiss national patrimony.

41 The only relevant provision seems to be Article 3(2) LPBC 2014, which merely states: "La Confédération [...] entretient des contacts [...] à l'échelon international dans le domaine de la protection des biens culturels".

The international treaties to be concluded pursuant to Article 12 LPBC 2014 should regulate such key issues as transport, protection, conservation, access, insurance, and exhibition of the objects entrusted to the Swiss State. On the other hand, the conclusion of a bilateral treaty is important from the domestic point of view as it constitutes a precondition to organizing the collaboration between all relevant federal bodies, including the Federal Office for Civil Protection, the Federal Office of Culture, the Directorate General of Customs, and the Swiss National Museum. The Federal Office for Civil Protection plays a key role in that it is responsible for the implementation of the 1954 Convention and its Protocols and of the bilateral treaties mentioned by Article 12(2) LPBC 2014 through the adoption of material or organizational measures.[42] The involvement of the Directorate General of Customs is essential to avoid that the items temporarily transported in Switzerland for refuge are subjected to customs duties or import tax. As these materials enter into the Swiss territory only to be stored in a refuge and not to be put into circulation or used in any other way, they are subject to a simplified regime named "Open customs warehouses".[43] Finally, the Swiss National Museum is tasked with the management of the safe havens identified by the Federal Government.

Article 12 LPBC 2014 calls to mind Articles 8 and 14 of the Federal Law on the International Transfer of Cultural Property (hereinafter "LTBC").[44] This act was adopted to implement the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (hereinafter "1970 UNESCO Convention").[45] In particular, Articles 8 and 14 LTBC were inserted to give execution to Article 9 of the 1970 UNESCO Convention. Article 9 calls upon the States Parties to "participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce" in support of the State Party "whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials". Article 8 LTBC empowers the Federal Council

[42] See Article 8 of the Ordonnance sur la protection des biens culturels en cas de conflit armé, de catastrophe ou de situation d'urgence, op. cit.

[43] See Article 50 of the Custom Law (*Loi sur les douanes*), 18 March 2005, RO 2007 1411.

[44] Loi fédérale sur le transfert international des biens culturels, 20 June 2003, RO 2005 1869. On this law see P. Gabus, M.-A. Renold, *Commentaire LTBC, Loi fédérale sur le transfert international des biens culturels*, Schulthess, Zürich 2006.

[45] 14 November 1970, 823 UNTS 231. The objective of the LTBC – in line with the main goal of the 1970 UNESCO Convention – is to "contribuer à protéger le patrimoine culturel de l'humanité et prévenir le vol, le pillage ainsi que l'exportation et l'importation illicites des biens culturels" (Article 2(2)). The assistance in law enforcement provided by the LTBC is based on four means: bilateral agreements; stricter duty of care for State museums officials and art dealers; a renewed international cooperation in criminal matters; and tighten controls over free ports. See M.-A. Renold, *Le droit de l'art et des biens culturels en Suisse: questions choisies*, "Revue de droit suisse" 2010, Vol. 129, pp. 137-220, 182.

to adopt provisional measures aimed at restricting or prohibiting the transit or export of archaeological or ethnological objects if the country of origin is subject to intense pillage or in other exceptional circumstances, such as armed conflicts and natural catastrophes.[46] In sum, the Swiss Federal Council can invoke Article 8 LTBC whenever it intends to adopt specific measures for safeguarding the patrimony of a foreign State. On the other hand, under Article 14 LTBC the Swiss Government may grant financial assistance to museums or similar institutions situated in Switzerland for the temporary safekeeping of the cultural objects of other States which are threatened in their territory as a consequence of extraordinary events. This type of assistance is subject to the following additional conditions: (i) the foreign State expressed its consent to the temporary safekeeping (or failing that, the deposit is placed under the auspices of UNESCO or another international organization); and (ii) the cultural objects concerned must be returned to the country of origin following the normalization of the situation.

Furthermore, it is interesting to analyse Article 12 of Federal Law 2014 in the light of Article 5 of the 1999 Second Protocol. This latter provision calls on States Parties to take appropriate "preparatory measures" in peacetime "for the safeguarding of cultural property [situated within their own territory] against the foreseeable effects of an armed conflict", such as "the preparation of inventories, the planning of emergency measures for protection against fire or structural collapse, the preparation for the removal of movable cultural property or the provision for adequate in situ protection of such property, and the designation of competent authorities responsible for the safeguarding of cultural property". Ostensibly, the LPBC 2014 goes further than the 1999 Second Protocol in that it is designed to offer protective measures not only for Swiss cultural patrimony but also for the treasures of foreign States. Furthermore, the LPBC 2014 displays a broad understanding of cultural heritage protection in peacetime as it addresses, as said, the possible consequences of natural and civil disasters and armed conflicts, including terrorist attacks.[47]

Finally, it is important to emphasise that the Federal Law 2014 establishes that third parties – e.g. a creditor of the foreign State – cannot make claims with respect to the objects transferred to Switzerland in accordance with a bilateral treaty concluded pursuant to Article 12 LPBC 2014. This means that the refuge granted to foreign States aims to protect cultural objects also from legal actions that can be filed by third parties seeking the seizure or attachment of cultural assets for reasons extraneous to their transfer to Switzerland.

[46] See Ordonnance sur le transfert international des biens culturels, 13 April 2005, RO 2005 1883.

[47] On the adoption of an integrated approach to peacetime planning see P.J. Boylan, *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention of 1954)*, UNESCO, Paris 1993, paras. 5.42-5.43, p. 71.

The ILA Guidelines on Safe Havens

In 2008, the Committee on Cultural Heritage Law of the International Law Association (ILA) adopted the "Guidelines for the Establishment and Conduct of Safe Havens for Cultural Materials".[48] The Committee's interest in the concept of safe havens grew out of the observation that cultural objects may need to be removed from the source State temporarily in order to ensure their safekeeping because of various threats, such as armed conflicts, natural catastrophes, civil disasters, and unauthorized excavations. The objective of the ILA Committee was to establish specific standards and procedures for rescuing, safekeeping, and returning cultural assets after the threats prompting their removal have come to an end and the materials can again be protected in the source State. Therefore, the Guidelines were intended to be integrated into State legislation and the internal rules of museums, professional associations and non-governmental organizations.

However, it seems that the ILA Guidelines were not taken into consideration during the consultation procedure that led to the adoption of the LPBC 2014. In effect, from a comparison of the two texts it results that the Guidelines are not reflected in Article 12 of the Federal Law 2014. For instance, the LPBC 2014 does not contain any reference to the laws and traditions of the State of origin of the material protected with respect to their preservation and display, while the ILA Guidelines underscore, for example, that safe havens must store human remains and religious objects according to the religious and cultural traditions and practices in the source State. Likewise, the Guidelines emphasize that these materials should not be exhibited when it would be inappropriate under the norms or customs of the State or culture of origin. Moreover, the LPBC 2014 does not specifically address the question of the legality of the exportation of cultural objects from the State which requested the safe haven, or the issue of the loan of entrusted artefacts. In addition, the issue of dispute resolution through non-adversarial mechanisms, such as good-faith negotiations and consultations, is contained in the ILA Guidelines but not in the LPBC 2014, which only indicates that the treaties concluded by the Federal Council should cover the issues of the applicable law and the competent tribunal.

In spite of these differences, it would be hasty to criticize the Swiss legislator on the grounds that the Federal Law 2014 does not reproduce the text of the Guidelines. It can be submitted that this mismatch could be resolved through the bilateral treaties concluded under Article 12(2) LPBC 2014. Indeed, it can be expected that the ILA Guidelines will be used during negotiations as a model to enhance international cooperation and the preservation and valorization of the

[48] See Resolution 2/2008, adopted at the 73rd Conference of the International Law Association, held in Rio de Janeiro, Brazil, 17-21 August 2008, http://www.ila-hq.org/en/committees/index.cfm/cid/13 [accessed: 7.11.2015].

cultural heritage items entrusted to the Swiss Government. However, not all issues can be resolved through bilateral negotiations. In particular, it is likely that the questions concerning the legality of the ownership title of the requesting State, on the one hand, and the validity of the restitution claims raised by third parties over the cultural heritage items covered by a bilateral treaty concluded pursuant to the LPBC 2014, on the other hand, would not be taken into account. The reason is that the objective of Article 12 the Federal Law 2014 is not to redress past wrongs by providing the restitution of (allegedly) wrongfully removed antiquities; rather it seeks to ensure the safekeeping of cultural assets that are threatened by extraordinary events.

Refuges for Cultural Objects Exemplified

The setting up of refuges to facilitate the protection of the cultural patrimony of foreign States is part of the humanitarian tradition of the Swiss State. As is well known, during the Spanish Civil War (1936-1939) a vast number of paintings belonging to the *Museo Nacional del Prado* of Madrid were transferred to the *Musée d'art et d'histoire* (MAH) of Geneva. More recently, before the 2001 war in Afghanistan commenced, the cultural treasures of the National Museum of Kabul were transferred for safekeeping to Switzerland at the initiative of a Swiss citizen in order to be stored at the Afghanistan Museum in Bubendorf.[49]

Another example relates to a vast collection of precious archaeological objects representing Gaza's rich cultural heritage that are currently in Geneva. These treasures, which belong to the collection of Palestinian businessman Jawdat Khoudary and to the Palestinian Authority, arrived in Switzerland in 2007 in the context of the exhibition "Gaza à la croisée des civilisations", organized by the MAH. This exhibition was meant to represent the first step towards the creation of an archaeological museum in Gaza. However, this project was blocked because of the Hamas takeover in June 2007 and the ensuing political insecurity. As a consequence, the City of Geneva and the MAH – with the consent of both the Palestinian Authority and Jawdat Khoudary – pledged to retain the collection until it can be returned safely to Gaza. The collection has been stored at the Free Port of Geneva ever since, though some pieces have been loaned abroad.[50] Notably, both the Afghanistan Museum in Bubendorf and the MAH have requested the financial assistance of the Swiss Government under Article 14 LTBC.[51]

[49] Message concernant la révision totale de la loi fédérale, op. cit., p. 8058.

[50] C. Zumbach, *Des trésors de Gaza embarrassent Genève, qui appelle Berne à l'aide*, "Tribune de Genève", 21 November 2014.

[51] P. Gabus, M.-A. Renold, op. cit.

Of course, Switzerland is not the only place where the relics of the past can find refuge from the scourge of war, terrorism, and other human-induced disasters.[52] For instance, Lebanon is filling warehouses with looted artefacts that have been intercepted by Lebanese authorities at the airport, ports, and at the land border. Seized objects are catalogued and stored in guarded warehouses until they can be returned to their countries of origin, most probably Syria and Iraq. However, while for many antiquities it is possible to establish their origin, for many others this is a difficult task in the absence of information from the country of origin. Regardless, Lebanon's vigilance in the face of widespread looting and trafficking of cultural objects by ISIS in Syria and Iraq is one of the few rays of light in an otherwise bleak scenario.[53]

Another example relates to the ongoing case of the "Crimean Scythian Gold". This is a collection of thousands of precious golden artefacts that was gathered from five Ukrainian museums – one in Kiev and four in Crimea – and delivered to the Allard Pierson Museum of Amsterdam in February 2014 for the exhibition "Crimea: Gold and Secrets of the Black Sea". Problems arose as a result of Russia's annexation of Crimea, which took place after the exhibition opened. At the end of the exhibition the Dutch museum returned only the objects borrowed from the museum in Kiev. The remaining artefacts are claimed by the museums of Crimea (and Russia) and the Ukrainian Government. The former insist that the artefacts should be returned to the museums that lent them out, while the latter demands the Netherlands to return the Crimean exhibits to Kiev on two grounds: (i) these objects are State property; and (ii) the exhibits cannot be returned to an occupied territory temporarily out of Ukraine's control.[54] In a press statement of August 2014, the Allard Pierson Museum said that it intended to retain and store the disputed objects until a court has determined who their rightful owner is.[55] It thus appears that the Dutch museum essentially decided to grant refuge to this collection despite the absence of an official request on the part of the foreign State(s) concerned. Ostensibly, it was the uncertainty regarding the question of

[52] Interestingly, the LPBC 2014 has inspired a number of French parliamentarians to approve an amendment to the project of the Loi relatif à la liberté de la création, à l'architecture et au patrimoine regarding the provision of safe havens for the movable heritage of foreign States. See G. Clavel, *Un 'amendement Palmyre' adopté pour offrir l'asile aux biens culturels en danger*, "Le Huffington Post", 17 September 2015. A similar move has come from the Association of Art Museum Directors (AAMD), which has compiled a list of guidelines offering museums around the world which are under threat from conflict or natural disasters the opportunity to transfer their holdings to any AAMD member institution for safekeeping until conditions for their safe return can be guaranteed. See H. Neuendorf, *Museum Group Offers Safe Haven for Threatened Art and Antiquities*, "Artnet News", 2 October 2015.

[53] E. Knutsen, *Lebanon Safeguards Region's Cultural Heritage*, "The Daily Star", 12 June 2015.

[54] *Ukrainian Parliament Asks Netherlands to Return Crimean Scythian Gold*, "Russia Beyond the Headlines", 12 May 2015.

[55] The press release is available at: http://www.allardpiersonmuseum.nl/en/press [accessed: 7.11.2015].

ownership resulting from the unlawful annexation of Crimea and the ensuing political and military instability of the area that led the Allard Pierson Museum to take this – unilateral – course of action. It is for this reason that the four museums in Crimea sued the city's Allard Pierson Museum for the return of the treasure. The Dutch State sought to intervene in the dispute to ensure compliance with international law. However, in April 2015 the Amsterdam District Court ruled that the Dutch Government cannot participate in the civil suit because this is between the parties claiming ownership – that is, Ukraine and the claimant museums.[56]

The Order Establishing Measures against Syria

In June 2011 the Swiss Federal Council adopted the Order Establishing Measures against Syria (hereinafter the "Order"). In this instance, Switzerland followed the example set by the European Union, which imposed sanctions against Syria in May 2011. These restrictive measures were decided upon due to the violent repression of the civilian population by the Syrian security forces. In its original version the Order provided for restrictions on trade and services and the freezing of assets, but did not address the problem of the looting and illicit trafficking in Syrian antiquities. The reason for this omission was probably that the protection of Syria's archaeological patrimony was not deemed imperative in the face of the death toll caused by the civil war. However, UNESCO, through its Director-General Irina Bokova, repeatedly called upon the international community to take action to stop the loss of cultural heritage caused by the civil war between the Free Syrian Army and the regime of Syrian President Bashar al-Assad.[57] These calls increased when it became clear that ISIS was engaged in the destruction of monuments and the looting of antiquities.

In December 2014, when discussions on how to counter the Syrian civil war and the rise of ISIS were ongoing in different international fora, the Swiss Federal Council revised the Order under examination to include a specific provision on "Prohibitions concerning cultural objects" (Article 9(a)). The first paragraph of this provision establishes that the import, export, transit, sale, distribution, brokerage and the acquisition of cultural objects belonging to the cultural heritage of Syria is prohibited, if there is reason to believe that such objects were stolen or illegally exported.[58] Article 9(a) is retroactive as it prohibits any international trade in Syrian antiquities that have been illicitly exported since 15 March 2011.

[56] *Dutch Courts Bar Government from Dispute over Crimean Gold*, "Reuters", 8 April 2015. As of writing, a date for the court's ruling on ownership has not been set.

[57] See A. Baker, M. Anjar, op. cit.

[58] Annex 9 of the Order lists the objects forming part of the patrimony of Syria.

It was only in February 2015 that a similar provision was adopted by the United Nations Security Council in Resolution No. 2199.[59] With this Resolution the Security Council condemned the destruction of cultural heritage committed by ISIS and other groups in Iraq and Syria and acknowledged that these terrorist groups are "generating income from engaging directly or indirectly in the looting and smuggling of cultural heritage items […], which is being used to support their recruitment efforts and strengthen their operational capability to organize and carry out terrorist attacks".[60] More importantly, the Security Council adopted legal measures to counter the illicit trafficking of antiquities removed from these States: "The Security Council […], [a]cting under Chapter VII of the Charter of the United Nations, […] [r]eaffirms its decision in paragraph 7 of resolution 1483 (2003) and decides that all Member States shall take appropriate steps to prevent the trade in Iraqi and Syrian cultural property […] illegally removed from Iraq since 6 August 1990 and from Syria since 15 March 2011, […] thereby allowing for their eventual safe return to the Iraqi and Syrian people […]".[61] In sum, Resolution 2199 (2015) aims to place economic and diplomatic sanctions on the countries and individuals that enable ISIS and other terrorist groups to profit from the illicit trade in antiquities. The Director-General of UNESCO welcomed the resolution, calling its adoption "a milestone for enhanced protection of cultural heritage in Iraq and Syria".[62]

Hence it may be concluded that the Swiss State, by revising the *Order Establishing Measures against Syria* in December 2014, anticipated the Security Council's action, thereby displaying, in my view, a proactive attitude vis-à-vis the pillage of Iraq's and Syria's culture and, in turn, the suppression of one of ISIS's sources of funding.

Concluding Remarks

Switzerland is one of the principal markets for articles of archaeological interest and it has long been considered as a major hub for the "laundering" of antiquities stolen, clandestinely excavated, or illicitly exported from source countries. In recent times the Swiss State has moved to change its gloomy reputation by the adoption

[59] United Nations Security Council Resolution No. 2199, 12 February 2015, UN Doc. S/RES/2199 (2015) on "Threats to international peace and security caused by terrorist acts". See also United Nations General Assembly Resolution on "Saving the Cultural Heritage of Iraq", 21 May 2015 (A/69/L.71).

[60] Ibidem, para. 16.

[61] Ibidem, para. 17.

[62] UNESCO, press release, 12 February 2015, http://www.unesco.org/new/en/unesco/about-us/who-we-are/director-general/singleview-dg/news/unesco_director_general_welcomes_un_security_council_resolution_to_step_up_protection_of_cultural_heritage_in_syria_and_iraq/#.VaDvyPnw-24 [accessed: 7.11.2015].

of two pieces of protective legislation. This article has examined the LPBC 2014 and the Order on Syria by focusing on their origin, revision, and on the most relevant norms. In particular, this article has dwelt on the provisions regulating the granting of refuge to cultural objects of foreign States that are threatened by armed conflicts, disasters, or other emergency situations.

Although these new laws are in place, it is too early to say whether these instruments will achieve the declared objectives. Nevertheless, these norms signal that Switzerland is now keen to support and cooperate with foreign States in their efforts to protect the national artistic patrimony when threatened by natural disasters or human-induced dangers, such as war and terrorism. In this respect, it must be mentioned that various collectors and collecting institutions that reside in market countries have advanced the view that the purchase of antiquities looted in conflict zones or unstable countries is preferable to leaving those items to uncertain fates. These have suggested that buying objects on the black market provides them with a safe haven from oblivion, while others have argued that the destruction of ancient sites in the Middle East by ISIS proves that only the "universal museums" in the West can preserve the world's cultural heritage.[63] In my view both of these arguments are untenable. The market cannot be the solution to the problems at stake. In particular, it has been correctly pointed out that the purchase of looted antiquities is going to worsen the problem. As has been said, it is increasingly clear that terrorist groups use the sale of antiquities as a revenue stream. Collectors and art trade professionals must therefore be mindful that by purchasing looted relics from Syria and Iraq they are not rescuing heritage; rather they are, first, supporting – albeit indirectly – the cultural cleansing carried out by ISIS and other criminal groups and their transnational crime networks;[64] and, second, weakening the efforts deployed by States and international organizations to put a halt to such cultural crimes.

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[63] K. Tharoor, *Museums and Looted Art: The Ethical Dilemma of Preserving World Cultures*, "The Guardian", 29 June 2015; A. Bauer, *Editorial: The Destruction of Heritage in Syria and Iraq and Its Implications*, "International Journal of Cultural Property" 2015, Vol. 22, pp. 1-6.

[64] D. D'Arcy, op. cit.; A. Bauer, op. cit.

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RESEARCH ARTICLES

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Considerations on the Legitimacy of Organizing a Humanitarian Intervention Aimed at Stopping the Intentional Destruction of Cultural Heritage

Abstract: Since its inception in Iraq, ISIS has been responsible for the pillaging and destruction of numerous cultural sites, notwithstanding the protests of the international community. None of the solutions proposed and implemented to stop this devastation have so far obtained adequate results. This article analyzes the legitimacy of organizing a humanitarian intervention aimed at preserving cultural heritage from such kinds of destructive actions. Two critical issues are addressed: first, the legitimacy of using armed force to preserve cultural heritage on the behalf of the international community; second, the technical difficulties associated with the development of such a practice.

Keywords: cultural heritage, intentional destruction, humanitarian intervention, responsibility to protect

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Introduction

During a meeting held on 29 September 2014 Irina Bokova, the Director-General of UNESCO, stated that "Islamic, Christian, Kurdish and Jewish heritage, among others, is being intentionally destroyed or attacked in what is clearly a form of cultural cleansing".[1] In an attempt to get media coverage, recruit new members and find antiquities to be sold on the black market, the militia of the so-called Islamic State of Iraq and Syria (ISIS) has pursued an escalating campaign of cultural devastation. ISIS has intentionally targeted historical monuments (such as the Assyrian Green Church in Tikrit and Jonah's Tomb in Mosul), archaeological remains (such as the ancient cities of Nimrod and Hatra), and works of art (for example, several rare manuscripts from the Mosul Library and two original items, the Winged Bull and the God of Rozhan, from the Mosul Museum) which it perceives as blasphemous and contrary to the tenets of its radical faith.[2]

Although the international community has firmly condemned these actions and UNESCO has established an Emergency Response Action Plan (ERAP), so far diplomatic and technical measures have not been sufficient to stop the injurious activity of ISIS against the Iraqi cultural heritage. In spite of enormous progress made at the legislative level, "the influence of international law in effectively mitigating the destructive capacity of a certain actor is less than reassuring".[3] Therefore it may be assumed that this devastation might well continue unabated without more resolute action(s).

This article critically assesses the legitimacy of organizing a humanitarian intervention specifically aimed at stopping the intentional destruction of cultural heritage. The first part of the article analyzes the possibility to rethink the doctrine of humanitarian intervention in order to suppress discriminatory acts of cultural heritage destruction. The second part identifies the basic conditions for arranging and establishing a legitimate and consistent humanitarian intervention. The third part examines the major risks related to the advent and consolidation of such a practice, while the fourth part examines the traps and pitfalls that can arise and, therefore, the need for a thorough *a priori* assessment and careful planning of any intervention. The fifth part summarizes the key points and offers critical conclusions.

[1] *A call to save Iraq's cultural heritage*, a call by Irina Bokova, UNESCO's Director-General, UNESCO Press, 2014, http://www.unesco.org/new/en/communication-and-information/resources/news-and-in-focus-articles/all-news/news/a_call_to_save_iraqs_cultural_heritage/ [accessed: 30.11.2015].

[2] Most of the statues destroyed in February at the Mosul Museum were actually reproductions. For more information on this event, read the interview to Atheel Njaifi (exiled governor of Mosul) at: *Most destroyed artifacts were copies*, http://rudaw.net/english/Kurdistan/28022015 [accessed: 6.11.2015].

[3] A. Milligan, *Targeting Cultural Property: The Role of International Law*, "Journal of Public and International Affairs" 2008, Vol. 19, p. 101.

Rethinking Humanitarian Intervention as a Response to the Intentional Destruction of Cultural Heritage

A humanitarian intervention is generally defined as "an uninvited intervention of external actors into the domestic affairs of a State with the primary motive of ending or preventing violations of human rights".[4] In the last twenty-five years a substantial number of humanitarian interventions have been deployed in different countries. The officially proclaimed objectives have included: establishing a secure environment (Somalia, Iraq and East Timor); aiding the peace process (Rwanda); upholding democracy (Haiti); stopping a massive violation of human rights (Kosovo); ending attacks against civilians (Libya); and promoting peace and security (Sierra Leone). Some of these interventions have been quite successful, while others can be deemed total failures. This section considers whether, from a legal perspective, the intentional destruction of cultural heritage might be a valid reason for engaging in a humanitarian intervention.

The first key point is to clarify whether the intentional destruction of cultural heritage is a violation of human rights, and one which can justify a humanitarian intervention. The 1948 Universal Declaration of Human Rights (UDHR) identifies a list of inalienable rights that belong to individuals as human beings. In the international legal framework a declaration is a non-binding document, which means that States are not legally required to act in accordance with the principles enunciated in such a document. However, considering its universal adoption, its influence on binding international legal texts (such as, for example, the International Covenant on Civil and Political Rights[5] or the International Covenant on Economic, Social and Cultural Rights[6]), and its significant impact on numerous national laws and constitutions, the UDHR stands out as something more than a "tool of soft law". According to some legal experts, the fundamental principles of the UDHR have progressively gained such a widespread and binding acceptance within the international community that they are nowadays viewed as principles of customary international law.[7]

With respect to the issue here examined, Articles 1, 2, 18, 19, 22 and 27 of the Universal Declaration of Human Rights are particularly relevant. Article 1 states that "all human beings are born free and equal in dignity and rights"; Article 2 prohibits any forms of discrimination based, for example, on "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth

4 K.L. Shimko, *International Relations: perspectives & controversies*, 3rd edn., Cengage Learning, Wadsworth 2010, p. 247.

5 International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

6 International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3.

7 For more on the status of the human rights doctrine, see for example, H. Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, "The Georgia Journal of International and Comparative Law" 1995/1996, Vol. 25, pp. 287-398, and P.G. Lauren, *The Evolution of International Human Rights*, 3rd edn., Pennsylvania University Press, Philadelphia 2011.

or other status"; Article 18 affirms freedom of thought, conscience and religion; Article 19 supports freedom of opinion and expression; Article 22 establishes the right to social security (realization of economic, social and cultural rights); and Article 27 asserts the right to freely participate in the cultural life of the community, enjoy the arts and share scientific advancement. As a result, any intentional destruction of cultural heritage for discriminatory reasons or aimed to constrain the freedom of thought, conscience, religion, opinion and expression of people could be interpreted as a serious violation of human rights.[8]

On the other hand, because of the risks of further destruction and disruption of human lives associated with any form of armed intervention, humanitarian interventions are "exceptional practices", limited to those circumstances where severe atrocities have been committed. Hence the critical question is whether systemic acts of intentional destruction of cultural heritage are grave enough to justify the risks of an armed humanitarian intervention? Based on interpretation of the opinions expressed by the International Criminal Tribunal for the Former Yugoslavia (ICTY), it would seem that they are. In the trial of Kordić and Cerkez, for example, the Court explicitly affirmed that the intentional destruction of cultural heritage is "criminalized under customary international law" and it added that "this act, when perpetrated with the requisite discriminatory intent, amounts to an attack on the very religious identity of a people. As such, it manifests a nearly pure expression of the notion of 'crimes against humanity', for all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects. The Trial Chamber therefore finds that the destruction and wilful damage of institutions dedicated to Muslim religion or education, coupled with the requisite discriminatory intent, may amount to an act of persecution".[9]

In a similar vein, in the trial of Jokić the Court declared that "the whole of the Old Town of Dubrovnik was considered, at the time of the events contained in the Indictment, an especially important part of the world cultural heritage. It was, among other things, an outstanding architectural ensemble illustrating a significant stage in human history. The shelling attack on the Old Town was an attack not only against the history and the heritage of the region, but also against the cultural heritage of humankind."[10]

In the case against Blaskić the Court, taking into account the acts of destruction and plunder of property (especially institutions dedicated to religion and education) ordered by the defendant against the village of Ahmići, declared that "persecution may take forms other than injury to the human person, in particular those

[8] Universal Declaration of Human Rights (adopted on 10 December 1948) UNGA Res 217 A(III) (UDHR) Arts. 1, 2, 18, 19, 22 and 27.

[9] *Prosecutor v. Kordić and Čerkez*, ICTY Case No. IT-95-14/2-T, Judgment of the Trial Chamber, 26 February 2001, para. 207.

[10] *Prosecutor v. M. Jokić*, ICTY Case No. IT-01-42, Judgment of the Trial Chamber, 18 March 2004, para. 51.

acts rendered serious not by their apparent cruelty but by the discrimination they seek to instil within humankind".[11]

In the trial against Strugar, the judging Chamber affirmed that the offences under Article 3(b) ("wanton destruction of cities, towns or villages, or devastation not justified by military necessity") and 3(d) ("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") of the Statute of the ICTY "are serious violations of international humanitarian law".[12]

The illegitimacy of intentionally targeting cultural properties has also been confirmed within other adjudicative frameworks. For example, in assessing the destruction of the Stela of Matara, the Claims Commission for Eritrea and Ethiopia specifically declared "that the felling of the stela was a violation of customary international law".[13]

Indeed, during the war in the former Yugoslavia, as well as in many other conflicts (like Afghanistan, Iraq, Libya, Mali and Syria, to mention just the most recent cases), those criminals who perpetuated massive discriminatory campaigns of destruction of cultural property have also been held responsible for cruelty against the civilian population. In the case of Kristić, for example, the Trial Chamber pointed out that "where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group".[14] Thus the intentional destruction of cultural heritage is frequently accompanied by a more widespread violation of human rights which might further justify the need for an humanitarian intervention, as would certainly seem to be the case with ISIS's actions. However, the most interesting aspect of the matter (for the purposes of this article) is that, according to the considerations and the examples mentioned above, the organization of a humanitarian intervention might also be formally legitimized by the sole objective to stop an intentionally (discriminatory) destruction of cultural heritage, even without the occurrence of other types of abuses. A different matter (which will be examined in the following sections) is whether such a humanitarian intervention is also morally and politically desirable, feasible and justifiable.

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11 *Prosecutor v. Blaskić*, ICTY Case No. IT-95-13, Judgment of the Trial Chamber, 3 March 2000, para. 227.

12 *Prosecutor v. P. Strugar*, ICTY Case No. IT-01-42, Judgment of the Trial Chamber, 31 January 2005, para. 232; see also the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 25 May 1993, UN Doc. S/RES/827 (1992), as amended on 17 May 2005, Articles 3(b) and 3(d).

13 Claims Commission for Eritrea and Ethiopia, 'Partial Award, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22, 28' (2004), 43 I.L.M. 1249 (2004) par. 113.

14 *Prosecutor v. Krstić*, ICTY Case No. IT-98-33, Judgment of the Trial Chamber, 2 August 2001, para. 580. Interestingly, in this case the Court took into account the deliberate destruction of mosques and houses belonging to members of the opposite group as evidence of an intent to commit the crime of genocide.

In connection with the foregoing considerations, another important question needs to be clarified: whether humanitarian interventions are lawful. This is one of the most debated issues in international affairs, primarily because it entails a clash between the recognition of individual rights and the respect for national sovereignty. Divergent positions have been expressed on this issue.

On one hand, since the Kellogg-Briand Pact (1928)[15] recourse to the use of force in the international context has been subject to restrictions. These constraints are nowadays codified within the United Nations Charter (1945).[16] Consistent with its Article 2(4), States Parties of the United Nations should refrain from the threat and use of force against the territorial integrity or political independence of any State. The sole admitted exceptions are related to the use of force in order to maintain international peace and security (Chapter VII), and the right of individual or collective self-defence in the case of armed attack (Article 51). The principle of non-intervention in States' internal affairs expressed in Article 2(7) adds a further constraint to the enforcement of humanitarian interventions. As a result, some researchers have criticized the growing support for humanitarian interventions, because in their view this practice is contrary to fundamental principles of international law and, therefore, recognizing its legitimacy would seriously put at risk the preservation of the entire international legal system. As affirmed by Henkin, "these pressures eroding the prohibition on the use of force are deplorable, and the arguments to legitimize the use of force in those circumstances are unpersuasive and dangerous [...] Violations of human rights are indeed all too common, and if it were permissible to remedy them by external use of force, there would be no law to forbid the use of force by almost any State against almost any other".[17]

On the other hand, some scholars insist that the concept of absolute sovereignty has been substituted by the idea of sovereignty as responsibility, which legitimizes humanitarian interventions in cases of extensive violations of human rights.[18] The incapacity of the international community to organize a prompt and effective response to stop the gross violations of human rights that took place during the genocide in Rwanda (1994) and the war in the former Yugoslavia (1991-1995) raised serious doubts about the concepts of legal and moral justice underlying the international normative system. It was primarily in response to such traumatic

[15] Treaty between the United States and other Powers Providing for the Renunciation of War as an Instrument of National Policy, 27 August 1928, 94 LNTS 57.

[16] 26 June 1945, 1 UNTS XVI, amended in 1963 (557 UNTS 143), in 1965 (638 UNTS 308), and in 1971 (892 UNTS 119).

[17] L. Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd edn., Columbia University Press, New York 1979, pp. 144-145.

[18] Researchers on pro-humanitarian interventions (in the framework of the responsibility to protect) include, e.g., G. Evans, *The Responsibility to Protect. Ending Mass Atrocities Crimes Once for All*, Brookings Institution Press, Washington 2008, and C.G. Badescu, *Humanitarian Intervention and the Responsibility to Protect. Security and human rights*, Routledge, London – New York 2011.

events that the International Commission on Intervention and State Sovereignty (ICISS) introduced, in 2001, the notion of 'responsibility to protect', i.e. that States have the responsibility to protect their citizens from avoidable catastrophes, and when they are unable or unwilling to fulfil this duty, then such responsibility shifts to the international community.[19] Subsequently, in a 2005 report for the General Assembly then-UN Secretary-General Kofi Annan affirmed that:

It cannot be right, when the international community is faced by genocide or massive human rights abuses, for the United Nations to stand by and let them unfold to the end [...] if national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations. When such methods appear insufficient, the Security Council may, out of necessity, decide to take action under the Charter of the United Nations, including enforcement action, if so required.[20]

These principles were subsequently officially adopted by the United Nations Generally Assembly at the 2005 World Summit and, more recently, have been reaffirmed by current UN Secretary-General Ban Ki-moon.[21] Therefore according to the pro-humanitarian perspective "international law still protects sovereignty, but – not surprisingly – it is the people's sovereignty rather than sovereign's sovereignty".[22] In the end, as suggested by Orford, international law "has traditionally oscillated between emphasizing the consent of States and the collective good as the foundation of its authority".[23]

Both interpretations are based on valid arguments. The main question is whether international law should be strictly interpreted according to the original intent of the legislator (the classicist view), or whether it should also be examined in the light of current attitudes (the realist view). According to Article 31(1) of the 1969 Vienna Convention on the Law of Treaties,[24] a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". However, the same Article 31 states in paragraph 3(b) that, together with the context, treaty interpretation must take into account "any subsequent practice in the application of

[19] *The Responsibility to Protect*, report of the International Commission on Intervention and State Sovereignty, ICISS, December 2001.

[20] *In larger freedom: towards development, security and human rights for all*, report of the Secretary-General, 21 March 2005, UN Doc. A/59/2005.

[21] See *2005 World Summit Outcome*, 15 September 2005, UN Doc. A/60/L. 1, and *Implementing the responsibility to protect*, report of the Secretary-General, 12 January 2009, UN Doc. A/63/677.

[22] W.M. Reisman, *Sovereignty and Human Rights in Contemporary International Law*, "American Journal of International Law" 1990, Vol. 84, p. 869.

[23] A. Orford, *International Authority and the Responsibility to Protect*, Cambridge University Press, Cambridge 2011, p. 209.

[24] 1155 UNTS 331.

the treaty which establishes the agreement of the parties regarding its interpretation". Therefore, as Holzgrefe states, "[I]f one accepts the classicist view, the illegality of unauthorized humanitarian interventions is patent. If one adopts the legal realist view, however, its legal status depends in large measure on the attitude of the international community towards it."[25] In other words, in adopting the second interpretative approach attention should be focused on the evolving practice of States rather than on the original interpretations of the norms. The organization of humanitarian interventions in Darfur (2006), Kenya (2008), Ivory Coast (2011), Libya (2011), and the Central African Republic (2013) seem to validate the idea that the international community has progressively recognized and accepted this new practice in cases of grave and widespread violations of human rights.

However, circumstances like the intervention in Libya and the non-intervention in Syria raise some doubts about the consistency of this doctrine.[26] For instance – Do States, as original members of the international community, have a right or a duty to intervene to end massive violations of human rights? Natural law theorists view humanitarian interventions as "imperfect duties" for which there is no corresponding right and, therefore, "States may discharge it at their own discretion and in the manner of their own choosing."[27] This argument raises some scepticism about humanitarian interventions. Walzer, for example, maintains that "clear examples of what is called 'humanitarian intervention' are very rare", taking into consideration that most of the time "the humanitarian motive is one among several".[28] Even more critical is the position of Cunliffe, who argues that "for power to be truly responsible, it need to be at least potentially accountable. Sovereignty as responsibility, however, makes the exercise of power unaccountable, and therefore ultimately irresponsible".[29]

As can be seen, the doubts and problems related to humanitarian interventions are so many that their comprehensive and definitive analysis is beyond the space and scope of this article. It suffices to note that a relevant group of scholars and States (at least considering the recent practices in the field) consider humanitarian interventions as a morally and legally justified response to massive violations of human rights, although their enforcement might be in contrast with other recognized normative paradigms. Even if we assume these issues as being resolved, we still need to clarify who – and under what conditions – may enforce a humanitarian intervention aimed to stop the intentional destruction of cultural heritage.

[25] J.L. Holzgrefe, *The Humanitarian Intervention Debate*, in: J.L. Holzgrefe, R.O. Keohane (eds.), *Humanitarian Intervention. Ethical, Legal and Political Dilemmas*, Cambridge University Press, Cambridge 2003, p. 39.

[26] F. Türkmen, *From Libya to Syria: The Rise and Fall of Humanitarian Intervention*, "German Review on the United Nations" 2015, Vol. 63, pp. 3-9.

[27] J.L. Holzgrefe, op. cit., pp. 26-27.

[28] M. Walzer, *Just and Unjust Wars. A Moral Argument with Historical Illustrations*, 4th edn., Basic Books, New York 2006, p. 101.

[29] P. Cunliffe, *Sovereignty and the politics of responsibility*, in: C.J. Bickerton, P. Cunliffe, A. Gourevitch (eds.), *Politics without Sovereignty. A critique of contemporary international relations*, UCL Press, London 2007, p. 29.

Conditions for a Legitimate and Consistent Humanitarian Intervention

From a purely ethical perspective, the distinction between a unilateral or multilateral humanitarian intervention may appear as a quite irrelevant matter, If I see a group of people trying to destroy a monument, I might feel the moral duty to intervene (for example, ordering them to stop or calling the police), notwithstanding the possible indifference of other bystanders. However, an international humanitarian intervention is generally viewed as legitimate when it is based on legitimate goals and is enforced according to a legitimate path. In other words, the approach adopted to achieve a specific goal through international action matters as much as its purpose. At the moment, and even more so after the doubts raised by NATO's intervention in Kosovo (1999), it may be said that "a right of unilateral humanitarian intervention does not yet exist and is unlikely to develop".[30] Therefore, although from a moral perspective it may sound odd that a valuable and constructive solution should depend from the (often too slow) response of the international community, a multilateral intervention, preferably conducted with the approval of the United Nations Security Council, is certainly the best option available. As maintained by Farer, "imputing authorizing power to a large coalition of States in a condition of voluntary association offers a very important guarantee that intervention is not designed to serve interests incompatible with the principles and purposes of the Charter".[31] In addition, the Preambles to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) and the UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage (2003) affirm that the entire international community has a direct interest in the preservation of cultural heritage because "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".[32] Francioni points out that "this statement speaks of 'people' and not States, and of 'the cultural heritage of all mankind', so as to underscore its connection to human rights and to foreshadow the idea of an integral obligation owed to the international community as a whole (*erga omnes*) rather than to individual States on a contractual basis".[33]

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30 M. Byers, S. Chesterman, *Changing the rules about the rules? Unilateral humanitarian intervention and the future of international law*, in: J.L. Holzgrefe, R.O. Keohane (eds.), op. cit., p. 178.

31 T.J. Farer, *Humanitarian Intervention before and after 9/11: Legality and Legitimacy*, in: J.L. Holzgrefe, R.O. Keohane (eds.), op. cit., p. 76.

32 Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 240, Preamble, and the UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage, 17 October 2003, UNESCO Doc. 32 C/Res. 33 (2003), Preamble.

33 F. Francioni, *The Humanitarian Dimension of International Cultural Heritage Law: An Introduction*, "European Journal of International Law" 2011, Vol. 22, p. 13.

A further challenge to the evolving doctrine is that, by definition, a humanitarian intervention is organized without the consent of the receiving State. As correctly stated by Shimko, "the right of intervention derives not from the target State's loss of sovereignty but from the right of those who are being abused".[34] However, some researchers refute this interpretation, because in their view this is only a clever way to legitimize acts of imperialism disguised as altruistic actions, while others highlight the risk of double standards: the unbalanced distribution of power among States will be, in practice, the core determinant in assessing the concrete chances of intervention in cases of grave violations of human rights.[35] As a result, a seemingly similar right of intervention into the internal affairs of States will just increase the normative gap between the most powerful and least powerful countries.

Overall, these must be deemed serious and reasonable concerns. However, they are partially mitigated by the demand for widespread consensus for the organization of multilateral interventions, as well as by the need to respect the "last resort" principle and the principle of proportionality. According to the last resort principle, an armed intervention should be used only after all peaceful and viable alternatives have been seriously attempted and exhausted. In other words, all reasonable soft power solutions (e.g. diplomatic pressure) should be comprehensively attempted before considering the implementation of a hard power solution involving the use of armed force. Furthermore, the principle of proportionality limits the enforcement of a military intervention to one in which the estimated benefits must be proportionate to the expected costs or harm. As stated by the ICISS report on the *Responsibility to Protect*, "military intervention is not justified if actual protection cannot be achieved, or if the consequences of embarking upon the intervention are likely to be worse than if there is no action at all".[36] Therefore, the intentional destruction of a single statue for discriminatory reasons, while constituting an outrageous and deplorable act, would be hardly enough to justify an intervention on site.

The main problem is the lack of any valid standard model that would clearly express when an intervention is legitimate. For example, how many episodes of intentional destruction are required in order to legitimize an intervention: one, ten, fifty, or hundreds? Should movable and immovable cultural properties, or listed and non-listed cultural sites, be taken into account in the same way? These questions are difficult to answer. In general terms, it seems plausible to consider as legitimate only those humanitarian interventions aimed at stopping discriminatory, systemic and repeated cases of intentional destruction. However, clarifying and specifying

[34] K.L. Shimko, op. cit., p. 249.

[35] See, for example, N. Chomsky, *Humanitarian Imperialism: The New Doctrine of Imperial Right*, "Monthly Review" 2008, Vol. 60, and E. McSweeny, *The Doctrine of Humanitarian Intervention: A Double Standard?*, "Cork Online Law Review" 2003.

[36] *The Responsibility to Protect*, op. cit., p. 37.

these parameters is problematic and the moral legitimacy of this approach is questionable (what about the destruction of a single, but very important, monument?).

Finally, humanitarian interventions are designed to stop a massive violation of human rights. As a result, the fair treatment of the civilian population would be the priority issue, even with respect to an intervention originally aimed at protecting cultural heritage from acts of intentional destruction. A situation whereby the destruction of cultural heritage is terminated, but individuals are still persecuted, would be illogical and indefensible.

Opening a Pandora's Box: the Complexity Involved in Moving from Theory to Practice

Although from a theoretical perspective a humanitarian intervention aimed at stopping the intentional destruction of cultural heritage seems to be a reasonable (last resort) plan of action, its practical implementation raises some serious challenges, which are briefly examined herein.

From a legal and political perspective, several problems are associated with the lack of precise criteria for assessing compliance with the principle of proportionality. First, a State could exploit this ambiguous condition in order to achieve purely national interests. For instance, let's consider the toppling of the Lenin's statue in Kharkiv (Ukraine) in 2014. What if, after such an incident, the Russian Federation had decided to organize a humanitarian intervention officially aimed at preserving the Russian cultural heritage in Ukraine? Could such an intervention be viewed as a legitimate action? Although most persons would presumably deny such a possibility, this hypothetical case shows that the risk of opportunistic interventions is quite realistic.

Second, the absence of precise parameters guiding humanitarian interventions inevitably leads to a concrete risk of inconsistency and double standards, i.e. under similar circumstances a humanitarian intervention might be organized in country A, but not in country B, primarily owing to practical and political reasons. In relation to the humanitarian intervention in Libya, for instance, Labonte argues that this intervention highlights the fact "that the skeptics who claim aspirational norms only influence policy when vital national interest operates, may have a point".[37]

Mendacious invocations and the risk of inconsistency are critical conditions because they may spread scepticism about the legitimacy and consistency of humanitarian interventions, thus inhibiting their use in response to real humanitarian catastrophes. Paradoxically, the same condition of flexibility could also lead to a never-ending procrastination of the final decision. The destruction of the Buddhas of Bamiyan in 2001 showed both the impotence of the international commu-

[37] M. Labonte, *Human Rights and Humanitarian Norms, Strategic Framing and Intervention. Lessons for the responsibility to protect*, Routledge, London – New York 2013, p. 157.

nity as well as its slowness before coming to a shared decision. Moreover, in the framework of the UN Security Council, the veto power can be used potentially to block any humanitarian initiative.[38] Therefore, the risk is that the laborious and time-consuming process required to gain a widespread international consensus will inexorably lead to a too-late intervention.

From a moral perspective the dilemma is whether the preservation of cultural heritage is worth the sacrifice of people. Resolution of this dilemma is very difficult because various arguments and emotional considerations can be raised in order to support the divergent positions. On one hand, the international community is seriously and legitimately concerned about the intentional destruction of cultural heritage occurring in different parts of the world. The common belief is that cultural heritage – as the highest representation of human history as well as a fundamental source of identity for local communities – deserves maximum international protection. On the other hand, a humanitarian intervention inevitably puts at risk the lives of those who are directly involved in the operation, and therefore States may be justifiably unwilling to risk their troops in order to stop the intentional destruction of cultural heritage in Iraq, Syria or in any other country.[39] Hence, while the preservation of cultural heritage is morally desirable, its feasibility is rather problematic.

From a practical perspective, a serious issue concerns how to determine whether a humanitarian intervention would be more beneficial or more harmful. Assessing *a priori* the effects of a humanitarian intervention is a challenging operation, for the obvious reason that certain consequences are unpredictable. As noted by Gibbs, "Direct military action – however well intended – may intensify rather than reduce ethnic tensions, and it may serve to heighten violence, including possibly genocidal violence."[40] As a result, cultural heritage (as well as local populations) could actually be even more threatened during a humanitarian intervention than before. However, the blasting of the Buddhas of Bamiyan and other similar cases have also illustrated the difficulties involved in dealing with certain fundamentalist groups through diplomacy. It may be concluded that a cautious approach in the pre-assessment and preparation of such an intervention is strictly required in order to reduce as far as possible the risk of unintended and dire consequences.

A further complex issue is the decision concerning which kind of cultural sites and properties need to be protected: should all cultural sites potentially at risk be secured, or only a selected group like, for example, those included in the UNESCO

[38] A. Blätter and P.D. Williams have proposed the introduction of some limits to the veto power in those cases concerning the responsibility to protect, but the practical implementation of this solution seems unlikely. See A. Blätter, P.D. Williams, *The Responsibility Not To Veto: A Way Forward*, Citizens for Global Solutions, Washington, DC 2010.

[39] See M. Walzer, op. cit., pp. 101-102.

[40] D.N. Gibbs, *First Do No Harm. Humanitarian Intervention and the Destruction of Yugoslavia*, Vanderbilt University Press, Nashville 2009, p. 8.

List of World Heritage in Danger? Both these possible conditions raise ponderous problems. In the first case the number of cultural sites and properties could be so huge that it would be practically unmanageable; while in the latter case the risk would be the choice of a discriminatory process of selection of the sites that deserve protection, thus violating the very moral principles underpinning the humanitarian mission itself.

Another controversial aspect is how to effectively protect cultural heritage once a humanitarian intervention has been enforced. Getting control and defending the sites at risk from intentional attacks would hardly be enough. Preventive, curative and rehabilitative measures are required for an efficient and effective intervention. Hence, there are several precautionary procedures that must be planned before the intervention (e.g. the formation and long-term maintenance of an adequate number of skilled "monuments men" who could be deployed in this kind of mission), enforced during the operation (for instance, the creation of a constructive relationship between the local heritage community and the intervening military troops), and granted in the post-intervention (such as, for example, facilitating access to required materials, expertise and technology).[41]

All these conditions make a humanitarian intervention aimed at stopping the intentional destruction of cultural heritage a risky and costly process that, without a careful *a priori* assessment of the consequences of the operation and a scrupulous arrangement of the mission, may miserably fail or even exacerbate the situation.

Conclusions

Since the destruction of the Buddhas of Bamiyan in 2001, the international community has been debating what can be done in order to avoid the repetition of similar catastrophes. Fourteen years later, the question still remains unresolved, as testified to by the widespread destruction of cultural sites in Iraq.

From a purely legal perspective, the international legislation on the protection of cultural heritage is nowadays quite comprehensive and well developed, but its efficacy is imperfect. One of the main problems is that fundamentalist groups, like Al Qaeda and ISIS, often operate in weak or failed States which, due to the lack of order and governmental control over the territory, make the enforcement of legal provisions and the enforcement of applicable sanctions unfeasible.[42] To make matters more complicated, as demonstrated by the destructions which took place in Afghanistan, Mali, Syria and Iraq, the power of diplomacy in these vulnerable frameworks is quite limited.

[41] For more on this topic see, for example, P.G. Stone, *A four-tier approach to the protection of cultural property in the event of armed conflict*, "Antiquity" 2013, Vol. 87, pp. 166-177.

[42] See S. Van der Auwera, *Contemporary Conflict, Nationalism, and the Destruction of Cultural Property During Armed Conflict: A Theoretical Framework*, "Journal of Conflict Archaeology" 2012, Vol. 7, p. 60.

Although raising legal and moral issues difficult of interpretation and resolution, the organization of a humanitarian intervention aimed to stop the intentional destruction of cultural heritage is, at least theoretically, an option that should not be discarded. As explained above, this intervention would be legitimate only in cases of grave discrimination, where prevention and mitigation failed. In such a context a humanitarian intervention could provide a prompt and resolute response to an ongoing threat. Nevertheless, the affirmation of such a practice could also involve a wide range of unconvincing and exacerbating side effects. On one hand, the main risk would be that this new condition might be exploited as a pretext for justifying illegitimate interferences into the internal affairs of other countries; while on the other hand the efficacy of such a solution would be strictly related to the willingness of the international community to effectively organize and enforce a humanitarian intervention whenever and wherever required, a willingness which may well be considered doubtful.

Therefore, rethinking humanitarian intervention as a morally justifiable, normatively legitimate and practically valuable solution for stopping and preventing the intentional destruction of cultural heritage is, at one and the same time, both a plausible solution as well as a potential hazard. A core problem is that a zero-sum game perspective still dominates the international framework. As a result, a full legitimization of humanitarian interventions directed at stopping the intentional destruction of cultural heritage can be viewed as entailing more risks than benefits, unless preceded by a more comprehensive reform of the core pillars (*in primis* the composition and system of voting of the United Nations Security Council) sustaining the current international legal framework.

In the meantime, the international community needs to decide whether it has, beyond a general feeling of discontent, the political will to take concrete steps for the preservation of cultural heritage in the world. If so, than a humanitarian intervention aimed at stopping the systemic and intentional destructions of cultural heritage could be viewed (under the specific conditions elaborated in section three) as an exceptional act of *Lawfulness Justification*: i.e. the intervention might be procedurally illegal, but morally and normatively legitimate, serving the core values of the legal system and the interests of the international community as a whole.[43] This condition is certainly far from ideal, but it may overcome the current paralysis, thus offering the possibility of formulating a concrete, prompt and resolute response in those extreme situations when doing nothing will only lead to worse consequences.

[43] The terminology *Lawfulness Justification* has been borrowed by A. Buchanan, *Reforming the Law of Humanitarian Intervention*, in: J.L. Holzgrefe, R.O. Keohane (eds.), op. cit., pp. 132-133.

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RESEARCH ARTICLES

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Culture under Attack: The Destruction of Cultural Heritage by Non-State Armed Groups

Abstract: This article considers whether there are any gaps within the legal framework protecting cultural heritage from attacks conducted by non-state armed groups. It first looks at the existing obligations of states vis-à-vis non-state armed groups with regard to the protection of such heritage, in particular their obligations stemming from the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. It also examines the obligations of non-state armed groups with regard to cultural heritage, clarifying their obligations under international humanitarian law, including customary international norms, and other sources of international law. Finally, this article discusses accountability mechanisms, in particular with the application of international criminal law to prosecute the members of non-state armed groups who have conducted attacks against cultural property.

Keywords: non-state actors, armed groups, cultural heritage, cultural property, armed conflict, Hague Convention

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Introduction

> […] *damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all humankind, since each people makes its contribution to the culture of the world*
>
> Preamble of the Hague Convention (1954)

As underlined by the preamble of the key treaty for the protection of cultural property in the event of armed conflict (Hague Convention),[1] any damage to cultural heritage is detrimental not only to a portion of interested individuals but to humanity as a whole. Cultural heritage, including its tangible form, is often representative of the core identity of peoples. This is why the destruction of material culture has long been used as a weapon to undermine an enemy's morale and affirm the will to conquer and dominate others. As Irina Bokova, Director-General of UNESCO, stated: "damage to the heritage of [a] country is damage to the soul of its people and its identity".[2] Cultural heritage is also at risk of direct attacks when it is turned into a military objective, such as when troops are stationed in a historic building or when weapons are stored in a museum. In addition to being the object of direct attacks during armed conflicts, either because of its cultural importance for a particular group of people or because of it being considered a legitimate military target, cultural objects are also regularly the casualties of collateral damage in armed conflicts.

Since the adoption of the Hague Convention in 1954, cultural heritage has continued to suffer from the same attacks but the nature of the armed conflicts has changed. While most armed conflicts used to have an international character, the large majority of current armed conflicts are internal, which means that they involve non-state armed groups fighting a state or non-state armed groups fighting among themselves within the territory of a state, rather than two (or more) states waging war against each other.[3] Therefore, the damage incurred by cultural heritage during an armed conflict is nowadays just as likely to be the result of the actions of non-state armed groups as those of states themselves. However, the loss of cultural heritage to mankind is the same whether it is generated by the actions of states or non-state armed groups. Given the changing nature of war associated with the increase in non-international armed conflicts, it is therefore crucial to clarify whether non-state armed groups are bound by the current legal framework protecting cultural heritage in armed conflict and, if so, to what rules they are bound.

[1] Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 240.

[2] *Director-General of UNESCO appeals for protection of Syria's cultural heritage*, 30 March 2012, http://www.unesco.org/new/en/media-services/world-heritage-37th-session/whc37-details/news/director_general_of_unesco_appeals_for_protection_of_syrias_cultural_heritage/ [accessed: 10.11.2015].

[3] See, for example, S. Casey-Maslen (ed.), *The War Report 2012*, Oxford University Press, Oxford 2013, p. vi, x.

Current Context: Increased Attacks by Non-State Armed Groups

Over the past few years, both moveable and immovable forms of cultural heritage have been the objects of increased targeting by non-state armed groups in situations of non-international armed conflicts, i.e. wars which include one or more armed non-state actor(s). For example, following the military coup in Mali in March 2012, rebel groups, including Ansar Dine, al-Qaeda in the Islamic Maghreb (AQIM), and possibly the Movement for Oneness and Jihad in West Africa (MUJAO), attacked Timbuktu's mosque and damaged or destroyed many of its other cultural monuments, including nine of its mausoleums inscribed on the World Heritage List.[4]

The continuing armed conflict in Syria between the national armed forces and the Free Syrian Army (FSA) and the al-Nusra Front has also led to significant damage to, or destruction of, cultural heritage.[5] In Damascus, fighting between the rebels and the Syrian army in November 2013 damaged the mosaics of the Umayyad Mosque and the wall of the Citadel.[6] During the siege of Homs in July 2014, the medieval castle of Krak des Chevaliers suffered extensive damage following an airstrike by the Syrian army which targeted rebels who had used it as a base.[7] Earlier in 2014, the Umayyad Mosque in Aleppo was reportedly used as a lookout and sniper location by rebels, which led to its shelling and eventual collapse. Its minaret was used as a lookout and sniper location by the rebels, which led to its shelling and collapse in March 2013.[8] The previous year, insurgents were reported to have es-

[4] See *UNESCO expert mission evaluates damage to Mali's cultural heritage*, the UNESCO press release of 7 June 2013, http://www.unesco.org/new/en/unesco/resources/unesco-expert-mission-evaluates-damage-to-malis-cultural-heritage [accessed: 10.11.2015]. See also the UN press release, *Mali: Timbuktu's cultural heritage more damaged than first estimated, UN agency says*, 7 June 2013, http://www.un.org/apps/news/story.asp?NewsID=45118 [accessed: 10.11.2015]. See further, D. Zwaagstra, *Crimes Against Cultural Property in Mali*, Peace Palace Library, http://www.peacepalacelibrary.nl/2013/01/crimes-against-cultural-property-in-mali [accessed: 10.11.2015].

[5] For more on the impact of the Syrian conflict on cultural heritage, see M. Lostal, *Syria's World Cultural Heritage and Individual Criminal Responsibility*, "International Review of Law" 2015, Issue 1, pp. 4 ff.

[6] D. Darke, *How Syria's ancient treasures are being smashed*, BBC, 10 July 2014, http://www.bbc.co.uk/news/magazine-28191181 [accessed: 12.11.2015].

[7] *Syria Crusader castle Krak des Chevaliers has war scars*, BBC, 22 March 2014, http://www.bbc.com/news/world-middle-east-26696113 [accessed: 10.11.2015]. For the damage suffered previously by the castle, see e.g. R. Fisk, *Syria's ancient treasures pulverised*, "The Independent", 5 August 2012, http://www.independent.co.uk/voices/commentators/fisk/robert-fisk-syrias-ancient-treasures-pulverised-8007768.html [accessed: 15.11.2015].

[8] See, e.g., *Syria Conflict: Mortar near Umayyad Mosque kills three*, BBC, 29 November 2013, http://www.bbc.co.uk/news/world-middle-east-25150432 [accessed: 10.11.2015]. On the pillaging of museums, see O. Almuqdad, *Syrian heritage under extreme attack*, Morocco World News, 16 June 2013, http://www.moroccoworldnews.com/2013/06/94567/syrian-heritage-under-extreme-attack [accessed: 14.11.2015]. On attacks on religious sites, see *Syria: Opposition Abuses During Ground Offensive*, Human Rights Watch, 19 November 2013, http://www.hrw.org/news/2013/11/19/syria-opposition-abuses-during-ground-offensive [accessed: 5.11.2015]. On the impact of attacks on religious sites, see *Syria: Attacks on Religious Sites Raise Tensions*, Human Rights Watch, 23 January 2013, http://www.hrw.org/news/2013/01/23/syria-attacks-religious-sites-raise-tensions [accessed: 10.11.2015].

tablished their headquarters near Aleppo's old souk, turning its old town into a battleground, which eventually resulted in the souk becoming the victim of a collateral fire.[9] In Bosra, it appears that a Roman amphitheatre was used as a military base from which snipers fired at rebels located in the Old Town.[10]

In addition, the insecurity context resulting from the Syrian conflict has allowed the rise of ISIS (the Islamic State of Iraq and Syria, also known as ISIL, the Islamic State of Iraq and the Levant), the jihadi militant group which took control of portions of Iraqi and Syrian territory in 2015.[11] Since 2014, it has intentionally damaged or destroyed the cultural heritage of those two states, as well as of Libya, because it sees it as heretical to Islam. Their targets have included religious sites, as well as ancient monuments and artefacts. For example, it has destroyed Byzantine mosaics and Assyrian statues, as well as Sufi and Shia shrines in the region of Raqqa in Syria.[12] In 2014 and 2015, ISIS destroyed several mosques, churches, Sufi and Shia shrines and tombs in Mosul, Northern Iraq, the site of the ancient Assyrian capital of Nineveh.[13] Video footages were released showing ISIS fighters destroying artefacts in the Mosul museum, in February 2015, the ancient cities of Nimrud and Hatra, in March 2015.[14] Since their capture of the ancient city of Palmyra in May 2015, ISIS militants have destroyed its Temples of Bel and Baal Shamin, its Arch of Triumph, as well as the iconic Lion of al-Lāt, an ancient statue representing a pre-Islamic goddess.[15]

[9] A. Barnard, H. Saad, *In Syria's Largest City, Fire Ravages Ancient Market*, "The New York Times", 29 September 2012, http://www.nytimes.com/2012/09/30/world/middleeast/fire-sweeps-through-ancient-souk-of-aleppo-citys-soul.html?_r=0 [accessed: 17.11.2015].

[10] For information on the destruction in Bosra and other Syrian sites, see *Ancient history, Modern Destruction: Assessing the Current Status of Syria's World Heritage Sites Using High-Resolution Satellite Imagery*, http://www.aaas.org/page/ancient-history-modern-destruction-assessing-current-status-syria-s-world-heritage-sites-using [accessed: 16.11.2015].

[11] *ISIS 'controls 50% of Syria' after seizing historic city of Palmyra*, "The Guardian", 21 May 2015, http://www.theguardian.com/world/2015/may/21/isis-palmyra-syria-islamic-state [accessed: 10.11.2015].

[12] P. Cockburn, *The destruction of the idols: Syria's patrimony at risk from extremists*, "The Independent", 11 February 2014, http://www.independent.co.uk/news/science/archaeology/news/the-destruction-of-the-idols-syrias-patrimony-at-risk-from-extremists-9122275.html [accessed: 10.11.2015].

[13] G. Bowley, *Antiquities Lost, Casualties of War*, "The New York Times", 3 October 2014, http://www.nytimes.com/2014/10/05/arts/design/in-syria-and-iraq-trying-to-protect-a-heritage-at-risk.html [accessed: 10.11.2015].

[14] *ISIS fighters destroy ancient artefacts at Mosul museum*, "The Guardian", 26 February 2015, http://www.theguardian.com/world/2015/feb/26/isis-fighters-destroy-ancient-artefacts-mosul-museum-iraq [accessed: 14.11.2015]; *ISIS video confirms destruction at UNESCO World Heritage site in Hatra*, "The Guardian", 5 April 2015, http://www.theguardian.com/world/2015/apr/05/isis-video-confirms-destruction-at-unesco-world-heritage-site-on-hatra [accessed: 14.11.2015].

[15] See, for example, *ISIS destruction of Palmyra's Temple of Bel revealed in satellite images*, "The Guardian", 1 September 2015, http://www.theguardian.com/world/2015/sep/01/satellite-images-reveal-isis-destruction-of-palmyras-temple-of-bel [accessed: 14.11.2015]. See also *ISIS militants destroy 2,000-year-old statue of lion at Palmyra*, "The Guardian", 2 July 2015, http://www.theguardian.com/world/2015/jul/02/isis-militants-destroy-palmyra-stone-lion-al-lat [accessed: 6.11.2015]; *ISIS blows up Arch of Triumph in*

Following the escalating number of deliberate attacks against cultural heritage by ISIS, the UNESCO Committee for the Protection of Cultural Property in the Event of Armed Conflict condemned the "repeated and deliberate attacks against cultural property […] in particular in the Syrian Arab Republic and the Republic of Iraq" at its meeting in 2014.[16] The destruction of cultural heritage in Iraq and Syria is also a violation of the United Nations Security Council Resolution No. 2199 (2015),[17] and the deliberate destruction of cultural heritage has been identified as a war crime not only in international but also in non-international armed conflicts.[18]

Article Outline

Given the surge of attacks mentioned above, it appears not only timely but also imperative to analyse the legal norms protecting tangible cultural heritage in situations of non-international armed conflicts and clarify if (and how) they apply to non-state armed groups. In conducting this analysis, this paper seeks to identify any existing gap in the current international legal framework and its implementation. It is of course particularly important that cultural heritage benefits from the same level of respect in the event of armed conflict regardless of whether the warring parties are states or non-state armed groups. The changing nature of war should not weaken the international law norms developed so far to protect cultural objects from deliberate attacks and incidental damage in situations of armed conflicts.

The following section highlights what are the international law norms protecting cultural heritage which are applicable in the event of non-international armed conflicts, acknowledging that many key documents were developed when wars between states were the most common type of armed conflicts. Once the rules applicable to civil wars have been identified, the subsequent section reflects on their

2,000-year-old city of Palmyra, "The Guardian", 5 October 2015, http://www.theguardian.com/world/2015/oct/05/isis-blows-up-another-monument-in-2000-year-old-city-of-palmyra [accessed: 6.11.2015]. Note that ISIS also beheaded Palmyra's former head of antiquities, Khaled al-Asaad, see *Syrian archaeologist 'killed in Palmyra' by IS militants*', BBC News, 19 August 2015, http://www.bbc.co.uk/news/world-middle-east-33984006 [accessed: 10.11.2015].

16 Chairperson's Statement on behalf of the Committee for the Protection of Cultural Property in the Event of Armed Conflict, 9th Meeting of the Committee, 19 December 2014, http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/images/9_COM_Statement_EN.pdf [accessed: 29.10.2015].

17 United Nations Security Council Resolution No. 2199, 12 February 2015, UN Doc. S/RES/2199 (2015) on the 'Threats to international peace and security caused by terrorists acts' condemns the destruction of cultural heritage in Iraq and Syria, particularly by ISIS and the al-Nusrah Front, para. 15-17.

18 Article 8(2)(b)(ix) and 8(2)(e)(iv) of the Statute of the International Criminal Court (Rome Statute), 17 July 1998, 2187 UNTS 90; see also Article 3(d) Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, 7 July 2009, UN Doc. S/RES/1877 (2009). See also *UNESCO Director General condemns destruction of Nimrud in Iraq*, UNESCO Press, 6 March 2015, http://www.unesco.org/new/en/media-services/single-view/news/unesco_director_general_condemns_destruction_of_nimrud_in_iraq/#.VctSefkYNNI [accessed: 11.11.2015].

applicability to non-state armed groups. The various possible grounds on which non-state armed groups are generally bound to international humanitarian norms are reviewed and applied with regard to the specific rules concerning cultural heritage. The final section looks at the existing obligations of states vis-à-vis non-state armed groups with regard to the protection of such heritage, in particular their obligations stemming from treaty law, including the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 (Hague Convention) and its Second Protocol[19]. The potential individual criminal responsibility of members of non-state armed groups and the role of states in prosecuting those who have committed offences against cultural objects in situations of armed conflicts is also discussed in this section. The paper concludes with a few suggestions as to avenues forward to strengthen the respect of cultural heritage by non-state armed groups during internal armed conflicts.

International Legal Framework and Non-International Armed Conflicts

While there is evidence since Antiquity of rules concerned with the respect of cultural heritage in wartime, it is a concept that only really crystallised in the 19th century, when the distinction between civilian objects and military objectives became widely recognised. Some military codes of conduct even afforded special protection to art works and buildings with a cultural purpose, such as the Lieber Code, which applied to United States' troops during the American Civil War, a non-international armed conflict.[20] A number of non-binding instruments regarding the conduct of hostilities, also adopted in the 19th century, included provisions protecting buildings because of their civilian character and, more specifically, buildings dedicated to cultural pursuits.[21] While they lacked binding force, these documents encouraged nevertheless the development of international rules protecting cultural heritage in armed conflicts, including those not of an international character.

[19] Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, 2253 UNTS 212.

[20] Articles 35-36, Lieber Code (or Instructions for the Government of Armies of the United States in the Field, General Order No. 100), 24 April 1863, http://avalon.law.yale.edu/19th_century/lieber.asp [accessed: 8.11.2015]. This code only applied to United States' troops and not to the secessionist Confederates.

[21] Article 17, Brussels Declaration concerning the Laws and Customs of War (27 August 1874, 4 Martens NRGT (2e série) 219) states that "if a defended town, fortress or village were to be bombarded, all necessary steps must be taken to spare, as far as possible, buildings dedicated to worship, art and science". See also Article 34, Manual of the Laws and Customs of War ("Oxford Manual"), 9 September 1880, https://www.icrc.org/ihl/INTRO/140?OpenDocument [accessed: 29.10.2015], which, like Article 17 of the Brussels Declaration, calls on the besieged to indicate to the enemy the presence of cultural buildings by distinctive and visible signs. This advance warning concept was adopted by the Hague Regulations Concerning the Laws and Customs of War on Land (1899 and 1907, 187 Parry's CTS 429, 208 Parry's CTS 77) and, later, by the 1954 Hague Convention.

The Hague Regulations constituted a key development in the protection of cultural heritage in armed conflict as they contained the first binding international norm calling for its state parties to take all necessary steps in bombardments "to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments".[22] Although they were annexed to the Hague Conventions on the Laws and Customs of War on Land, a series of treaties adopted at two diplomatic conferences, first in 1899 and again in 1907, the Hague Regulations remain relevant to this day as they are still in force for the state parties that have not ratified subsequent treaties on those matters.[23] While they were meant to apply exclusively to international armed conflicts, i.e. wars between two states or situations of occupation, their rules concerned with the protection of cultural heritage have been described as reflecting custom and being also applicable to non-international armed conflicts.[24]

The Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (also known as the Roerich Pact, 1935) states that Historic monuments, museums, scientific, artistic, educational and cultural institutions shall be considered as neutral and as such respected and protected by belligerents, as long as they are not used for military purposes.[25] This aspirational treaty has only been ratified by ten states, including the United States and some Latin American states. It is unclear whether the Roerich Pact applies to both international and non-international armed conflicts.

The Geneva Conventions, adopted in 1949, do not contain any specific provision regarding cultural heritage but their rules protecting properties because of their civilian nature, applying the customary principle of distinction, also cover cultural objects. For example, the "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" constitute grave breaches of the Geneva Conventions.[26] In addition, the private property of protected persons, including cultural objects, cannot be the object of reprisals.[27] However, these provisions are only applicable to international armed

[22] Article 27 Hague Regulations (1899 and 1907).

[23] The 1899 Hague Convention II has 50 State parties, while the 1907 Hague Convention IV, which largely confirmed the provisions contained in the 1899 Convention II and its annexed Regulations, has 36 State parties.

[24] See, for example, *Prosecutor v. Kordić and Čerkez*, ICTY Case No. IT-95-14/2-T, Judgment of the Trial Chamber, 26 February 2001, para. 362, where it clearly referred to "the custom codified in Article 27 of the Hague Regulations".

[25] Articles 1 and 5, Roerich Pact (or Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments), 15 April 1935, https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=EE57F295093E44A4C12563CD002D6A3F [accessed: 10.11.2015].

[26] Article 147 GC IV.

[27] Ibidem, Article 33.

conflicts. Common Article 3, the only provision within those Conventions which is applicable to non-international armed conflicts, is only concerned with civilian persons and not civilian properties.

Adopted in 1977, Additional Protocol I and II to the Geneva Conventions provide supplementary protection to the victims of international and non-international armed conflicts, respectively. While Additional Protocol I proscribes attacks against civilian objects during international armed conflicts, unless they have been turned into military objectives, this general prohibition was not reiterated in Additional Protocol II.[28] However the more specific prohibition contained in Article 53 of Additional Protocol I, which forbids "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" and "to use such objects in support of the military effort", was enshrined under Article 16 of Additional Protocol II.[29] As this provision does not provide for an exception in the case of military necessity, it affords a rather high level of protection. However, as the provision refers to cultural objects and places of worship which constitute "the cultural or spiritual heritage of peoples" and not "people", it appear to refer to those monuments or objects that transcends national borders and can thus be argued to be well known and forming part of the heritage of mankind, without requiring a specific listing.[30] As Additional Protocol II applies to non-international armed conflicts taking place on the territory of a state party,[31] it is applicable to the internal armed conflicts occurring on the territory of Mali or Libya, but not on those of Iraq or Syria, for example. However, as Article 16 is generally considered as being an expression of

[28] Article 52 AP I. However, it can be argued that Article 13(1) is vague enough to encompass all civilian objects.

[29] Article 16 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II, AP II), 8 June 1977, 1125 UNTS 609. Article 53(a)(b) Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I, AP I), 8 June 1977, 1125 UNTS 3. Note that AP I also prohibits to make cultural objects the object of reprisals (Article 53(c) AP I) and considers that making clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where it was not used militarily and when such cultural property was not close to military objectives, is a grave breach of the Protocol (Article 85(4)(d) AP I). However, neither of these provisions were adopted in AP II.

[30] Y. Sandoz, Ch. Swinarski, B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, International Committee of the Red Cross, Brill-Nijhoff, Geneva 1987, para. 4840 and 4844. While it is suggested that this definition is similar to the one found in Article 1 Hague Convention, its scope is arguably narrower.

[31] It currently numbers 167 State parties, see the website of the ICRC: http://www.redcross.org/humanityinwar/additional-protocol-ii-to-the-geneva-conventions-1977 [accessed: 10.11.2015]. See also J.-M. Henckaerts, L. Doswal-Beck, *Customary International Humanitarian Law*, Vol. I: *Rules*, Cambridge University Press, Cambridge 2005, at xxxiv.

customary law, it may thus apply to any party to a non-international armed conflict, whether or not they are bound by Additional Protocol II.[32]

The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (thereafter the "Hague Convention"), adopted in 1954, is the key treaty in this area. Its scope includes many types of cultural "property", including "movable or immovable property of great importance to the cultural heritage of every people."[33] In addition, it also covers buildings which preserve or exhibit such property, as well as centres containing monuments, such as historic town centres.[34] Given that its definition of what constitutes "cultural property" lacks precision, the protection system established by the Hague Convention may encompass a large amount of cultural objects. However, they must be deemed "of great importance", a term which has to be determined by each state party and which may consequently greatly limit its application. The vagueness of this definition may furthermore generate implementation challenges on the ground, i.e. when troops need to determine rapidly whether an object or site falls within the protection provided by the Convention or not.

The Hague Convention's provisions regarding the respect of cultural property are applicable both in international armed conflicts and non-international armed conflicts, on a state party's territory and on its enemy's territory if that state is also a party to the Convention.[35] Under the Convention, respecting cultural heritage in the event of armed conflict means that it must not be exposed to possible damage or destruction. Thus, cultural objects must not be used in a way that could turn them into a legitimate military objective, for example by being used for military purpose, which could be the case if a museum houses a military command centre or if weapons or troops are stationed in a historic monument, for example. The Hague Convention thus adopts the principle of distinction between civilian objects and military objectives, where the latter can be legitimately targeted if their partial or total destruction would offer a definite military advantage as their current nature, location, purpose or use make "an effective contribution to military action".[36] According to the Hague Convention, the immediate surroundings of a cultural

[32] See the practice identified in the ICRC Customary IHL database, Rules 38-39.

[33] Article 1(a) Hague Convention. These may include "monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions" of such property.

[34] Ibidem, Article 1(b) and (c). These include museums, libraries, archives, as well as shelters dedicated to protecting that heritage in times of armed conflict.

[35] Ibidem, Articles 2, 4(1), 18 and 19. The Second Protocol is also clearly applicable to both international and non-international armed conflicts as it specifically excludes those situations that do not amount to a non-international armed conflict, such as civil unrest, thus making clear that it does apply to situations that have reached the threshold of non-international armed conflicts.

[36] Article 1(f) Second Protocol which uses the definition of military objectives as adopted by Article 52(2) Additional Protocol I; see also Article 6(a) Second Protocol.

object must not be used in a way that could expose it to damage or destruction either.[37] And just like Additional Protocol II, the Hague Convention also prohibits direct attacks against such an object.[38] Furthermore, the Second Protocol to the Hague Convention (Second Protocol), adopted in 1999, states that military operations must be conducted with all feasible precautions to avoid, or at least minimise, any possible incidental damage to cultural property (including through the choice of means and methods of warfare).[39] It also requires the party attacking such an object to verify that it is a military objective and cancel or suspend the attack if it becomes apparent the object is not (or no longer) a military objective.[40] The Second Protocol also refers to the customary principle of proportionality, according to which belligerents must refrain from conducting (or suspend) an attack which may lead to excessive damage in relation to the expected military advantage.[41]

However, despite these prohibitions, attacks against cultural objects or their use for military purpose remains allowed in cases of imperative military necessity, a concept that is difficult to apply consistently in practice.[42] Attacking cultural objects or using them for a military purpose may be legitimate if such an attack or use offers a distinct military advantage to win the war, or at least a key battle. In the event of military necessity, the customary principle of proportionality still applies, which means that the advantage that can be gained by conducting the attack must outweigh any potential damage or destruction to the cultural object under attack and there must be no other method available for obtaining a similar military advantage.[43] The party conducting the hostile act must also take all precautionary measures to minimise the consequent damage to the object in question, including precautionary measures against the effects of attacks.[44] This may consist of removing cultural objects from the vicinity of military objectives, or vice versa.

While it acknowledges the principle of military necessity, the Hague Convention attempts to limit the possibility of invoking it by adding the term "imperative" to it, without clarifying how this differs from the generally accepted concept.[45] The Second Protocol to the Hague Convention has thus sought to narrow recourse to imperative military necessity when conducting an act of hostility against a cul-

[37] Article 4(1) Hague Convention.

[38] Ibidem.

[39] Articles 7-8 Second Protocol.

[40] Ibidem, Articles 7(a) and (d).

[41] Ibidem, Article 7(c) and (d)(ii).

[42] Article 4(2) Hague Convention.

[43] Article 6(a)(b) Second Protocol.

[44] Ibidem, Articles 7-8. Note that the requirement to take precautions in attack was not included in Additional Protocol II but could be inferred from its Article 13(1).

[45] For more on this doctrine, see C. Forrest, *The Doctrine of Military Necessity and the Protection of Cultural Property During Armed Conflicts*, "California Western International Law Journal" 2007, Vol. 37, pp. 177-219.

tural object: the object in question must not only have been turned into a military objective but there must also be no feasible alternative available to obtain a similar military advantage.[46] In addition, when possible, advance warning must be given before the attack.[47] With regard to military use, the Second Protocol states that a cultural object can only be used in such a way, as long as there is no other way to obtain a similar military advantage.[48] Finally, under the Second Protocol, imperative military necessity can only be invoked by higher ranked officers.[49]

The core content of the above norms is now generally recognised as a matter of customary international law, which means that it must be respected by all states, even when they have not ratified the treaty that contains that particular rule.[50] To be considered customary international law, a rule requires sufficient state practice (*usus*) and a belief that such practice derives from a legal obligation (*opinio juris*).[51] According to state practice, historic monuments, places of worship and other cultural objects are regarded as *prima facie* civilian objects.[52] In addition to the protection they benefit as civilian properties, the customary international humanitarian study conducted by the International Committee of the Red Cross (ICRC)[53] has confirmed the customary status of the rule according to which belligerents must take special care when conducting military operations, in order to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments, unless such buildings have been turned into military objectives.[54] In addition, sufficient state practice appears to have also been

46 Article 6(a) Second Protocol.

47 Ibidem, Articles 6(d) and 13(2)(c).

48 Ibidem, Article 6(b).

49 Ibidem, Article 6(c).

50 While it can be argued that only Article 27 of the Hague Regulations, which calls to "to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments" has reached the status of customary international law, the ICRC Customary IHL Study appears to have identified sufficient State practice at least with regard to the prohibition of direct attacks against, and military use of, cultural property, see the practice associated with Rules 38-39 (and below), in particular see the Annotated Supplement to the US Naval Handbook (1997) which states that "[W]hile the United States is not a Party to the 1954 Hague Convention [for the Protection of Cultural Property], it considers it to reflect customary law." For a detailed analysis of customary international law in this area, see R. O'Keefe, *The Protection of Cultural Property in Armed Conflict*, Cambridge University Press, Cambridge 2006, pp. 316 *et seq*.

51 *Continental Shelf Case (Libyan Arab Jamahiriya v. Malta)*, Judgment of 3 June 1985, ICJ Reports 1985, pp. 29-30, para. 27.

52 J.-M. Henckaerts, L. Doswal-Beck, *Customary International Humanitarian Law*, Vol. II: *Practice*, Cambridge University Press, Cambridge 2005, at 34.

53 Rule 38-40 ICRC Study on customary international humanitarian law. For all the international law provisions incorporating these rules, as well as relevant practice of states, international organisations, judicial and quasi-judicial bodies, see J.-M. Henckaerts, L. Doswal-Beck, *Customary International Humanitarian Law*, Vol. II, pp. 723-813.

54 Rule 38(a) of the ICRC Study on customary international humanitarian law, which reflect the content of Article 27 of the Hague Regulations.

gathered with regard to the rule which calls on belligerents not to attack objects "of great importance to the cultural heritage of every people", and quite possibly with regard to the rule not to use them in a way that exposes it to destruction or damage, unless imperatively required by military necessity.[55]

With regard to the types of cultural objects protected under customary international law, the ICRC adopts both the wording of the Hague Regulations with regard to the special care that must be provided to "buildings dedicated to religion, art, science, education or charitable purposes and historic monuments" and the wording of the Hague Convention with regard to the prohibition to attack, and military use, "property of great importance to the cultural heritage of every people".[56] However, it appears that the practice of states is in this regard not homogenous. While some military manuals have adopted the understanding of protected cultural buildings as contained in the Hague Regulations,[57] many others have adopted a more encompassing definition of cultural objects, including, for example, moveable works of arts.[58] Thus, the type of cultural objects which are protected from attacks and military use under customary international law remains unclear. The international recognition of an object,[59] as well as the display of a distinctive emblem,[60] may play a role in identifying whether a particular object falls under such protection.

The ICRC has also affirmed that belligerents are not allowed to seize, destroy or wilfully damage cultural institutions and monuments, as well as works of art and science,[61] and that theft, pillage or misappropriation of, and any acts of vandalism directed against, property of great importance to the cultural heritage of every people is prohibited, as a matter of custom.[62] While there exists some indication

[55] Ibidem, Rule 38(b) and 39, which include, for example, many military manuals' provisions which specifically prohibit attacking cultural objects and using them for military purposes. Note that the term 'imperative military necessity' was adopted in the rules identified by the ICRC, thus reiterating the language of the Hague Convention and its endeavour to limit recourse to this justification when cultural objects are concerned.

[56] The ICRC opted for the term 'every people', which corresponds to the wording of the Hague Convention and which appears more encompassing than the one found in Additional Protocol II.

[57] See, for example, the military manuals of Burkina Faso, Ecuador, Greece, Mali, Morocco, Nigeria, and Senegal (as cited under the practice associated with Rule 38 of ICRC Study on customary international humanitarian law).

[58] See, for example, the military manuals of Australia, Burundi, Colombia, Germany, Hungary, the Netherlands, New Zealand, Spain, Sweden, Switzerland, Ukraine, and the United Kingdom (as cited under the practice associated with Rule 38 of ICRC Study on customary international humanitarian law).

[59] See, for example, the consideration of the Old Town of Dubrovnik as an 'especially protected site' because of its inscription on the UNESCO World Heritage List in *Prosecutor v. Pavle Strugar*, ICTY Case No. IT-01-42, Judgment of the Trial Chamber, Judgment, 31 January 2005, para. 310.

[60] See, for example, the military manual of Argentina, Benin, Guinea, and the Philippines (as cited under the practice associated with Rule 38 of ICRC Study on customary international humanitarian law).

[61] Rule 40(a) of the ICRC Study on customary international humanitarian law.

[62] Ibidem, Rule 40(b).

that custom is emerging in that regard, the state practice identified is less widespread that the one pertaining to the prohibition of attacking cultural objects, thus putting into question the customary status of such a rule.

The above rules have also been considered to apply to both international and non-international armed conflicts. For example, in the *Tadić case*, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) held that "it cannot be denied that customary rules have developed to govern internal strife. These rules [...] cover such areas as [...] protection of civilian objects, in particular cultural property."[63] It referred to Article 19 of the 1954 Hague Convention, which provides for the application of the provisions of the Convention relating to the respect for cultural property "as a minimum" in non-international armed conflicts occurring within the territory of a state party, adding that this treaty rule had "gradually become part of customary law".[64] These provisions would then also include the prohibition of theft, pillage and vandalism.

The above section demonstrates that there are a number of existing rules protecting cultural heritage in non-international conflicts. They are clearly binding on states when they are contained in a treaty they have ratified or when they have become part of customary international law. The below section considers whether these norms are also binding on non-state armed groups.

Obligations of non-State Armed Groups towards Cultural Heritage

Before considering whether the rules mentioned in the above section bind non-state armed groups, one must establish that there is a situation of non-international armed conflict. While a single incident involving the armed forces of two states may constitute an international armed conflict, a non-international (or internal) conflict only qualifies as an "armed conflict" if the hostilities between the state and the non-state armed group (or between non-state armed groups) are protracted.[65] In addition, the armed group(s) involved must have a certain level of organisation.[66] Thus, situations of internal disturbances and tensions, such as the riots or isolated and sporadic acts of violence which occurred during the so-called Arab Spring, for example, do not amount to non-international armed conflicts. Although the qualifi-

[63] *Prosecutor v. Tadić*, ICTY Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 127.

[64] Ibidem, para. 98. See also, *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, ICTY Trial Chamber Judgment (31 January 2005), para. 229.

[65] Note that Additional Protocol II applies only to non-international armed conflicts that involve a state, to the contrary of Common Article 3 which may apply to non-international armed conflicts which involve only non-state armed groups.

[66] These conditions were established by the ICTY in the *Tadič* case.

cation of a conflict as an "armed conflict" is often challenging in practice, it is indispensable to determine the legal regime applicable thereto. For example, the situation in Afghanistan at the time the 6th century statues of Buddha were destroyed by the Taliban could be classified as an internal armed conflict in certain parts of the country. However, this was most likely not the case in the region of Bamiyan, where those monumental statues where located. In addition, their destruction was not directly connected to that conflict. Thus, rules protecting cultural heritage in situations of armed conflicts, even those that could be seen as binding on non-state armed groups, could not be applied to that situation and those who destroyed them could not be prosecuted for a *war* crime.[67]

The norms of international law which apply to non-international armed conflicts are widely considered to be binding on all parties to that conflict, and thus to non-state armed groups as well.[68] International courts have considered non-state armed groups to be bound to international law obligations arising from their participation in internal armed conflicts.[69] It is of course coherent to expect that civilians and civilian properties benefit from the same protection no matter the type of the belligerents involved in the conflict. For example, it should not be prohibited for states to use cultural monuments to support their military effort but allowed for non-state armed groups to do so. It would provide the latter with an unfair advantage over the state's armed forces, as well as putting the monument at risk of damage or destruction.

Most of the rules protecting cultural heritage in a non-international armed conflict as presented in the previous section are enshrined in treaties. Some of these treaties even specifically mention that they apply to *all* belligerents involved in a non-international armed conflict. This of course means that the treaty (in whole or in part) applies to at least one non-state armed group, as non-international armed conflicts involve a state and a non-state armed group or several armed groups.[70] Article 19(1) of the Hague Convention states that "[I]n the event of

[67] R. O'Keefe, *Cultural Heritage and International Law*, in: S. Jodoin, M.-C. Cordonier Segger (eds.), *Sustainable Development, International Criminal Justice and Treaty Implementation*, Cambridge University Press, Cambridge 2013, p. 123, where he adds that a 'war crime' must be connected to the ongoing conflict, which was not the case in the destruction of the Buddhas, which he calls an act of 'fundamentalist religious iconoclasm'.

[68] See, for example, A. Cassese, *The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflict*, "International and Comparative Law Quarterly" 1981, Vol. 30, pp. 416, 424; G. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge University Press, Cambridge 2010, p. 157; see also United Nations Security Council Resolution No. 1214, 8 December 1998, UN Doc. S/RES/1214 (1998), para. 12.

[69] In addition to the jurisprudence of the ICTY cited above, see, for example, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986, ICJ Reports 1986, p. 14, para. 219, where the Court stated that Common Article 3 applied to the non-state armed group (the Contras) fighting the government.

[70] See K. Chamberlain, *War and Cultural Heritage, A Commentary on the Hague Convention 1954 and its Protocols*, 2nd edn., Institute of Art and Law, 2013, pp. 53-55.

an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as, a minimum, the provisions of the present Convention which relate to respect for cultural property",[71] highlighting that this does not affect the legal status of the parties, which means that a non-state armed group remains a non-state actor even if it becomes bound by the same obligations as the state in question.[72] It also adds that "the parties to the conflict shall endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention", thus leaving the door open for non-state armed groups to apply those regarding the safeguarding of cultural heritage, such as the preparation of inventories, the planning of emergency measures for protection against fire or structural collapse, or the preparation for the removal of movable cultural property or the provision of adequate *in situ* protection.[73] Article 22 of the Second Protocol to the Hague Convention simply states that it applies "in the event of an armed conflict not of an international character, occurring within the territory of one of the Parties".[74] As it does not limit its application to the provisions associated with the respect of cultural objects, it may also bound non-state armed groups to its other provisions, including those relating to safeguarding cultural heritage.

Additional Protocol II applies in non-international armed conflicts "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".[75] Thus Additional Protocol II does not apply to internal armed conflicts involving only non-state armed groups; the state must be involved in the conflict in question, which is not the case for the application of the Hague Convention or its Second Protocol. The application of Additional Protocol II is also limited to those groups who exercise control over a portion of the territory of a state party. Therefore, its application is more limited than the application of the Hague Convention and its Second Protocol, as they apply to any non-state armed group taking part

71 See R. O'Keefe, *The Protection…*, p. 98, where he states that, according to the drafters, treaty obligations were imposed on non-State armed groups because each party to an armed conflict are bound by contractual arrangements undertaken by the community of which it is a part.

72 Article 19(4) Hague Convention.

73 Ibidem, Article 19(2); the safeguarding of cultural heritage is provided under Article 3 Hague Convention.

74 See R. O'Keefe, *The Protection…*, pp. 245-246, where he explains that the provisions contained in the Hague Convention and its Second Protocol which refer to non-international armed conflicts must be read with Common Article 3 of the 1949 Geneva Conventions, which means that they may apply to armed conflicts involving only non-state armed groups (and no state).

75 Article 1(1) Additional Protocol II. Additional Protocol II did not mirror the language of Common Article 3 of the Geneva Conventions, which clearly states that "each Party to the conflict shall be bound to apply as a minimum" its provisions.

in an internal armed conflict on the territory of a state party, even if the group in question is not in control of a territory. Thus, in the case of Additional Protocol II, non-state armed groups are clearly bound to its provisions concerned with the respect of cultural heritage, as long as they are taking part in an armed conflict that involves a state and have control over a portion of the territory of a state party. In the case of the Hague Convention and its Second Protocol, armed groups are bound to some (or most, in the case of the Second Protocol) of the provisions these treaties contain, regardless of the type of internal armed conflicts they are active in or possible control of an area, as long as the armed conflict in question occurs on the territory of a state party.[76]

An argument against the application of these treaty provisions to non-state armed groups lies in their non-participation in their adoption process and in their lack of avenues to formally adhere to them subsequently.[77] Underlining that consent is a key element in the formation of international legal obligations, the Vienna Convention on the Law of Treaties envisages the creation of obligation for a third state (which is not a party to the treaty in question) only if it "expressly accepts that obligation in writing".[78] However, this provision is only applicable to states, and does not prohibit the creation of obligations for non-state actors, even if the latter have not expressly accepted them. While this may be contested by non-state armed groups, it does not change the fact that under treaty law, as adopted by states, they may be considered bound by some of those treaty provisions.

Given that the above mentioned treaty provisions only apply with regard to non-international conflicts taking place on the territory of its state parties, another legal basis must be identified to bind non-state armed groups conducting hostilities on the territory of states which are not party to a treaty containing rules protecting cultural heritage in armed conflict. In such instance, the other avenue for imposing international obligations on non-state armed groups is customary international law, which is also a source of international law. According to its Statute, the International Court of Justice recognises international custom ("a general practice accepted as law") as a source of international law, without specifying that the practice must be state practice.[79] In its draft conclusions, the International Law Commission purports that it is primarily the practice of states (and in some cases the practice of international organisations) that "contributes to the formation, or expression,

[76] On the application of the Hague Convention to non-state armed groups, see Z. Howe, *Can the 1954 Hague Convention Apply to Non-state Actors?: A Study of Iraq and Libya*, "Texas International Law Journal" 2012, Vol. 47, pp. 403-425.

[77] As reported by the ICRC Commentary on Common Article 3, which does not contain provisions regarding cultural heritage but which applies to non-international armed conflicts and can thus assist the present analysis, doubts were emitted at the Diplomatic Conference "as to whether insurgents could be legally bound by a Convention which they had not themselves signed", see Commentary, Vol. IV, p. 37.

[78] Article 35 Vienna Convention on the Law of Treaties, 23 March 1969, 1155 UNTS 331.

[79] Article 38(1)(b) Statute of the International Court of Justice, 24 October 1945, 33 UNTS 993.

of rules of customary international law".[80] It adds that the conduct of other actors does not contribute to the formation of customary international law but may be relevant when assessing the practice of states or international organisations. Despite their lack of participation in its formation, non-state actors are considered bound by customary international law in the same manner as they are bound by the above mentioned treaty provisions.[81] As a result, they are bound to the core content of the treaties containing rules protecting cultural heritage in armed conflict, as explained in the previous section.

Notwithstanding the above, during hostilities, whether amounting to an international or non-international armed conflict, what matters is that the warring parties respect the rules of war, the *jus in bello*. In order to respect these rules, including those pertaining to cultural heritage, parties must believe they are legally bound to do so (*opinio juris*). Therefore, it would be beneficial to consider the practice and *opinio juris* of non-state armed groups with regard to the protection of cultural heritage in armed conflict and support the development of a non-state based custom in that area. While assessing the extent of the practice and *opinion juris* of all active non-state armed groups with regard to the respect of cultural heritage in armed conflict goes beyond the scope of this paper, some relevant examples can be hastily identified. Although the ICRC study of customary international humanitarian law focuses on state practice, it does contain one document through which a non-state armed group binds itself to a rule concerned with the respect of cultural heritage. At the time it was a rebel group, the Sudan People's Liberation Movement and Army (SPLM/A) stated, in its 1983 Manifesto and a resolution on human rights and civil liberties adopted in 1991 by the Politico-Military High Command of the SPLM/A, that "cultural objects which include religious monuments, buildings such as mosques and churches and various icons are respected by the SPLM/A".[82] The inclusion of icons demonstrates that there is non-state practice not only with regard to the respect of cultural buildings but also of moveable cultural objects. Respect may here arguably refer to all the provisions contained in Article 4 of the Hague Convention.

In addition to the practice identified by the ICRC study mentioned above, further practice may be noted through which non-state armed groups have bound

[80] International Law Commission, Sixty-seventh session, Identification of Customary International Law (Text of the draft conclusions provisionally adopted by the Drafting Committee), 14 July 2015, UN Doc. A/CN.4/L.869, Draft conclusion 4.

[81] In addition, non-state actors are also not able to persistently object to a rule of customary international law in the way states are, see the ILC draft conclusion 15.

[82] J.-M. Henckaerts, L. Doswal-Beck, *Customary International Humanitarian Law*, Vol. II, p. 778, citing Report on SPLM/A Practice, 1998, Chapter 4.2, referring to Sudan Liberation Movement/Army, Manifesto, 31 July 1983, Article 24(C) and PMHC Resolution No. 15: Human Rights and Civil Liberties, 11 September 1991, para. 15.2.

themselves to respect cultural objects in non-international armed conflicts.[83] For example, in their Guidelines on the Law of Armed Conflict, the National Transitional Council/Free Libyan Army (NTC/FLA) has adopted guidelines prohibiting it to "harm cultural, educational and religious buildings and historic sites unless Qadhafi forces are using them for hostile purposes, and such harm is absolutely necessary".[84] These context specific guidelines limit the prohibition of attack to immoveable cultural objects, recognising the exception for military objectives and the principle of military necessity. In addition to the practice of the SPLM/A, other groups specifically provide for the protection of moveable cultural objects, in addition to buildings and sites. In the Philippines, the National Democratic Front of the Philippines (NDFP) agreed to be bound by the "generally accepted principles and standards of international humanitarian law", including those regarding the protection of "historic monuments, cultural objects and places of worship".[85] According to its Code of War, the Colombian Ejército de Liberación Nacional (ELN) shall not attack religious sites or cultural objects.[86] Some groups have adopted provisions referring to international humanitarian law in general or entire treaties. Sharing the concern of the United Nations Security Council regarding the destruction of religious or historic monuments in Mali,[87] the National Movement for the Liberation of Azawad (MNLA), adopted an action plan according to which it commits itself to instruct its troops to ensure they abide by international humanitarian law in general.[88] While the ELN considers itself to be bound by the 1949 Geneva Conventions and by Additional Protocol II,[89] the Kurdistan Workers' Party/

[83] The following examples have been found on "Their Words: the Directory of Armed Non-State Actor Humanitarian Commitments" compiled by Geneva Call: http://theirwords.org [accessed: 10.11.2015].

[84] Libyan Opposition Forces, Guidelines on the Law of Armed Conflict, 17 May 2011, http://theirwords.org/media/transfer/doc/ly_ntc_2011_09-344f847e0eb8a2e16e10099309e91005.pdf [accessed: 14.11:2015], p. 3.

[85] Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law in the Philippines between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines, 14 June 1998, Part IV, Article 4, http://www.opapp.gov.ph/sites/default/files/Comprehensive%20Agreement%20on%20Respect%20for%20Human%20Rights%20and%20International%20Law.pdf [accessed: 29.10.2015].

[86] Ejército de Liberación Nacional (ELN), *El Codigo de Guerra* (15 July 1995), http://theirwords.org/media/transfer/doc/co_eln_1995_01-89ff189bf16014583e81e00a88cd03d6.pdf [accessed: 30.10.2015]; see also ELN, *Accuerdo de Puerta de Cielo* (15 July 1998), which lists cultural centres as protected objects under international humanitarian law (para. 14).

[87] United Nations Security Council Resolution No. 2056, 5 July 2012, UN Doc. S/RES/2056 (2012), which also notes that "attacks against buildings dedicated to religion or historic monuments can constitute violations of international law which may fall under Additional Protocol II to the 1949 Geneva Conventions and the Rome Statute of the International Criminal Court", para. 16, p. 4.

[88] Mouvement National de Libération de L'Azawad (MNLA), *Action Plan: Respecting the Laws of War*, 10 October 2012, http://theirwords.org/media/transfer/doc/1_ml_mnla_2012_04-70db-343c912fd1aa11a348984c3153a0.pdf [accessed: 10.11.2015], see, in particular, actions 3-4.

[89] See the declaration of the ELN's Commander Manuel Pérez, 'El Ejército De Liberación Nacional Y El Derecho Humanitario' (15 July 1995).

People's Defence Forces (PKK/HPG) states in its internal rules and regulations that it will abide by the "UN Geneva Convention".[90] In their agreements on the application of international humanitarian law between them, Croatia and the Socialist Federal Republic of Yugoslavia, as well as all parties to the conflict in Bosnia and Herzegovina, all reiterated their commitment to respect the Geneva Conventions and agreed to "promote respect for the principles and rules of international humanitarian law".[91] At the other end of the spectrum, in their agreement with the government of Sri Lanka, the Liberation Tigers of Tamil Eelam (LTTE) solely agreed to vacate armed personnel from places of worship.[92]

The above examples indicate that a number of non-state armed groups are willing to bind themselves to rules regarding the respect of cultural heritage in non-international armed conflicts. The non-state practice identified here is not sufficient to establish the existence of a uniform or widespread practice which would support the existence of a "non-State customary law" in this area.[93] In any case, the establishment of non-state armed groups' practice is not necessary for binding them to customary international law as it is the practice of states that contributes to its formation. While non-state armed groups are already bound to rules concerned with the respect of cultural heritage, whether through treaty or customary international law, the identification and further development of their own practice in that regard may nevertheless support the implementation of these rules in practice, by ensuring that such groups consider themselves bound by those rules (*opinio juris*). The key issue lies of course in the enforcement of those rules and the accountability mechanisms available in the case of violations. As explained below, the only efficient mechanisms in place are based on the individual criminal responsibility of the perpetrators. Thus, it is the individual members of non-state armed groups who may be prosecuted for not respecting cultural heritage in armed conflicts and not the armed groups *per se*.

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90 See the declaration of the ELN's Commander Manuel Pérez: Declaración Pública del Comandante Manuel Pérez, 'El Ejército De Liberación Nacional Y El Derecho Humanitario', 15 July 1995, http://cedema.org/ver.php?id=3391 [accessed: 20 November 2015].

91 Memorandum of Understanding on the Application of IHL between Croatia and the Socialist Federal Republic of Yugoslavia, 27 November 1991, para. 13-14, https://www.icrc.org/casebook/doc/case-study/yugoslavia-agreements-case-study.htm [accessed: 10.11.2015], and Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina, 22 May 1992, preamble and para. 4, http://theirwords.org/media/transfer/doc/yu_sda_sds_hdz_1992_01-d2d62e36891dd6a31b4727538c4ceb35.pdf [accessed: 11.11.2015].

92 Agreement on a Ceasefire between the Government of the Democratic Socialist Republic of Sri Lanka and the Liberation Tigers of Tamil Eelam, 22 February 2002, Article 2(2), https://www.regjeringen.no/en/dokumenter/agreement_on_a_ceasefire_between/id260701 [accessed on 29.10.2015].

93 A "uniform and widespread State practice" is the term used by the International Court of Justice, see *Maritime Delimitation Case (Qatar v. Bahrain)*, Judgment of 16 March 2001, ICJ Reports 2001, pp. 101-102, para. 205.

Obligations of States in Protecting Cultural Heritage from non-State Armed Groups

Unlike non-state armed groups, states have themselves assumed their obligations with regard to cultural heritage in armed conflicts with the adoption of treaties or the establishment of custom through their own practices. In addition to the obligations already mentioned in section two of this paper, according to which states must respect cultural heritage in armed conflict as a matter of both treaty law and custom, they may have additional obligations in peace time. State parties to the Hague Convention have a clear obligation to safeguard cultural heritage against the foreseeable effects of an armed conflict with non-state armed group(s) on its territory, by taking measures such as those already mentioned in the preceding section.[94] In Mali, for example, rare historic manuscripts which could have been considered idolatrous by a rebel group and thus be the object of direct targeting, were apparently evacuated from Timbuktu shortly after the conflict erupted in order to be safeguarded, although it was first reported that many had been burnt by the rebels.[95] In addition, states may seek to develop respect and understanding for cultural heritage among its population in time of peace. This may not only be pursued among members of the armed forces but also among members of the public, such as by developing school programmes that teach the historical value of cultural heritage which is common for all peoples and engaging public debates on the role cultural heritage may play in uniting, rather than dividing peoples.

In addition to the rules regarding the respect of cultural heritage, states have additional avenues to protect cultural heritage from the actions of non-state armed groups in armed conflicts. In particular, they may request to list cultural objects under the additional system of protection first established by the Hague Convention (and subsequently improved under its Second Protocol), which protects cultural property from attacks and prohibits its use to support military action.[96] Enlisting cultural property under the Second Protocol's enhanced system of protection limits the possibility to invoke military necessity to conduct an act of hostility against

[94] Articles 3 and 7 Hague Convention and Article 5 Second Protocol.

[95] V. Walt, *Mali: Timbuktu Locals Saved Some of City's Ancient Manuscripts from Islamists*, "Time", 28 January 2013, http://world.time.com/2013/01/28/mali-timbuktu-locals-saved-some-of-their-citys-ancient-manuscripts-from-islamists [accessed: 12.11.2015].

[96] See K. Hausler, *The Protection of Cultural Heritage in Armed Conflict*, in: S. Casey-Maslen (ed.), *The War Report 2013*, Oxford University Press, Oxford 2014, pp. 371-373. It is known as 'special' protection under The Hague Convention and 'enhanced' protection under the Second Protocol. The system established by the Hague Convention has not been very successful as only a few limited types of property are eligible under it (see Articles 8, 9, 10, 11, 16, and 17). This is why a different system of 'enhanced' protection, which applies to a larger number of properties, was adopted in the Second Protocol, according to which any movable or immovable cultural property that is part of the 'heritage of greatest importance for humanity' may fall under its enhanced system of protection.

such object.[97] However, even this form of protection is not absolute and may be lost if the object in question becomes a military objective, despite the fact that such an object can no longer be readily turned into a military objective.

States may also request that their cultural monuments, which are of outstanding value to humanity, be listed as a World Heritage building or site under the system established by the Convention Concerning the Protection of World Natural and Cultural Heritage (World Heritage Convention, 1972). While being awarded World Heritage status raises the cultural profile of a particular site, it does not offer additional protection from the actions of non-state armed groups in the event of an armed conflict, even if the object in question is placed on the List of World Heritage in Danger.[98] The fighting in Syria has damaged all of its six cultural sites inscribed on the United Nations Educational, Scientific and Cultural Organization (UNESCO) World Heritage List, which includes the ancient cities of Aleppo, Bosra, Damascus, Crac des Chevaliers and Qal'at Salah El-Din, as well as the site of Palmyra and about 40 ancient villages situated in north-western Syria.[99] In 2013, these sites were all placed on the List of World Heritage in Danger, as the armed conflict was considered an imminent threat to their intrinsic cultural value.[100] Nevertheless, being listed as a World Heritage site could play a role in reconstruction efforts, as the World Heritage Fund may cover damage resulting from non-international armed conflicts involving non-state armed groups.

Finally, states have the obligation under treaty law to make any violation of the respect of cultural heritage in armed conflict a clear offence. Although the Hague Regulations already stated that seizing, damaging or destroying cultural objects were conducts that "should be made the subject of proceedings", they did not impose a clear duty on states to prosecute.[101] Additional Protocol I provides for criminal repression but not Additional Protocol II, which is the one applicable to non-international armed conflicts and thus non-state armed groups. The Hague Convention does contain a vaguely-termed obligation on state parties to prosecute offenders of any nationality, including the members of non-State armed groups operating

[97] Articles 6 and 13 Second Protocol.

[98] Note that the World Heritage status of a site may be taken into account by a court, which may seek to identify the importance of a cultural object and the fact that an enemy may or may not have known its 'cultural' status, see for example the *Jokić case*, in which the ICTY considered the World Heritage status of Dubrovnik.

[99] See the website of the World Heritage Centre, *Syrian Arab Republic*, http://whc.unesco.org/en/statesparties/sy/ [accessed: 10.11.2015].

[100] They include the ancient city of Damascus, the ancient city of Bosra, the site of Palmyra, the ancient city of Aleppo, the castles of Crac des Chevaliers and Qal-at Salah El-Din, and about 40 ancient villages situated in north-western Syria. See the website of the World Heritage Centre, *Ancient City of Aleppo*, http://whc.unesco.org/en/list/21 [accessed: 10.11.2015]. See also Article 11(4), World Heritage Convention, 16 November 1972, 1037 UNTS 151, which explicitly mentions 'the outbreak or threat of an armed conflict' as a serious and specific danger for cultural heritage.

[101] Article 56 Hague Regulations.

on their territories, and impose sanctions in the case of breach.[102] As this obligation to prosecute was imprecise and thus difficult to implement at the domestic level, it was clarified by the Second Protocol, which contains an entire section dedicated to criminal responsibility and jurisdiction, including a list of what constitutes a serious violation of the Protocol.[103] Therefore, individuals who are members of non-state armed groups which operate on the territory of state parties to the Second Protocol, must be held criminally responsible for violating provisions respecting cultural heritage in armed conflict, including: making cultural property the object of attack (whether or not the object is under enhanced protection); using cultural property under enhanced protection in support of military action; extensive destruction of cultural property; and "theft, pillage or misappropriation of, or acts of vandalism directed against, cultural property".[104]

States must criminalize these violations under domestic law and assign them appropriate sanctions and, in the case of violations, must either prosecute or extradite the alleged perpetrator(s). Their jurisdiction is universal which means that they may prosecute someone no matter their nationality (or country of residence) and no matter where the offence was committed. This obligation stems from the Hague Convention and its Second Protocol, as well as from the Rome Statute for those states that are a party to it. It is only when states are unwilling or unable to prosecute war crimes against cultural property that the International Criminal Court (ICC) may prosecute such crimes.[105]

The ICC may prosecute individual members of non-state armed groups for violating Article 8(2)(e)(iv) of the Rome Statute according to which it is a "war crime" to intentionally direct attacks against historic monuments and buildings dedicated to religion or art, unless these objects have been turned into military objectives.[106] The ICC Prosecutor may open an investigation following the referral of a situation by a state party, as it did following the self-referral by Mali in 2012.[107]

[102] Article 28 Hague Convention.

[103] Articles 15-21 Second Protocol.

[104] Ibidem, Article 15.

[105] Article 17 Rome Statute.

[106] See also ibidem, Article 8(2)(e)(v), which considers pillaging a town or place as a 'war crime'. In addition to the ICC, *ad hoc* criminal tribunals may also have jurisdiction to prosecute leaders of non-state armed groups allegedly responsible for the destruction of cultural heritage. Although the International Criminal Tribunal for the Former Yugoslavia was particular influential in developing the law with regard to cultural heritage in conflict, its jurisprudence will not be considered further in this article as it is beyond its scope. For more on this topics, see R. O'Keefe, *Protection of Cultural Property under International Criminal Law*, "Melbourne Journal of International Law" 2010, Vol. 11, pp. 339-392; F. Lenzerini, *The Role of International and Mixed Criminal Courts in the Enforcement of International Norms Concerning the Protection of Cultural Heritage*, in: F. Francioni, J. Gordley (eds.), *Enforcing International Cultural Heritage Law*, Oxford University Press, Oxford 2013, pp. 40-76.

[107] In accordance with Articles 13(1) and 14, ICC Statute. The Referral Letter to the Prosecutor is available at: http://www.icc-cpi.int/NR/rdonlyres/A245A47F-BFD1-45B6-891C-3BCB5B173F57/0/ReferralLet-

In its report on the situation in Mali, the ICC affirmed that it may reasonably be believed that a violation of Article 8(2)(e)(iv) took place.[108] It then added that potential cases would likely be admissible as no domestic proceedings were pending (in Mali or another state) against the individuals who appeared to bear the greatest responsibility for the crimes.[109] Following the issuance of an arrest warrant, Ahmad Al Faqi Al Mahdi, one of the alleged perpetrators of attacks against the mausoleums in Timbuktu and a member of Ansar Dine (a Tuareg group associated with AQIM), was surrendered to the Court by Niger in September 2015.[110]

The ICC Prosecutor may also open an investigation *proprio motu*, if the Pre-Trial Chamber authorizes it.[111] In the case of situations referred by state parties or investigated *proprio motu*, the Court has both territorial and personal jurisdiction, i.e. with regard to crime(s) which appeared to have been committed on the territory of a state party or by the national of a state party.[112] With regard to crimes that allegedly occurred on the territory of a state that is not a party to the Rome Statute, an investigation may also be open if the situation was referred to the Prosecutor by the UN Security Council acting under Chapter VII of the UN Charter.[113] Despite many reports of widespread atrocities, including the destruction of cultural heritage, that have allegedly been perpetrated in Syria and Iraq by ISIS militants, the Security Council has not referred either situation to the ICC Prosecutor, although this could be envisaged despite the fact that none of these states is a party to the Rome Statute.[114] The Prosecutor could also investigate these situations *proprio motu*, in case the alleged perpetrators were nationals of a state party to the Rome Statute.[115]

terMali130712.pdf [accessed: 10.11.2015]. The letter mentions in particular the destruction of churches, mausolea, and mosques in the north of the country.

108 *Situation in Mali*, report, International Criminal Court, 16 January 2013, § 173, https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/pr869.aspx [accessed: 10.11.2015].

109 Ibidem, § 174.

110 See the ICC Press Release on the *Situation in Mali: Ahmad Al Faqi Al Mahdi surrendered to the ICC on charges of war crimes regarding the destruction of historical and religious monuments in Timbuktu*, 26 September 2015, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1154.aspx [accessed: 12.11.2015].

111 Article 15 Rome Statute.

112 Ibidem, Article 12.

113 Ibidem, Article 13(b).

114 Ibidem, Article 13(b).

115 Ibidem, Articles 12(2)(b) and 15. As explained by the ICC Prosecutor, Fatou Bensouda, in her statement on the alleged crimes, including the 'wanton destruction of cultural property,' committed by ISIS of 8 April 2015, this is unlikely given that ISIS foreign fighters who are nationals of state parties do not appear to be the ones 'most responsible' for the atrocities committed, see *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS*, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-08-04-2015-1.aspx [accessed: 12.11.2015].

Given the lack of mechanisms to hold non-State armed groups *per se* accountable when they violate international norms protecting cultural heritage in armed conflict, the establishment of individual criminal responsibility is an important route to close the accountability gap with regard to the non-respect of cultural heritage in armed conflict. While holding the leaders of non-state armed groups accountable for damaging or destroying cultural heritage does not erase the loss of the object in question, it may serve as a deterrent in the future. In addition to making those offences war crimes, states should ensure that the same acts are also prosecuted if conducted in times of peace. This would guarantee that there are no gaps in the criminal liability and that individuals that conduct attacks against cultural heritage in situations that do not amount to an armed conflict, such as those against the Buddhas of Bamiyan, are also held criminally responsible for damaging or destroying cultural heritage, intentionally or not.

Concluding Remarks

The rules protecting cultural heritage in armed conflict were first developed with international armed conflicts in mind and were thus established to bind states which were the only parties to such conflict. The changing nature of war, with the emergence of an increased number of non-international armed conflicts, has meant that the same rules have to bind non-state armed groups in the same way, in order for cultural heritage to be respected in armed conflicts.

It is now admitted that non-state armed groups are obliged to respect cultural heritage in armed conflict, in accordance with the obligations adopted either under treaty law or through the establishment of customary international law. Nevertheless, an armed group which is fighting the state may not consider itself to be bound by the rules contained in a treaty ratified by that state or to the customary international rules that were established through state practice. However, what matters on the ground is that cultural heritage is respected by *all* belligerents to a non-international armed conflict. Therefore, the formal consent of non-state armed groups to abide by the relevant rules should be sought, by supporting the establishment of their own customary law. More evidence of non-state practice regarding the respect of cultural heritage should be identified and, if there is further evidence that there is a gap in this area, non-state armed groups should be encouraged to develop practice and *opinio juris* with regard to these rules.[116] Awareness of the rules respecting cultural heritage should also be raised within these groups, for example through training, so that they may in turn ensure that their troops know about them.

[116] This could, for example, be done through the adoption of manifestos, agreements, and commitments with regard to the respect of cultural heritage in armed conflicts, with the possible development of a deed of commitment similar to those already developed by Geneva Call concerning the protection of children in armed conflict, the prohibition of sexual violence or the ban on anti-personnel mines.

As this article highlights, state parties to the Hague Convention and its Second Protocol have also a key role to play in this area, including through the adoption of safeguarding measures in peacetime, which may entail educating non-state actors about cultural heritage. The Cairo Declaration on the Protection of Cultural Property, adopted in 2004, calls on states not only to accede to the Hague Convention and its two Protocols, but also to implement them at the national level.[117] More recently, the chairperson of the UNESCO Committee (UNESCO Committee) for the Protection of Cultural Property in the Event of Armed Conflict called on Syria and Iraq to ratify the Second Protocol.[118] While the adoption of the Second Protocol has created a monitoring mechanism with states having to report regularly on implementation to the UNESCO Committee, there is no similar mechanism with regard to the Hague Convention, leaving states with the responsibility to oversee and enforce its provisions. Enforcement must include the prosecution, at the domestic level of the individuals responsible for the actions of the non-state armed group which amounted to breaches of those norms. Of course, all states should be aware that, even if they are not party to the relevant treaties, they are clearly bound to the core content of the obligations to respect cultural heritage in armed conflict, as they are considered part of customary international law given the amount of state practice and *opinio juris* in that area.

In recognising the importance of cultural heritage, the UNESCO Declaration on the Intentional Destruction of Cultural Heritage (2003) reiterates the international community's commitment "to fight against its intentional destruction in any form so that such cultural heritage may be transmitted to the succeeding generations".[119] Safeguarding cultural heritage should thus be seen as an obligation towards future generations, with the international community acting as a steward of that heritage.[120] There is an urgent need to increase the protection of cultural heritage from the increased attacks, in particular those of a direct nature, conducted by non-state armed groups. While adopting safeguarding measures in peacetime and prosecuting the leaders of those groups in the case of violations of the rules concerned with the respect of cultural heritage are key elements of state obligations which may curb non-state attacks against cultural heritage, more effort should be devoted to establishing the formal consent of non-state armed groups to be bound to the international obligations regarding the respect of cultural heritage

[117] See the Cairo Declaration on the Protection of Cultural Property, 16 February 2004, https://www.icrc.org/en/download/file/4103/cairo-declaration-cultural-property.pdf [accessed: 10.11.2015].

[118] See, e.g. Statement of the Chairpersonon behalf of the Committee to the Second Protocol to the Hague Convention of 1954, 21 May 2015, http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Statement_FINAL_FR.pdf [accessed: 10.11.2015].

[119] Part I of the UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage, 17 October 2003, UNESCO Doc. 32 C/Res. 33 (2003).

[120] This idea explains also the preference for the term cultural *heritage* over the term cultural *property*, which focuses on the idea of ownership which does not underline the transgenerational value of cultural objects.

in armed conflict and developing their practice in this area, such as through training and awareness raising, even if such consent is not necessary for them to be bound by those rules. For cultural heritage to transcend generations, what matters is that those rules are abided by on the ground and, in order for this to happen, non-state armed groups must not only be bound by the relevant rules but they must also be aware of those rules and consider themselves bound by them.

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RESEARCH ARTICLES

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State Responsibility and the International Protection of Cultural Heritage in Armed Conflicts

Abstract: This article deals with the international responsibility of States for their breach of cultural heritage obligations in the event of armed conflicts. The topic is both highly important and challenging. In fact, the implementation of State responsibility for the breach of a cultural heritage obligation may meet with serious practical difficulties in attributing unlawful conduct to a given State. Moreover, political circumstances often favour the prosecution of individual perpetrators, even if they acted under the direction or control of a State, rather than invoking the responsibility of that State. Viewed in such light, this article briefly discusses the sources and status of international cultural heritage in the event of armed conflict, then deals with the consequences of their violation in international practice. It also discusses the resolution *Succession of States in Matters of International Responsibility*, adopted this year by the Institute of International Law (IIL), and analyses its potential outcomes in relation to cultural heritage obligations applicable to States' conduct in armed conflicts.

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Whose Responsibility?

Although the protection of cultural heritage is a relatively new area of international law, it has already created a complex system of international obligations.[1] These refer particularly to the regime for the protection of cultural heritage in the event of armed conflict and occupation. While this is still an expanding area of international law-making, a number of questions arise as to the consequences of a breach of such obligations. In fact, various entities may bear responsibility for international offences against cultural heritage committed during an armed conflict. Yet, the rules governing their responsibility are regulated under distinct, though interconnected, normative regimes of international law.

Since the judgment of the Nuremberg International Military Tribunal[2] certain offences committed by individuals against cultural heritage during armed conflicts may be considered as international crimes and give rise to individual criminal responsibility.[3] After the Second World War the regime of individual criminal responsibility for the violation of international obligations towards cultural heritage was consolidated in international humanitarian law, under the 1954 Hague Convention[4] and the 1977 Additional Protocols to the 1949 Geneva Conventions.[5] But the major developments have taken place more recently. In light of the destruction of cultural heritage in the Balkans, the Second

[1] For a conceptual overview, see *inter alia* J. Blake, *International Cultural Heritage Law*, Oxford University Press, Oxford 2015; F. Francioni, *Evolving Framework for the Protection of Cultural Heritage in International Law*, in: S. Borelli, F. Lenzerini (eds.), *Cultural Heritage, Cultural Rights, Cultural Diversity. New Developments in International Law*, Brill-Nijhoff, Leiden – Boston 2012, pp. 3-28; G. Carducci, *The Growing Complexity of International Art Law: Conflicts of Law, Mandatory Rules, UNSC Resolutions and EU Regulations*, in: B.T. Hoffman (ed.), *Art and Cultural Heritage. Law, Policy and Practice*, Cambridge University Press, New York 2006, pp. 68-86.

[2] See J. Nowlan, *Cultural Property and the Nuremberg War Crimes Trial*, "Humanitares Volkerrecht" 1993, Vol. 4, pp. 221-223.

[3] *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg 14 November 1945–-1 October 1946*, International Military Tribunal, Nuremberg 1948, Vol. 2, pp. 593-616.

[4] Convention for the Protection of Cultural Property in the Event of Armed Conflict and the First Protocol to this Convention, 14 May 1954, 249 UNTS 240, 249 UNTS 358; see Article 28 of the 1954 Hague Convention.

[5] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, Article 85(4)(d); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609, Article 16.

Hague Protocol (1999)[6] set up the most advanced and detailed regime of individual criminal responsibility for offences against cultural heritage (committed in both international and non-international armed conflicts). Certain acts against cultural heritage were also criminalized under the Statute of the International Criminal Tribunal for ex-Yugoslavia (ICTY).[7] The practice of this international *ad hoc* tribunal also offers the most comprehensive case law to date in the area of individual criminal responsibility for the breach of international cultural heritage obligations. In addition, the statute of the International Criminal Court (ICC), the first permanent criminal court, also refers to cultural heritage crimes,[8] and the Court has just recently initiated a proceeding with respect to such offences (the proceedings against Abu Tourab).[9] Yet, it needs to be stressed that the extent of offences against cultural property under the statutes of these tribunals is limited as compared to the regime of the Second Hague Protocol, both from a quantitative perspective and that of differentiation on the basis of gravity.[10]

The current acts against cultural heritage occurring in Syria, Iraq and Mali have given rise to another pressing issue – that of the international responsibility or corporate (group) criminal responsibility of non-State actors such as Daesh (ISIS). However, to date no corporate entity (non-State group) has been prosecuted by any municipal or international court for any international cultural heritage crime. Moreover, there is no such practice in relation to any other international crimes either. Importantly, the statutes of international criminal tribunals, including the Statute of Rome, provide only for jurisdiction over natural persons – not their collectivities.[11] Accordingly, there are so far no "accepted rules or standards for corporate criminal responsibility under international law".[12] On the other hand, it has

[6] Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, 2253 UNTS 212.

[7] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 25 May 1993, UN Doc. S/RES/827 (1992); see Article 3(d).

[8] Statute of the International Criminal Court (Statute of Rome), 17 July 1998, 2187 UNTS 90; see Articles 8(2)(b)(ix) and 8(2)(e)(iv).

[9] Abu Tourab – Ahmad Al Mahdi Al Faqi, an alleged member of Ansar Dine, a Tuareg Islamic extremist militia in North Africa, suspected of war crimes allegedly committed in 2012, in Timbuktu (Mali), by intentionally directing attacks against buildings dedicated to religion and/or historical monuments; ICC, *Prosecutor v. Ahmad Al Faqi Al Mahdi*, No. ICC-01/12-01/15.

[10] See A. Carcano, *The Criminalization and Prosecution of Attacks against Cultural Property*, in: F. Pocar, M. Pedrazzi, M. Frulli (eds.), *War Crimes and the Conduct of Hostilities: Challenges to Adjudication and Investigation*, Edward Elgar, Cheltenham 2013, pp. 78-97.

[11] In fact, the above-mentioned proceedings before the ICC relating to the war crimes in Mali have been initiated against a member of a group, but not against the group itself.

[12] J. Crawford, *State Responsibility: The General Part*, Cambridge University Press, Cambridge 2013, p. 81.

been asserted that non-State corporate actors are bound by international law rules. In particular this relates to non-State armed groups exercising control over a given territory and population.[13] Thus more and more voices are postulating the establishment a coherent set of principles and mechanisms concerning the corporate responsibility of non-State groups for the breach of international law, beyond the regime of individual criminal responsibility.[14]

The third context, and perhaps the most important one, in which the violation of international cultural heritage obligations may be invoked is that of State responsibility. Indeed, from the traditional, horizontal perspective of international law, the violation of binding obligations under international law entails international responsibility which can be invoked and implemented against those entities which are recognized as possessing personality on the international plane, in particular States, which still the primary subjects of international law. The regime of responsibility of States for internationally wrongful acts is regulated under customary international law, comprehensively codified by the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).[15] Although the ARSIWA does not have the form of a treaty, many of its provisions are generally considered as reflecting customary international law.[16]

It is clear that most of the international obligations for the protection of cultural heritage are made by and for States. Yet the objectives of such obligations have, over the years, gone beyond the exclusive cultural, political and economic interests of States towards general interests and values shared by the entire international community, with increasing focus on the protection and promotion of human rights.[17] In this regard, the breach of international cultural heritage obligations by a State may give rise to secondary obligations toward, and vested in, not

[13] See, for instance, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986, ICJ Reports 1986, p. 392, para. 219; for a complex analysis see Z. Howe, *Can the 1954 Hague Convention Apply to Non-State Actors?: A Study of Iraq and Libya*, "Texas International Law Journal" 2012, Vol. 47, p. 403; N. Gal-Or, C. Ryngaert, M. Noortmann (eds.), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place: Theoretical Considerations and Empirical Findings*, Brill-Nijhoff, Leiden – Boston 2015.

[14] See article by K. Hausler, *Culture under Attack: The Destruction of Cultural Heritage by non-State Armed Groups*, "Santander Art and Culture Law Review" 2015, current issue, pp. 129-141.

[15] November 2001, UN Doc. A/56/83 (2001).

[16] See, for instance, J. Crawford, *State Responsibility*, in: *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Heidelberg-Oxford 2006, http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1093?prd=EPIL [accessed: 11.11.2015], para. 65.

[17] See, in particular, A.F. Vrdoljak, *Human Rights and Cultural Heritage in International Law*, in: F. Lenzerini, A.F. Vrdoljak (eds.), *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature*, Hart, Oxford 2014, p. 139.

only a State directly injured but also in their plurality or the international community as a whole. This common denominator, that is, the protection of goods particularly cherished by the international community, establishes a link between the primary rules, protecting such basic values and interests, and the secondary rules governing the consequences of any violation of these rules. Yet the implementation of State responsibility for the breach of a cultural heritage obligation may also encounter serious practical difficulties in terms of attributing a course of conduct to a given State. Moreover, the complex and internally fragmented system of international heritage law does not provide for any comprehensive dispute settlement mechanisms.[18] In addition, political circumstances often favour the prosecution of individual perpetrators, even if they acted under the direction or control of a State, rather than invoking the responsibility of that State.

In such a context, this article explores the existing regime of State responsibility for internationally wrongful acts against cultural heritage which are committed in the course of an armed conflict. First, it briefly discusses the sources and status of international cultural heritage obligations in the situation of military conflict. Second, it deals with the consequences of their violation in international practice. Finally, it recalls the resolution by the Institute of International Law (IIL) – *Succession of States in Matters of International Responsibility* – adopted in Tallinn on 28 August 2015,[19] and analyses its provisions in light of cultural heritage obligations. This recent doctrinal development addresses a long-neglected "grey zone" of international law which has an important practical impact on cultural heritage matters, such as restitution of cultural property pillaged or displaced in the event of an armed conflict and reparations for cultural loss. Arguably, such a reconceptualization seems highly important in the light of current political and territorial reconfigurations in eastern Ukraine and possible final ruptures in Libya, Syria and Iraq.

Sources and Status of Cultural Heritage Obligations in Armed Conflicts

In contrast to the law on international responsibility of States, cultural heritage obligations are established in the great majority of cases by multilateral treaties, and to a certain extent by bilateral treaties and agreements in the matter of protection, preservation and cooperation in matters of culture and cultural heritage. In relation to tangible cultural heritage in the event of armed conflicts, two main groups

[18] A. Chechi, *Evaluating the Establishment of an International Cultural Heritage Court*, "Art, Antiquity & Law" 2013, Vol. 18, p. 32.

[19] IIL, 14th Commission, M.G. Kohen (Rapporteur), 28 August 2015, http://www.justitiaetpace.org/idiE/resolutionsE/2015_Tallinn_14_en.pdf [accessed: 15.11.2015].

of obligations can be identified:[20] 1) the protection and respect of cultural property in the event of armed conflict and occupation; 2) restoration of material unlawfully appropriated and transferred from militarily occupied territories. Importantly, the first group refers to obligations established by substantive "primary" rules of international law regulating the conduct of hostilities and occupation in relation to cultural property, whereas the second one would primarily refer to "secondary" obligations of States flowing from their breach of such cultural heritage obligations.

The destruction and pillage of property and buildings dedicated to religion, education, art, and science have been prohibited under binding international instruments on war conduct since the Peace Conferences of 1899[21] and 1907.[22] Yet the complex set of rules governing the situation of cultural property in the event of an armed conflict was codified after the Second World War, under the 1954 Hague Convention, which today binds more than 120 State Parties.[23] This formalized the concept of "cultural property" as an autonomous legal category requiring international protection due to the inherent value of cultural heritage for every people. It also recognizes that such protection is of universal concern, because "each people make their own contribution to the culture of the world".[24] The regime established by the 1954 Hague Convention was extended by its Second Protocol (1999) to cover non-international conflicts. Article 22 of this Protocol provides that the international regime of protection shall also "apply in the event of an armed conflict not of an international character, occurring within the territory of one of the Parties". Moreover, the Second Hague Protocol elaborated the provisions of the 1954 Hague Convention relating to the safeguarding of and respect for cultural property

[20] The third of group of obligations under the treaty law, that has been not analyzed in this article, regards the duty to prosecute and impose penal or disciplinary sanctions upon individual perpetrators responsible for the violations of the rules of the protection of cultural property in armed conflicts. As already mentioned, the 1954 Hague Convention and the 1977 Protocol I to the 1949 Geneva Conventions oblige their State parties to ensure that such adequate criminal regulations and measures are established. In addition, the Second Hague Protocol introduces the principle of universal jurisdiction over the most "serious violations" of the norms on the protection of cultural heritage, and obliges the parties to prosecute or extradite the offender regardless of his or her nationality or the location of the violation committed. The penalized offences not only comprise the destruction of cultural heritage, but also theft, pillage, or misappropriation of cultural material. Read further M. Hector, *Enhancing Individual Criminal Responsibility for Offences Involving Cultural Property – the Road to the Rome Statute and the 1999 Second Protocol*, in: N. van Woudenberg, L. Lijnzaad (eds.), *Protecting Cultural Property in Armed Conflict*, Brill-Nijhoff, Leiden – Boston 2010, pp. 69-76; R. O'Keefe, *The Protection of Cultural Property in Armed Conflict*, Cambridge University Press, New York 2006, p. 236.

[21] Regulations Annexed to the Convention (II) with Respect to the Laws and Customs of War on Land, 29 July 1899, 187 Parry's CTS 429, Article 56.

[22] Regulations Annexed to the Convention Respecting the Laws and Customs of War on Land, 18 October 1907, 208 Parry's CTS 77, Articles 27 and 56.

[23] http://www.unesco.org/eri/la/convention.asp?KO=13637&language=E&order=alpha [accessed: 16.11.2015].

[24] The 1954 Hague Convention, Preamble.

during the conduct of hostilities. In particular, it established a new category of enhanced protection for "tangible cultural heritage that is of greatest importance for humanity" (Article 10). Accordingly, under the Hague regime States are obliged to spare cultural property, provided that it does not serve for military purposes, from attacks in territories affected by an armed conflict, and abstain from the pillage and removal of cultural objects situated therein.

At the level of international treaty law, the second category of obligations refers to the restitution of cultural property unlawfully removed from an occupied territory. The duty to return cultural property appropriated and/or removed from occupied territories by the use of force and/or under duress, already universally confirmed by the Allied legislation during the Second World War, particularly the 1943 London Declaration,[25] was codified by the First Hague Protocol (1954), which prohibits the export of cultural property from an occupied territory and requires the return of such property to the territory of the State from which it was removed. The "export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power" was also regarded as "illicit" by the 1970 Convention (Article 11).[26] More recently, the obligation to restore cultural material removed from occupied territories has been fully recognized by the *ad hoc* legislation of the UN Security Council adopted on the basis of the Chapter VII of the UN Charter.[27] In particular, the most important provisions are to be found with respect to the cultural heritage of Iraq and Kuwait. According to Resolution 686 (1991),[28] the Security Council demanded that Iraq "immediately begin to return all Kuwaiti property seized by Iraq, to be completed in the shortest possible period" (paragraph 2 (d)). Resolution 1483 of 2003[29] went much further. In this instance, the Security Council decided that all member States of the United Nations "shall take appropriate steps to facilitate the safe return to Iraqi institutions of Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from the Iraq National Museum, the National Library, and other locations in Iraq" (paragraph 7). Thus, the resolution – as a binding international instrument – provided for an obligation *erga omnes* to ensure that cultural property illicitly transferred from occupied territories

[25] The Inter-Allied Declaration against Acts of Dispossession Committed in Territories under Enemy Occupation or Control, 5 January 1943, http://www.lootedartcommission.com/ inter-allied-declaration [accessed: 15.11.2015].

[26] Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, 823 UNTS 231.

[27] Charter of the United Nations, 26 June 1945, 1 UNTS XVI, amended in 1963 (557 UNTS 143), in 1965 (638 UNTS 308), and in 1971 (892 UNTS 119).

[28] UN Doc. S/RES/686 (1991).

[29] UN Doc. S/RES/1483 (2003).

would be returned. The latest events in Syria and in Iraq have also fostered various international measures with the objective of stopping the trafficking in or pillage of cultural objects and facilitating their return. The Council Regulation (EU) No 1332/2013 of 13 December 2013[30] is perhaps the most significant international instrument in this regard. It recognizes the obligation of the EU Member States to "return to their legitimate owners goods constituting Syrian cultural heritage which have been illegally removed from Syria" (3rd recital), and requires measures to be adopted in order "to prohibit the import, export or transfer of such goods" (Article 11).

The recent international practice has also demonstrated that most treaty rules in relation to States' obligations towards cultural heritage reflect customary international law. Indeed, an explicit recognition of the customary nature of these obligations can be found in the jurisprudence of international courts.[31] In particular, the ICTY held that the intentional destruction of cultural heritage law is criminalized under customary international law.[32] Similar conclusions were also reached by the Eritrea–Ethiopia Claims Commission, established by the peace accords concluded in Algiers on 12 December 2000[33] in order to settle the disputes between these two States arising from events which took place during the war of 1998-2000. The commission found Ethiopia responsible for the destruction of an important archaeological monument in the occupied territory of Eritrea and held that such an act "was a violation of customary international humanitarian law"[34] even though the 1954 Hague Convention was not applicable as neither Eritrea nor Ethiopia was a party to it.

In addition, the link between the destruction of cultural heritage, its wilful damage and grave violations of humanitarian law has been strengthened. Accordingly, the ICTY found that the destruction of cultural heritage committed with "the requisite of discriminatory intent", may amount to persecution, that is, it may be considered as a crime against humanity.[35] Moreover, if such attacks are directed

[30] Amending Regulation (EU) No. 36/2012 concerning restrictive measures in view of the situation in Syria, OJ L 335, 14.12.2013, pp. 3-7.

[31] See F. Lenzerini, *The Role of International and Mixed Criminal Courts in the Enforcement of International Norms Concerning the Protection of Cultural Heritage*, in: F. Francioni, J. Gordley (eds.), *Enforcing International Cultural Heritage Law*, Oxford University Press, Oxford 2013, pp. 41-64.

[32] See for example *Prosecutor v. Kordić and Čerkez*, ICTY Case No. IT-95-14/2-T, Judgment of the Trial Chamber, 26 February 2001, para. 206; *Prosecutor v. Tadić*, ICTY Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 98.

[33] Agreement the Governments of the State of Eritrea and the Federal Democratic Republic of Ethiopia, 12 December 2000, UN Doc. A/55/686-S/2000/1183, Annex, http://www.pca-cpa.org/upload/files/Algiers%20Agreement.pdf [accessed: 10.11.2015].

[34] Claims Commission for Eritrea and Ethiopia, "Partial Award, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22, 28" (2004), 43 ILM (2004) 1249, para. 113.

[35] *Prosecutor v. Kordić and Čerkez*, op. cit., para. 207.

against cultural or religious property of a given group, they "may legitimately be considered as evidence of an intent to physically destroy the group",[36] thus providing evidence of the intent (*mens rea*) requirement for the commission of the crime of genocide under the 1948 Genocide Convention.[37] More recently, such an interpretation of the wilful damage to cultural heritage of a group has also been confirmed in the caselaw of the Extraordinary Chambers in the Courts of Cambodia (ECCC). Accordingly, intentional acts against cultural property have been considered as crimes against humanity, when committed with a discriminatory intent.[38] Importantly, the nature of international offences against cultural heritage occurred in armed conflicts was addressed in two genocide cases before the International Court of Justice (ICJ). These two judgements directly transposed the *aquis* of the ICTY relating to the cultural dimension of genocide (in particular the judgment in *Kristić*) to the realm of State responsibility. Accordingly, the ICJ held that attacks on cultural and religious property during an armed conflict constitute a violation of international law. Furthermore, such acts may be considered as evidence of a genocidal intent aimed at the extinction of a group.[39]

Alongside the developments of relevant international case law, the customary notion of the obligation to respect cultural heritage in armed conflicts seems to be confirmed in the practice of major international organizations. In fact, such a position was taken by the UN. Accordingly, the UN Secretary-General, Kofi A. Annan, in his 1999 Observance by United Nations Forces of International Humanitarian Law set up for the protection of cultural property during operations under the UN.[40] Apparently, the obligations binding the UN forces are treated here as arising from general international law. This was also confirmed and emphasized by the UNESCO's General Conference in its 2003 Declaration Concerning the Intentional Destruction of Cultural Heritage,[41] adopted in response to the destruction

[36] *Prosecutor v. Krstić*, ICTY Case No. IT-98-33-T, Judgment of the Trial Chamber, 2 August 2001, para. 580.

[37] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277.

[38] Case 002, Indictment, 15 September 2010, Case File No. 002/19-09-2007-ECCC-OCIJ, paras. 1420-1421, http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D427Eng.pdf [accessed: 10.11.2015].

[39] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, ICJ Reports 2007, p. 43, para. 344; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment of 3 February 2015, http://www.icj-cij.org/docket/files/118/18422.pdf [accessed: 7.11.2015], para. 390.

[40] UN Secretary-General's Bulletin, 6 August 1999, UN Doc. ST/SGB/1999/13, Article 6.6.

[41] UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage, 17 October 2003, UNESCO Doc. 32 C/Res. 33 (2003).

of the sixth-century Buddhas of Bamiyan in Afghanistan.[42] It reiterated that "the development of rules of customary international law has also been affirmed by the relevant case-law, related to the protection of cultural heritage in peacetime as well as in the event of armed conflict" (Preamble). Moreover, it provided, under Article VI, that "a State that intentionally destroys or intentionally fails to take appropriate measures to prohibit, prevent, stop, and punish any intentional destruction of cultural heritage of great importance for humanity, whether or not it is inscribed on a list maintained by UNESCO or another international organization, bears the responsibility for such destruction, to the extent provided for by international law." In relation to this, it seems necessary to mention a remarkable study by the International Committee of the Red Cross.[43] Based on an assessment of the very rich source material analysed therein, it concluded that the obligations in this respect committed during armed conflicts, both international as well as those of an internal nature, is now a fully-established set of norms of customary law.[44] This also refers to the obligation to restore cultural property removed from territories under military occupation.[45]

The development of general international norms concerning the protection of cultural heritage has also been the subject of recent analyses in the international legal scholarship.[46] Their universally binding nature is interpreted in the context of protecting the common interest of all mankind, manifesting itself in the protection and promotion of cultural heritage.[47] Moreover, it is also argued that cultural heritage belongs to global common goods and thus requires international solidarity and protection.[48] This is usually analysed in relation to the concept of cultural diversity being "a source of exchange, innovation and creativity; cultural diversity is as necessary for humankind as biodiversity is for nature".[49] In fact, cultural diversity has already been recognized and promoted as a global common good for a variety of reasons and purposes, including its importance

[42] R. O'Keefe, op. cit., pp. 356-357.

[43] J.-M. Henckaerts, L. Doswald-Beck (eds.), *Customary International. Humanitarian Law*, Vol. 1: *Rules*, Vol. 2: *Practice*, Cambridge University Press, New York 2005.

[44] Ibidem, Vol. 1: *Rules*, pp. 127-138, 523-525; Vol. 2: *Practice*, pp. 723-813, 3452 *passim*.

[45] Ibidem, Vol. 1: *Rules*, p. 137.

[46] For the most complex analysis, see F. Francioni, *Au-delà des traités: l'émergence d'un nouveau droit coutumier pour la protection du patrimoine culturel*, "Revue générale de droit international public" 2007, Vol. 111, pp. 19-42.

[47] See J. Blake, op. cit., pp. 119-124.

[48] I. Kaul, I. Grunberg, M.A. Stern (eds.), *Global Public Goods: International Cooperation in the 21st Century*, Oxford University Press, New York – Oxford 1999, p. 453; F. Francioni, *Public and Private in the International Protection of Global Cultural Goods*, "European Journal of International Law" 2012, Vol. 23, pp. 719-730.

[49] UNESCO Universal Declaration on Cultural Diversity, 2 November 2001, UNESCO Doc. 31C/Res., Article 1.

to peace and stability, progress and development, and the full realization of all human rights.[50] Therefore a number of international obligations in relation to cultural heritage are sometimes seen as effective *erga omnes*.[51] These particularly concern the duty to protect cultural property in the event of armed conflict and occupation arising from the 1972 World Heritage Convention.[52] It is recognized that the very nature and logic of these obligations under this treaty are of "general or common interest".[53] Thus a breach of obligations towards cultural property protected under the 1972 UNESCO regime and situated in the territory of one State does not necessarily have to inflict a specific injury on another State, but amounts to "an offence against all the State Parties to the Convention".[54]

Since the memorable judgement of the International Court of Justice in *Barcelona Traction*,[55] international obligations stemming, *inter alia*, from the protection of fundamental human rights or the prohibition of serious crimes of international law can be regarded as binding on the entire international community.[56] According to the ICJ,[57] certain norms aimed at protecting the general interest of humanity, even if established by a specific group of States, may be deemed to be effective *erga omnes* provided that are accepted and recognized by the international community. Consequently, these can be invoked against other subjects of international law, even those not participating in their creation. As the World Heritage Convention has been ratified or acceded to by nearly all States of the world, the obligation to respect and protect cultural property of great importance for every people

50 For further analysis see A.F. Vrdoljak, *Human Rights and Cultural Heritage*..., pp. 168-172.

51 F. Francioni, *Au-delà des traités*..., pp. 19-42.

52 Convention Concerning the Protection of World Natural and Cultural Heritage, 16 November 1972, 1037 UNTS 151.

53 G.P. Buzzini, L. Condorelli, *Article 11: List of World Heritage in Danger and Deletion of a Property from the World Heritage List*, in: F. Francioni, F. Lenzerini (eds.), *The 1972 World Heritage Convention: A Commentary*, Oxford University Press, Oxford 2007, p. 178.

54 Ibidem, see also C. Forrest, *International Law and the Protection of Cultural Heritage*, Routledge, London – New York 2010, pp. 50, 277-278; see also *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment of 11 November 2013, ICJ Report 2013, p. 281, para. 106.

55 ICJ Rep. 1969, p. 33.

56 Cfr. inter alia *Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, p. 136, paras. 155-157; *Armed Activities on the Territory of the Congo (DRC v. Rwanda)*, Judgment of 3 February 2006, ICJ Reports 2006, p. 3, para. 41. Read further Ch.J. Tams, *Enforcing Obligations Erga Omnes in International Law*, Cambridge University Press, New York 2005; Ch. Tomuschat, J.-M. Thouvenin (eds.), *The Fundamental Rules of The International Legal Order: Jus Cogens And Obligations Erga Omnes*, Brill-Nijhoff, Leiden – Boston 2006; M. Ragazzi, *The Concept of International Obligations Erga Omnes*, 2nd edn., Oxford University Press, Oxford 2000.

57 See *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, ICJ Reports 1949, p. 174, at 185 and *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, ICJ Reports 1971, p. 16, paras. 126-127.

and/or for international humanity as a whole constitutes a general principle of international law of an *erga omnes* nature.[58] The postulate concerning the formation of international obligations effective *erga omnes* with respect to cultural heritage at the level of general international law – beyond the exclusive realm of a given treaty regime (obligations *erga omnes contractantes*) – is not however accepted uncritically. It is primarily argued that the system for international legal protection of cultural heritage is based on the respect for the full sovereign competence of States to determine the elements of their heritage to be preserved and protected.[59] Some authors therefore formulate more cautious opinions, according to which the vast majority of international obligations in relation to the protection of cultural heritage do not possess an *erga omnes* nature at the level of general international law, although their further evolution and consolidation are envisioned.[60]

Internationally Wrongful Acts against Cultural Heritage and Their Consequences

Every breach of an international obligation by a State, regardless of the origin of the obligation (treaty or customary law) or its character, entails the international responsibility of that State.[61] As regards the violations of cultural heritage obligations in the event of an armed conflict, this may be invoked, in the vast majority of cases, by a State determined to have been injured, rather than by a third State or their plurality. Accordingly, the breach of an obligation to respect cultural property involves legal consequences, as clearly established by Part II of the ARSIWA, those being to cease that act, if it is continuing; to offer appropriate assurances and guarantees of non-repetition, if circumstances so require; and to make full reparation for the injury caused by the internationally wrongful act. In practice, reparation primarily takes the form of compensation and satisfaction. In fact, in the above-cited dispute before the Eritrea – Ethiopia Claims Commission, the perpetrator State found to be responsible for unlawful damage to cultural property was obliged to apologize the injured State and to pay monetary compensation.[62]

[58] F. Francioni, *Au-delà des traités*..., p. 41; F. Francioni, F. Lenzerini, *The Obligation to Prevent and Avoid Destruction of Cultural Heritage: From Bamiyan to Iraq*, in: B.T. Hoffman (ed.), op. cit., p. 28.

[59] J.P. Fishman, *Locating the International Interest in Intranational Cultural Property Disputes*, "Yale Journal of International Law" 2009, Vol. 35, pp. 359ff.; R. O'Keefe, *World Cultural Heritage: Obligations to the International Community as a Whole?*, "International & Comparative Law Quarterly" 2004, Vol. 53, p. 195.

[60] R. O'Keefe, *World Cultural Heritage*..., pp. 203-205; A.F. Vrdoljak, *Intentional Destruction of Cultural Heritage and International Law*, in: K. Koufa (ed.), *Multiculturalism and International Law, Thesaurus Acroasium*, Vol. XXXV, Sakkoulas Publications, Thessaloniki 2007, pp. 384-396.

[61] Article 1 and 12 of the ARSIWA.

[62] Claims Commission for Eritrea and Ethiopia, op. cit., para. 114.

In this context, it is necessary to recall the principle of restitution-in-kind, applicable when cultural property has been unlawfully damaged in the event of an armed conflict. This principle was partially implemented in the peace treaty practice following the First World War. Accordingly, under Article 247 of the 1919 Treaty of Versailles[63] Germany had to compensate Belgium with cultural materials "corresponding in number and value" to those destroyed in the Library of Louvain in 1914. Germany was also bound to hand over certain paintings from its State art collections to the Church of St Peter at Louvain, which was heavily damaged by German artillery fire in 1914. In fact, the question of restitution-in-kind for damage to the cultural heritage of an injured State was intensely discussed during the Paris Peace Conference. However, such a form of reparation for cultural loss was not conclusively accepted as a general rule of post-war settlements,[64] since similarly founded claims by France and Italy were not seriously considered and eventually rejected.[65]

Undoubtedly, the obligation to restore cultural property unlawfully appropriated and transferred from militarily occupied territories constitutes the fundamental consequence of a breach of the obligation to protect cultural heritage in armed conflicts. Moreover, "it can nevertheless be concluded that the obligation to return illicitly exported cultural property is customary because, in addition to support for this rule found in the practice, it is also inherent in the obligation to respect cultural property, and particularly in the prohibition on seizing and pillaging cultural property".[66] In addition, the primacy of restitution of cultural property has also been reiterated in relation to the removal of such materials during the course of genocidal practices and other "circumstances deemed offensive to the principles of humanity and dictates of public conscience".[67] Once again the much more problematic question refers to the restitution-in-kind (or compensatory restitution) principle with regard to pillaged and lost cultural material. The peace treaty practice after the First World War addressed it in several contexts. For instance, under Article 192 of the 1919 Treaty of Saint-Germain[68] and Article 176 of

[63] Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles), on 28 June 1919, 225 Parry's CTS 188.

[64] A.F. Vrdoljak, *Enforcement of Restitution of Cultural Heritage through Peace Agreements*, in: F. Francioni, J. Gordley (eds.), op. cit., p. 30, see also W. Kowalski, *Restitution of Works of Art Pursuant to Private and Public International Law*, "Collected Courses of The Hague Academy of International Law" 2001, Vol. 288, pp. 70-74, and the bibliography provided therein.

[65] A. Jakubowski, *State Succession in Cultural Property*, Oxford University Press, Oxford 2015, pp. 63-64.

[66] J.-M. Henckaerts, L. Doswald-Beck (eds.), op. cit., Vol. 1: *Rules*, p. 137.

[67] UNESCO Doc. 181/EX/53 Add, Annex I, p. 2.

[68] Treaty of Peace between the Allied and Associated Powers and Austria together with Protocol and Declarations (Treaty of St Germain-en-Laye), 10 September 1919, 226 Parry's CTS 8.

the Treaty of Trianon,[69] Austria and Hungary respectively had to "restore objects of the same nature as those referred to in the preceding Article which may have been taken away since 1 June 1914 from the ceded territories, with the exception of objects bought from private owners". It seems that such a form of reparation was recognized at the end of the Second World War as well. In fact, the 1945 Paris Conference on Reparation stated that "objects (including books, manuscripts and documents) of an artistic, historical, scientific (excluding equipment of an industrial character), educational or religious character which have been looted by the enemy occupying Power shall so far as possible be replaced by equivalent objects if they are not restored".[70] In 1946, the Allied Control Council for Germany (Control Council) adopted a final definition of "restitution" which was applicable to the entire German territory[71] and which also provided that restitution-in-kind could be ordered with regard to goods of a unique character whose restoration was not possible. At the same time, this very far-reaching principle was questioned by the US administration as early as 1947, when it argued that the extensive application of cultural replacement would not be consistent with the principle of protection of the cultural property of all nations, including the German people.[72] On the other hand, in the Soviet occupation zone the principle of compensatory restitution was extensively applied in the form of retention of cultural property as war reparations. Such a practice has been largely criticized, since on the one hand the actual removal of cultural material from Germany constituted *de facto* war plunder contrary to the rules of occupation, and on the other hand the choice of concrete objects and collections was made unilaterally by the victorious party.[73] Thus, paragraph I.3. of the First Hague Protocol, concluded few years later, specifically and expressly forbade the appropriation and retention of cultural property as war reparations. However, the assessment of the measures taken in years 1944-45 in relation to German cultural property still remains a subject of much controversy in cultural relations between Russia and Germany.[74] Perhaps the most striking example of such a controversy can be seen the negotiations on the adoption of

[69] Treaty of Peace between the Allied and Associated Powers and Hungary together with Protocol and Declarations (Treaty of Trianon), 4 June 1920, 6 LNTS 187.

[70] Final Act and Annex of the Paris Peace Conference on Reparation, 21 December 1945, Annex 1: Resolution on the Subject of Restitution in J.B. Howard, *The Paris Agreement on Reparations from Germany*, United States Government Printing Office, Washington DC 1946, p. 19.

[71] I. Vásárhelyi, *Restitution in International Law*, Publishing House of the Hungarian Academy of Sciences, Budapest 1964, p. 87.

[72] W. Kowalski, op. cit., p. 154.

[73] See, for example, A. Gattini, *Restitution by Russia of Works of Art Removed from German Territory at the End of the Second World War*, "European Journal of International Law" 1996, Vol. 1, pp. 67-88.

[74] See, for example, P. Kennedy Grimsted, *Legalizing "Compensation" and the Spoils of War: the Russian Law on the Displaced Cultural Valuables and the Manipulation of Historic Memory*, "International Journal of Cultural Property" 2010, Vol. 17, pp. 217-255.

the 2007 UNESCO Draft Declaration of Principles Relating to Cultural Objects Displaced in Connection with the Second World War.[75] This provided for an obligation to return cultural property to the territories from which they were was taken. The final text of this document, in contrast to the initial drafts,[76] did not provide for the possibility of restitution-in-kind and explicitly excluded the retention of cultural objects as war reparations. Primarily for these reasons the adoption of the said instrument was opposed by both Russia[77] and Poland.[78] The latter State claimed that the exclusion of the principle of restitution-in-kind constituted an unjustified abrogation of the regime adopted in the Allied legislation after the Second World War, and therefore the Draft Declaration would be beneficial only for some States (Germany) at the expense of others. Poland also emphasized that the Draft Declaration did not "constitute a source of international law" and it would serve only as "a political act, indicating possible procedures and forms of resolving a particular issue, in this case the issue of cultural objects displaced in connection with the Second World War".[79]

Irrespective of these controversies relating to the law applicable in 1945, it is clear that today reparations for the violation of rules on the protection of cultural heritage in the event of an armed conflict must not involve the retention of cultural objects of the perpetrator State by the injured State, at the expense of the population of the former. An opposite view or act would be in an obvious contrast to the regime of the First Hague Protocol. Moreover, it would also violate the cultural human rights of those who enjoy a given heritage, since States are no longer recognized as the sole and exclusive decision-makers in the realm of cultural heritage,[80] the protection of which is gradually becoming perceived as a matter of human rights law.[81] However, these arguments do not entirely preclude the application of the principle of restitution-in-kind as a form of reparation for damage to cultural heritage in the event of an armed conflict. In fact, "the international community has approved restitution-in-kind or compensation where the item cannot be returned, because it has been destroyed, lost, or it [its return] may impact negative-

75 9 March 2007, UNESCO Doc. 34C/22, Annex.

76 L.V. Prott, *Principles for the Resolution of Disputes Concerning Cultural Heritage Displaced During the Second World War*, in: E. Simpson (ed.), *The Spoils of War*, Harry N. Abrams, New York 1997, p. 229.

77 UNESCO Doc. 34C/22, Annex II, pp. 4-5.

78 Ibidem, pp. 2-4.

79 Ibidem, p. 3.

80 For further analysis see, for example the studies in the volume edited by E. Waterton, S. Watson, *Heritage and Community Engagement: Collaboration Or Contestation?*, Routledge, London – New York 2010.

81 See A.F. Vrdoljak, *Human Rights and Cultural Heritage…*, pp. 139-174; eadem, *Liberty, Equality, Diversity: States, Cultures and International Law*, in: eadem (ed.), *The Cultural Dimension of Human Rights*, Oxford University Press, New York 2013, pp. 26-70; J. Blake, *Taking a Human Rights Approach to Cultural Heritage Protection*, "Heritage & Society" 2011, Vol. 4, pp. 199-238.

ly on the cultural or religious heritage of the group against whom the restitution order is made".[82] For instance, the Human Rights Chamber for Bosnia and Herzegovina (HRCBiH), a mixed national–international and *sui generis* court which sat from March 1996 to September 2003,[83] applied this principle in a case involving an Orthodox Church built in Bosnia-Herzegovina in the place of a mosque destroyed during the war in 1993. Clearly, the application of restitution as a preferred remedy was not feasible. The HRCBiH declined to order the removal of the church, and it instead ordered restitution-in-kind by requiring Republika Srpska to provide a parcel of land available to the Islamic Community and allow for the (re)construction of a new mosque on this alternative site.[84]

As already highlighted, certain international cultural heritage obligations relating to States' conduct in the event of armed conflicts can be effective *erga omnes*. Arguably such a status is enjoyed by the obligation to respect, during armed conflict, cultural heritage that is particularly important to all humankind, such as those recognized as World Heritage Sites. In this regard, the question emerges: which State is entitled to invoke international responsibility against the State determined to have carried out an internationally wrongful act against such universally protected cultural heritage? Undoubtedly in the first instance the State(s) which are directly affected are eligible to so, in accordance with the definition adopted in Article 42 of the ARSIWA. One may ask, however, whether the obligations to protect cultural heritage in the event of armed conflict, in particular those relating to goods of special importance for the entire international community, may give rise to the international responsibility of a State in relation to a larger group of States or the international community as whole?[85] Thus the question arises as to the legitimacy of *actio popularis* lodged by any State in the interest of the entire international community. According to the provisions of Article 48.1 of the ARSIWA, any State other than the injured one is entitled to invoke the responsibility of another State provided that: "(a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole".

[82] A.F. Vrdoljak, *Genocide and Restitution: Ensuring Each Group's Contribution to Humanity*, "European Journal of International Law" 2011, Vol. 22, p. 45.

[83] General Framework Agreement for Peace in Bosnia and Herzegovina, 14 December 1995, 35 ILM (1996) 89, Annex 6: Agreement on Human Rights.

[84] *Islamic Community in Bosnia Herzegovina v. Republika Srpska (Zvornik Mosques)*, CH/98/1062, Decision on Admissibility and Merits, 12 October 2001, 194, Human Rights Chamber for Bosnia and Herzegovina, *Digest, Decisions on Admissibility and Merits 1996-2002* (2003), p. 177; see further A.F. Vrdoljak, *Genocide and Restitution*..., p. 45.

[85] In the latter instance, such a violation may amount to a serious breach of an obligations under peremptory norms of general international law, as defined by Article 40 of the ARSIWA.

Although international practice as well as the codified regime of the ARSIWA are not conclusive in this regard, it should be noted that the ICJ in its recent judgment in a case *aut dedere, aut iudicare* (*Belgium v. Senegal*) held that that with respect to obligations effective *erga omnes*, every State has "a legal interest" in their observance.[86] Thus, any State can claim that it has *locus standi* before international courts to assert a claim to cease the alleged infringement by another State of an *erga omnes* obligation. Such a construction of international responsibility for the breach of cultural heritage obligations *erga omnes* would potentially strengthen the existing mechanisms for the protection of heritage of great value to all humankind in the event of armed conflicts. However, as already explained, the existence of a well-established set of such obligations has not been widely and unanimously accepted by the international community.

Cultural Heritage and State Succession to International Responsibility

Continuity and Negative Succession Rule

Another problematic issue regards the consequences of an internationally wrongful act against cultural heritage and the law on State succession. Here it is necessary to consider situations which involve the continuity of international personality, as well as those which distinguish the identity of pre-succession States from that of new States. Accordingly, a continuing State retains its pre-existing rights and obligations arising from internationally wrongful acts, irrespective of the fact of State succession. However, the situation of a successor State is much more obscure.[87] In this regard, international delicts have long been considered as being of a "personal" nature and thus they could only be attributed to the State responsible for committing them, and not to its successor.[88] Consequently, the under the negative succession rule, the passing of international responsibility from the predecessor to the successor State has long been excluded.[89] Thus, the obligations arising from the commission of such an act were claimed as being non-transmissible and non-enforceable. However, the developments of the post-Cold War international practice[90] and the new doctrinal approaches postulated in international legal

86 *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, ICJ Reports 2012, p. 422, para. 68; see Th. Weatherall, *Jus Cogens: International Law and Social Contract*, Cambridge University Press, Cambridge 2015, pp. 374, 382.

87 See UN Doc. A/56/10, ch. IV.E.2, p. 119, para. 3.

88 J. Crawford, *State Responsibility: The General…*, p. 441.

89 Ibidem, pp. 437 ff.

90 See in particular, *Case Concerning the Gabčikovo-Nagymaros Project* (*Hungary v. Slovakia*), Judgement of 25 September 1997, ICJ Reports 1997, p. 3.

scholarship have led to widespread criticism of the negative succession rule. These new developments and approaches clearly favour a more equitable approach to State succession and international responsibility, based on analysing the factual and legal contexts of a given case in light of the principles of international justice as well as the stability and security of international legal relations.[91] These developments have also affected succession to the rights and obligations stemming from a violation of rules of conduct with respect to cultural heritage applicable in armed conflicts.

In reference to State practice with respect to the international responsibility of States for violations of cultural heritage obligations, this unsurprisingly refers to past pillages of cultural material and its intentional destruction, which has occurred mainly in cases of an armed conflict. Apart from the specific cases of Russia and the Federal Republic of Germany, which continued their obligations and rights arising from acts against cultural heritage committed during the Second World War,[92] the most significant cases in practice have involved the dissolution of the Socialist Federal Republic of Yugoslavia. In particular, Serbia assumed responsibility for violations of the rules governing war conduct (First Hague Protocol) in relation to cultural heritage committed by the Federal Republic of Yugoslavia (FRY) during the war with Croatia. In fact, on 23 March 2012 Serbia and Croatia signed a protocol on the restitution of Croatian cultural assets from Serbia to Croatia. According to its provisions more than 1000 works of art taken during the 1990s would be returned from Serbia to Croatia.[93] In fact, some restitution has already taken place.[94] Yet in principle the actual arrangements adopted by successor States in matters of responsibility for the breach of cultural heritage obligations have been usually been based on non-succession *ex gratia* arrangements negotiated between the States concerned, rather than by the application of concrete rules or principles of the law on State succession.[95]

[91] Cf *inter alia* J. Crawford, *State Responsibility: The General…*, pp. 435-455; Tai-Heng Cheng, *Why New States Accept Old Obligations?*, "University of Illinois Law Review" 2011, Vol. 1, pp. 1-52; V. Mikulka, *State Succession and Responsibility*, in: J. Crawford, A. Pellet, S. Olleson (eds.), *The Law of International Responsibility*, Oxford University Press, Oxford 2010, pp. 291-296; B. Stern, *Responsabilité international et succession d'États*, in: L. Boisson de Chazournes, V. Gowlland-Debbas (eds.), *The International Legal System in Quest of Equity and Universality/L'ordre juridique international, un système en quête d'équité et d'universalité*, Brill-Nijhoff, Leiden – Boston 2001, pp. 327-356; P. Dumberry, *The Controversial Issue of State Succession to International Responsibility in Light of Recent State Practice*, "German Yearbook of International Law" 2006, Vol. 49, pp. 413-448; M.J. Volkovitch, *Righting Wrongs: Toward a New Theory of State Succession to Responsibility for International Delicts*, "Columbia Law Review" 1992, Vol. 92, pp. 2162-2214; W. Czapliński, *State Succession and State Responsibility*, "Canadian Yearbook of International Law" 1990, Vol. 28, pp. 339-359.

[92] See A. Jakubowski, op. cit., pp. 193-196.

[93] *Protocol on Restitution of Cultural Assets from Serbia to Croatia Signed*, 23 March 2012, http://www.culturenet.hr/default.aspx?id=44206 [accessed: 13.11.2015].

[94] http://www.min-kulture.hr/default.aspx?id=9899 [accessed: 12.11.2015].

[95] A. Jakubowski, op. cit., pp. 193-198.

Equity and Justice

As already mentioned, the obscure legal regime governing State succession and international responsibility became the topic of more extensive scholarly investigation in the early 1990s. Comprehensive research in the field was initiated a few years ago at the Institute of Graduate Studies in Geneva, Switzerland. The research work of Patrick Dumberry and Marcelo G. Kohen is of particular relevance in this regard. An extensive analysis undertaken by Dumberry[96] revealed certain common patterns in assuming or rejecting succession to State responsibility, depending on the types of succession of States and the "specific situations and circumstances".[97] He advocated that these practices could amount to the emergence of new rules of customary international law,[98] while at the same time acknowledging that the existence of already well–established rules of international law in this area is still debatable.[99] This research was continued within the framework of the 14th IIL Commission, with Marcelo G. Kohen as Rapporteur. The IIL initiative was commenced in 2009, and four year later the Rapporteur submitted his Provisional Report, including a draft Resolution.[100] On 28 August 2015 the final text of the resolution *Succession of States in Matters of International Responsibility* was adopted (hereinafter: the 2015 IIL Resolution).

This doctrinal instrument provides a catalogue of operational guiding principles on succession and the consequences of internationally wrongful acts applicable to distinct categories of State succession. Importantly, it is founded on the argument that "situations involving succession of States should not constitute a reason not to implement the consequences stemming from international wrongful acts".[101] In other words, "no internationally wrongful act must remain unpunished as a result of the emergence of a case of State succession".[102] Its basic premise consists of a distinction between cases of continuity and succession of States. Accordingly, the "general, though not absolute, rule proposed is that in cases in which the predecessor State continues to exist, it is this State that continues the enjoyment of rights

96 P. Dumberry, *State Succession to International Responsibility*, Brill-Nijhoff, Leiden – Boston 2007.

97 Ibidem, pp. 420-430.

98 Ibidem.

99 Cfr J. Crawford, *State Responsibility: The General…*, p. 455.

100 M.G. Kohen, Rapporteur, *State Succession in Matters of State Responsibility. Provisional Report* and *State Succession in Matters of State Responsibility. Draft Resolution*, 9 August 2013, IIL, 14th Commission, Tokyo Session, 2013, http://www.idi-iil.org/idiE/annuaireE/2013/IIL_14_Kohen.pdf [accessed: 5.11.2015]; for the commentary see A. Jakubowski, op. cit., pp. 265-270.

101 2015 IIL Resolution, preamble, third recital.

102 M.G. Kohen, Rapporteur, *State Succession in Matters of State Responsibility. Final Report*, 30 June 2015, IIL, 14th Commission, Tallinn Session, 2015, http://www.justitiaetpace.org/idiE/annuaireE/2015/IIL_14_2015-06-30.pdf [accessed: 14.11.2015], (hereinafter: Kohen's Final Report), para. 26.

and the assumption of obligations arising from the internationally wrongful acts in which it was involved before the date of State succession".[103] This is founded on the observation that "the same subject that has been the victim or the author of an international wrongful act holds the rights or obligations arising from this act, no matter whether its territory and population have diminished".[104] Therefore a general negative succession rule has been proposed in relation to all cases of State succession in which the predecessor State continues to exist, that is, territorial cession, secession, and the creation of a newly independent State.[105] However, certain exemptions from this general rule are put forth, which include: an "intrinsically direct link of the consequences of the wrongful act with the territory or the population concerned";[106] a "wrongful act committed by an entity of the predecessor State that later becomes the successor State";[107] or "acceptance by the successor State of fulfilling the obligations".[108]

Indeed, one of the most important elements of the 2015 IIL Resolution consists of the equitable approach to the territorial factor in resolving issues of State succession to international responsibility.[109] Accordingly, the principle of an "intrinsically direct link of the consequences of the wrongful act with the territory or the population concerned" is consistently applied in the provisions concerning specific categories of successor States, except those regarding the merger of States or incorporation of one State into another existing State. This principle is corrective in nature, since alongside territorial considerations it invokes a human link that may exist between the wrongful act and the population concerned. In fact, "this is particularly relevant in cases of violations of human or minority rights", that is, when the wrongful act "has a specific population as a direct victim".[110] Accordingly, the continuity of obligations and rights arising from such a serious breach of international law will be maintained, irrespective of any non-succession or discontinuity claims of the States concerned.

The human dimension and equitable nature of the 2015 IIL Resolution also characterizes the solutions proposed with regard to rights stemming from internationally wrongful acts committed against the predecessor State or the population concerned. These may be of great relevance for State succession to international

103 Ibidem, para. 56.

104 Ibidem.

105 2015 IIL Resolution, Articles 11, 12 and 16.

106 Kohen's Final Report, paras. 57-62.

107 Ibidem, paras. 63-65.

108 Ibidem, paras. 66-69.

109 "The question of where the wrongful act took place is not [...] necessarily decisive", ibidem, para. 57; see also P. Dumberry, *State Succession*..., pp. 285-288 and the literature cited therein.

110 Kohen's Final Report, para. 62.

responsibility for the breach of cultural heritage obligations. Importantly, the right to redress internationally wrongful acts against cultural heritage may be treated in parallel to that of arising from violations of human and minority rights, and thus it shall continue to be enforceable irrespective of the transformations experienced by States. This may be especially crucial for peoples who did not constitute independent States when wrongful acts were committed. Importantly, Article 16.4 of the 2015 IIL Resolution provides that "the rights arising from an internationally wrongful act committed before the date of the succession of States by the predecessor State or any other State against a people entitled to self-determination shall pass after that date to the newly independent State created by that people". As the IIL Provisional Report of 2013 explains, this principle has already been recognized by both State practice and international jurisprudence.[111] Arguably, it may provide a newly independent State which has emerged in violent circumstances with a strong legal argument against its predecessor and/or another State to which a wrongful act can be attributed and give it the right to claim reparation for the violation of cultural heritage obligations, in particular those established by humanitarian rules for the protection of cultural property.[112] On the other hand, the newly independent State shall be held responsible for the conduct, prior to the date of State succession, of a national liberation movement which succeeded in establishing such a newly independent State. Thus, the responsibility for internationally wrongful acts against cultural heritage committed by such a national liberation movement shall, in principle, pass to the successor State.[113] It is important to note that the regime provided for by the 2015 IIL Resolution in relation to newly independent States may well be tested against international facts very soon. It may be applicable to the ingoing transformations in eastern Ukraine and possible final dissolutions of Libya, Syria and Iraq. All these situations have already involved breaches of international obligations to protect cultural heritage in armed conflicts, accompanied by grave violations of other norms of humanitarian law. In fact, the question may arise as to the status and transferability of rights and obligations stemming from current violations of international cultural heritage obligations in relation to new States that would emerge from the current political and social turmoil.

Finally, the question arises whether such specific considerations would apply to rights and obligations arising from the breach of cultural heritage obligations of

111 M.G. Kohen, Rapporteur, *State Succession in Matters of State Responsibility. Provisional Report*..., paras. 95-98.

112 It might also be argued that the consolidation of the regime on the succession in secondary rights of the predecessor State arising from a wrongful act of another State (irrespective of the specific situation of newly independent States), could give to the successor State better legal foundations to protect its cultural heritage. Accordingly, a State responsible for the breach of cultural heritage obligation would still have the duty to repair, notwithstanding the replacement of an injured State by its successor.

113 Article 16.3 of the 2015 IIL Resolution; see also Article 10(2) of the ARSIWA.

an *erga omnes* nature (such as the destruction of a World Heritage Site). Since such violations give rise to obligations owed to the international community as a whole, automatic succession with respect to them is strongly advocated.[114] However, the 2015 IIL Resolution does not provide for any special regime in this context. According to the Rapporteur, "the consequence of the distinction between *erga omnes* obligations and other kinds of obligations is a matter for the law of responsibility",[115] not that of State succession, since "no distinct consequences arise" in this field: "the successor State(s) inherit(s), or not, the rights or obligations stemming from the commission of an internationally wrongful act, no matter the nature of the obligation breached".[116] Arguably, this solution correctly reflects the current state of international law. In fact, there is no support, either in State practice or in relevant international case law, for the automatic transferability of obligations stemming from a grave violation of international law, comprising the breach of an obligation *erga omnes*.[117]

Conclusions

The international law rules on the protection of cultural heritage in armed conflicts would not be effective without an efficient regime governing the consequences of their violation. This article has explored the regime of international responsibility of States for the breach of two main groups of cultural heritage obligations in the event of armed conflicts: to respect cultural property during military operations; and to restore cultural material unlawfully appropriated and transferred from occupied territories. It has been shown that these obligations are not only established by relevant treaty provisions, but also reflected in and confirmed under customary rules of international law. Moreover, those obligations which relate to the protection of and respect for cultural heritage of great importance to all humankind are ever more often being perceived as effective *erga omnes* under general international law. Accordingly, their violation might entail lodging *actio popularis* by any State, including States other than the one(s) directly injured, which would then have *locus standi* to invoke the responsibility of the perpetrator State in the interest of the entire international community. However, international practice has not to date provided any relevant examples of such an action.

As regards reparations for the violation of rules of States' conduct in armed conflicts in relation to protected cultural heritage, restitution and compensation are the most common forms, as confirmed by international practice and legal scholarship.

114 P. Dumberry, *State Succession*..., p. 298; B. Stern, op. cit., p. 349; M.J. Volkovitch, op. cit., p. 2200.

115 Kohen's Final Report, para. 25.

116 Ibidem.

117 P. Dumberry, *State Succession*..., p. 298; B. Stern, op. cit., p. 349.

It also appears that the regime of State responsibility has been recently consolidated with respect to State succession. This is due to a more pragmatic approach to the legal effects and consequences of transformations of States observed in international practice, and driven by the objective of maintaining the geopolitical equilibrium of the international legal order. Moreover, the main policy underlying the recent initiative by the IIL has been that no internationally wrongful act must remain unpunished due merely to the fact of State succession. The IIL initiative also reflects certain "pragmatic" approaches to the matter of State succession, postulating flexible solutions based on fairness and equity.[118] In fact, the equitable nature of the 2015 IIL Resolution seems to be in line with the character of cultural heritage obligations: on one hand these often involve extremely complex historical and politically sensitive aspects, while on the other hand they may be seen as parallel to those obligations stemming from the rules on the protection of human and minority rights. Thus, every internationally wrongful act against cultural heritage in the event of an armed conflict entails a duty to provide reparations, irrespective of the particular circumstances of a given case with respect to State succession, if that act has a direct link with the territory or the human community concerned.

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[118] See *inter alia* W. Czapliński, *Equity and Equitable Principles in the Law of State Succession*, in: M. Mrak (eds.), *Succession of States*, Brill-Nijhoff, The Hague 1999, pp. 61-73; S. Oeter, *State Succession and the Struggle over Equity: Some Observations on the Laws of State Succession with Respect to State Property and Debts in Cases of Separation and Dissolution of States*, "German Yearbook of International Law" 1995, Vol. 38, pp. 73-102.

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RESEARCH ARTICLES

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Cultural Genocide in Tibet: The Failure of Article 8 of the United Nations Declaration on the Rights of Indigenous Peoples in Protecting the Cultural Rights of Tibetans

Abstract: The importance of culture has been present in the international human rights field since the compilation of the 1948 Universal Declaration of Human Rights (UDHR),[1] but its prominence re-emerged in the 1990s following the surge of indigenous peoples' movements. For the attainment of peace and stability, the right to culture needs to be encouraged and "cultural genocide", the non-physical destruction of an ethnic group, should be punished.[2] International human-rights frameworks, in particular Article 8 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP),[3]

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1 10 December 1948, UNGA Res 217 A(III); see J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent*, University of Pennsylvania Press, Philadelphia 2000.

2 S. Mako, *Cultural Genocide and Key International Instruments: Framing the Indigenous Experience*, "International Journal on Minority and Group Rights" 2012, Vol. 19, pp. 175-194.

3 13 September 2007, UN Doc. A/RES/61/295 (2007).

have attempted to protect such groups and their cultural identity.[4] Despite these developments, cultural rights are the least developed and understood category of human rights, largely with regards to their enforceability, legal understanding, and scope. The granting of cultural rights to minority groups or indigenous people furthermore remains a contested and controversial subject, and one full of complexity. Though it is incorporated in human rights legislation, there exists a lack of understanding about how it works in tandem with other human rights categories. The occupation of China in Tibet has embodied a destructive colonialism that is denying the Tibetan people the freedom to exercise their fundamental cultural rights. Robert Badinter described the disappearance of Tibetan culture as cultural genocide in 1989,[5] a stance that has since been adopted by those challenging China's rule in Tibet. By exploring Article 8 of the UNDRIP and the importance of cultural identity to the Tibetan people, this paper explores how China's nationalist policies are in breach of Article 8 and, consequently, China is carrying out cultural genocide in Tibet. In concluding, the essay examines how China's refusal to recognise Tibetans as indigenous leaves them at an impasse, as protection offered by the frameworks is compromised by other factors.

Keywords: cultural genocide, Tibet, indigenous peoples, colonialism, cultural rights, human rights, international law, cultural heritage, nationalism, cultural identity

Introduction

Despite the brutal and unjustifiable era of Western colonialism and the omnipresent modern global society, indigenous peoples have maintained their valued intrinsic identity and continue to thrive as communities.[6] The struggles of these groups in the past few decades has brought international attention to their aspirations; the desire for the continuation of their cultural and spiritual identity, one that is manifested through their connection to ancestral land.[7]

4 E. Pulitano (ed.), *Indigenous Rights in the Age of the UN Declaration*, Cambridge University Press, New York 2012.

5 *60 Years of Chinese Misrule: Arguing Cultural Genocide in Tibet*, International Campaign for Tibet, Washington DC 2012.

6 S. Wiessner, *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges*, "European Journal of International Law" 2011, Vol. 22, pp. 121-140.

7 B. Kingsbury, *"Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy*, "American Journal of International Law" 1998, Vol. 92, pp. 414-457.

The importance of culture has been present in the human rights field since the compilation of the 1948 Universal Declaration of Human Rights (UDHR),[8] but its prominence re-emerged in the 1990s following the surge of indigenous peoples' movements.[9] For the attainment of peace and stability, the right to culture needs to be encouraged and "cultural genocide", the non-physical destruction of an ethnic group, needs to be addressed.[10] Thus, international human-rights frameworks, in particular Article 8 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), have been created to protect these groups and their cultural identity from such attempts of cultural destruction.[11] Cultural rights, as basic entitlements, have nonetheless received significantly less consideration within international human rights law than civil, political, economic and social rights, and remain somewhat of a weak and unstructured category.

The Chinese occupation of Tibet has embodied a destructive colonialism that is denying the Tibetan people the freedom to exercise their fundamental cultural rights. Robert Badinter described the disappearance of Tibetan culture as cultural genocide in 1989,[12] a stance that has since been adopted by those challenging China's rule in Tibet. The human-rights instruments designed to safeguard the group and ensure their cultural protection are, however, insufficient and their collective rights as an ethnic minority in China are compromised by the State's national sovereignty.

The first part of this paper explores interpretations of culture and how these have manifested themselves in international human rights law. Through doing so, it will outline the existing frameworks designed to protect groups from cultural genocide, in particular Article 8 of the UNDRIP. The second part of this article will follow by examining the status of Tibet and Tibetans: both exploring how the Tibetans fulfil the definition of an indigenous group and providing a brief historical analysis of their geopolitical relationship with China. By exploring article 8 of the declaration and the importance of cultural identity to the Tibetan people, the final part of this paper will argue that China's policies are in breach of Article 8 and, as a result, China is carrying out cultural genocide in Tibet. Consequently, this section will provide a critique to Barry Sautman's analysis of the situation, in which he denies the cultural destruction of the Tibetans. In concluding, the essay will look at how

[8] See further A. Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land*, Cambridge University Press, Cambridge 2007, pp. 196ff.

[9] K. Engle, *Culture and Human Rights: The Asian Values Debate in Context*, "New York University Journal of International Law and Politics" 2000, Vol. 32, pp. 291-331.

[10] S. Mako, op. cit., pp. 175-194.

[11] See the commentaries by E. Stamatopoulou, *Taking Cultural Rights Seriously: The Vision of the UN Declaration on the Rights of Indigenous Peoples*, and J. Gibson, *Community Rights to Culture: The UN Declaration on the Rights of Indigenous Peoples*, in: S. Allen, A. Xanthaki (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Hart, Oxford 2011, pp. 387-412; 433-456, respectively.

[12] *60 Years of Chinese Misrule…*

China's refusal to recognise Tibetans as indigenous leaves them at an impasse, as protection supposedly offered by the frameworks, government and international community is compromised by other factors. This article will draw on the limits of the existing legal frameworks and the need for international human rights law to develop effective and binding instruments to punish acts of cultural genocide.

Understanding Culture

Whilst definitions of culture differ, there is a general consensus that it refers to shared values, histories and meanings that determine individual and group behaviour and allow a group to perpetuate itself. Dismissing earlier ideas that culture is fixed and static, modern anthropological theorisations understand it to be continually evolving and creating new meaning and practices determined by the relationships of group members.[13]

Notable anthropologist, Edward Burnett Tylor in 1920 defined culture as: "that complex whole which includes knowledge, beliefs [religion], arts, morals, laws, customs, and any other capabilities and habits acquired […] as a member of society."[14]

The importance of each element varies depending on the group, but religion, arts and language serve as the symbolic ways of transferring cultural values amongst generations, the latter being fundamental to the communication of culture. Culture also serves as an important component of nationalism and global nationalist movements.[15] As a political ideology, nationalism looks to culture to strengthen group solidarity and to define the group as a people.[16]

Historically, the idea of rights and culture were seen as mutually exclusive as they embodied different ideologies.[17] However, ideas of culture in the international human rights arena have risen, mainly in response to the plight of minority groups

[13] S.E. Merry, *Changing Rights, Changing Culture*, in: J.K. Cowan, M.-B. Dembour, R. Wilson, *Culture and Rights: Anthropological Perspectives*, Cambridge University Press, New York 2001, p. 258; eadem, *Constructing a Global Law – Violence Against Women and the Human Rights System*, "Law and Social Inquiry" 2003, Vol. 28, No. 4, pp. 941-977.

[14] E.B. Tylor, *Primitive Culture: Researches into the Development of Mythology, Philosophy, Religion, Language, Art and Custom*, John Murray, London 1920.

[15] Rupert Emerson defined nationalism as: "A community of people who feel that they belong together in the double sense that they share […] common heritage and […] have a common destiny […] [it] has become the body which legitimizes the state". R. Emerson, *From Empire to Nation: The Rise to Self-Assertion of Asian and African People*, "Political Science Quarterly" 1960, Vol. 76, pp. 416-418; M. Koskenniemi, *National Self-Determination Today: Problems of Legal Theory and Practice*, "International and Comparative Law Quarterly" 1994, Vol. 32, pp. 241-269.

[16] Cfr. R.J. Johnston, D.B. Knight, E. Kofman (eds.), *Nationalism, Self-Determination and Political Geography*, Routledge Publishers, London – New York 1988.

[17] J.K. Cowan, *Culture and Rights after Culture and Rights*, "American Anthropologist" 2006, Vol. 108, pp. 9-24.

or those who consider themselves and their cultural identity at threat. Accordingly, discourse during the past three decades has incorporated debates about the significance of culture and the right to culture.[18] Despite the difficulty in framing an agreed definition for culture, it has nonetheless become recognised as too important a concept to abandon.

Cultural Genocide

The systematic and deliberate annihilation of culture and cultural heritage was recognised by Raphael Lemkin, a Polish-Jewish lawyer and public prosecutor, as early as 1933, whereby he described the acts of vandalism and barbarity as new crimes that warrant punishment under international law. The term genocide was officially introduced by Lemkin in 1944, during the aftermath of the Holocaust where he provided a written legal analysis of the term in his influential text *Axis Rule in Occupied Europe* (1944); a combination of the Greek word *genos* (meaning tribe) and the Latin word *cide* (killing).[19] The act of genocide is broadly defined as the intentional destruction of a nation or ethnic group; it can, according to Lemkin, be committed either through barbarity (physical genocide) or vandalism (cultural genocide).[20]

Vandalism is as much of a method of group destruction as physical annihilation, given the importance of culture to the realisation of individual and group needs, and thus should constitute genocide.[21] Lemkin had a holistic understanding of genocide; he acknowledged the interdependency of cultural and physical elements within the body of a nation.

Cultural genocide has since been used as the core definition of the intentional destruction of a group's culture by non-physical means, carried out to dominate or destroy a group.[22] Lemkin articulated that it employs "drastic methods aimed at the rapid […] disappearance of the cultural, moral and religious life of a group of human beings".[23]

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18 K. Engle, op. cit.

19 D. Short, *Cultural Genocide and Indigenous Peoples: A Sociological Approach*, "International Journal of Human Rights" 2010, Vol. 14, pp. 831-846.

20 R. Lemkin, *Genocide as a Crime under International Law*, "American Journal of International Law" 1947, Vol. 41, pp. 145-151; J. Docker, *Are Settler-Colonies Inherently Genocidal? Re-Reading Lemkin*, in: A.D. Moses (ed.), *Empire, Colony, Genocide: Conquest, Occupation, and Subaltern in World History*, Berghahn Books, Oxford 2009, p. 502.

21 A.D. Moses, *Raphael Lemkin, Culture and the Concept of Genocide*, in: D. Bloxham, A.D. Moses (eds.), *The Oxford Handbook of Genocide Studies*, Oxford University Press, New York 2010, p. 696.

22 S. Mako, op. cit.; L. Davidson, *Theoretical Foundations*, in: L. Davidson, *Cultural Genocide: Genocide, Political Violence, Human Rights*, Rutgers University Press, New Jersey 2012, p. 162.

23 Draft Convention on the Crime of Genocide, 26 June 1947, UN Doc. E/447 (1947).

This includes the eradication of a shared language, suppression of religious beliefs and demolition of sacred monuments, attacks on historical and academic works and buildings, as well as the assimilation into the dominant culture.[24] As culture is continually evolving, Lemkin acknowledged the existence of cultural change. However, this change is considered gradual and the result of a group's adaptation to new circumstances, occurring without intent, whereas cultural genocide is a *deliberate* attempt at assassinating group culture.[25]

Cultural Genocide in International Law

Human Rights jurisprudence sufficiently lacks adequate laws and regulations to redress cultural genocide, which largely differs from other forms of cultural rights violation.[26] Unlike physical genocide, cultural genocide is not illegal under customary international law or present in the UN Convention on the Prevention and Punishment of the Crime of Genocide.[27]

During the initial drafting of the Genocide Convention in 1946, Lemkin encouraged an inclusive description that entailed physical, biological and cultural genocide.[28] There was, however, strong opposition to the inclusion of cultural genocide from some UN members, who argued that cultural destruction should not be aligned with the mass murder of groups. Indeed, key resistance came from colonial powers, who feared subsequent prosecution for having dominated natives' culture; done as a means of integration without physical eradication, but still resulted in a great deal of mistreatment.[29] Consequently, cultural genocide was intentionally revoked from the 1948 Convention.[30]

The 1993 drafting of UNDRIP[31] saw the reappearance of the concept of cultural genocide. Article 7[32] of the 1993 draft stated, "Indigenous people have the [...]

[24] S. Mako, op. cit.

[25] Ibidem.

[26] D. Nersessian, *Rethinking Cultural Genocide under International Law*, "Human Rights Dialogue" 2005, No. 2, pp. 1-3.

[27] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277; see L. Davidson, op. cit.

[28] R.F. Coelho, *Cultural Genocide and the Conservative Approach of the Genocide Convention*, "Teoria e Cultura" 2008, Vol. 2, pp. 95-113.

[29] W.A. Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd edn., Cambridge University Press, New York 2009; S. Mako, op. cit.

[30] A.F. Vrdoljak, *International Law, Museums and the Return of Cultural Objects*, Cambridge University Press, Cambridge 2006, 168 ff.

[31] UN Draft Universal Declaration on the Rights of Indigenous Peoples, 23 August 1993, UN Doc. E/CN.4/Sub.2/1993/29; UN Doc. E/CN.4/Sub.2/1994/2/ Add.1.

[32] Article 7: "Article 7. – Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:
(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

right not to be subjected to […] cultural genocide",[33] and proposed a ban on forced assimilation, forced population transfer, and action that removes them from their land. Though the words "cultural genocide" were removed from the final version in 2007, the rest of the conditions remain, which provides us with an authoritative basis to judge cultural genocide.[34]

Article 8 states (please note, the Article's reference changed from 7 to 8 in the final version):

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:
   (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
   (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
   (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
   (d) Any form of forced assimilation or integration;
   (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Despite specific reference to the destruction of culture as a violation of peoples' rights in the UNDRIP, the notion of cultural genocide, and its weight within international law, remains contested, with some scholars and experts accepting its importance as an obligatory framework whilst others reject the notion completely. The non-binding element of the declaration has implications for both its compliance and enforcement, as, though it exists as a framework to guide states on best practice, the inability to hold states accountable for cultural genocide remains a serious hindrance.

The impact and destruction caused by cultural genocide, however, remains on the radar of the United Nations and the international human rights agenda, and attempts have been made to include these violations within other human rights frameworks.[35]

(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
(c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights;
(d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;
(e) Any form of propaganda directed against them."

[33] See J. Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victors to Actors*, Martinus Nijhoff Publishers, 2012.

[34] *60 Years of Chinese Misrule*, op. cit.

[35] B. Sautman, *'Cultural Genocide' and Tibet*, "Texas International Law Journal" 2003, Vol. 38, pp. 173-248.

The United Nations does indeed place importance on the attainment of cultural identity and cultural rights.[36]

International human rights law first recognised and documented cultural rights in the UDHR, most notably under Articles 22 and 27.[37] This was further affirmed with the creation of two international treaties in 1966, the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 15 in particular,[38] and the International Covenant on Civil and Political Rights (ICCPR), Article 27 of which specifically addresses the cultural rights of minorities:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.[39]

The rights outlined in the UDHR were codified into these treaties, creating legal obligations for those States who have ratified it. Thus, this collection of human rights frameworks and instruments carries significant weight in international law and States are accountable for protecting and encouraging cultural diversity and rights. Nonetheless it does not resolve the existing gap in international law whereby

[36] See further M.A. Freeman, *Human Rights: An Interdisciplinary Approach*, 2nd edn., Polity Press, Cambridge 2011.

[37] Article 22 of the UDHR:
"Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."
Article 27 of the UDHR:
"(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.' in The United Nations. (1948). Universal Declaration of Human Rights."

[38] International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171; Article 15 of the ICESCR:
1. The States Parties to the present Covenant recognize the right of everyone:
   (a) To take part in cultural life;
   (b) To enjoy the benefits of scientific progress and its applications;
   (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields."

[39] 16 December 1966, 993 UNTS 3.

acts of cultural genocide largely go unpunished, unless they are related to the physical destruction of the targeted group. By exploring the lack of protection provided to the Tibetans by these frameworks, this article will underpin why there is a strong requirement to incorporate cultural genocide into customary international law.

Tibetan Indigenous Identity

Tibet, a remote territory located in the People's Republic of China (PRC), is home to the ethnic Tibetan people and culture. The region falls outside of what the world traditionally refers to as China and, for many centuries, prior to China's invasion in 1949, operated as a sovereign nation.[40]

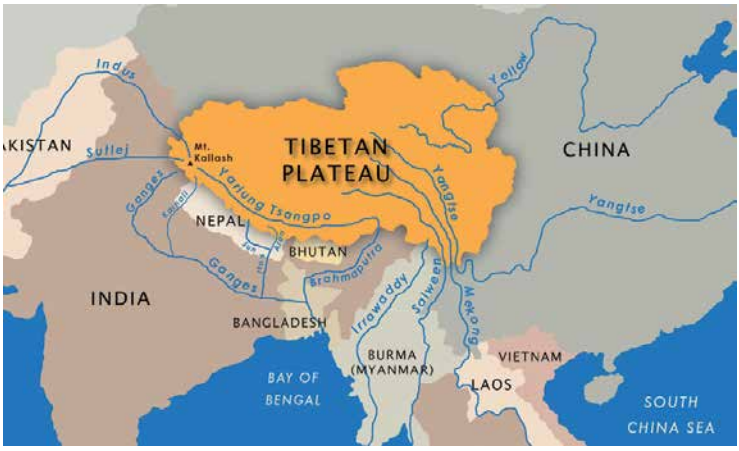

Figure 1: Map of South Asia, highlighting Tibetan Plateau
Source: Territorial Map of Tibetan Plateau Region – World Atlas 2012.

To determine whether, in accordance to the UNDRIP, the Tibetan people have a right not to be subjected to cultural genocide, their status as indigenous peoples needs to be assessed. Since neither UNDRIP nor international law offers a distinct definition, a commonly cited one by Jose Martinez-Cobo (1982) is used here:

> Indigenous communities […] form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.[41]

[40] L. Davidson, op. cit.

[41] J.R.M. Cobo, *Study of the Problem of Discrimination against Indigenous Populations*, General: United Nations Economic and Social Council, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 20 June 1982, pp. 1-70.

The key characteristics of indigenous groups, according to the UN, are:

a) Self-identification as indigenous
b) Close connection to ancestral land and territories
c) Possess their own indigenous language
d) Adhere to social and political institutions, different from the state
e) Share distinct history, traditional customs and practices
f) Economic activity usually reliant on land.[42]

The Tibetan people have developed a distinctive civilisation over 2,000 years, characterised by its own language (Tibetan), calendar and astrology, spiritual traditions and practices, livelihoods (reliant on agriculture and subsistence-farming), arts and literature.[43] Additionally, Buddhism has been integral to Tibetan identity since its introduction in the 7th century: the religion's monastic education system is at the core of Tibet's intellectual and spiritual development but, more importantly, it functions as a political body with power to make decisions regarding the development of the Tibetan people.[44] Tibetans identify themselves as indigenous and continuously proclaim their identity is unique to that of the Han-Chinese.

Chinese Occupation in Tibet

Whilst Tibet has experienced volatile relations with China for more than 1,500 years, the past 70 have seen larger levels of human-rights violations, subjugation of Tibetan practices and cultural destruction.[45] To understand the region's instability, a brief review of events in the past 70 years is required.

In 1949, China's People's Liberation Army invaded Tibet. By undermining the Lhasa government, territory was signed over to China and the Tibet Autonomous Region (TAR) was joined to China under the Seventeen Point Agreement.[46] In 1959, following tensions between the Dalai Lama's government and the Chinese Communist Party (CCP), the first anti-Chinese uprising occurred, after which the Dalai Lama fled to India and set up the Tibetan government in exile there.[47]

[42] *The Concept of Indigenous Peoples*, Workshop on Data Collection and Disaggregation for Indigenous Peoples,United Nations, Department of Economic and Social Affairs, New York, 19-21 January 2004, pp. 1-4.

[43] A. Kolas, M.P. Thowsen, *On the Margins of Tibet: Cultural Survival on the Sino-Tibetan Frontier*, University of Washington Press, Seattle 2006.

[44] *60 Years of Chinese Misrule*, op. cit.

[45] W.W. Smith, *China's Tibet?: Autonomy or Assimilation*, Rowman & Littlefield Publishers, Lanham 2006; D. Norbu, *China's Tibet Policy*, Routledge Publishers, Durham 2001.

[46] The Seventeen Point Agreement is a contract which was signed by the Tibetan de facto government and the People's Republic of China. It affirmed sovereignty to China on the condition of autonomy in Tibet. Tibet dismisses the legal binding of the agreement as it was signed under political pressure, and China has continuously broken the conditions stipulated in the contract. J. Norbu, *Exile: Resistance and Diplomacy*, in: R. Barnett, S. Akiner (eds.), *Resistance and Reform in Tibet*, C. Hurst & Co. Publishers Ltd., London 1994, pp. 186-196.

[47] J. Norbu, *Exile: Resistance and Diplomacy…*, op. cit.

During 1966-1976, as part of Mao's Cultural Revolution, the CCP tried to bring an end to the Four Olds: Customs, Culture, Habits and Ideas. This had devastating effects on Tibetan cultural identity.[48] Following Mao's death, in 1977, there were brief attempts at reconciliation between the Tibetan government in exile and the PRC, however 2008 saw renewed instability, with Tibetans protesting against religious suppression, the lack of socioeconomic opportunities and ethnic destruction.[49] In response, the Chinese authorities shut down the major monasteries, detained thousands of people and tortured and executed others.[50]

Cultural Genocide in Tibet

The existence of Tibetan people and their culture is severely under threat.[51] Despite Chinese propaganda that China is like a "caring parent to the Tibetan people",[52] the policies in Tibet are on par with those of China proper, namely a combination of Chinese chauvinism and Marxist language, which are anathema to Tibetan cultural values.

Barry Sautman has widely criticised the idea of cultural genocide in Tibet, leaning heavily on Lemkin's definition.[53] The notion of *intent* to destroy, he argues, is not part of Chinese policy and any evidence of cultural deterioration is the result of cultural change. This section will contest this by identifying how China's actions, historic and current, are intentional and strongly oppose Article 8 of the UNDRIP.

Any action which has the aim or effect of depriving them of their integrity as distinct peoples…

Religion

The Marxist-Leninist ideology that China was devoted to during Mao's reign criticised religion and thus Chinese authorities enforced atheism.[54] During the 1959

48 Ibidem, A. Kolas, M.P. Thowsen, op. cit.

49 W.W. Smith, *Tibet's Last Stand? The Tibetan Uprising of 2008 and China's Response*, The Rowman & Littlefield Publishing Group, Lanham 2009.

50 Ibidem.

51 K. Gyaltsen, *Preventing Cultural Genocide: The Case for Genuine Autonomy for Tibet*, Symposium on Cultural Diplomacy & Human Rights, 31 May 2013, Berlin, pp. 1-4; A.A. Shiromay (ed.), *The Spirit of Tibet, Universal Heritage: Selected Speeches and Writings of HH the Dalai Lama XIV*. Allied Publishers, New Delhi 1995.

52 F. Ching, *Its Wake Up Time for the CCP*, "The China Post", 9 April 2008.

53 Barry Sautman's arguments will not be explored in depth in this essay, for further readings refer to: B. Sautman, *Cultural Genocide in International Contexts*, in: B. Sautman (ed.), *Cultural Genocide and Asian State Peripheries*, Palgrave Macmillan, New York 2006, p. 286, and B. Sautman, *'Cultural Genocide' and Tibet*, pp. 173-248.

54 W.W. Smith, *The Nationalities Policy of the Chinese Communist Party and the Socialist Transformation of Tibet*, in: R. Barnett, S. Akiner (eds.), *Resistance and Reform in Tibet*, C. Hurst & Co. Publishers Ltd., Delhi 1994, pp. 51-75.

uprising, sacred Buddhist texts were publicly burnt during political demonstrations, religious and historical monuments destroyed and monasteries looted and demolished. Tibetan monks and nuns were forced to leave their monasteries[55] and approximately 90,000 Tibetans were massacred.[56] The attempt to destroy Tibetan Buddhism almost succeeded: only eight of the 6,000 + (97%) Tibetan monasteries were left standing.[57]

The religious ban was lifted following the death of Mao, and Buddhism re-emerged in 1980.[58] The PRC have allowed for its practice but have adopted a policy that encourages religion to "naturally wither away",[59] firstly by denouncing the importance of the monastic institutions and the role they play in Tibetan society and politics; and secondly by undermining the educational element of monastic institutions by introducing non-monastic schools and controlling the curriculum of the monastic ones. It has further tightened its clutch on the latter with recent measures[60] calling for the appointment of teachers who need to meet certain criteria, including supporting the Communist Party and its socialist ideologies, and being patriotic to China.[61]

Language

Language is also seen as a barrier to achieving China's nationalist ideology. Government officials in Tibet are now encouraged to speak Chinese, despite Tibetan being the official working language, and any economic opportunities require candidates to speak Chinese before Tibetan.[62] This highlights three things: firstly the desired assimilation through China's chauvinistic policy, secondly the lack of respect for the Tibetan language and its importance to the indigenous culture, and thirdly the threat felt by China over the Tibetan language undermining their sovereignty and aiding resistance to the adoption of Han culture. With economic opportunities in Tibet requiring spoken Chinese as a minimum, parents are encouraged to send their children to schools teaching predominantly in Mandarin,[63] reducing the younger

[55] C. Jian, *The Tibetan Rebellion of 1959 and China's Changing Relations with India and the Soviet Union*, "Journal of Cold War Studies" 2006, Vol. 8, pp. 54-101.

[56] D. Lal, *Indo-Tibet-Conflict*, Kalpaz Publications, Delhi 2008.

[57] Ibidem.

[58] H.H. Lai, *The Religious Revival in China*, "Copenhagen Journal of Asian Studies" 2003, Vol. 18, pp. 40-64.

[59] Z. Luo (ed.), *Religion Under Socialism in China*, M.E. Sharpe Inc., Armonk – New York – London 1991.

[60] The Regulation is titled "Measures to determine qualification and employment of religious instructors in Tibetan Buddhist Monasteries" and was published on 3 December 2012.

[61] State Administration for Religious Affairs of the People's Republic of China (2 December 2012). Buddhist Temples by the Teacher Qualification and Appointment of the Tibetan Way. *National Bureau of Religious Affairs of Political Division*, Beijing [not available in English].

[62] K. Wangdu, *China's Minority Education Policy with Reference to Tibet*, "Tibetan Review" June 2011, pp. 19-23.

[63] B. Sautman, *'Cultural Genocide' and Tibet*...

generation's ability to speak or understand Tibetan, restraining continuation of the language. In addition, Tibetan is spoken significantly less in educational institutions with much of the curriculum taught solely in Chinese.[64]

In this context, language may seem like a superficial element that, as many pro-China people would argue, is being exaggerated for claims of nationalism, but the demise of the Tibetan language is affecting the preservation of its religion and history, as much religious and historical text is available solely in Tibetan.

Any action which has the aim or effect of dispossessing them of their lands…

During Mao's Cultural Revolution, "democratic reforms" were imposed. To sway the support of the poor and impressionable who had long suffered from class struggles,[65] the authorities abolished theocratic serfdom and redistributed the land recovered from the destroyed monasteries.[66] This reform dispossessed people of their land but also caused a great deal of religious and political instability, as monks and nuns were displaced and the monastic institutions ceased to hold political power.

In the past decade, as part of China's development strategy, the creation of "new socialist villages"[67] has seen the relocation of 2 million Tibetans in the TAR and of almost 500,000 nomadic farmers, in most cases forcibly, in the Tibetan Plateau,[68] ostensibly to improve their standard of living and access to public resources.[69] This has had significant negative effects: nomadism and pastoralism is not just about sustaining their livelihoods but has, for centuries, been a crucial element of Tibetan culture.[70] Human Rights Watch argues that the relocation of ethnic Tibetans is to break them from their cultural traditions but also to implement tighter political control. The Chinese government has also made it clear that these policies are part of a larger strategy to integrate Tibetans and prevent separatist ideas.[71] Prior to the relocation, farmers were self-sufficient; the relocation has meant they are now more dependent on government subsidies, and are therefore more susceptible to political control.

64 K. Wangdu, op. cit.

65 H. Jing, *The Tibet Issue: An Impasse or Entrapment?*, "East Asian Policy" 2009, Vol. 1, pp. 23-31.

66 L. Davidson, op. cit.

67 K.E. Looney, *China's 'Building a New Socialist Countryside': The Ganzhou Model of Rural Development*, "American Political Science Association 2012 Annual Meeting Paper".

68 *"They say we should be Grateful": Mass Rehousing and Relocation Programs in Tibetan Areas of China*, "Human Rights Watch", 27 June 2013.

69 F. Robin, *The "Socialist New Villages" in the Tibetan Autonomous Region: Reshaping the Rural Landscape and Controlling its Inhabitants*, "China Perspectives" 2009, No. 3, p. 58.

70 W.W. Smith, *China's Tibet…*

71 *"They say we should be Grateful"…*, op. cit.

Any form of forced population transfer...

The Third Work Forum of 1994 initiated policies for mass Han-migration and the PRC has since continued to push these forward. During the forum Jiang Zemin, then CCP General-Secretary, stated:

> While [...] promoting Tibet's fine traditional culture, it is also necessary to absorb the fine cultures of other nationalities in order to integrate the fine traditional culture with the fruits of modern culture. This will facilitate the development of socialist new culture in Tibet.[72]

Delegates at the Forum, when discussing Tibet's instability, concluded that it was the result of the "Dalai Clique separatist activities", who were fuelling unrest in the region and using nationalism and culture to demand independence.[73] To overcome this, it was asserted that large levels of Han-migration were required to create a balance amongst the population and to create a more modern Tibetan culture in line with Maoist ideology. The opening up of Tibet's borders and job market has therefore been encouraged for the enjoyment of Chinese citizens, leading to large-scale Han-migration, an ongoing trend with economic incentives being offered by the government to those who do migrate.[74]

The 2006 launch of the Qinghai-Tibet railway further allows for the rapid influx of Chinese migrants,[75] with an estimated 6,000 Chinese entering Tibet daily and only 50% of them returning to China.[76] The railway had been proposed 40 years previously, as part of Mao ideology to fully control Tibet, and Tibetans now state that this is accelerating the rate of cultural genocide. Demographic statistics are hard to find for the region, but it is estimated that in Tibet 7.5 million Han-Chinese now live amongst 6 million ethnic Tibetans.[77]

Any form of forced assimilation or integration

Sinicization (whereby Han-Chinese societies take over non-Han-Chinese societies and become the dominant cultural influence) is aimed at strengthening Chinese nationalism, and is a process of forced assimilation.[78] The population transfer, land rehousing and language and religion assimilation are part of this sinicization. Indeed, occupying the territory where Tibetan culture is manifested for the sake of integra-

72 W.W. Smith, *China's Tibet...*

73 Ibidem.

74 *60 Years of Chinese Misrule*, op. cit.

75 Ibidem.

76 Ibidem.

77 M.G. Chitkara, *Toxic Tibet under Nuclear China*, APH Publishing Corporation, New Delhi 1996.

78 A. Bhattacharya, *China and its Peripheries: Strategic Significance of Tibet*, "Institute of Peace and Conflict Studies", May 2013, pp. 1-12.

tion is intimidating and undermines the Tibetan's native association to their land.[79] Unsurprisingly, the Tibetan government in exile has declared that these polices are fostering the disappearance of Tibetan culture.

Resistance to Chinese culture has been seen by pro-Chinese authorities as terrorism and is reportedly punished with detainment, torture and execution. However, Tibetan resistance is not about disrespecting Chinese culture but rather a great desire to preserve their own,[80] as Martinez Cobo notes in his definition of indigenous groups.

Any form of propaganda designed to promote or incite racial or ethnic discrimination…

The level of censorship and media control in China allows the authorities to report negatively on the Tibetans and to spread nationalist rhetoric, both at social and State level.[81] Policies, driven by propaganda efforts, are devised to show Tibet as a tyrannical region, backward and requiring State-modernisation. Religion and spirituality are particularly condemned and practices are highlighted as an attack towards the State; self-immolations attract no sympathy from the Han-Chinese society who despise the 'antagonistic' anti-Chinese retaliations and do not appreciate the cultural aspirations of the Tibetans. The more positive reports present patronising and demeaning images of Tibetans, highlighting their lack of socioeconomic development and the need for government assistance.[82] This only serves to exacerbate the tensions between Han-Chinese and Tibetans, the former of whom believe themselves to be superior as a result of China's modernisation.

Self-immolation as a consequence of cultural genocide

The unsettling, and increasingly common, practice of Tibetans self-immolating further underpins Lemkin's idea of group destruction. Since 2009, 139 Tibetans have self-immolated as a direct protest against Chinese rule and to escape tight cultural and religious restrictions. Sautman asserts these incidences are incited by a lack of social and economic opportunities in the region and dismisses them as senseless "suicidal politics",[83] despite some self-immolators leaving messages

[79] M.A. Michaels, *Indigenous Ethics and Alien Laws: Native Traditions and the United States Legal System*, "Fordham Law Review" 1998, Vol. 66, pp. 1565-1584.

[80] D. Norbu, *China's Tibet Policy*, op. cit.

[81] *60 Years of Chinese Misrule*, op. cit.

[82] Ibidem.

[83] B. Sautman, *Tibet's Suicidal Politics*, "East Asia Forum. Economics, Politics and Public Policy in East Asia and the Pacific", 21 March 2012.

outlining their wish to escape Chinese oppression and calling for support of the Dalai Lama.[84]

Sautman implies that there is no policy that penalises Tibetans on the basis of being Tibetan and that the Chinese authorities do not oppose religion. However, the PRC has targeted religion since its illegal annex of Tibet and continues to punish those who practise Buddhism. Ironically, if lack of economic opportunities is causing self-immolations, then this is the result of China's policies which a) penalise Tibetans who seek employment but cannot speak Chinese, b) have removed Tibetans from their land and thus their livelihoods, and c) forced practicing monks to leave the monasteries and seek a 'job' in the unfamiliar capitalist system.

Is Tibet protected from Cultural Genocide?

China has consistently denied any allegations of cultural genocide in Tibet; the 1949 invasion was characterised as "liberation" for the subjugated Tibetan people, to release them from the suppression of the feudal monastic strains and to bring modernisation.[85] This makes the assumption that Tibet's cultural development is stagnant and traditional practices backwards[86] – a much-distorted view of culture. Monastic institutions were, and still are, committed to learning, teaching and contributing to the continual development of Tibetan culture.[87] Indeed, Tibetan Buddhism itself is a progressive religion which, based on the notion of enlightenment, teaches its followers the importance of development.[88] China's idea of modernisation therefore deeply patronises and undermines the meaning of culture.

Article 8 of the UNDRIP provides China with a useful framework to consult when devising policies in Tibet that would avoid cultural genocide. Analysis of Chinese doctrine shows, however, that its policies are morally unjust and strongly oppose both Article 8 and the Declaration;[89] not only do they disregard the importance of Tibetan indigenous culture but they are *intentionally* seeking to eradicate it. Whilst States have a commitment to abide by Article 8 and the UNDRIP,

84 R.D. Sloane, *Tibet, Cynical Sinicism and the Tragedy of Self-immolations*, "East Asia Forum. Economics, Politics and Public Policy in East Asia and the Pacific", 9 May 2012; S.J. Hartnett, *"Tibet is Burning": Competing Rhetorics of Liberation, Occupation, Resistance, and Paralysis on the Roof of the World*, "Quarterly Journal of Speech" 2013, Vol. 99, pp. 283-316.

85 N. Subramanya, *Human Rights and Refugees*, APH Publishing, New Delhi 2004.

86 T.W. Shakya, *The Tibet Question* [written Interview], "New Left Review" 51, May-June 2008, pp. 5-28.

87 M. Goldstein, *The Revival of Monastic Life in Drepung Monastery*, in: M. Goldstein, M. Kapstein (eds.), *Buddhism in Contemporary Tibet: Religious Revival and Cultural Identity*, University of California Press, Berkeley – Los Angeles – London 1998, pp. 15-52.

88 M.A. Mills, *Identity, Ritual and State in Tibetan Buddhism: The Foundations of Authority in Gelukpa Monasticism*, Routledge Curzon Publishers, New York 2010.

89 R.C. Rÿser, *The UN Declaration on the Rights of Indigenous Peoples: Tibet*, "Fourth World Eye Blog", Center for World Indigenous Studies 2018.

the declaration is not legally binding under international law and therefore relies on the voluntary good faith of China to implement it.[90]

China voted in favour of the 2007 UNDRIP and has since conveyed that China has no indigenous-groups but acknowledges the contributions these groups make to the development of human societies.[91] By failing to recognise the Tibetan people as indigenous, the actions of the Chinese are justified as being Chinese nationalist promotion directed at all groups. Critics of China's assimilation policies argue that cultural genocide is carried out to suppress Tibet's nationalism and therefore their potential call for self-determination and independence. Independence is not the only desire of Tibetans; indeed, the Dalai Lama has consistently pleaded for autonomy rather than independence, whereby Tibetans would be free to practise their cultural and religious beliefs within their own territory, a condition stipulated in the Seventeen Point Agreement[92] but never granted. By recognising the Tibetans as indigenous, China would need to protect Tibetan cultural identity but also support these nationalism ideals.[93] Which it is not, evidently, keen to do.

The cultural genocide in Tibet is deliberate and one born out of politics: a modern-day colonial rule, similar to those which prohibited the inclusion of cultural genocide in the 1946 Genocide Convention. Tsering Shakya deems that the policies implemented in Tibet by the Chinese are not unlike those of the former Western colonial powers; in a bid to civilise the indigenous groups, all such scenarios led to disrupted cultural identity, loss of traditional epistemology, high levels of native exploitation, unjust claim to territory and disintegration of social structures.[94] In Tibet, these efforts, deemed as cultural homogenisation, seek to create a cultural standardisation that "nationalises" the Tibetans to communist Chinese society.[95]

The anti-Chinese unrests and self-immolations are a resistance to this cultural homogenisation, highlighting Tibet's desire for cultural and spiritual recognition. However, China dismisses these as acts of terrorism supporting the despotic Dalai Lama and has as such gained support by speaking of the "disruption" they cause to

[90] D. Nersessian, op. cit., pp. 1-3.

[91] M.C. Davis, *Tibet and China's 'National Minority' Policies*, "University of Hong Kong Faculty of Law Research Paper" 2012, No. 31, pp. 1-17.

[92] The Seventeen Point Agreement is a contract which was signed by the Tibetan de facto government and the People's Republic of China. It affirmed sovereignty to China on the condition of autonomy in Tibet. Tibet dismisses the legal binding of the agreement as it was signed under political pressure, and China has continuously broken the conditions stipulated in the contract.

[93] L. Brilmayer, *Secession and Self-Determination: One Decade Later*, "Yale Journal of International Law" 2000, Vol. 25, pp. 273-321.

[94] T.W. Shakya, op. cit.

[95] D. Conversi, *Cultural Homogenization, Ethnic Cleansing and Genocide*, in: R.A. Denemark (ed.), *The International Studies Encyclopedia*, Wiley-Blackwell, Oxford 2010, pp. 719-742.

the national unit:[96] whilst culture has been deemed an important right for groups, its importance does not always hold up against territorial integrity.

This notion finds itself declared in various UN Resolutions:[97] "Any attempt aimed at the [...] disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and the principles of the Charter of the United Nations."[98]

So whereas the UNDRIP and other human-rights instruments do make reference to the right to practise one's culture, it permits this so long as it does not jeopardise the state's sovereignty or disrupt national unity. This paradoxical notion thus indicates that the indigenous Tibetans, who are culturally and ethnically distinct from Han-Chinese populations, have a limited basis for expressing their cultural identity and can only do so if the state warrants it. So, not only are the Chinese authorities able to continue their acts of cultural genocide but any acts carried out by the Chinese following Tibetan resistance are justified under this notion. The protection of cultural identity and the safeguarding of ethnicity under the UNDRIP remains political rhetoric.

Article 27 of the ICCPR, whilst legally binding and thus holding more weight in international law, has also proved inadequate in protecting Tibetans from cultural genocide as, though China has signed the covenant, it has not put any structures in place for its implementation, in other words it has yet to ratify it. This strongly highlights that, despite signing the treaty over 17 years ago in 1998, the commitment to actually comply with the regulations set out in the convention is severely lacking, with no clear evidence to suggest otherwise. Ratification or accession of the treaty would indicate China's willingness to be held accountable should any violations occur. By not doing so, China clearly demonstrates its position with regards to protecting Tibetans from cultural destruction.[99]

As Lemkin originally proposed, for culture to be protected it needs to incorporated into the Genocide Convention, which would make it illegal under international law and, as it holds the status of *jus cogens*, would bind all member states to intervene in cases of cultural genocide.[100] Currently, the international community has

[96] W.W. Smith, *Tibet's Last Stand?...*

[97] Article 2(4) of the Charter of the United Nations (26 June 1945, 1 UNTS XVI, amended in 1963 [557 UNTS 143], in 1965 [638 UNTS 308], and in 1971 [892 UNTS 119]); UNGA Resolution 1514 (XXV), Declaration on the Granting of Independence to Colonial Countries and Peoples, 14 December 1960, UN Doc. A/RES/1514(XV) (1960); UNGA Resolution 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 24 October 1970, UN Doc. A/RES/25/2625(XXV) (1970); see further J. Summers, *Peoples and International Law: How Nationalism and Self-Determination Shape a Contemporary Law of Nations*, Martinus Nijhoff Publishers, Leiden – Boston 2007.

[98] Article 6 of the Declaration on the Granting of Independence to Colonial Countries and Peoples.

[99] C. Dingding, *China's Participation in International Human Rights Regime: A State Identity Perspective*, "Chinese Journal of International Politics" 2009, Vol. 2, pp. 399-419.

[100] W. Morrison, *Criminology, Civilisation and the New World Order*, Routledge Cavendish, Abingdon 2006.

largely ignored the cultural suppression of the Tibetans. Indeed, upholding international human rights frameworks has become secondary to self-serving economic interests; with access to China's large and growing economic market, challenging the human-rights violations of the Tibetans poses a risk to future economic activities and potential business deals for States which benefit from friendly relations with China.[101]

Conclusion

Regarding Tibet, a continuum between colonialism, cultural genocide and cultural homogeneity exists: one linked to China's nationalist dominance. Critics of the notion of cultural genocide say that ethnicity is persistently amplified to strengthen nationalist movements and, where nationalists are pressing for self-determination, used as a weapon to oppose assimilation.[102] Sautman argues that this is the case with Tibet, whereby proponents of a free Tibet consistently draw on the contrasts between the Tibetan and Han-Chinese cultures.[103] This research has explored Tibetans' status as an indigenous group and the significance of cultural identity to their development, which merits them to greater cultural protection.

Whilst culture has been placed on the international agenda, the understanding of what it means to human affairs, development and wellbeing is, at present, severely lacking at state level and secondary to economic and nationalist interests.[104] China's disregard of the importance of culture for the Tibetans is not a standalone case. Indigenous groups the world over are fighting for recognition and their right to culture.[105]

The status of indigenous groups may have improved in the last half-century, but much of this improvement remains on paper. The right to freely and without prejudice practise culture has the power to eliminate the mass suffering of the Tibetan people. Article 8 of the UNDRIP has, however, proved inadequate at protecting Tibetans from cultural genocide, despite clear evidence that China is violating the Declaration and other forms of international law, for example Article 27 of the ICCPR. China could argue that many of these events occurred prior to the implementation of the UNDRIP, however their policies show ongoing cases of cultural

101 E. Herzer, *Occupied Tibet: The Case in International Law*, Tibet Justice Center, Oakland (CA) 2013.

102 H. Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights*, University of Pennsylvania Press, 1996.

103 B. Sautman, *Colonialism, Genocide, and Tibet*, "Asian Ethnicity" 2006, Vol. 7, pp. 243-265.

104 E. Nimni, *National-Cultural Autonomy as an Alternative to Minority Territorial Nationalism*, "Ethnopolitics" 2007, Vol. 6, pp. 345-364.

105 D. Champagne, *Rethinking Native Relations with Contemporary Nation-States*, in: D. Champagne, S. Steiner, K.J. Torjesen (eds.), *Indigenous Peoples and the Modern State*, Rowman & Littlefield Publishers Inc., Walnut Creek – Lanham – New Your – Toronto – Oxford 2005.

suppression and no evidence of revoking them. Cultural genocide, therefore, needs to be addressed in customary international law and not to be seen as inferior or secondary to physical genocide.

Ironically, cultural genocide for Lemkin was the most important component of genocide, as *genos* depicted culture,[106] the group that exists by its social morality, which is indeed true for the ethnic Tibetans in China.

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[106] R. Lemkin, op. cit., pp. 145-151.

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RESEARCH ARTICLES

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Memory and Transitional Justice: Toward a New Platform for Cultural Heritage in Post-War Cyprus

Abstract: This paper deals with two issues often dismissed when assessing cultural expressions during conflict and post-conflict situations. The first concerns the memories of victims and perpetrators as a resource for cultural heritage identification. The second involves the limitations on institutions trying to incorporate cultural issues into processes and discussions that are mainly political. This dichotomy is also reflected in the UNESCO doctrine. On the one hand, the official narratives endorsed by UNESCO and its Member States dismiss memories (some of which include recollections of conflict) that do not complement or support adopted national narratives. At the same time, UNESCO only honours and recognizes political agreements and actors which are seen as unquestionable and uncontested. Using the specific case of Cyprus, I propose an alternative lens through which to view cultural heritage in conflict and post-conflict areas and situations. In particular, I argue that Transnational Justice offers an effective platform to redress cultural heritage. At the same time I address the two limitations mentioned above.

Keywords: Transitional Justice, cultural heritage, UNESCO, Famagusta, Cyprus

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Cyprus: At a Dead End

This paper draws attention to two issues often dismissed when assessing cultural expressions during conflict and its aftermath, or during a stage of transition between conflict and a stable form of society and governance. The first pertains to the memories of victims and perpetrators as a resource for cultural heritage identification, while the second involves the limitations placed on institutions to incorporate culture in the transition process, which is considered to be mainly political. This dichotomy is also reflected in the UNESCO doctrine. On one hand, it honours political agreements where actors are unquestionable and uncontested, while at the same time it dismisses the memories arising from conflicts, which remain unrecognized unless those memories are included in national narratives.[1]

Using the specific case of Cyprus, I propose an alternative lens through which to view cultural heritage in conflict and post-conflict areas, highlighting the limitations of the international cultural heritage system to address the issue. Looking at Cyprus and its unresolved political issues, I propose an alternative perspective to elucidate the role of cultural heritage in the formation of an inclusive society. This perspective is Transitional Justice. In particular, I argue that Transnational Justice offers an effective platform to redress cultural heritage. Furthermore, I address the two limitations mentioned above.

Cyprus, as one of the oldest unresolved conflicts in the world, can play an important role in understanding the factors and facets that contribute to the destruction of heritage assets. In as much as an in-depth examination of the causes and roots of the Cyprus issue is beyond the scope of this paper, it is sufficient to note here that scholars propose different perspectives and theories on how and why the division of the island emerged and why the conflict has remained unresolved. Some scholars point to the lack of a common Cypriot identity, the failure of peace talks and discussions, and the economic disparities between the sectors of the population, while others emphasize the historical divide between the Turkish and Greek Cypriots (and their mother countries) and the militarization of the issue as the crucial factors.[2]

[1] The general recognition of this statement, as a consequence of analysis of the cultural heritage concept over time, conventions, expert meetings, declarations and doctrinal documents, represents a step forward in acknowledgment of the political component of heritage, at the global, regional and local levels. The political component is by far the most relevant consideration to understanding the current heritage condition of Famagusta. Although this is an academic work, it is unrealistic to leave to academics the responsibility to prevent the additional decay of the site. The reality speaks for itself. International NGOs and independent practitioners can, and have, produced an important body of literature on Famagusta. However, as it stands now, cultural heritage works remain a highly political endeavor for both the discussion of this research and for the politics of Cyprus and North Cyprus. The direct linkage between UNESCO – Nation State – and policy design operates as an important obstacle on resolving the current situation of Famagusta.

[2] For additional information on the contemporary historiography for the Mediterranean and Cyprus, see: P. Horden, N. Purcell, *The Corrupting Sea: A Study on Mediterranean History*, Blackwell Publishers, Oxford 2000; I. Malkin (ed.), *Mediterranean Paradigms and Classical Antiquity*, Routledge, London 2005; T. Morgan,

In the 1950s, the dominant political ideology in the island was to unite with Greece (Enosis). This was championed by the National Organization of Cypriot Fighters (EOKA).[3] The group staged a violent terrorist campaign against the British administration. Following a series of conferences between the British, Greeks, Turks, and representatives from the Cypriot groups, the new Republic of Cyprus was created in 1960. As a newly independent State formed out of a volatile society without a strong sense of trust or a shared identity, cracks in the system quickly emerged.[4]

Turkish Cypriots, who feared the union of Cyprus with Greece, simultaneously clamored for the division of the island. The decade following independence was characterized by sporadic intensification of inter-communal disputes. By 1963, fighting ensued following the proposed changes to the constitution. In 1974, the inter-communal conflict in the island reached its peak when the Cypriot National Guard, supported by Athens, declared a coup against the elected President Archbishop Makarios III. When the skirmishes between the two groups intensified (and when the union of Cyprus with Greece appeared imminent) Turkey sent in troops and invaded the island. In the course of the summer, Turkey's forces occupied about 30% of the island, causing a massive population flow from north to south by Greek Cypriots, and from south to north by Turkish Cypriots. The division of the island was formalized in 1983 with the creation of the Turkish Republic of Northern Cyprus, a State unrecognized by the United Nations, and this status has remained in place until the present day.

Famagusta's (a heritage town located in North Cyprus) main asset derives from its importance as a reminder and memory of the turbulent past of the Mediterranean basin and its connections between East and West. Yet it cannot be under-

Sweet and Bitter Island: A History of the British in Cyprus, I.B. Tauris, London 2011; A-M. Olteanu, "The European Union and the Local Freeze: The Cyprus Conflict", paper presented at the course Challenges of a New Europe: Chances in Crises, Utrecht School of Governance, The Netherlands, 18-24 April 2010, http://www.inclusionexclusion.nl/site/?Previous_editions:Edition_2008:Papers_Participants [accessed: 4.12.2014].

[3] "EOKA was organized by Col. Georgios Grivas [...] with the support of Makarios III, Orthodox archbishop of Cyprus. [...] By early 1957, however, a reinforced British army renewed attacks on the mountain hideouts of the considerably outnumbered EOKA. Violence subsided after Makarios's release from detention in exile in March 1957, though there were increased hostilities leading up to mid-1958, when EOKA clashed with Turkish Cypriot guerrillas. In 1958 Makarios announced he would accept independence for Cyprus rather than *enosis*. In February 1959 a compromise agreement was concluded between Turkish and Greek representatives at Zürich and endorsed by the Cypriot communities in London, and EOKA disbanded. [...] The Greek government reentered Cyprus secretly to form EOKA B, to 'prevent a betrayal of *enosis*'. [...] Makarios (then president of Cyprus) officially proscribed EOKA B in April 1974, three months before he was ousted and before Turkish forces invaded and divided the country in a brief civil war. In 1978, EOKA B declared its dissolution." EOKA (*Encyclopædia Britannica Online*), http://www.britannica.com/topic/EOKA [accessed: 8.11.2015].

[4] See R. Bryant, *Imagining the Modern: The Cultures of nationalism in Cyprus*, I.B. Tauris, London 2011; J. Scott, *World Heritage as a Model for Citizenship: the Case of Cyprus*, "International Journal of Heritage Studies" 2002, Vol. 8, p. 100.

stood only in historic terms, but also in the value of the memories it encompasses. Famagusta is a ruined city, unable to transcend from the past to the present and serve as a witness to the societies, ethnicities, and cults arising from the Persian and British empires. Next to the old town of Famagusta lies the former tourist district of Varosha. It used to be a highly visited area until the 1970s, which boasted of its buildings from the "modern" period between 1950s and 1970s. Varosha was entangled in the design of the "Green Line" – a division established by the UN to prevent further violence between the two predominant communities in Cyprus.

The "line" also divided Nicosia, giving it the dubious title of "last divided city in Europe". Together with the Green Line, it comprised the so-called "buffer zone", a form of international territory ruled by UN forces with no political alliances in the island. This buffer zone serves to house the "good offices" and host talks and meetings surrounding the Cyprus issue. In other words, the buffer zone merely divided up two heritage sites: Varosha in the Municipality of Famagusta, and the city of Nicosia. These areas represent two different moments in time, suspended and hanging in the balance by international forces for the last forty years. Contrary to the original objective of the buffer zone, which was to prevent violence and escalation, the legitimization of the division has caused irreversible damage to the heritage in Cyprus. Heritage assets have been neglected. Famagusta's suburb of Varosha was cleared of its inhabitants. Its buildings were deserted, with some being physically destroyed, and Varosha remains unoccupied to this day.

In this regard Cyprus, and the city of Famagusta in particular, provide an ideal paradigm not only to understand the connections between the East and the West throughout time, but also to our understanding of cultural heritage. Cultural heritage, being an asset that transcends generations, recognizes peoples from all periods and backgrounds, including those arising from any recent period, whether conflict-laden or not. It also speaks of fairness in relation to the past because it allows for the elaboration and interpretation of multiple narratives, without favouring one or the other. It is a reflection of the plurality of a society, rather than a unified identity constructed between communities. This is an ideal approach to the case of Cyprus.

At the same time, cultural heritage offers a scenario for memorialization of the memories that have impacted culture and society. At a deep level, cultural heritage reflects facts that are beyond identity, boundaries, and political frameworks. Since everyone is entitled to their own culture, cultural heritage is regarded as a part of Human Rights.[5] It constitutes a legal argument for communities that lie both within and outside boundaries, such as cosmopolitan communities, diasporas, refugees, internally displaced people, and people living in contested or unrecognized areas, allowing them to claim their own cultural and heritage

[5] Universal Declaration of Human Rights, 10 December 1948, UNGA Res 217 A(III).

expressions.[6] In this respect cosmopolitan communities, such as those that recognize the cultural heritage present in Famagusta as their own, cannot expect acknowledgement of their primary rights (including cultural rights) to be based on the legitimacy of governments.

As is visible in Cyprus, the governments from both parts of the island have chosen coercion over the heritage assets of Famagusta as political argument. Work in cultural heritage in the north is considered subversive to both forms of sovereignty in Cyprus. This is the case unless and until cultural heritage work is seen as a sign of recognition of the accountability of the North over those assets. Alternatively, the work is triangulated through international organizations with regional mandates, such as the EU with its focus on historic structures, mainly in Nicosia. Cultural heritage has, throughout the years, been assumed to be a moral issue. When understood as such, it does not require the argument of universality. It simply exists for everyone, without need for characterization, segmentation, and classification.[7]

Cultural Heritage and its Capacity to Hold Memory(ies) and Memorialization at the Same Time

Cultural heritage offers information that is fundamental in the construction of social life. The role of politics, religion and institutions frequently move at differing paces, in different directions, and pursue different objectives than those of one's community, society and generation. This information is frequently represented by the memories that can be read in expressions of cultural heritage. Buildings and sites hold memories that are sometimes difficult to process, but should nevertheless be nourished in order to offer clues to those memories to future generations. Heritage discussions have the ability to provide a multilayered, multidimensional and multiform setting in which conversations about memories can be carried out – particularly those that are difficult to face in the present, but which others may analyse and see differently in the future.

Viewed in this light, it becomes crucial to discuss the role of both memory and forgetting. Here I contextualize memory within the framework of heritage and explain the cord linking heritage and memory. To put it plainly, the relationship between heritage and memory consists of two fundamental facets: 1) memory shapes, influences, creates, and justifies heritage; and 2) heritage organizes, frames, and in extreme cases even disregards memory.

[6] F. Shaheed, *Access to Cultural Heritage as Human Right*, http://www.ohchr.org/EN/Issues/CulturalRights/Pages/Consultation10Feb2011.aspx [accessed: 5.10.2015].

[7] M. Barnett, M. Finnemore, *Rules for the World: International Organizations in Global Politics*, Cornell University Press, Ithaca, NY 2004.

As Macdonald puts it the context of the Cyprus case:

> distinct affective sensibilities embedded in different socio-political situations that may co-exist – in this case, between the different populations of the island. […] after the 1974 division of the island, "nostalgia… became a patriotic duty" for Greek Cypriots who had been displaced […] Turkish Cypriots , however faced "an official rhetoric that the past was all negative and that the north was now their true 'homeland'", which meant that they were not supposed to "feel nostalgic towards the homes they left behind in 1974, as that could imply that they wished to return or that life there was not always bleak" […] in what is perhaps an over-stated opposition, one may characterize the Greek Cypriot position as nostomania and that of Turkish Cypriots as nostophobia […].[8]

In other words, Cyprus is immersed in a political turmoil that prevents the island from recognising memories of destruction and despair – which could help in building an inclusive society – except in the context of an agreed separation or full unification. The construction, definition, and development of the concept of memory have taken different paths and have been adapted to contemporary positions on human, and therefore social, behaviour.

Cultural Memory, when related to other human beings, is studied in the form of relationships and links which have a direct relationship with the memory aspect of cultural heritage. Jan Assman, a German Egyptologist, has reflected on this aspect of memory. He argues that Cultural Memory serves to save knowledge that directs long-term behaviour and experience, as opposed to Communicative Memory, which is subject to everyday life and usually lasts only three to four generations. Similar to Cultural Memory, the concept of Social Memory is also important as a perspective on the function of memory in societal unification. Paul Connerton explains that Social Memory "[is] control of a society's memory [that] largely conditions the hierarchy of power. Seen in this light, social memory is inherently instrumental: individuals and groups recall the past not for its own sake, but as a tool to bolster different aims and agendas."[9]

But the question arises: how do personal memories become a part of collective memory? Some scholars argue that aspects like rituals and traditional activities within communities condition their memory formation.[10] There are forms of memory that do not necessarily come from individual experiences but from the context.[11]

[8] S. Macdonald, *Memorylands: Heritage and Identity in Europe Today*, Routledge, New York 2013, p. 94.

[9] S. Hoelscher, D.H. Alderman, *Memory and place: geographies of a critical relationship*, "Social & Cultural Geography" 2004, Vol. 5, p. 349.

[10] For Kasabova this argument is: "Unlike the notion of commemoration, the notion of memory (at least as regards conscious and personal memory) implies that we consider ourselves as agents: when we retrieve an event from our past experience we construct the past by positioning it and taking it as true." A. Kasabova, *Memory, Memorials and Commemoration*, "History and Theory" 2008, Vol. 47, p. 335.

[11] Kansteiner expresses it as: "Elites produced sites of memory in language, monuments, and archives which had one common referent, the nation-state, and which strove to secure the future of the nation-state

These "collective" memories have grown into a strong argument for the regularization of the Cyprus political issue and unification of the island,[12] and to some extent to the shape of its identities.[13] This issue has permeated the cultural heritage sector and its very core principles. Traditionally, the inclusion of memory within heritage requires a collective recognition and endorsement. This principle may be viewed as an assertion that governments, as publicly elected bodies, have a collective endorsement, and that what States recognize as cultural heritage is therefore in the public's interest.[14] In principle, this rationale is valid. However a closer look reveals how "collectiveness" is positioned as exclusively pertaining to what the majority recognizes, decides, and chooses to call cultural heritage. For example, those who resisted the siege of Famagusta in 1571 are seen as heroes, while the Ottoman army is portrayed as the victimizers, when, in fact, the Ottoman period positively contributed to the cultural heritage landscape of Cyprus as well as Europe. This suggests that the structure of power embedded in governments reflects the will of the elite, and often the dismissal of any threat to unity and solidarity. The same is true with respect to heritage views and recognition, where power politics is also apparent.

The constantly changing relationship between memory and society has impacted heritage formation. In this regard, two questions are pertinent: First, to what extent does the memory produced at the societal level transform, impact, and/or destroy the character of cultural heritage? Second, to what extent can cultural heritage be a game changer in the shaping of narratives that identify and define a community, in particular a community under conflict or in a post-conflict phase? These are fundamental questions that can produce more than one answer, depending on one's approach to cultural heritage. But what is important is that this strong relationship is acknowledged. The intention of this discussion is to highlight that as part of the dynamics of change in memory and identity, cultural heritage expressions also change. Furthermore, the physical characteristics of cultural

through compelling inventions of its traditions." W. Kansteiner, *Finding meaning in memory: A methodological critique of collective memory studies*, "History and Theory" 2002, Vol. 41, p. 183.

12 In Golden's perspective: "Leaders may, literally, dig up evidence of events long forgotten that may have had little significance in the social memory of the past but that are used to restructure or eliminate social memory in the present […]." Ch. Golden, *Where Does Memory Reside, and Why Isn't It History*, "American Anthropologist" 2005, Vol. 107, p. 271.

13 "[…] new political culture theory highlights the discursive dimensions of politics, seeing political language, symbolism, and claim-making as a constitutive of interest and identities." J.K. Olick, *Collective Memory: The Two Cultures*, "Sociological Theory" 1999, Vol. 17, p. 337.

14 The following clarifies this term: "Nancy Wood has delineated such an approach in her account of collective memory, the unconscious, and intentionality: [W]hile the emanation of individual memory is primarily subject to the laws of the unconscious, public memory – whatever its unconscious vicissitudes – testifies to a will or desire on the part of some social group or disposition of power to select and organize representations of the past so that these will be embraced by individuals as their own. If particular representations of the past have permeated the public domain, it is because they embody an intentionality – social, political, institutional and so on – that promotes or authorizes their entry." Kansteiner, op. cit., 188.

heritage reflect the multiplicity of transformations the heritage experiences over time. The division of Cyprus into two different and antagonistic regions polarized any discussion on the memory aspects of culture. However, the political division of the island does not reflect a division of its cultural heritage, because heritage is formed by communities and the memories embedded in it. In defiance of the political imposition of this division, new communities in the south and in the north have added new meanings to the heritage expressions that have been utilized in the political contestation in Cyprus.

A highly sensitive aspect of the history of Cyprus and of the relationships between regions in this part of the world is the Armenian population. The year 2015 marks one century following the ethnic cleansing of the Armenian population in what is today's Turkey. Cyprus, given its location and role in the politics of the region, can trace its Armenian population back to 1570, when the siege of Nicosia took place. Armenians were not indifferent to the events that marked the political and ethnic turmoil of the region throughout the centuries. While this paper does not explore the historical events, their political and social consequences, or the current political affairs that involve the Armenian population in Cyprus, it must be highlighted that the potential of the Armenian quarter in Famagusta is a key component of heritage construction, memorialisation, and justice in transition.

Transitional Justice: A Platform

The long history of conflict and the unresolved international recognition of Cyprus is reflected in the current deplorable state of its cultural heritage. More importantly, the case of Cyprus and its vital heritage assets is evidence of the limitations of the international system governing cultural heritage. The limitations of the current doctrine in cultural heritage are evident when we scan the condition of cultural heritage in the conflicts that have emerged after the creation of UNESCO.[15] For instance, the 1990s Balkan war remains sensitive to this day in heritage terms.[16] In this respect, the intricacy involved in framing a cultur-

[15] Additional works on this aspect are: M.R.T. Dumper, C. Larkin, *The Politics of Heritage and the Limitations of International Agency in Contested Cities: a Study of the Role of UNESCO in Jerusalem's Old City*, "Review of International Studies" 2012, Vol. 38; J. Blake, *International Cultural Heritage Law*, Oxford University Press, Oxford 2015; R. Harrison, *Heritage: Critical Approaches*, Routledge, London 2013.

[16] "Cultural heritage is often seen as an important factor in explaining the post-socialist landscape of the Balkans. The destruction of socialist identity and common heritage, as well as inventing new traditions and interpretations of the past, is a part of the general process of political, economic and cultural transition together with processes of European integration of the region. As the consequence of discrepant historical contexts as well as Western symbolic geography, the image of the Balkans has remained full of dichotomies – it is a misread, forgotten and isolated region, the "other" rejected Europe, the periphery – and it is adorned as an incredible phantasm of the Orient with passion, colours and emotions." M.D. Šešić, L.R. Mijatović, *Balkan Dissonant Heritage Narratives (and Their Attractiveness) for Tourism*, "American Journal of Tourism Management" 2014, Vol. 3, p. 10.

al heritage that openly contests nations and their constituents adds to the difficulties of engaging in effective and useful initiatives aimed at the preservation of heritage.

Moreover, the principles and legal definitions of property prevent realistic actions with respect to managing heritage. The consistent reaffirmation of this vision has built a system that excludes or neglects silenced and contested voices and memories – voices and memories that by all means have a right to justice and to recognition as part of fundamental cultural expressions. What really happens to the plethora of voices and memories present in heritage in places undergoing transition? What management framework should be applied to ensure that diverse memories are not dismissed in favour of the creation of a national myth? Both parts of Cyprus have certainly expressed their own arguments for not engaging in maintenance of the heritage located in the North. That has led to its neglect. Moving a step away from the discussion of memory, I now explore Transitional Justice as a legal framework for Famagusta; as a way to support the process of its coming to terms with its past based on dealing with its memories – including what is remembered, neglected, and forgotten. In this regard, Transitional Justice is useful for a number of reasons.

Transitional Justice is an alternative lens through which to view and discuss those gaps and caveats that are present when working on cultural heritage in places that, for a variety of reasons, are undergoing a transitional process from conflict. Transitional Justice is a legal model that facilitates transition from a troubled past to improved stages of social life. This is done in reference to past events by adopting transitional judicial and civil measures in order to re-frame the legacies of human rights violations, injustice, exclusion, and dilemmas at the moral, legal and political levels caused by such events.[17] This framework differentiates five major topics that need to be addressed: 1) criminal prosecutions; 2) truth commissions; 3) reparations programmes; 4) security system reforms; and 5) memorialization.[18] The utilization of Transitional Justice in rebuilding communities'

[17] "The field [Transitional Justice] has been described as an international web of 'individuals and institutions whose internal coherence is held together by common concepts, practical aims, and distinctive claims for legitimacy'. Indeed, the study of how societies emerging from periods of dictatorship and armed conflict that left a legacy of gross human rights violations is not only confined to academic research, but also of international NGOs." L. Viaene, *Voices from the Shadows: The Role of Cultural Contexts in Transitional Justice Processes. Maya Q'eqchi' Perspectives from Post-Conflict Guatemala* [PhD diss.], Ghent University 2010, pp. 4-5.

[18] See R.N. Lebow, *The Memory of Politics*, in: R.N. Lebow, W. Kantsteiner, C. Fogu (eds.), *The Politics of Memory in Post-War Europe*, Duke University Press, Durham, NC, USA 2006; B. Davis, *Violence and memory of the Nazi Past in 1960s-70s West German Protests*, in: P. Gassert, A.E. Steinweis (eds.), *Coping with the Nazi Past: West German Debates on Nazism and Generations Conflict, 1955-1975*, Berghahn Books, New York 2006; H. Rousso, *The Vichy Syndrome: History and Memory in France since 1944*, trans. A. Goldhammer, Harvard University Press, Cambridge 1994; R.L. Braham, *The Politics of Genocide: The Holocaust in Hungary*, condensed edition, Wayne University Press in association with the United States Holocaust Memorial Museum, Detroit 2000.

trust and peace has become a laboratory for emerging communities to come to terms with their violent past.

This framework encompasses the idea that fairness that leads to justice, and that justice is impartial to all, being therefore universal. The framework also emphasizes the need to enforce memories of troubled times as a way to prevent similar events from emerging again in the future. I have chosen three characteristics that can contribute to the elucidation of a future for Famagusta's cultural heritage. First, Transitional Justice is a framework within which to discuss the memories of destruction, human rights violations, history, and the past (all of which are substantial components of heritage construction). Second, Transitional Justice offers the establishment of a legal framework with international endorsement for communities to come to terms with events that impede the reconstruction of societies linked to troubled past, contested memories, and war. As such, it opens a path to attend to the management and potential development of the heritage that has long been neglected in Famagusta. Third, Transitional Justice provides a platform for opening up the dialogue necessary to set the conditions for "a future". Those aspects that embody the difficulties of a transition are also reflected in cultural heritage, and are particularly salient in Famagusta: a site with no international recognition, at the heart of divided communities, with severe management difficulties, a recipient of memories that speak of hybridity, disconnection, fragmentation and evolution and above all a site with a history that transcends the boundaries of Cyprus, the Mediterranean, and Europe.

As a legal concept, Transitional Justice is still a work in progress. Harvey M. Weinstein is among the leading scholars engaged in defining the principles behind Transitional Justice: its applicability, the conditions it requires to work, and how the concept is related to broader fields such as history, human rights, political transformation, truths, and even heritage legitimization and management.[19] According to the International Center of Transitional Justice:

> Transitional justice refers to the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses. These measures include criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional reforms.[20]

[19] For additional information on the work of Harvey Weinstein, see J. Halpern, H.M. Weinstein, *Empathy and Rehumanization After Mass Violence*, in: E. Stover, H.M. Weinstein (eds.), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, Cambridge University Press, Cambridge 2004; M. Biro et al., *Attitudes Toward Justice and Social Reconstruction in Bosnia and Herzegovina and Croatia*, in: E. Stover, H.M. Weinstein (eds.), op. cit.; P. Vinck, P.N. Pham, E. Stover, H.M. Weinstein, *Exposure to War Crimes and its Implications for Peace Building in Northern Uganda*, "Journal of the American Medical Association" 2007, Vol. 298; H. Liebling Kalifani, et al., *Violence against Women in Northern Uganda: the Neglected Health Consequences of War*, "Journal of International Women's Studies" 2008, Vol. 9.

[20] See the full text: *What is Transitional Justice?*, http://ictj.org/about/transitional-justice [accessed: 18.09.2015].

In short, Transitional Justice is a malleable and flexible concept, capable of adapting to specific conditions (political, religious, ethnic, ethical and geographical, among others) and providing the conditions to overcome the difficulties of the present, while cultural heritage as a system has and provides fixed principles, with the capacity to add features and classifications,[21] thus preventing the inclusion of unaligned forms of thinking.

Application of the perspective of Transitional Justice would liberate the cultural heritage in Famagusta from the need to be included on a "world list" or be part of a "world classification". Instead, it would allow it to be seen as a moral endeavour that does not need further assessment or comparison. Furthermore, when heritage is framed as a Human Right, it becomes a legal issue, which thus gives it a different weight and relevance, above local legislation. This is precisely one of the core difficulties Famagusta faces – the accountability of local governments over the future of its heritage assets. The legal aspects of cultural heritage detached from value, and beyond national boundaries and local legitimacy, begin to reveal the fluidity of its conceptualization. As I have stated, this conceptualization speaks of the need for preservation of such assets without an additional set of values and categorizations attached to their conservation.[22] Cultural heritage simply exists, and needs no further argument.

All conflicitive societies face the need for a closure process and the design of a "next stage", which vacillates between what is true, what is historically accepted or proposed, how communities maintain a sense of identity over troubled times, and how "others" identify them and their role during conflict. Here I present

[21] An interesting example is provided in the analysis of what is, in UNESCO's classification, "Cultural Landscapes": "The term 'cultural landscape' embraces a diversity of manifestations of the interaction between humankind and its natural environment. [...] Protection of cultural landscapes can contribute to modern techniques of sustainable land-use and can maintain or enhance natural values in the landscape. The continued existence of traditional forms of land-use supports biological diversity in many regions of the world. The protection of traditional cultural landscapes is therefore helpful in maintaining biological diversity" (*Cultural Landscapes*, UNESCO, 1992, http://whc.unesco.org/en/culturallandscape/#1 [accessed: 18.09.2015]). This classification should be compared with also FAO's Globally Important Agricultural Heritage Systems: "Worldwide, specific agricultural systems and landscapes have been created, shaped and maintained by generations of farmers and herders based on diverse natural resources, using locally adapted management practices. Building on local knowledge and experience, these ingenious agricultural systems reflect the evolution of humankind, the diversity of its knowledge, and its profound relationship with nature [...]" (*Biodiversity and Agricultural Heritage*, FAO, 2002, http://www.fao.org/biodiversity/cross-sectoral-issues/agricultural-heritage/en/ [accessed: 18.09.2015]).
The fact that there is no apparent difference between these two terms highlights one of UNESCO's most troublesome limitations: the recognition of nation-states as the main and accountable stakeholder of cultural heritage. For UNESCO, in Cyprus the only accountable stakeholder is the Republic of Cyprus.

[22] In this regard, it is important to ask if the traditional view on cultural heritage conservation, which – until now – has focused its actions only on the physicality of the asset, can shift its meaning to an alternative perspective, in which conservation refers to the connections heritage is capable of establishing between diverse communities, at different moments in time and under various forms of governance.

some examples that help – by contrast – illuminate the case of Famagusta. The first is van Riebeeck's Hedge in South Africa, which is a colonial garden from Dutch occupation times, with Victorian forms and foreign species. It was adorned with a plaque that read:

> This hedge of wild almonds was planted in the year 1660 A.D. by order of Commander Jan van Riebeeck as to mark the southern frontier of Cape Town Colony, from Kirstenbosh along Wynberg Hill, to a point below the Hen and Chickens Rocks. Thence the hedge continued by a fence of poles across the camp ground to the mouth of the Salt River.[23]

This plaque was subsequently removed and replaced by a more subtle one, thus establishing two versions of the same site. The new plaque says:

> This wild almond hedge was planted in 1660 by order of Commander Jan van Riebeeck as a barrier protecting the expanding European population against the indigenous Koisan inhabitants of the Cape. The hedge stretched from Kirstenbosch along Wynberg Hill to a point below the Hen and Chickens Rocks. Beyond this the barrier continued as a pole fence to the mouth of the Salt River. The hedge has come to be a symbol of exclusion.[24]

On the other hand, Singapore´s only World Heritage Site listed in 2015 is the Botanic Gardens. A city-state with three main ethnicities (Malay, Chinese and Indian) and three belief systems (Hindu, Muslim and Buddhism) decided to nominate a garden that honours colonial times, seemingly walking away from heritage and embracing nation-building. Once the site was listed as a World Heritage Site, Singapore's Minister of Culture Lawrence Wong emphasized that in the total land area of the world, (48.94 million km^2), there are only 1000 World Heritage Sites, and one of those sites is the Botanic Gardens, located in Singapore, a tiny island of approximately 700 km^2. In other words, he asserted that Singapore is of world importance.

This affirmation was later reinforced by Minister Wong at the Daniel S. Sanders Memorial Lecture for the 19th International Symposium of the International Consortium for Social Development (ICSD 2015), where on 9 July 2015 he stated the following:

> You see it in the way we unite together around our heritage, around our well-loved places, like the Singapore Botanic Gardens, which was recently inscribed as our first ever UNESCO World Heritage Site. [...] The domains of arts, heritage, sports, and

[23] L. Lixinski, *Cultural Heritage Law and Transitional Justice: Lessons from South Africa*, "International Journal of Transitional Justice" 2015, Vol. 9, pp. 278-287.

[24] Ibidem.

> community also help to fortify our sense of nationhood. In a world of ever-increasing automation and efficiency, I believe that these softer aspects of our humanity become even more important. These are the things that shape our national identity. And a national identity is what makes a society resilient amid turbulence and destructive change. A national identity is what enables the whole to be greater than the sum of its parts.[25]

Europe's experience in dealing with the difficult memories in its recent history has indubitably been strenuous. The Second World War left open wounds throughout much of the continent, wounds which continue to raise discussions on how to address the past, its complexity, and the consequences for the present. The defeat of the Nazi regime left unresolved a number of questions, at the heart of which was how to deal with a Nazi past which many European societies possessed in one form or another. Germany, France, Belgium, the Netherlands and Hungary have explicitly addressed issues of accountability and justice, therefore of memory (outside the national narrative), collective remembering (not the same as collective memory), and embarked upon the search for answers to heal the wounds of war. At different times and for a variety of reasons, Spain, Portugal, Greece and Poland have also ventured on several processes of memory telling, truth discovery, and justice.[26]

This cornucopia of complexities and unresolved questions remaining in Europe are also visible and linger on in Famagusta. Greek Cypriots and Turkish Cypriots have nurtured their differences throughout the years, and new communities that are not engaged in that dilemma have arrived in the island (immigrants from Africa, Turkey, the Philippines, Russia and the Middle East, among others), communities which also require space in society to build their own memories in a historically multicultural island. If North Cyprus is seen as a transitional stage rather than a place that has reached a status quo, it is possible to come to terms with a past that still presents serious difficulties for the future of the island. While cultural heritage has served numerous ideologies throughout time, the Cyprus case

[25] See the full text: *Speech By Mr Lawrence Wong, Minister For Culture, Community And Youth & Second Minister For Communications And Information, At The Daniel S. Sanders Memorial Lecture For The 19th International Symposium Of The International Consortium For Social Development (ICSD 2015) On 9 July 2015*, http://www.unisim.edu.sg/Happenings/speeches/Pages/S2015-7.aspx [accessed: 5.10.2015].

[26] For more on Transitional Justice, see Ch.J. Colvin, *Purity and Planning: Shared Logics of Transitional Justice and Development*, "The International Journal of Transitional Justice" 2008, Vol. 2, pp. 412-425; J. Elster, *Coming to Terms with the Past: A Framework for the Study of Justice in Transition to Democracy*, "European Journal of Sociology" 1998, Vol. 39; C. Hesse, R. Post (eds.), *Human Rights in Political Transitions: Gettysburg to Bosnia*, Zone Books, New York 1999; N.J. Kritz, *The Dilemmas of Transitional Justice*, in: N.J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Recon with Former Regimes*, United States Institute of Peace Press, Washington DC, 1995, pp. xix-xxx; A. Margalit, *The Ethics of Memory*, Harvard University Press, Cambridge (MA) 2002; H. Rousso, *History of Memory, Politics of the Past: What For?*, in: K. Jarausch, T. Lindenberger (eds.), *Conflicted Memories: Europeanizing Contemporary History*, Berghahn, Oxford 2007; R.G. Teitel, *Transitional Justice Genealogy*, "Harvard Human Rights Journal" 2003, Vol. 16, pp. 69-94.

offers the possibility to design a narrative with connections to a future where there is no fear for the past, because truth is reachable for all. In the following section, the linkages between cultural heritage, memory, and memorialization will be discussed, followed by an assessment of the application of Transitional Justice in managing the cultural heritage in Cyprus.

Applying a Transitional Justice Framework to the Cultural Heritage of Cyprus

Transitional Justice tackles the need to remember, as well as remind, by proposing memories and actions to encourage remembrance. I suggest that at the very core of this process, cultural heritage assets provide a malleable means to remember, remind and establish clear connections to memory and the past. The connections between history, memory, and Transitional Justice will here be explored in the case of cultural heritage in Famagusta.

Memory is a distinct field of study and an evolving concept, which can be defined from various vantage points. I consider the concept of memory as basis for valuing cultural heritage in a dynamic and evolving manner. This is in part because cultural heritage has been used to erase, transform, and manipulate those memories that contained inherent conflict for governmental structures, countries and dictatorships around the world. However, memory helps in post-conflict recovery. Cultural heritage can be used to substantiate and demonstrate that some memories, even when difficult to deal with, are necessary for the reconstruction of societal structures and healing.

The fact that Famagusta has witnessed, throughout its existence, such a variety of cultures means that a variety of tools are needed to assess events in terms of both heritage formation and destruction. The link between remembering and forgetting has been brought into focus by the 1974 conflict. The changes of street and village names, for example, gives an idea of how much the current community wants to drive away a past that is full of turbulent times by erasing those things that could remind them of it: the village called Tatlisu changed to Akantou; Kazafani to Ozanköy, etc. When analysing this situation, it can be seen that the use of new names signified the recognition of changes which had been resisted for more than four decades by the previous communities, which were displaced.

Cultural heritage – as it stands now – is entrenched in the idea of conservation, and conservation has been developed as part of the idea of territoriality, nationality and identity. However, the value of Famagusta involves its representation of the legacy of conflicts that transformed the place throughout time. The series of wars and conflicts in Famagusta, involving commerce, religion etc., has had profound effects on buildings, decorations, craftsmanship, etc. All this gives Cyprus a singularity, and Famagusta a unique status as a witness of various times, eras, styles,

and also conflicts. For example, Saint Nicholas´s Cathedral in Famagusta held the coronation of the King of Jerusalem throughout the Lusignan era (from 1186); subsequently the building was modified and converted into the Lala Mustafa Pasha Mosque during Ottoman times.

The pain that conflict brings into the memories of communities has become a form of denial, or has resulted in forms of nationalism that also represent denial. What would be left in Famagusta if its memories of conflict were erased? Probably very little. A walk throughout Famagusta is generally an opportunity to think about the past, destruction, epochs, empires, technology and war. Opportunities arise on every corner to reflect on society's values. How does one complete a city that seems to be in a permanent state of incompleteness, and endow it with opportunities to live a dignified life in the near future? This is a question I have asked myself at many different moments during my work in Cyprus. How does one organize the puzzle of time in fair way, so that we do not incubate more destruction, more conflict and more segregation? Certainly the "flag" of cultural heritage has shown its distinct limitations in this regard over the past fifty years.

The neglect of Famagusta's cultural heritage is reflected in two phenomena. First, a great number of the current community living in the centre of town have been "resettled", coming originally from mainland Turkey, and so have limited connections with the heritage site. Secondly, the question of a practical settlement creates uncertainty for the future and the risk of a loss of "autonomy". This fact demonstrates the futility and irrelevance of addressing heritage in terms of identity or national pride, when the reality is such that the cultural heritage in Famagusta is profoundly disconnected from the communities living in it, and requires new meanings to re-construct its significance for and between the citizens and their physical context. The re-framing of cultural heritage to include a Transitional Justice framework could help build up a real civil society and create a sense of belonging and ownership of those buildings and structures that currently communicate so very little to their inhabitants. The dynamism and evolution of the cultural heritage model proposed here can remedy the loss of identity which has emerged from four decades in limbo, making it accessible to residents as well as visitors. A response to unconventional forms of conflict might be unconventional forms of societies, with cultural heritage and its memory component playing a key role.

Cyprus is a transnational place. The North makes little sense without the South, and vice versa. The way the island shaped its connections to the world over the centuries, the way it structured its cities and ports, its agriculture and customs, are distorted by the latest division into boundaries, and even if there is a settlement, the roots of Cypriots lie in every corner of the island. In this case, a forceful transition can unfold into new ethnic disturbances, religious unrest, and a new cycle of conflict. A transitional stage is designed to address the issues that are unresolved and prevent them from being exacerbated in the future. As Craig Calhoun

puts it, "a strong public sphere where the past can be addressed depends upon a favourable organization of civil society".[27] This approach is not focused only on the past, but also on aspects such as the economy, inequity, and unemployment which the emergence of a new (post-conflict) system might bring with it.

Hence, Transitional Justice is a process necessary for healing. Victims and perpetrators require forms of expressions and institutions to recognize their role in the conflict. Although many would wish to forget, healing or coming to terms with the past creates a long lasting "wellness" for the whole of society. Other aspects that are relevant during transitional processes deal with unresolved issues concerning property (although some would like to believe Famagusta does not have such issues), the tenure of nationalized buildings, access to official documents on missing persons, truth, religious property, oral history and memorialization. But these are aspects of the Cyprus issue that probably no governmental organization (either in North Cyprus or in the Republic of Cyprus) is willing to confront.

The stage of transition that I use to frame Famagusta's cultural heritage is one that is generally employed after a conflict, internal conflict, or a process of transformational change in political terms, for example from a totalitarian military dictatorship to democracy, or from communism to a different form of government. Changes are frequently ushered in with violence, and violence impinges on human rights. Transition itself is a historical process in which many facts, events and truths are unclear and therefore misleading. History is as much necessary in a transitional process to understand the events that led to violence or conflict as it is necessary to document the violence itself. It gives clarity to past events, their causes, and their consequences. More than factual, history in relation to transitional stages and justice has a role in the prevention of forgetting.[28]

Transitional Justice is a tool to assist in coming to terms with the past in conditions where law, human rights, violence and truth are permeated by mixed emotions and subjectivities. Cultural heritage here becomes a main component in truth telling and remembrance, which facilitates the coexistence of multiple narratives and versions of the past: historical, sociological, psychological, and "official". It also welcomes a dynamic re-assessment of events that can be interpreted in multiple ways. The relevance of cultural heritage is fundamental to the Transitional Justice process to help us understand that history is incomplete when memories are missing from its narratives. Memory, as Pierre Nora describes it, is what history dismisses:

[27] O. Simić, Z. Volčič, *Transitional Justice and Civil Society in the Balkans*, Springer, New York 2013, p. 4.

[28] N. Wouters, *The Use of History in the Field of Transitional Justice: A Critical Introduction*, in: N. Wouters (ed.), *Transitional Justice and Memory in Europe (1945-2013)*, Intersentia, Cambridge 2014, p. 18.

> What we are now in the habit of calling 'memory' is in reality the history of those who have been forgotten by History, those who have been excluded from official history because they live in the margins of society; hence the founding connection between memory and minority groupings.[29]

A transitional scenario yields the opportunity to incorporate heritage as a main component of life in Cyprus, and as such it opens the possibility to re-frame it, re-define it and re-develop it, in ways that recognize the transnationality of its nature, its role in the memory of Europe, and its key role in the rebuilding of a society that has endured so much for so long. It is clear that places and territories that have endured a conflict require, in the process of overcoming events from the past, forms of remembrance, mechanisms to make peace with the past, and the assurance that the places of memory will remain as part of a narrative that is closer to society, and more distant from nationalism and politics. In addition to memories, remembrance, and historic events and their relationship with identity, cultural heritage sites remain as assets that can permanently become sources of new interpretations, new discoveries, and new discourses. These also include difficult memories.

Applying a transitional scenario also gives heritage assets a more permanent presence in the locus of a community. The separation of cultural heritage from memory, as established in the international cultural heritage system, has permitted the manipulation of the past, framed as history. At the end of the day, I assume that the tenets of a holistic Transitional Justice process in Famagusta would unlock a whole process of confronting the prevailing issues in Famagusta. In this process, cultural heritage would not only serve as a means to overcome the political barriers and instigate efforts to deal with the history of wars, conflicts, and displacements that have plagued Cyprus. It would also be subjected to a proper management model with the help of the international civil society (NGOs), the private sector, and the general public.

The recent works in one of the remaining buildings in the Armenian quarter (known as the Armenian Church) and the meticulous job in securing a wall painting called the "Forty Martyrs" make an important contribution to the reading of the past – the far past in the form of physical materials, and the recent one, in the form of memories. The participation of neutral actors, additional stakeholders and non-political organizations such as international NGOs places Famagusta at a level where an open discussion is possible on the shape of society Cyprus is projecting for the future. By applying the framework of Transitional Justice within Cyprus, the potential the Armenian Church and the Armenian quarter include the following: 1) Memorialization of the events of 1915 (Armenian ethnic

[29] H.K. Anheier, Y.R. Isar, *The Cultures and Globalization Series 4: Heritage, Memory & Identity*, Sage Publications, London 2011, p. x.

cleansing) and 1974 (Turkish military occupation of the quarter); 2) Participation of neutral international stakeholders (Nanyang Technological University and the World Monument Fund); 3) Remediation, by providing a neutral location for the Armenian community to hold memories; 4) Reinterpretation and the inclusion of narratives that are openly painful but necessary to deal with; and 5) Re-conceptualization of a heritage site and the re-formulation of values to allow the Armenian quarter (Church included) to develop and establish contemporary links and connections in order to secure its future.

Farida Shaheed, a special rapporteur in the field of cultural rights, points out that since the establishment of her mandate on Transitional Justice in 2009, she has received numerous testimonies stressing the importance of historical and memorial narratives as shapers of collective identities and cultural heritage. She added that "I also noted that, all too often, a cultural rights-based approach to transitional justice and reconciliation strategies is not rendered the attention it deserves."[30] In the case of Cyprus, the application of Transitional Justice would open up a platform for the emergence of various historical and memorial narratives from the side of both the Greek Cypriots and the Turkish Cypriots, as well as those in between. There is a need, and also an opportunity for cultural expressions to recover their role in building communities under the aegis of contemporary and realistic values, identities, and a sense of time, place, and space.

However, there are a number of features of the participation of governmental institutions which threaten the Transitional Justice process, which include: 1) The way in which transition is recognized – For North Cyprus the aim is international recognition, while for the Republic of Cyprus it is submission to, or absorption within, the current institutions. These contradictory goals make almost any scenario unfeasible, and the transitional stage is likely to devolve into conflict; 2) Division – Forty years of division have permeated all levels of government: education, economy, religion and family, and these divisions are not likely to change easily or soon; 3) Involvement of a sovereign nation – Turkey and its presence in North Cyprus turns the Cyprus issue into an international affair that the region has allowed. Should Turkey also become involved in the Transitional Justice process, the matter could easily devolve.

In the aftermath of conflicts, including the one in Cyprus, international organizations under the umbrella of the UN are not capable of either avoiding or driving out the politics of conflict. How could they when they are, in principle, the product of political agreements and exist to honour them? Contrary to popular perceptions,

[30] Full text: *Integrating cultural rights in transitional justice strategies in post-conflict societie*s, UNHR, 24 March 2014, http://www.ohchr.org/EN/NewsEvents/Pages/Integratingculturalrightsinpost-conflict-societies.aspx [accessed: 18.09.2015].

the United Nations Peacekeeping Mission in Cyprus has been limited in terms effectively protecting or improving the cultural heritage in Cyprus, being subject to the political environment in the island for the past forty years. Its presence has been and still is a political component of the island's landscape, and that, I would argue, has prevented more global action in aspects such as cultural heritage and its broad conceptualization. It is unlikely that the memories that took place in Cyprus in the recent past can be accommodated in the rhetoric of cultural heritage as understood by UNESCO, while its real tenets are fundamental to prevent segregation and exclusion.

Conclusions

Within the Transitional Justice framework, I have described the connections between memory, transition, human rights and justice, and suggested how cultural heritage could help in bridging the existing fissures and offering new perspectives and links, for example to remembrance and memorialization. However, the role of governments in initiatives such as Transitional Justice is not clear. Is it necessary to recognize whether the political will exists and ask how the institutions in Cyprus would react to the proposed scenario? What is clear is that Transitional Justice is a process that involves the civil society at large – beyond political and religious actors, beyond generations and beyond the historic narratives of the past – and will eventually be addressed in Cyprus. It is a process that needs to be carried out *for* Cyprus, *in* Cyprus, and *with the participation of* Cypriots. Civil society must be present. It is important to ask how Transitional Justice will be implemented in Cyprus. What are the necessary settings or institutions that must be present in order for it to work? I imagine a Transitional Justice process in Cyprus motivated by civil society at both the local and global levels. Transitional Justice is a growing movement around the world, with many experiences in different regions, and enough scholarship exists to build a network of endorsements from academics, legal practitioners, non-governmental institutions and the international community and, potentially, offer an alternative to cultural heritage that would finally relate to societies in the making.

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COMMENTARIES

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The Process of the Establishment of Independence of the Republic of Croatia and the Foundation of Its National Policy in Culture and Art

Abstract: Two goals motivate the authors of this essay. The first is to examine the legal, historical and political context of the establishment of independence of the Croatian State at the time the Yugoslav crisis was originating. Following up on this issue in the second segment of our analysis we present a framework of the new Croatian cultural policy, which is essentially conditioned by historical events. This constitutes an overview of the founding of the new Croatian national cultural policy since the 1990s, focused on the primary sources of recent Croatian cultural and legal infrastructures in the new context of its European integration.

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Legal and Historical Framework of the Process of the Establishment of the Republic of Croatia – (The Christmas Constitution of 1990 and the Cultural and Arts Policy)

The major constitutional decisions of the Croatian Parliament (*Sabor*) in 1991 must be considered within the wider historical context of the watershed events which took place during the end of 1980s and the beginning of the 1990s. This was a time of radical changes in the entire system of international relations and the end of bipolarity and the Cold War, which led to the collapse of the Soviet State and its political and economic system and which, in turn, led to new reformist demands in many Central European States. The position of the United States also changed. It became a unilateral actor in international relations, and began to speak about finding and defining a so-called New World Order.[1] At the same time, these events were accompanied by trends aimed at the strengthening of European institutions, such as the reformist moves of the European Economic Community (later known as the European Union – EU), as well as the strengthening of organizations such as the OECD (of special significance is the Charter of Paris of 1990).[2] Due to space limitations, it is not possible in this article to delve more deeply into these questions, which have been widely discussed elsewhere.[3]

Croatia faced the events surrounding the fall of the communist system in somewhat different circumstances than other Central European countries. Its formal legal position, in keeping with the 1974 Constitution of the Socialist Federal

[1] For more on this, see R. Vukadinović, *Postkomunistički izazovi europskoj sigurnosti – od Jadrana do Baltika* [The Post-communist Challenges on the European Security – From the Baltic to the Adriatic], Ziral, Mostar 1997.

[2] Charter of Paris for a New Europe, 21 November 1990, http://www.osce.org/mc/39516 [accessed: 15.09.2015].

[3] E. di Nolfo, *Storia delle relazioni internazionali 1918-1999*, Laterza, Roma – Bari 2005, pp. 1347-1411; P. Calvocoressi, *World Politics Since 1945*, Longman, London 1996; C. Pleshakov, *Berlino 1989: la caduta del muro. La guerra civile che ha portato alla fine dell comunismo*, Corbaccio, Milano 2009; P. Kenney, *The Burdens of Freedom: Eastern Europe since 1989*, Zed Books, London – New York 2006; H. Kissinger, *Diplomacy*, Simon & Schuster, New York 1994, p. 762 ff., G. Sabbatucci, V. Vidotto, *Il mondo contemporaneo. Dall 1848 a oggi*, Laterza, Roma – Bari 2008, p. 601 ff.

Republic of Yugoslavia (SFRY),[4] included some relatively clear elements of statehood (defined, of course, by standard Socialist ideology), and even some characteristics of subjectivity under international law. But the disintegration of the entire Yugoslav social, governmental and economic system, which had been weakened during its search for new reformist solutions, reached a dangerous turning point when it became tied in with Greater Serbian policies. Originating in intellectual circles, Greater Serbianism became sublimated into the Communist Party's leading establishment, gathered around the new main leader of the Serbian Communists, Slobodan Milošević. In certain instances, the protagonists of Greater Serbianism expertly cloaked themselves under the banner of saving the Yugoslav community, relying on the forces of the Yugoslav People's Army (JNA). The Croatian leadership, which sought to make maximum use of the constitutional position of the Socialist Republic (SR) of Croatia, did not at first have enough force and determination to successfully meet the challenges posed by the recurring provocations of Milošević. Still, it began to implement the initial constitutional revisions required for a radical change in the existing system, one headed toward its democratization and liberalization. This became especially obvious in the legal reformist moves aimed at the introduction of a multiparty system, the announcement and organization of elections, and the call for constituent meetings of the Croatian Parliament.

From a constitutional perspective, the new democratic government significantly accelerated the path toward the establishment of Croatian statehood, and these steps would act as the basis for the adoption of key constitutional decisions by the Croatian Parliament in 1991. Following the formation of the new democratic government (after 30 May 1990), amendments to the Constitution of the SR of Croatia (25 July 1990) abandoned the socialist attributes found in State symbols, as well as in the general characteristics of the organization of government. The strengthening of executive power (a Government replaced the former Executive Council of the Parliament) led to the separation of powers among the three branches of the government, in contrast to the prior emphasis on the principle of the government's unity.[5]

The pinnacle of the constitutional process of establishing the Croatian State is without doubt the adoption of the Constitution of the Republic of Croatia,[6] the so-called "Christmas Constitution" (22 December 1990). The Constitution accepted the position of the Republic of Croatia within the Yugoslav State, setting forth in both its transitional and final provisions possible scenarios in case of a breach of the fundamental interests of the Republic. It also clearly spelled out the desire of the

[4] Ustav Socijalističke Federativne Republike Jugoslavije [Constitution of the Socialist Federal Republic of Yugoslavia], 21 February 1974, Dopisna Delavska Univerza, Belgrade 1974 [English translation].

[5] For sources, see A. Milardović, *Dokumenti o državnosti Republike Hrvatske* [Documents on the Statehood of the Republic of Croatia] Alinea, Zagreb 1992.

[6] Ustav Republike Hrvatske [Constitution of Croatia], 22 December 1990, Narodne novine [Official Gazette], No. 56/90, as amended.

Croatian Republic to be constituted as an independent and sovereign State. While Article 140 of the Constitution states that the "Republic of Croatia remains within the SFRY", two provisions of the Constitution clearly reflected the determination to establish the State's independence. Firstly, the Constitution gave the Parliament the power to undertake such a decision (which in fact it did through its acts in June and October 1991); and secondly, it anticipated the possibility of coming to an agreement with the other Yugoslav republics concerning a new constitutional arrangement. Taking into account the complexities surrounding the Yugoslav crisis the Parliament, in Paragraph 140, listed the possible dangers and threats to the territorial integrity of the Republic of Croatia, including its placement in an unequal position within the Yugoslav State or a threat to its interests (by anybody in the Federation or from other republics or provinces). In this Paragraph, which is subordinate to the first Paragraph of the Article, the Republican organs became specifically charged with adopting special acts to protect the interests of the Republic. These acts were further spelled out in the Constitutional Law for the Implementation of the Constitution of the Republic of Croatia, which temporarily suspended a number of sections of the Constitution (e.g., foreign affairs, defence).[7]

The Croatian Constitution is based on the Western European democratic tradition, as well as on the rich Croatian legal tradition and State individuality. By analysing the Constitution it is possible to conclude that it contains several fundamental provisions relating to the national cultural and arts policy. Included are the classic constitutional principles of culture – freedom of scientific, cultural and artistic creativity. The Constitution defines the State as obliged to encourage and assist in their development. Scientific, cultural and artistic goods, as national spiritual values, are protected by the State. The Constitution contains the principle of guarantees of moral and property rights which are the result of scientific, cultural, artistic and other creative activities.[8] Such rights exist in the Constitution as indirectly linked to the presented basic principles: constitutional material rights (freedom of thought, conscience, the right to a healthy life, the general principles of freedom of education, university autonomy etc.). On the other hand there are rules on determining the competence of national authorities in the implementation of State policy on culture and arts. The Constitution, as well as special laws (in some cases constitutional laws) contain the rights related to the cultural autonomy of the national minorities in Croatia, as well as the obligation to protect Croatian emigrant communities, which represent a kind of national or ethnic minority in their host countries.[9] The analysis of other sources and issues related to the State's cultural and arts policy and legal infrastructure follow in the second part of this essay.

[7] Concerning the means by which the Christmas Constitution was adopted, see D. Šarin, *Nastanak hrvatskoga Ustava* [The Establishing of the Croatian Constitution], Narodne novine, Zagreb 1997.

[8] Constitution of Croatia, op. cit., para. 68.

[9] I. Josipović, *Pravne i organizacijske odrednice hrvatske kulturne politike* [Legal and Organizational Guidelines for Croatian Cultural Policies], "Zbornik Pravnog fakulteta u Zagrebu" 1997, Vol. 47, pp. 565-567.

The major Croatian constitutional decisions, which represented the basis for the establishment of the Croatian State as a subject of international law, were adopted in 1991. Extremely difficult diplomatic conditions, which remained completely at odds with Croatian national interests, required the Parliament to take complex and unique steps in connection with independence. This, in part, made the establishment of Croatia's legal and factual sovereignty more complicated, as well as more arduous.

The first extraordinary event on the road toward independence and the constitutional establishment of a free and sovereign Croatian Republic was the Decree (*Odluka*) of the President of the Republic of Croatia concerning the holding of a referendum, issued on 25 April 1991.[10] The Decree established a referendum on 19 May 1991 which presented two questions to voters:

1. Are you in favour of the Republic of Croatia, as a sovereign and independent State which guarantees the cultural autonomy and all civil rights of Serbs and members of other nationalities in Croatia, entering into a federation of sovereign States with the other republics (in accordance with the proposal of the Republic of Croatia and the Republic of Slovenia to resolve the SFRY State crises)?
2. Are you in favour of the Republic of Croatia remaining in Yugoslavia as a unified federal State (in accordance with the proposal of the Republic of Serbia and the Socialist Republic of Montenegro to resolve the SFRY State crisis)?

The announced results of the referendum confirmed the undeniable desire of the great majority of Croatian people concerning the independence and sovereignty of the Republic of Croatia.[11] With respect to the first question, 2,845,521 votes were in favour, representing 93.24% of all voters. A somewhat lower number voted against the second referendum question. This represented not only a further affirmation of the voting public's approval of the path taken by the Croatian State's leadership to establish an independent and sovereign Croatian Republic, but also a clear demand by the citizens of the Republic for its full independence.

The end of May and early June 1991 marked the complete breakdown of all discussions among the leaders of the Yugoslav republics. Constant provocations by local Serbs and the Yugoslav Army on the ground threatened to escalate an extremely dangerous situation into open conflict. The political situation remained murky, while constant meetings between the Presidents of the Yugoslav republics failed to lead to an acceptable solution.[12] During this period, President Tuđman and

[10] Odluku o raspisu referenduma u Republici Hrvatskoj [Decree of the President of the Republic of Croatia Concerning the Holding of a Referendum], 25 April 1991, Narodne novine [Official Gazette], No. 21/91.

[11] According to the referendum results collected from 7,691 polling stations, out of 3,592,827 registered voters, 3,051,881, or 83.56%, voted in the referendum.

[12] Even the newly announced Platform Concerning the Reorganization of the Yugoslav State, authored by A. Izetbegović and K. Gligorov, did not propose a solution which could give any indication that the crisis would be resolved. This compromise proposal, supported by certain leftist circles in Croatia and Slovenia,

the Slovenian President Kučan discussed questions concerning future bilateral relations after the proclamation of independence. All bodies of the Croatian government began to prepare for adoption of the act concerning the independence and sovereignty of the Croatian State.

At its meeting on 25 June 1991, the Croatian Parliament adopted the most important Constitutional acts proclaiming the independence and sovereignty of the Croatian State. These decisions are expressed in two acts: the Constitutional Decision Concerning the Sovereignty and Independence of the Republic of Croatia (the Constitutional Decision), and the Declaration Concerning the Proclamation of the Sovereignty and Independence of the Republic of Croatia (the Constitutional Declaration). One should also mention the Constitutional Law Concerning Amendments and Additions to the Constitutional Law for the Implementation of the Constitution of the Republic of Croatia (the Constitutional Implementation Law).[13]

Pursuant to the Constitutional Decision, the Parliament proclaimed the Republic of Croatia as an independent and sovereign State (Point I), and announced that the Republic would begin the processes necessary to disassociate itself from the other republics of SFRY and to seek international recognition (Point II). Pursuant to this act, the Parliament determined that international agreements which had been entered into and ratified by SFRY would be adopted by the Republic of Croatia to the extent that they did not contradict the Constitution and the legal system of the Republic, in keeping with international law concerning the succession of States with respect to treaties (Point IV). The Parliament further declared that only those laws adopted by it would be effective in the territory of the Republic, as would those laws of SFRY which the Parliament did not repeal, until such time as the process of disassociation had been completed. The Republic assumed all rights and duties which, under the Constitutions of the Republic of Croatia and SFRY, had been undertaken by the organs of SFRY, subject to the condition that such assumption would be governed by a Constitutional Law (Point V). The Constitutional Decision further declared that the boundaries of the State would be based on the international legal principle of *uti possidetis iuris* (which would later be affirmed pursuant to the positions taken by the Badinter Commission.[14] The borders of Croatia would correspond to the internationally recognized borders of the former SR of

remained unacceptable to the leadership of the Croatian State, which already had a plan outlined for the proclamation of indeendence, and was even more unacceptable to Greater Serbian, Unitarian circles.

[13] All of these acts adopted on 25 June 1991: Ustavna odluka o suverenosti i samostalnosti Republike Hrvatske [Constitutional Decision Concerning the Sovereignty and Independence of the Republic of Croatia], 25 June 1991; Deklaracija o proglašenju suverene i samostalne Republike Hrvatske [Declaration Concerning the Proclamation of the Sovereignty and Independence of the Republic of Croatia], 25 June 1991; Ustavni zakon o izmjeni i dopuni Ustavnog zakona za provedbu Ustava Republike Hrvatske [Constitutional Law Concerning Amendments and Additions to the Constitutional Law for the Implementation of the Constitution of the Republic of Croatia] 25 June 1991, are published in Narodne novine [Official Gazette], No. 31/1991.

[14] See Arbitration Commission of the Conference on Yugoslavia (Badinter Commission), Opinions Nos 1–10 (1991-1992), 31 ILM (1992) 1494, Opinions Nos 11–15, 32 ILM (1993) 1587.

Croatia within SFRY (Point VI). By accepting the principles of the Charter of Paris, the Croatian Republic guaranteed to all of its citizens all national and other rights and freedoms, a democratic system, the rule of law, and all other privileges of its constitutional and the international legal systems.

The Constitutional Declaration contained the elemental principles and arguments in favour of the proclamation of sovereignty and the independence of Croatia. Thus, the Declaration discusses constitutional continuity, emphasizing Croatian statehood within the framework of the Yugoslav federation. The Constitutional Declaration consolidates the previously expressed foundations of the constitutional principles of the legal system of the Croatian Republic, as well as the path of overall future policies toward the remaining republics of SFRY. The last Point of the Declaration (Point V) sets forth the criteria for future cooperation with the Yugoslav republics, with the goal of creating a possible federation of sovereign States on a confederal basis.

The Constitutional Implementation Law brought into force those Constitutional provisions which had not been implemented after their adoption, which for the most part concerned matters related to international relations and defence. The Parliament repeated its fundamental support for the protection of the rights of people and minorities in its Charter on the Rights of Serbs and Other Nationalities in the Republic of Croatia.[15]

These decisions of the Croatian Parliament, adopted on the same day that Slovenia declared its independence, were to have important effects on the further radicalization of relations in the evolving Yugoslav crisis. The JNA began its aggression against Slovenia only a day later, while the crisis in Croatia would also soon escalate into an open war of aggression pitting Serbia and Montenegro, with the assistance of the JNA, against the Croatian Republic. The international community, in an attempt to influence the resolution of the crisis, pressured the Croatian leadership to impose a three-month moratorium on the previously-mentioned Constitutional decisions concerning Croatian sovereignty and independence, during which time an agreement could be negotiated among the Yugoslav republics. This was set forth in the 7 July 1991 Brioni Declaration.[16] The Brioni Declaration confirmed the basic principles for future relations among the Yugoslav republics, with the goal of resolving the crisis, and established an Observation Mission of the European Community for Yugoslavia (Annex II). The Declaration further set forth specific provisions concerning the preparations for negotiations (Annex I).[17]

[15] Povelja o pravima Srba i drugih nacionalnosti u Republici Hrvatskoj [Charter on the Rights of Serbs and Other Nationalities in the Republic of Croatia], 25 June 1991, Narodne novine [Official Gazette], No. 31/1991.

[16] Common Declaration (Brioni Declaration), 8 July 1991 (http://www.ucdp.uu.se/gpdatabase/peace/Yug%2019910712.pdf [accessed: 12.11.2015]), as cited in A. Milardović, op. cit., pp. 114-117.

[17] In the end, the Brioni Declaration was only partially implemented. Its main aim, to commence negotiations among the Yugoslav republics to resolve the crisis, never got started, while events on the ground re-

The conclusion of the Brioni moratorium, along with the above-mentioned circumstances, influenced the further steps of the Croatian government toward the goal of achieving full independence and cutting off all constitutional ties with the republics of the SFRY, as well as with the Federation itself. This is contained in the Croatian Parliament's 8 October 1991 Decision Concerning the Termination of Constitutional Ties (Termination Decision), which severed the bonds forming the basis of SFRY between the Republic of Croatia and the remaining republics and provinces of SFRY.[18] This represented the last act in the constitutional process of establishing an independent and sovereign Croatian State. Beginning on and after 8 October 1991, the Republic of Croatia effectively became a subject of international law, and this date is viewed as the beginning of the international life of the Republic. The declaratory act of international recognition would later only reaffirm the effective establishment of the legal status created on 8 October 1991.

Relying on the right of self-determination of the Croatian people, SFRY's 1974 Constitution, the legitimate decisions concerning the establishment of a sovereign and independent State, and confirming the expiration of the moratorium, the Croatian Parliament, in the initial two Points of its Termination Decision, broke all constitutional ties "on the basis of which [the Republic of Croatia] together with the other republics and provinces had created the present-day SFRY". Based on the Termination Decision, Croatia rejected the further legitimacy and legality of all organs of the Federation, and refused to recognize any legal action of any organ which acted in the name of SFRY. The Republic of Croatia thus announced that it would continue the process of disassociation from the republics, provinces and Federation, setting forth in the Termination Decision a position which would be soon affirmed by the international community – that Yugoslavia no longer existed! The Termination Decision also contained provisions which clearly reflected the determination of the Republic of Croatia to base its international relations (including with the other republics of the former SFRY) on the most widely accepted principles of international law.[19]

flected the need for defense from the now open aggression against the Croatian Republic. Croatia became forced to wage a defensive war (known as the Homeland War) against Serbia, Montenegro and the Yugoslav Army. Given the passivity of the international community, which even imposed an arms embargo on the Republic, conditions in Croatia at that time became extremely uncertain and critical. In its military operations, the aggressor violated basic provisions of international humanitarian law. The Croatian leadership, led from August 1991 by a coalition Government of Democratic Unity, faced the extremely difficult tasks of organizing the defense of the State, which in such unique and critical times opened up very complex questions (humanitarian assistance, questions concerning displaced persons and refugees, etc.).

[18] Odluku, Klasa: 021-03/91-05/07 [Decision Concerning the Termination of Constitutional Ties], 8 October 1991, Narodne novine [Official Gazette], No. 53/1991.

[19] In Croatian scientific and political circles the legal nature of these decisions is still discussed. For more, see S.F. Gagro, B. Vukas, Jr., *Pravna priroda i politička pozadina oružanih sukoba u Hrvatskoj i Bosni i Hercegovini* [Legal Nature and political background of the armed conflict in Croatia and Bosnia and Herzegovina], "Zbornik Pravnog fakulteta u Zagrebu" 2008, Vol. 58, pp. 1159-1199; Zbornik *Dan kada je nastala Država Hrvatska* [The Day when the State of Croatia Was Founded], Hrvatska Akademija znanosti i umjetnosti,

The Constitutional Law for the implementation of the Constitution demanded that the Yugoslavian federal legislation should be applied in the Croatian legal system under the condition of its harmonization with the Croatian Constitution. A period of one year was determined for the harmonization of Yugoslavian Law with the new Croatian Constitutional Law. This period was later extended to four years.

At the time, the Croatian legal infrastructure in the field of culture and education was already built on the basis of Croatian "Republican Law", in accordance with the Constitution of SFRY (1974) and the Constitution of the Republic of Croatia of 1974. Federal Yugoslav Law was adopted in the Croatian legal system according to the Law of Adoption of the Federal Laws in the Area of Education and Culture in the Republic of Croatia as its National Law.[20] With the adoption of this Law, the Federal Law on the registration of scientific, cultural, educational and technical cooperation with foreign countries, as well as The Federal Copyright Act were adopted into the Croatian legal system. Some of the provisions of the Federal Copyright Act were declared unconstitutional. In its Articles 2-6, this Law defined the modalities of its harmonization with the Constitution of the Republic of Croatia.

The War as a Significant Factor in Defining a New Cultural Policy – Croatian Culture during the 1990s

The distinguishing factor with respect to the new Croatian policy in culture after the fall of communism, in comparison with other Eastern European countries, was the war of aggression against the Republic of Croatia. During their military campaign, Serbia and Montenegro committed many crimes against the civilian population, as well as organized crimes destroying the rich cultural heritage of Croatia. Specific examples of towns which suffered included Vukovar – a phenomenon of Croatian Central European identity along the Danube; and Dubrovnik – a world cultural heritage site under UNESCO protection. The aggressor also organized its war activities so as to target Croatian monuments under Croatian Control (for example the Cathedrals in Šibenik and Zadar, the National Theatre in Osijek, and many churches in Lika and Banovina Regions). The aggressor also systematically destroyed many religious and cultural monuments on the occupied territories.

Zagreb, February 28th 2015. This essay doesn't cover the issues surrounding the international recognition of the Republic of Croatia. For more on these issues, see B. Vukas, Jr., *The Process of the Establishment of the Independence of the Republic of Croatia from the Perspective of International Law*, "Review of Croatian History" 2012, No. 1, pp. 11-35; B. Vukas, Jr. Vukas B., Jr. *State, Peoples and Minorities*, "Collected Courses of the Hague Academy of International Law" 1991, Vol. 231, pp. 293-309.

[20] Zakon o preuzimanju saveznih zakona iz oblasti prosvjete i kulture koji se u Republici Hrvatskoj primjenjuju kao republički zakoni [Law of Adoption of the Federal Laws in the Area of Education and Culture in the Republic of Croatia as its National Law], 28 June 1991, Narodne novine [Official Gazette], No. 56/91 in force from 8 October 1991.

Many artists participated in the Croatian Homeland War, and special military units of artists were formed and many art events were held for humanitarian purposes.

The circumstances of the war caused economic instability, presenting different priorities for the Croatian national policy. The economic transition and the instability of the international crisis gave rise to many difficulties in the creation of a coherent policy in culture and in its development.[21]

In the early 1990s, Croatia began to implement a new cultural policy, searching for solutions aimed at preserving its national identity and political freedoms, new cultural values, and political and democratic freedom, freed from the shackles of the Yugoslav communist, repressive and totalitarian model in which culture was a statement of the party and ideological will. Among other things, there was a call for cultural autonomy, and culture became key focus. In its provisions, the Constitution protects cultural development and cultural heritage as the nation's greatest assets. National laws (e.g. the Law on Cultural Funds), regulations, decisions, and by-laws formed the legal framework of the cultural policy of the time. War was not a thankless time during which to create a cultural strategy; rather the cultural policy was an expression of spontaneity, and its creation was led by artists aiming to change the valuable political and cultural policy relations. A major role in the preservation of cultural identity was also played by the Catholic Church which, as always throughout Croatian history, cared for its protection.

Special emphasis is put on the Catholic Church as the protector of cultural goods in this context because religious buildings and works of art were specifically targeted by the enemy, and the Croats have considered the Church to be an important factor of national identity for centuries.[22]

[21] In his analyses on Croatian history, the Croatian historian Ivo Goldstein concluded: "Beside thousands of casualties, the war in Croatia also caused great destruction. Indirect damage (in tourism, transit traffic, investment etc) is practically incalculable, and it will cost about 20 billion dollars merely to rebuild that which was destroyed (The Croatian gross national products fell from 16 billion dollars before the war to about 8 billion dollars in 1992, which is considered the first post–war year). About 500 cultural monuments were destroyed or badly damaged, the most frequent targets being Catholic churches. Hospitals, schools, and nursery schools were also specifically targeted." I. Goldstein, *Croatia – A History*, Hurst Company, London 1999, p. 236.

[22] One of the "reasons" for the serious crimes against the objects of the Christian culture certainly stemmed from the special historical relations between the Croats, the Croatian States, and the Holy See which have developed over last thirteen centuries. Vatican diplomacy played an immeasurable role in the processes of international recognition of the Republic of Croatia during the pontificate of St. Pope John Paul II For more, see V. Cvrlje, *Vatikanska diplomacija* [The Vatican diplomacy], Školska knjiga, Kršćanska sadašnjost, Zagreb 1992, pp. 297-310; V. Cvrlje, *Sveta Stolica i Republika Hrvatska – Dvadeset godina diplomatskih odnosa (1992-2012)* [The Holy See and the Republic of Croatia – 20 years of diplomatic relations], Ministarstvo vanjskih i europskih poslova Republike Hrvatske, Libreria Editoriale Vaticana, Zagreb 2014.

Table 1. Destroyed and damaged facilities of the Catholic Church

Facilities	Completely destroyed	Badly damaged	Damaged	Total Casualties
Parish churches	65	100	101	266
Other churches	51	70	185	306
Chapels	88	79	87	254
Rectories and halls	66	85	135	286
Monasteries	7	24	49	80
Cemeteries	15	42	43	100
Crosses in the open	88	16	30	134
Total	380	416	630	1426

Source: Croatian Almanac 1998/99.

Protection was carried out on at least two levels; physical protection during wartime destruction, and protection aimed at preserving (restoring and protecting) cultural wealth in parts of the country that were not directly affected by the war.

However, despite the care that was taken, many cultural goods from the occupied territories were, if not destroyed, looted and have still not been returned to Croatia.

After the end of the war[23] in the mid-nineties, the cultural policy was marked by the creation of the National Program of Culture of the Republic of Croatia, which aimed to create a cultural development strategy. Special attention was given to forms of financing in culture, and the Ministry of Culture was focused on the protection of cultural heritage, promotion of cultural identity, and planning priorities in cultural activities. The National Report on the Cultural Policy of the Republic of Croatia was drafted in 1998 by a group of experts, and in the same year a report was published by European experts – *Croatian cultural policy: from barriers to bridges*. The strategy

[23] When speaking of the end of the Croatian Homeland War, it should be analyzed in the context of the Yugoslav Crisis. After the end of the brutal military aggression in 1991, and in the context of the EEC and UN peace missions and various peace initiatives in the very confusing Yugoslav Crisis (which included the aggression and the war on Bosnia and Herzegovina), the Croatia national police and military forces re-established their national sovereignty in their occupied Regions (in May and August of 1995). What followed was the beginning of the Process of Peaceful Reintegration of the Eastern Slavonia and Baranja Regions, which led to the finalization of the War in Bosnia and Herzegovina. The first major sign of stabilization in the region was the Dayton agreement of 1995, a form of a peace agreement which marked the creation and improvement of the Croatian-Serbian relationship, as well as the relations of Serbia towards Bosnia and Herzegovina. There are many papers on this Agreement and they offer a variety of conclusions. In sum, it can be concluded that the Agreement failed to provide for a significant transformation of Bosnia and Herzegovina toward democratization, nor for its accession to the European Union, although it was the main and the most significant document for the achievement of peace and stability in the region. After the finalization of the process of Peaceful Reintegration in the Eastern Croatian Regions, Croatian sovereignty was established on January 15th 1998. For more historical details, see I. Goldstein, op. cit., pp. 248-257; M. Tanner, *Croatia – A Nation forced in War*, 1st edn., Yale Nota Bene, Yale University Press, New Haven – London 2001, p. 221; S. Fabijanić Gagro, B. Vukas, Jr., *The Path of the former Yugoslavia Countries to the European Union: From integration to disintegration and back*, "Maastricht Journal of European and Comparative Law" 2012, Vol. 19, p. 300.

for cultural development was adopted in 2001, primarily emphasizing freedom in culture and its autonomous values. When speaking here of cultural autonomy, we must pause and considers its definition in relation to the other factors that affect it, as culture is a part of the institutional, legal and organizational framework. However, its prevalence and specificity allow for its existence outside the institutions.

What is Culture and Cultural Policy?

According to Pope John Paul II, culture is that which makes a man, as a man, become a higher man.[24] Authentic culture is the culture of freedom which springs from the depths of the soul, from the clarity of the mind, and from selfless love. Without freedom there can be no culture.[25]

Culture assumes freedom and autonomy from politics, materialism, and conformism. The question arises: Is culture subordinated to the economy and politics, or is it their basis?[26] The submission of culture to politics and the economy hinders its autonomy, freedom in its functioning, and the unburdened creativity associated with freedom of expression. Culture does not then achieve its primary function, which consists in giving a new dimension to people's lives and opening up new horizons. Cultural policy then becomes rather an expression of political will, and thus a place for conflicts of ideas between the government and various interest groups. Although culture and identity can survive even in adverse political and economic conditions, its development requires a strategy, which is the result of political will. Culture also needs financial assistance, as well as a motivating legal and organizational framework. Together with the necessary formal requirements of cultural policy, there are also substantive quality requirements, which are harder to verify since there are no material or physical parameters for them. They are the result of values that are innate in every individual, every organization, and every government agency, and they depend on the moral and value system of a given society. The relativization of a society's values leads to the relativization and "averaging out" of culture, to the creation of a mass culture of kitsch, and to distancing it from what culture should transfer – truth, goodness and beauty. It creates a "culture of ugliness", and while it may be referred to as an alternative cultural form, like a freedom or diversity that enriches us, in reality it renders culture all the poorer.

That said, the subject of this article is the determinants of the legal and organizational framework of cultural policy as an essential factor for the existence and development of culture.

[24] John Paul II, *Address to UNESCO* (speech, 2 June 1980), "La Traccia" 1980, a.I, pp. 472-478/VI. The text can be found at: http://inters.org/John-Paul-II-UNESCO-Culture [accessed: 15.10.2015].

[25] Ibidem.

[26] Z. Golubović, *The role of Culture in the post-Modern world. Its Impact on the Development of Human potentialities*, "Synthesis Philosophica" 2008, Vol. 45, p. 3. The text can be found at: http://webcache.googleusercontent.com/search?q=cache:tZ1tEkefLhAJ:hrcak.srce.hr/file/48760+&cd=1&hl=hr&ct=clnk&gl=hr [accessed: 15.10.2015].

The Legal and Organizational Framework of Cultural Policy

For ease of description of the legal and organizational framework of cultural policy, legal sources are divided into international and national, and into legal sources which regulate cultural policy directly and those which regulate cultural policy indirectly. The most important legal regulations are the following: the Constitution, international treaties, and general and specific legal documents related to culture and cultural policy.

In addition to these regulations, it should be noted that Croatia's cultural policy is largely determined by strategies, proposals, plans, and various forms of international cooperation, as well as various *ad hoc* approaches to its development.

As mentioned before, the Constitution contains provisions which are fundamental to the organization and development of cultural policy, including provisions that directly control culture, and provisions that indirectly affect culture.

The Constitution declares that the freedom of scientific, cultural and artistic creativity is guaranteed, and that its development is a State concern.[27] Scientific, cultural and artistic goods enjoy the protection of the Republic of Croatia, and the moral and property rights derived from scientific, artistic and other creative activities are also guaranteed.[28] As for the free development of culture, Article 69 of the Constitution, which guarantees freedom of thought and expression, freedom of the press and other media of communication, freedom of speech and public expression, as well as access to information and the prohibition of censorship, is of special significance.[29] The State is obligated to protect scientific, cultural and artistic goods as national spiritual values.[30]

The provisions of the Constitution which are of a general nature and determine the legal and organizational framework of any social sphere, including culture, include provisions regarding the jurisdiction and organization of a governmental body and provisions regarding the budget and funding.

International Agreements

The legal space of cultural policy includes international legal sources, the most important of which are international treaties, both bilateral and multilateral, which are concluded and ratified in accordance with the Croatian Constitution and form part of its internal order.[31] Among them, the most significant are the International

[27] Ustav Republike Hrvatske [Constitution of Croatia], op. cit., consolidated text (6 July 2010): Narodne Novine [Official Gazette], No. 85/10, para. 69.

[28] Ibidem.

[29] Ibidem, para. 38.

[30] Ibidem, para. 69.

[31] Ibidem, para. 141.

Covenant on Economic, Social and Cultural Rights;[32] the UNESCO's Constitution;[33] and the European Cultural Convention.[34] These treaties provide general guidelines for the development of culture at both the global and European levels, and thus also at the individual Member State level. Among the most important bilateral agreements relating to cooperation of States Parties in the field of culture are those concluded with Italy, France, Great Britain, and Austria.[35]

General and Special Rules

General regulations which are only indirectly related to cultural policy but are still very important for its development and organization include sources of law relating to minorities, such as the Constitutional Law on National Minorities, as well as a part of the Maritime Code which is also important for culture and its protection.[36] Among the general regulations, those relating to the organization and participation of various State and non-State actors in the creation of cultural policies are also important, such as the Law on Institutions, Law on Associations, and the Law on Endowments and Foundations.[37] From the financial aspect, the Law on Corporate Income Tax Act is also essential for culture, as is the Law on Income Tax, and the Value Added Tax Law, according to which cultural activities have a privileged tax status.[38] Laws whose application refers to various areas of social life, such as

[32] International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3.

[33] Constitution of the United Nations Educational, Scientific and Cultural Organization, 16 November 1945, 4 UNTS 275.

[34] European Cultural Convention, 19 December 1954, CETS No. 018.

[35] Ugovor o kulturnoj, prosvjetnoj i znanstvenoj suradnji između Vlade Republike Hrvatske i Vlade Ujedinjenog Kraljevstva Velike Britanije i Sjeverne Irske [Agreement between Croatia and the United Kingdom on Co-operation in the Fields of Culture, Educational and Science], 6 June 1996, Narodne novine [Official Gazette], No. 7/96; Ugovor između Vlade Republike Hrvatske i Vlade Republike Austrije o suradnji u području kulture i obrazovanja [Agreement between Croatia and Austria on Co-operation in Culture and Education], 5 October 2004, Narodne novine [Official Gazette], No. 5/05; Ugovor o kulturnoj, prosvjetnoj, tehničkoj, znanstvenoj i tehnološkoj suradnji između Vlade Republike Hrvatske i Vlade Francuske Republike [Treaty on Cultural, Educational, Technical, Scientific and Technological Co-operation between Croatia and France], 2 February 1995, Narodne novine [Official Gazette], No. 2/95; Ugovor o filmskoj koprodukciji između Vlade Republike Hrvatske i Vlade Talijanske Republike [Film Co-production Agreement between Croatia and Italy], 25 November 2007, Narodne novine [Official Gazette], No. 11/07.

[36] Ustavni zakon o pravima nacionalnih manjina [Constitutional Law on National Minorities], 13 December 2002, Narodne novine [Official Gazette], No. 155/02, 47/10, 80/10, 93/11; Pomorski zakonik [Maritime Code], 8 December 2004, Narodne novine [Official Gazette], No. 181/04, 76/07, 146/08, 61/11, 56/13, 26/15.

[37] Zakon o ustanovama [Institutions Act], 14 March 2008, Narodne novine [Official Gazette], No. 35/08; Zakon o udrugama [Associations Act], 28 September 2001, Narodne novine [Official Gazette], No. 88/01; Zakon o zakladama i fundacijama [Endowments and Foundations Act], 16 May 1995, Narodne novine [Official Gazette], No. 36/95.

[38] Zakon o porezu na dobit [Corporate Income Tax Act], 3 December 2004, Narodne novine [Official Gazette], No. 177/04, 90/05, 57/06, 146/08, 80/10, 22/12, 148/13, 143/14; Zakon o porezu na dohodak [Income Tax Act], 3 December 2004, Narodne novine [Official Gazette], No. 177/04, 73/08, 80/10, 109/11

science, education, sport, culture and other spheres are also certainly important for culture, because their provisions in large touch on and control potential cultural events. In this respect, the Law on Media, the Law on Electronic Media, the Croatian Television Law, and the Croatian News Agency Law must also be mentioned.[39] Also of great importance for culture is the Law on Copyright and Related Rights, because it regulates the rights of authors of works in the literary, scientific and artistic domains, and the related rights of artists, publishers, film producers and others.[40]

Among the special provisions which directly regulate culture, either by regulating decisions in culture, financing culture, organizing the legal framework and different collaborators – State and non-State, non-profit and for-profit, or regulating specific cultural activities or other contents of cultural policy those listed below are the most important, having special reference to the main determinants of individual cultural activities.

The law that governs decision-making in culture, objectives and programs of cultural policy is the Law on Cultural Councils.[41] With respect to the financial aspect of cultural policy, the Law on Financing of Cultural Needs is of special importance.[42] A major role in the development, international cooperation and promotion of Croatian culture abroad is played by independent artists, whose rights are specified in provisions on the establishment and activities of artistic organizations and measures to encourage cultural and artistic creativity in the Act on the Rights of Independent Artists and Encouraging Cultural and Artistic Creativity.[43] Cultural goods are of interest to the Republic of Croatia and enjoy special protection, while their types, methods of protection, obligations and rights, and the organizational and financial aspects associated with them are regulated by the Law on the Protection and Preservation of Cultural Heritage.[44]

– OUSRH, 114/11, 22/12, 144/12, 43/13; Zakon o porezu na dodanu vrijednost [Value Added Tax Law], 14 June 2013, Narodne novine [Official Gazette], No. 73/13, 99/13, 148/13, 153/13, 143/14.

[39] Zakon o medijima [Media Act], 30 April 2004, Narodne novine [Official Gazette], No. 59/04, 84/11, 81/13; Zakon o elektroničkim medijima [Electronic Media Act], 11 December 2009, Narodne novine [Official Gazette], No. 153/09, 84/11, 94/13, 136/13; Zakon o Hrvatskoj radioteleviziji [Croatian Television Act], 3 December 2010, Narodne novine [Official Gazette], No. 137/10, 76/12; Zakon o Hrvatskoj izvještajnoj novinskoj agenciji [Croatian News Agency Act], 25 November 2001, Narodne novine [Official Gazette], No. 96/01.

[40] Zakon o autorskom pravu i srodnim pravima [Copyright and Related Rights Act], 12 December 2006, Narodne novine [Official Gazette], No. 167/03, 79/07, para. 1.

[41] Zakon o kulturnim vijećima [Cultural Councils Act], 2 April 2004, Narodne novine [Official Gazette], No. 48/04, 44/09, 68/13.

[42] Zakon o financiranju javnih potreba u kulturi [Act on Financing of Cultural Needs], 9 November 1990, Narodne novine [Official Gazette], No. 47/90, 27/93, 38/09.

[43] Zakon o pravima samostalnih umjetnika i poticanju kulturnog i umjetničkog stvaralaštva [Act on the Rights of Independent Artists and Promotion of Cultural and Artistic Creativity], 17 May 1996, Narodne novine [Official Gazette], No. 43/96, 44/96, para. 1.

[44] Zakon o zaštiti i očuvanju kulturnih dobara [Protection and Preservation of Cultural Heritage Act], 18 June 1999, Narodne novine [Official Gazette], No. 69/99, 151/03, 157/03, para. 2.

Due to their specificity, in both content and form, and the fact that cultural activities are regulated by special laws, rules, regulations and decisions, it is difficult to predict legal consequences and solutions by the mere interpretation of general laws. The Law on Theatres governs the theatre and musical-theatrical activity, namely the establishment of theatres and theatre groups, theatre management and organization, the position of theatre artists and workers and other issues.[45] Archival activity is regulated by the Law on Archives and Archival Material.[46] In Croatia, archiving is carried out by the Croatian State Archives, along with a number of regional State archives. Library activity is regulated by the Law on Libraries.[47] Museum activity is regulated by the Law on Museums.[48]

The war in Croatia caused a lot of damage with respect to cultural museum treasures, as many cultural treasures became war trophies of the aggressors, and most of them have not been returned to this day.

The provision, organization and funding of audio-visual works and their encouragement, promotion and protection is regulated by the Audio-visual Activities Act.[49] Wartime activities halted the domestic production of films and the number of cinematographers decreased, but today we witness four film productions a year, and Croatia is engaged in international cooperation through membership in the European Co-Production Film Fund – Eurimages, as well as participates in the MEDIA Program of the European Union.[50]

Jurisdiction and Participants

Cultural policy, its planning and development, is dependent on and subject to the actions of many participants. In addition to government authorities, including bodies of local government and autonomous ones, there are also various public and private institutions, non-governmental organizations, independent artists and artist organizations, and other for-profit and non-profit organizations. The mechanisms of their influence are numerous, from the point of view of both

[45] Zakon o kazalištima [Theatres Act], 9 June 2006, Narodne novine [Official Gazette], No. 71/06, 121/13, 26/14, para. 1.

[46] Zakon o arhivskom gradivu i arhivima [Archives and Archival Material Act], 19 September 1997, *Narodne novine*, [Official Gazette] No. 105/97,64/00, 65/09.

[47] Zakon o knjižnicama [Libraries Act], 19 September 1997, Narodne novine [Official Gazette], No. 105/97, 5/98, 104/00, 69/09.

[48] Zakon o muzejima [Museums Act], 9 November 1998, Narodne novine [Official Gazette], No. 142/98, 65/09.

[49] Zakon o audiovizualnim djelatnostima [Audio-visual Activities Act], 6 July 2007, Narodne novine [Official Gazette], No. 76/07, 90/11, para. 1.

[50] The text can be found at: http://hr.wikipedia.org/wiki/Hrvatska_kinematografija [accessed: 15.10.2015].

substance and the formal, legal-organizational aspects. The State government exercises significant influence by creating legislation and allocating funds from the budget. The Ministry of Culture is the governmental body responsible for the distribution of budget resources to individual users; for government grants for various cultural projects; for supervision of the work of those institutions dealing with cultural activities; for the appointment of directors of public cultural institutions; for the establishment of the most important cultural institutions; and is the most important factor in the formal creation and implementation of cultural policy in the Republic of Croatia.[51]

At the lower, local level, cultural politics are implemented by various local authorities. Their jurisdiction is set forth in Article 19 of the Law on Local and Regional Self-Government.[52] Local and regional self-government is an important factor in cultural policy since it adapts its actions to local and regional needs, where cultures and traditions, customs and all that makes up the identity of the people is most visible.

A growing sphere of cultural policy is occupied by institutions, associations, foundations and endowments, artistic organizations, and individual artists. Institutions, whether public or private, are a common organizational form of cultural expression.

The Croatian National Theatres (of which there are five), museums, libraries and other participants in the national cultural scene have been established as public institutions.

Even though they were rare in the past, foundations are also a form of cultural manifestation in today's cultural scene in Croatia. Foundations, together with their assets, trust assets, and the income they acquire, permanently serve the achievement of a purpose deemed generally beneficial or charitable.[53]

Other important participants include arts organizations and non-profit legal entities carrying out activities for which they are registered, which include theatre, music, film and others, as well as independent artists subject to the Law on the Rights of Independent Artists and Encouraging Cultural and Artistic Creativity.[54] Cultural activities can be performed by companies, although this is still quite uncommon on the Croatian cultural scene.

[51] Zakon o ustrojstvu i djelokrugu ministarstava i drugih središnjih tijela državne uprave [Law on the Organisation and Scope of Ministries and Other Central State administration Bodies], 22 December 2011, Narodne novine, [Official Gazette], No. 150/11, 22/12, 39/13, 125/13, 148/13, para. 24.

[52] Zakon o lokalnoj i područnoj samoupravi [Act on Local and Regional Self-Government], 12 February, 2013, Narodne novine [Official Gazette], No. 19/13.

[53] Zakon o zakladama i fundacijama [Endowments and Foundations Act], op. cit., para. 2.

[54] Zakon o pravima samostalnih umjetnika i poticanju kulturnog i umjetničkog stvaralaštva [Act on the Rights of Independent Artists and Promotion of Cultural and Artistic Creativity], op. cit., para. 11.

Financing

Although the way in which cultural policy survives even outside of the institutional framework has been mentioned, the financial aspect is still an important formal factor that can affect its development. Italy, one of the leading European cultures, can serve as an example which confirms the theory that culture can survive even in difficult financial conditions, where the emergence of top-quality art is not connected to material incentives, but rather begins spontaneously from the people, without special cultural projects and programs (an example may be Italian neorealist films).

The question of financing culture is closely linked with that of its commercialization. Namely, the commercialization of culture can, on the one hand, lead to its self-financing, i.e. to a culture that is financially self-sustaining and directly and indirectly leads to the economic development of the country. On the other hand, the commercialization of culture can also result in a decrease in its quality; culture can become a culture of blandness, mediocrity, mass production.

The most important financial source of cultural policy in the Republic of Croatia is certainly the State Budget, which establishes the budget for culture at the national level. It is legislated by the Croatian Parliament, and their revenues and receipts, expenditures and expenses are estimated for the period of one year. In Croatia, according to data from the beginning of 2014, 0.48% of the State budget is allocated to culture.

The Law on Financing Cultural Needs stipulates that the Republic of Croatia, counties, the City of Zagreb, and districts and municipalities must also adopt programs fulfilling cultural needs and secure funds for their implementation from their own budgets. The State bodies can offer suggestions for projects to be funded.[55] It is also envisioned that foundations and other cultural organizations may acquire their own revenues through the conduct of their activities and through fees for the provision of services, sales of services and products on the market, as well as through donations, sponsorships, gifts and other means.

Indirect financial sources of funding culture are include the tax regulations. According to the Law on Corporate Income Tax, corporate taxpayers can donate tax-free up to 2% of their revenue from the tax year, in kind or in cash, for cultural, scientific, educational, healthcare, humanitarian, sport, religious, environmental and other public purposes, to organizations and other persons that perform the aforementioned activities in accordance with special regulations. In addition, this amount may exceptionally exceed 2% of the income for a tax year if it is so decided by the authorized Ministry of Financing of Special Programs and Actions. From a tax point of view, a similarly significant law is the Law on Personal Income Tax, which,

[55] Zakon o financiranju javnih potreba u kulturi [Act on Financing of Cultural Needs], op. cit., para. 2 and 3.

similarly to the Law on Corporate Income tax, provides tax relief through the increase of the non-taxable personal allowance for domestic donations made in kind and money credited in a giro account, and in cultural, educational, scientific, healthcare, humanitarian, sport and religious purposes, to associations and other persons that perform such activities in accordance with special regulations, in amounts up to 2% of the income for which the annual tax return is filed. Exceptionally, this personal allowance may be increased for gifts above the set value provided that it is so decided and approved by the authorized Ministry of Financing of Special Programs and Actions, and not for the regular activities of the donee-recipient. Thus all donations, whether in cash or in kind, that do not exceed 2% of the total revenues of donors in a given tax year are recognized as legitimate deductions by letter of Law.

Since becoming a member of the European Union on July 1st 2013,[56] Article 167 of the Treaty on the Functioning of the European Union, which stipulates the manner in which the Union supports, coordinates and supplements the actions of Member States in the field of culture and seeks to highlight Europe's common cultural heritage, has been in effect for the Republic of Croatia. The EU grants awards for specific areas of cultural activities, creates funding programs, creates initiatives like Heritage Days and Cultural Capitals, and advocates the preservation of cultural heritage and cooperation between Member States.

The question arises whether the EU represents a threat to Croatian cultural identity. According to Eurobarometer data from December 2011, 20% of the population in Croatia expressed a fear of Croatia losing its national identity.[57] As a full-fledged EU Member State, Croatia is slowly integrating into the European cultural space, while at the same time experiencing many challenges to the preservation of its cultural identity in the context of the multicultural composition of many societies and countries. The European cultural space consists of many diverse cul-

[56] The membership of the independent Croatia to the EU and NATO represented the main international goals of all the Croatian Governments from 1990 onwards. The complicated Yugoslav crisis, the Great Serbian aggression Wars against Slovenian independence and Croatian and Bosnian sovereignty and the Albanian population on Kosovo, made the surrounding circumstances in Croatian progress to the EU was very complicated and long. As part of the so-called "West Balkan Region" (diplomatically established from 1998), the process of Croatian accession to the European Union was designated as a "stability process", containing very specific criteria in comparison to other candidate States from Eastern and Central Europe. In addition to the general Copenhagen Criteria, Croatia had to meet special Criteria and standards. The process of Croatian accession to the EU was also influenced by the political context and the structure of international interests. To summarize, it should be noted that these conditions included: a) Cooperation with International Criminal Tribunal for the former Yugoslavia (the tribunal was established in 1993 as an assistant organ of the UN Security Council) b) the implementation of post-war Regional Cooperation with neighbour States, c) ensuring minority protection, d) The Slovenian blockade, caused by a small bilateral dispute in the determination of the State border. For more information, see more: S. Fabijanić Gagro, B. Vukas, Jr., op. cit.; G.G. Sander, B. Vukas, Jr., *Kroatiens steiniger Weg in die Europäische Union*, in: N. Bodiroga-Vukobrat, G.G. Sander (eds.), *Die Europäische Union und Südosteuropa Herausforderungen und Chancen*, Verlag Dr. Kovač, Hamburg,2009, pp. 145-167.

[57] The text can be found at: *Croatian Culture in the European Union*, 3 April 2012, http://www.ficdc.org/cdc2186?lang=fr [accessed: 15.09.2015].

tural expressions, which are constantly renewed and developed. As an EU member, Croatia takes part in the Creative Europe 2014-2020 Programme, which consists of cooperation projects, networks, platforms and literary translation projects. This Programme will provide funding to an estimated 6,400 cultural organizations and cover sectors ranging from the performing arts to literature to multi-media. Croatia is responsible for implementing the Creative Europe strategic directions into its own cultural policy and strategy.[58] This Programme definitely opens the way for Croatia towards a higher-level of cooperation and towards establishing a stronger role for culture in Croatia's external relations. Will it make Croatian culture better? Will it help Croatia to promote its national culture, or will Croatia lose it in the midst of European cultural diversity? Croatian culture is opening new horizons by seeking and finding its place in the diverse European society. Croatia needs to participate in the intercultural dialogue while simultaneously preserving, protecting and promoting its own cultural heritage.

Conclusions

The processes of establishing Croatia's independence had both symbolical and multiple practical effects that led to many new ideas in the Croatian Cultural policy and in its culture in general. The new values, democratic imperatives, national considerations, and the European Context and Concepts opened up a new fundamental objective in Croatian Cultural policy. Many examples can be found in confirmation of this statement, including Croatia beginning to question its literary heritage in the new context (the Christian humanism of Marko Marulić), or discovering new unknown authors and forgotten topics. There are also new approaches to the sacral heritage and culture. Croatia has discovered the forgotten musical works of Ivan pl. Zajc and Dora Pejačević.

The processes of the establishment of the State, the creation of the State structure and the establishment of a new basis of the legal system has slowed down the work on the development of a cultural strategy or legal infrastructure to support it. However, the earlier legislation of the Croatian "Republic", based on the Constitution of the Socialist Republic of Croatia of 1974, constituted a good basis for the establishment of the new legal system. In accordance with the Constitution of the SFRY of 1974, culture and education laws were predominantly regulated at the level of the Republic.

The collapse of the communist ideology and the rejection of the values related to a particular Yugoslav ideology had a fundamental influence on the creation of a new Croatian culture. However, even in the face of these difficulties one of the biggest challenges for the development of Croatian culture was undoubtedly the war. Not only were some important Croatian monuments destroyed, but the fundamental ob-

[58] B. Cvjeticanin, V. Katunaric, *Croatian Culture in the European Union*, http://www.culturelink.org/news/members/2012/members2012-006.html [accessed: 15.09.2015].

jectives of national policy were also significantly shifted to other values, upsetting the genesis of all value models in relation to the European experience of that time.

In the field of culture, The Republic of Croatia has a formal, legal and organizational framework which can still be significantly improved. However, this framework satisfies formal cultural needs, protects cultural property and regulates the relations in culture.

Problems in cultural policy arise with respect to its financial aspects, the absence of a strategy focused on content-based criteria and, one may say, in the poor promotion of culture abroad. Cultural heritage and culture are significant national achievements, and Croatian cultural policy should protect against the diminution of and damage to that which has been achieved. Finally, the culture of each country depends on the State of the nation's cultural identity as much as on the legal, financial and organizational framework. The aspect of legal framework is critically important because it can help raise overall cultural activity. We can conclude that such a basic framework exists, and in the future Croatia will be able to focus on content.

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COMMENTARIES

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When Art Meets Criminal Law – Examining the Evidence[1]

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[1] The team of the Chair of Criminal Law, Law of Criminal Procedure and Criminology of the European University Viadrina in Frankfurt (Oder) organised an exhibition entitled "Art and Criminal Law" in the Main Building of the University in the 2013/2014 winter semester. The aim of the project was to identify how the two fields overlap by means of texts and images displayed on eleven panels. The topic was discussed using, inter alia, examples of relevant cases and decisions, some of which are also dealt with in this paper. The exhibition has since been shown at the Faculty of Law of the Paris-Lodron-University in Salzburg and (including panels in Polish) at the Collegium Polonicum in Słubice, the University of Arts in Poznań, the Faculty of Law of the Adam Mickiewicz University, the Kazimierz Wielki University in Bydgoszcz, the Faculty of Law and Administration of the Nicolaus Copernicus University in Toruń and the University Białystok. For further information on this exhibition see http://www.kunstundstrafrecht.de. A modified German version of this paper (*Wenn Kunst und Strafrecht einander begegnen – Auszug aus einer Spurensuche*) has been published in "Iurratio" 2014, No 5, pp. 137-140.
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Abstract: When art and criminal law cross paths life has some fascinating stories to tell which may well extend beyond national borders. Such stories are closely linked with a multitude of diverse legal issues which can frequently be reduced to two aspects, both of which require clarification: First, what is art? And, second, is everything permitted in art? This paper explores both questions by considering several case studies by way of illustration. Possible solutions are presented and carefully examined. The paper also provides an interesting glimpse of the "Art and Criminal Law" exhibition developed by the team of the Chair of Criminal Law, Law of Criminal Procedure and Criminology under Professor Uwe Scheffler at the European University Viadrina, Frankfurt (Oder). The exhibition is currently on tour in Germany and Poland where it is being shown at a number of universities.

Keywords: the concept of art, artistic freedom, art exhibition, criminal law, borders, balancing of interests

Introduction

When art and criminal law cross paths life has some fascinating and, in some cases, almost bizarre stories to tell which may well extend beyond national borders. Moreover, art may assume very different roles. For example, if someone sneaks into a museum at night to steal a valuable 16th century gold work of art,[2] art is the object of a criminal act as referred to in Sections 242(1) and 243(1) 2nd sentence No. 2, 3 and 5 of the German Criminal Code (StGB).[3] If, on the other hand, a politician is painted wearing nothing but shocking pink suspenders and her chain of office,[4] art becomes the party who has committed an insult (Section 185 of the StGB) if it is no longer covered by artistic freedom.

Yet sometimes circumstances require the artist to reveal that he has broken the law. Take the case of artist Han van Meegeren who was possibly the cleverest

[2] This is based on the "Saliera Case", one of the most sensational art thefts of the post-war period which took place in 2003. For further details see U. Scheffler, materials on the panels for the "Art and Criminal Law" exhibition: Panel "Art and Theft" – "The Saliera Case", p. 2 ff., http://www.kunstundstrafrecht.de [accessed: 15.11.2015].

[3] German Criminal Code (Strafgesetzbuch, StGB), English translation available at http://www.gesetze-im-internet.de/englisch_stgb [accessed: 12.11.2015].

[4] This is how artist Erika Lust portrayed Helma Orosz, Lord Mayoress of Dresden – with the Waldschlösschen Bridge in the background – in early 2009. For further details on this case see U. Scheffler, materials on the panels for the "Art and Criminal Law" exhibition: Panel "Art and Iinsult" – "The Mayoress of Dresden Case", p. 2 ff., http://www.kunstundstrafrecht.de [accessed: 15.11.2015].

art forger of the 20th century:[5] Following the Second World War, he was literally fighting for his life when he protested "I painted the picture!" during his trial at an Amsterdam Court. As a Dutch national, he faced the death penalty after having been accused of collaborating with the enemy by selling art belonging to the Dutch nation to an enemy State. In 1941, van Meegeren had sold German Reichsmarschall Hermann Göring a painting entitled *Christ with the Adulteress*, which he had painted himself but claimed was by the great Dutch baroque painter Jan Vermeer van Delf,[6] for 1,650,000 Dutch guilders.[7] However, the examining magistrate did not believe van Meegeren's confession.[8] The artist therefore requested a visit to his studio in Nice, stating that four other "trial forgeries" were kept there, two of which had been painted in the style of Vermeer. When these paintings were indeed discovered in the studio, the court accepted another proposal by van Meegeren – that he be allowed to paint a new "Vermeer". He subsequently did so while in custody using only those materials that were absolutely necessary and under police supervision. The painting "Jesus among the Doctors",[9] which was completed in eight weeks, subsequently resulted in considerable doubts about the authenticity of the

[5] Han van Meegeren was a Dutch painter, restorer and art dealer. However, art critics were disparaging about his work owing to the close similarity of his style to that of the 17th century Old Masters. To quote H. Schulz, in: G.H. Mostar, R.A. Stemmle (eds.), *Der neue Pitaval*, Kurt Desch Verlag, Wien – Basel 1964, p. 22: "Van Meegeren and his kitschy symbolic pictures. Always imitating the Old Masters! It's nothing but cheap sensationalism." It was for this reason that, to quote idem, p. 34, "Van Meegeren swore revenge on his critics to 'show that *they're* the ones who are stupid and don't know a thing about art'" (Schulz's emphasis). Van Meegeren resolved to imitate the Old Masters so well that art critics would be unable to tell that his paintings were forgeries. He began studying the techniques of 17th century Dutch painters systematically, particularly the style employed by Jan Vermeer van Delft (as well as that of Frans Hals, Gerard ter Borch and Pieter de Hooch). Van Meegeren earned a total of around 7,300,000 Dutch guilders from selling eight forged paintings (two in the style of de Hooch and six in the style of Vermeer). See J. Kilbracken, *Fälscher oder Meister? Der Fall van Meegeren*, Paul Zsolnay Verlag, Wien – Hamburg 1968, p. 11 ff.

[6] Vermeer's oeuvre, of which the portrait *Girl with a Pearl Earring* is probably the most popular work, is generally considered to comprise fewer than 40 paintings. This is one of the reasons why the painting "Christ with the Adulteress" – initially thought to be a previously unknown work by Vermeer – caused such a sensation when it was discovered in a salt mine near Alt-Aussee in Austria in 1945 after the end of the Second World War. This was where Hermann Göring had had his works of art stored in 1944 to protect them against Allied bombardments. Thus it can be seen that "van Meegeren never just copied any of the lesser known paintings of the great Delft Master. He painted in Vermeer's style but was always searching for new motifs and always based his work on his own ideas", H. Schulz, op. cit., p. 21.

[7] "Wie sich herausstellte, hatte Göring aber […] im Tauschwege gezahlt; er übergab […] mehr als zweihundert Gemälde, die von Nazi-Okkupatoren in Holland geraubt worden waren. Der Gesamtwert dieser Bilder dürfte indes den vereinbarten Kaufpreis eher noch überstiegen haben." (It turned out that Göring had paid for the painting by exchanging over two hundred paintings stolen by the Nazi occupying force in Holland. The total value of those paintings probably exceeded the agreed sales price), J. Kilbracken, op. cit., p. 234.

[8] "The situation is quite unusual. Generally, the judge accuses the defendant of an offence and the defendant does everything to prove his innocence. However, in this case, the defendant accuses himself and the judge tries his best to prove that he *did not* commit the offence concerned", H. Schulz, op. cit., p. 20 (emphasis in original).

[9] Van Meegeren had already taken an interest in the motif earlier on (in 1918) when he was personally going through a religious phase, see J. Kilbracken, op. cit., pp. 144 ff., 242.

work of art that had been sold to Göring. In order to be absolutely certain, the court appointed an international investigative commission comprising seven experts and art historians from England, Belgium and the Netherlands and headed by Professor Dr. Paul Coremans, Director of the chemical laboratory of Belgian museums.[10] The Commission was asked to subject all of those paintings which van Meegeren claimed to have forged[11] and which had been sold to a thorough scientific and artistic examination. It took the Commission more than two years to reach a unanimous decision which was submitted in October 1947. The Commission found that: "Our investigations have demonstrated without doubt that none of these paintings can date back to the 17th century. Without exception, they are all more recent – they are all fakes […] and were probably painted by van Meegeren."[12] The accusation of collaboration with the enemy was therefore groundless.[13] The charge was subsequently reduced to the accusation that van Meegeren had acted fraudulently for personal gain and that he had signed the paintings using a false name or signature

[10] For more details see ibidem, p. 248 ff.

[11] Apart from the painting bought by Göring, the work *Supper at Emmaus* painted in the style of Vermeer in 1937, which was one of the eight, caused a sensation. When Van Meegeren had placed his forgery on the art market, he had claimed it originated from a private Italian collection and had been smuggled out of the country. The most prominent Dutch art historian of that time, Abraham Bredius, classified the painting as a genuine Vermeer and it also passed another five random tests, all of which seemed to confirm its origin. It was then purchased by the Rembrandt Society for 530,000 Dutch guilders for the Boymanns Museum in Rotterdam where it was displayed as one of 450 works by Dutch Masters at the celebrations for Queen Wilhelmina's jubilee in September 1938. See J. Kilbracken, op. cit., pp. 11, 90 ff.; H. Schulz, op. cit., p. 24 ff. Against this background, the case against van Meegeren was particularly controversial as the artist's confession, if proven to be true, would be devastating for the reputation of the expert who had claimed for years that the "rediscovered" Vermeer was genuine. The buyers of van Meegeren's pictures also stood to lose a great deal of money if the paintings in their possession turned out to be worthless forgeries, see J. Kilbracken, op. cit., p. 242 f.

[12] Quoted from H. Schulz, op. cit., p. 30. In this context it should be noted that proving that the paintings were forgeries did not yet establish van Meegeren as their originator as these were two completely different issues in the investigations. The Commission based the verification of the paintings as forgeries on the following aspects in particular: 1. The presence of phenol and formaldehyde in the top layer of paint (unknown up to the 19th century); 2. Indian ink in the craquelure (cracks that occur when the paint and varnish "liquid preparation applied to protect paint" dry); 3. The hardness of the paint (which partly withstood solvents which would have completely destroyed genuine paintings) and 4. The structure of the craquelure which turned out to be artificial, cf. J. Kilbracken, op. cit., p. 254. It was the "trial forgeries" in particular, along with the pigments, artificial resin mixes, oils, fragments of canvas and frames, discovered in van Meegeren's studio that indicated that the artist was the originator. Various objects dating from the 17th century and discovered in van Meegeren's possession, such as a wine jug that can be seen in five of the eight forgeries that were sold, were further evidence, cf. ibidem, p. 252 f. Legal proceedings against Coremans in 1955, instituted by art collector van Beuningen, who had bought the painting "The Last Supper", amongst others, from van Meegeren for 1,600,000 Dutch guilders and subsequently continued to insist that the painting was a genuine Vermeer, were unsuccessful, thus confirming the results of the Commission. For further details see J. Kilbracken, op. cit., p. 255 f.; H. Schulz, op. cit., p. 42 ff.

[13] The public prosecutor is said to have given a cynical reply to the judge's question as to whether the charge of collaboration with the enemy should be maintained: "Anyone who sells paintings that belong on the flea market to the enemy at a high price cannot be convicted as a collaborator. He should be given a medal!", H. Schulz, op. cit., p. 30.

in order to pass them off as works by someone else which constituted a violation of Article 326[14] and 326a[15] of the Dutch Criminal Code.[16] The Amsterdam Regional Court finally found van Meegeren guilty of both charges and sentenced him to the minimum penalty of one year's imprisonment on 12th November 1947.[17]

Yet it is not only stories of this kind that make the subject of art and criminal law so interesting. In particular, it is the closely linked legal issues that lead lawyers to rediscover the law time and time again, while improving their general education in the field of art at the same time. Thus the question of whether draping a black

[14] Article 326 of the Dutch Criminal Code: "Any person who, with the intention of benefitting himself or another person unlawfully, either by assuming a false name or a false capacity, or by cunning manoeuvres, or by a tissue of lies, induces a person to hand over any property, to render a service, to make available data, to incur a debt or relinquish a claim, shall be guilty of fraud […]". Dutch Criminal Code (Wetboek van Strafrecht), http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafrecht_ENG_PV.pdf [unofficial translation; accessed: 15.11.2015]. See K. Toebelmann, *Das niederländische Strafgesetzbuch vom 3. März 1881*, W. de Gruyter, Berlin 1959, p. 68. It is noticeable that the most important difference between the cited article and Section 263 of the StGB is that "culpability is not based on simple deception but on fraudulent practices. As simple lies, even though they are or may be deceptive, are not covered by criminal law, the protection of assets against deception under criminal law in the Netherlands somewhat lags behind Section 263 of the StGB", see M.G. Faure, *The Protection of Property against Deception in Belgium, France and the Netherlands*, "Zeitschrift für die gesamte Strafrechtswissenschaft" 1996, Vol. 108, pp. 527, 544.

[15] Article 326b of the Dutch Criminal Code states that "anyone who falsely places any name or any mark, or falsifies the authentic name or the authentic mark on or in a work of […] art […] with the intention of making it appear as if that work had been created by the person whose name or mark he has placed on or in it; 2°. intentionally sells, […] a work of […] art […], on which or in which any name or any mark has been falsely placed, or on or in which the authentic name or the authentic mark has been falsified, as if that work had been created by the person whose name or mark has been falsely placed on or in it […]" will be punished. See K. Toebelmann, op. cit., p. 68 ff. Art forgeries are not dealt with in German criminal law. However, forging art may, under the conditions set out in Section 267 (1) of the StGB, be punishable as falsification of documents and selling a forged work of art may be regarded as fraud under the conditions set out in Section 263 (1) of the StGB.

[16] Cf. J. Kilbracken, op. cit., p. 269. Regarding the charge under Article 326 of the Dutch Criminal Code, van Meegeren's defence counsel, E. Heldring, requested a verdict of not guilty as his client had not acted for motives of pecuniary gain but had only wished to defend himself against the critics who had relentlessly rejected or ignored him; money had never been important. "Beim Malen seien zwar gewisse 'raffinierte Kunstkniffe' angewendet worden, beim Verkauf habe es jedoch 'keinerlei Tricks' gegeben. Niemals sei behauptet worden, das betreffende Bild sei ein Vermeer oder ein de Hooch, ja nicht einmal, es könnte einer sein – diese Entscheidung sei in jedem Falle dem Sachverständigen, dem Händler oder dem Käufer anheimgestellt geblieben." (He argued that, although certain artful tricks had been employed during painting, no tricks of any kind had been employed when selling the work; it had never been claimed that the painting concerned was by Vermeer or de Hooch, nor even that it could be the work of one of those artists – this decision had been left entirely up to the expert, the dealer or the buyer at all times.), ibidem, p. 281.

[17] Van Meegeren did not appeal against the judgment. On 26th November 1947 he suffered a heart attack from which he recovered slightly in hospital. However, he suffered another heart attack on 29th December 1947 which led to his death the following day. In August 1958, two German newspapers ("Welt" and "Rheinischer Merkur") both reported that "an exhibition of van Meegeren's work [was] being held at de Boer's art shop in Haarlem" and "that a number of 'genuine' paintings by van Meegeren [were] currently being sold for several thousand guilders each […] Forgers [were] now attempting to imitate van Meegeren's paintings and sell them for a good price", cited from H. Schulz, op. cit., p. 45. The forger's popularity as expressed by such fakes still persists to this day – in 2010, the Boijmanns Van Beunigen Museum in Rotterdam held an exhibition entitled "Van Meegeren's fake Vermeers".

burqa over the Little Mermaid statue in Copenhagen can be regarded as damage to property shifts the focus of attention to Section 304 of the Criminal Code (StGB), which is frequently neglected even in criminal cases, in addition to Section 303 of the Code.[18] And if one considers the stick figures sprayed on façades and walls by Harlad Naegeli, also known as the "Zürich sprayer", from the same legal point of view, it is possible to understand the terms commonly used in the graffiti scene such as "pieces" and "tags" which are either "bombed" or "pimped".[19]

The abundance and diversity of possible legal issues lead us to two aspects, both of which require fundamental clarification: First, what is art? And, second, what is permitted in art? Is it "everything" as Tucholsky once claimed for satire? Even though lawyers otherwise often find answers to other questions in the law, little is found in this case. Indeed, Article 5(3) 1st sentence of the German Basic Law consists of the following short and concise statement only: "Arts and sciences, research, and teaching shall be free." The Law does not even mention how art is to be defined or whether there are any limits to its freedom. Consequently, it is left up to the courts to develop guidelines for this field. These will be illustrated below in a discussion of several model cases.

The Concept of Art

Ernst Wilhelm Wittig (born in 1947), also known as Ernie, is a German streaker from Bielefeld who is usually "active" in the Ostwestfalen region. Apart from shoes and socks, the only item of clothing he wears during his appearances is a baseball cap which is his hallmark.[20]

Ernie first attracted attention outside his home region when he ran naked across the pitch during the second half of the Bundesliga football match between Arminia Bielefeld and Borussia Mönchengladbach at the Alm Stadium in Bielefeld on 16th February 1997 before a crowd of 22,000 fans, causing the match to be interrupted.[21] His largest audience was at the Bundesliga football match between

[18] For a more detailed account see, U. Scheffler, materials on the panels for the "Art and Criminal Law" exhibition: Panel "Art and damage to property" – "The Case of the Little Mermaid in Copenhagen", p. 2 ff., http://www.kunstundstrafrecht.de [accessed: 15.11.2015].

[19] For a more detailed account see U. Scheffler, materials on the panels for the "Art and Criminal Law" exhibition: Panel "Art and artistic freedom" – "The Zürich Sprayer Case", p. 2 ff., http://www.kunstundstrafrecht.de [accessed: 15.11.2015].

[20] For a detailed account of the case see U. Scheffler, materials on the panels for the "Art and Criminal Law" exhibition: Panel "Art and artistic freedom" – "The Ernie Case", p. 2 ff., http://www.kunstundstrafrecht.de, [accessed: 15.11.2015].

[21] Streaking at sporting events was supposedly "invented" by Michael O'Brian. The 25-year-old Australian ran naked across the pitch in front of 48,000 fans at the rugby international match between England and France at Twickenham Stadium in London on 20th April 1974 to win a bet. For more details see U. Scheffler, materials on the panels for the "Art and Criminal Law" exhibition: Panel "Art and artistic freedom" – "The Ernie Case", p. 2 ff.

Borussia Dortmund and Arminia Bielefeld at the Westfalen Stadium in Dortmund on 16th April 2005 when he ran naked across the pitch in front of 76,500 fans in the 78th minute of the match.[22]

Ernie sees himself as an "interaction artist". He calls himself "Germany's most handsome streaker" and has declared his body a work of art. Psychologists regard him as a man with a personality disorder, lawyers as someone who has broken the law and caused a disturbance.

Ernie has already been fined more than 20 times following his "interactions". As early as 1995, the authorities in Herford had banned him from displaying his naked body on all public roads and paths as well as in all public facilities and buildings. The ban was based on the general authority of the police to prevent a threat to public order.[23]

Ernie protested that his nude appearances were art – which is an aspect of fundamental legal relevance as the Federal Constitutional Court had previously explicitly stressed[24] "that the freedom of art as set out in Artilce 5(3) 1st sentence of the Basic Law is not subject to the restrictions arising from the general authority of the police to intervene in order to prevent a threat to public order".

The issue therefore shifted from whether Ernie was a work of art to whether his nude appearances were performing art, comparable, say, with a performance by a nude opera singer on stage.[25]

However, Ernie's complaint against the ban was dismissed in the last instance by the Higher Administrative Court in Münster.[26] His performances were not deemed to be covered by the protection conferred by the fundamental right to artistic freedom enshrined in Article 5(3) 1st sentence of the Basic Law.

The Court based its decision on three different concepts of art formulated by the Federal Constitutional Court: on the one hand, the Higher Administrative Court considered what is known as the formal concept of art cited by the Federal

22 Borussia Dortmund was fined 3,000 € by the Sports Tribunal of the German Football League (DFB) in a simplified procedure after charges were brought against the club by the DFB's Supervisory Committee for failing to provide adequate security services.

23 Section 14 (1). Police Authorities Act of North Rhine Westphalia (Gesetz über die Organisation und die Zuständigkeit der Polizei im Lande Nordrhein-Westfalen, 5 July 2002, GV.NRW 2002, p. 308, as amended): "The police authorities may take any steps required to avert a danger to public safety or order in individual cases."

24 Judgments of the Federal Constitutional Court of Germany (Entscheidungen des Bundesverfassungsgerichts), BVerfGE 1, pp. 303 (305).

25 For example, Jens Larsen's performance as a nude Seneca in Barrie Kosky's production of "Poppea" by Claudio Monteverdi at the Comic Opera in Berlin in 2013, see U. Scheffler, materials on the panels for the "Art and Criminal Law" exhibition: Panel "Art and artistic freedom" – "The Ernie Case", p. 12 ff.

26 Münster Higher Administrative Court, "Neue Juristische Wochenschrift" 1997, p. 1180 with discussion by F. Hufen, "Juristische Schulung" 1997, p. 1129.

Constitutional Court in 1984 in its decision[27] on "The Anachronistic Procession"[28] according to which the essence of a work of art could be considered to be that, "from a formal, typological perspective, requirements of a certain type of work are fulfilled" – a concept of art "which relates only to the activities and results of painting, sculpture or poetry, for example […]".

Based on this definition, the Higher Administration Court did not consider Ernie's appearances as the realisation of any form of art: "The mere presentation of the naked body is neither a 'classic' form of street theatre nor an avant-garde form of artistic installation or performance."[29]

In addition, the Higher Administrative Court in Münster referred to what is known as the material concept of art developed by the Federal Constitutional Court in 1971 in its decision[30] on the "Mephisto Case":[31]

> The essence of artistic endeavour lies in the free creative process whereby the artist, in his chosen communicative medium, gives immediate perceptible form to what he has felt, learnt, or experienced. Artistic activity involves both the conscious and the unconscious, in a manner not rationally separable. Intuition, imagination, and knowledge of the art all play a part in artistic creation; it is not so much communication as expression, indeed the most immediate expression of the artist's individuality.

Even when seen in this light, the court refused to classify Ernie's nude appearances as art, giving only a brief statement of its reasons for doing so:[32]

> The complainant's conduct does not satisfy this description of the requirements for what is to be considered as art. Even given a generous interpretation of the conceptual requirements there is nothing to suggest that the complainant's behaviour could be classified as artistic. There is nothing creative about the complainant merely being nude.

In its ruling on "The Anachronistic Procession", the Federal Constitutional Court had also drawn on a third concept of art[33] which is closer to the material con-

27 BVerfGE 67, pp. 213 (226 f.).

28 The "Anachronistic Procession" was a political street theatre event performed in Munich in 1980 and based on the poem of the same name written by Bertolt Brecht in 1947. The then Bavarian Premier Franz Josef Strauß was allegedly insulted during the performance.

29 Münster Higher Administrative Court, op. cit., pp. 1180 (1181). However, the Higher Administrative Court did not mention the aspect of entertainment, for further details see U. Scheffler, materials on the panels for the "Art and Criminal Law" exhibition: Panel "Art and artistic freedom" – "The Ernie Case", p. 13 ff.

30 BVerfGE 30, pp. 173 (188 f.).

31 The decision concerned the novel "Mephisto" by the writer Klaus Mann in which the deceased actor Gustav Gründgens had allegedly been disparaged.

32 Münster Higher Administrative Court, op. cit., p. 1180 f.

33 BVerfGE 67, pp. 213 (227).

cept than the formal one: the "open" concept of art. While the material concept tends to centre on the artist's creative act, the open concept focuses to a greater extent on the interpretative aspect.

Even when seen from this point of view, the Higher Administrative Court in Münster failed to arrive at a different result:[34]

> If the distinguishing feature of an artistic statement is regarded solely as the ability constantly to permit new and broader interpretations owing to the diversity of its message […] then this feature is also lacking. The complainant's nude appearance does not extend beyond its ordinary function as a statement, nor does it lead to an inexhaustible and multi-faceted communication of information.

Yet, even after considering the above discussion, art remains a nebulous concept. It is evidently impossible to define the term with any clarity. Is an inflammatory poem about fraudulent asylum seekers art because it rhymes, even if only passably so? The Bavarian Supreme Regional Court found in 1994 that it was.[35] Can showing the Nazi salute be art if, when doing so, one is ranting on about the "dictatorship of art"? The Kassel Local Court ruled in 2013 that it was.[36] The significance of the question as to whether something counts as art can be illustrated well by a quote from Schiller – the writer once described art as "freedom's daughter". However, it would be wrong to assume that art therefore enjoys a sacrosanct primacy over other protected interests. This is demonstrated by the following case:

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[34] Münster Higher Administrative Court, op. cit., pp. 1180 (1181). The performance "Imponderabilia" by the Serbian artist Marina Abramovic in collaboration with the German Frank Uwe Laysiepen, alias Ulay, would be open to such an interpretation, for further details see U. Scheffler, materials on the panels for the "Art and Criminal Law" exhibition: Panel "Art and artistic freedom" – "The Ernie Case", p. 15.

[35] Judgments of the Bavarian Supreme Regional Court in criminal matters, Bayerisches Oberstes Landesgericht (BayObLGSt) 1994, pp. 20 (25); according to the court, the poem came under "the formal concept of art due to the mere fact that it rhymed"; the Regional Court in Hanover was of a different opinion, "Niedersächsische Rechtspflege" 1995, p. 110.

[36] Kassel Local Court, "Neue Juristische Wochenschrift" 2014, p. 801: "It was an art performance. This is demonstrated by the fact that, at the start, the defendant read out a manifesto on the 'dictatorship of art' lasting several minutes which he had written himself. He used the stylistic device of exaggeration – in the content by the constant use of superlatives and formally by the loudness of his voice and by his gestures – and by the absurdity of it all. […] As far as the content was concerned, the defendant was expressing his view of contemporary art and his fellow artists. Furthermore, the event was held only a few days before the opening of the 'documenta 13' art exhibition. At that time, the air was 'supercharged with art'. […] The fact that the defendant had had his photograph taken standing with a unicorn in front of swastikas and had uploaded this picture to his website together with the Nazi salute also indicates that he did not identify with the symbols but was ridiculing them instead. The artistic device of satire was being employed; this is characterised by certain persons, views, events or circumstances being mocked using ridicule, irony or exaggeration; it conveys a distorted image of reality […]". By classifying the defendant's action as an art performance, the court ruled that he had not committed a punishable offence as defined in Sections 86a (1) no. 1 and 86 (1) no. 4 of the StGB, with reference to Sections 86a (3) and 86 (3) of the Criminal Code, and acquitted him.

Artistic Freedom

A performance[37] by the 46-year-old German performance artist Falk Richwien in February 2006 caused a furore. Entitled *Death of a rabbit*, it took place in a backyard gallery known as the "Monster Basement" in the Berlin district of Mitte.

At about 10 o'clock in the evening, around twenty to thirty people who had read about the performance in a city magazine met in a back room of the gallery where two white rabbits had been placed in a cardboard box. The performance, which was conducted in silence, began by the artist handing the first animal to an organic butcher who was present and who proceeded to give it a well-aimed blow to the back of the neck with a club. The butcher then held the rabbit by its feet while the artist's black leather-clad assistant wrung the rabbit's neck. She then cut off the rabbit's head on a wooden block and hung it by a nylon string in a glass jar filled with formaldehyde. The second rabbit was killed in the same manner. The work of art created in this way was called *Rabbit in formol* and was offered for sale for 9,800 € before vanishing without trace after the gallery had been put under pressure. As originally planned, the remaining parts of the rabbit were eaten at a dinner for twelve people held several days later.[38]

Richwien's intention was for art experienced in this way to be educational. The artist considered such art to be focused on spirituality and as working with emotions, to quote:

> I attempted to raise awareness of a particular issue and therefore tormented the awareness of consumers who gorge themselves without thinking. It is naive to call this action cruel as it happens every day in our abattoirs – we only try to push it to the back of our minds.[39]

Around a year after the performance Tiergarten Local Court fined all three participants,[40] Richwien and the butcher for infringing Section 17 no. 1 of the Ani-

[37] A performance is an event in which an artist or group of artists presents a work of art, for further information see http://de.wikipedia.org/wiki/Performance [accessed: 15.11.2015].

[38] Cf. Tiergarten Local Court, "Kunst und Recht" 2007, p. 116; Berlin Higher Regional Court, "Neue Zeitschrift für Strafrecht" 2010, p. 175; see also the press release entitled *Animal Welfare versus artistic freedom: rabbits slaughtered in Monster Basement*, "Spiegel Online", 4 June 2007, http://www.spiegel.de/panorama/justiz/tierschutz-vs-kunst-kaninchenmeucheln-im-monsterkeller-a 486660.html [accessed: 15.11.2015] and the press release *Death of a rabbit*, "Stern", 3 March 2009, http://www.stern.de/panorama/icke-muss-vor-jericht-das-ableben-des-hasen-656490.html [accessed: 15.11.2015]. In the first press release it was also reported that the Berlin tabloids had gone to town on the "Rabbit scandal" and that Richwien's file was overflowing with complaints. Yet why do artists often come in for so much criticism from the public when they use animals in their art or as part of a work of art or art performance? Although Richwien subjected his audience to shocking scenes, innumerable animals are treated just as appallingly in factory farms every day. Furthermore, the consumerism of the majority of people who are indignant about "animal art" probably contributes towards such treatment.

[39] *Death of a rabbit*, op. cit.

[40] Tiergarten Local Court, "Kunst und Recht" 2007, p. 116.

mal Welfare Act,[41] the assistant for infringing Sections 17 no. 1 and no. 2a of the Animal Welfare Act[42] – in each case as joint principals (Section 25(2) of the StGB[43]). While the assistant accepted the ruling, the artist and butcher appealed against it.

However, their appeals at the Berlin Regional Court and the appeals on points of law at the Higher Regional Court in Berlin were unsuccessful. The Higher Regional Court was satisfied that "the defendants had acted jointly to kill the two rabbits 'without reasonable cause' within the meaning of Section 17 1 of the Animal Welfare Act".[44]

The Court stated that, although killing animals for meat could be regarded as "reasonable cause",[45] the rabbits had in this case primarily been killed for a different purpose. When staging their artistic project, the defendants had intended to kill the two animals in a way that would capture the audience's attention as effectively as possible. This was not altered by the fact that the animals were eaten a week later.

The Higher Regional Court in Berlin recognised that artistic freedom as a fundamental right also had to be considered when interpreting the phrase "reasonable cause".[46] However, the court also took the view that artistic freedom did not

41 According to Section 17 no. 1 of the German Animal Welfare Act (Tierschutzgesetz, 18 May 2002, Federal Law Gazette I, pp. 1206 and 1313, as amended), anyone who kills a vertebrate without reasonable grounds for doing so is committing an offence.

42 According to Section 17 no. 2a of the German Animal Welfare Act, anyone who brutally subjects a vertebrate to considerable pain or suffering is committing an offence. The assistant's sentence (as a joint principal) under Section 17 no. 1 and no. 2a of the German Animal Welfare Act can be explained by the fact that she had limited her objection to the penal order to the legal consequences so that the verdict of guilt became effective (cf. Section 410 of the Code of Criminal Procedure). By contrast, the criminal prosecution of the other two defendants was limited to an infringement of Section 17 no. 2a of the Animal Welfare Act with the consent of the Public Prosecutor's Office in accordance with Section 154a (2) of the Code of Criminal Procedure, cf. Tiergarten Local Court, "Kunst und Recht" 2007, p. 116 ff. See M. Pfohl, in: W. Joecks, K. Miebach (eds.), *Munich Commentary on the Criminal Code*, 2nd edn., Vol. 6, C.H. Beck, München 2013, Section 17 of the Animal Welfare Act Note 138 ff. for the relationship between Section 17 no. 1 and no. 2 of the Animal Welfare Act.

43 Section 25 (2) of the StGB: "If more than one person commit the offence jointly, each shall be liable as a principal (joint principals)."

44 Berlin Higher Regional Court, op. cit., p. 175.

45 "A cause is deemed reasonable when it is recognised as being cogent, comprehensible and based on a legitimate interest and if, under the specific circumstances, it outweighs the animal's interest in its physical integrity and wellbeing." E. Metzger, in: G. Erbs, M. Kohlhaas (eds.), *Strafrechtliche Nebengesetze*, Loseblattsammlung, 204. Ergänzungslieferung September 2015, C.H. Beck, München 2015, on Section 1 of the Animal Welfare Act, Note 24. For further details see A. Lorz, E. Metzger, *Animal Welfare Act*, 6th edn., C.H. Beck, München 2008, Section 17 Note 19; J.-D. Ort, K. Reckewell, in: H.-G. Kluge (ed.), *Animal Welfare Act*, Kohlhammer, Stuttgart 2002, Section 17 Note 165 ff.

46 The Senate did not rule on whether artistic freedom as guaranteed by the constitution is affected by the illegality of the deed in this case, cf. Berlin Higher Regional Court, "Neue Zeitschrift für Strafrecht" 2010, p. 176. See the overviews on the controversial meaning of the term "without reasonable cause" within the meaning of Section 17 no. 1 of the Animal Welfare Act by J.-D. Ort, K. Reckewell, opt. cit., Note 29 with citations; M. Pfohl, op. cit., Note 32 ff.

automatically take precedence over animal welfare in spite of being guaranteed without any limitations[47] as it was also subject to limitations intrinsic to the Basic Law. Moreover, animal welfare interests had to be taken into account when considering artistic freedom ever since animal welfare had been incorporated into Article 20a of the Basic Law as a national objective in 2002 ("the State shall protect the natural foundations of life and animals […] within the framework of the constitutional order").[48]

This interpretation was based the Federal Constitutional Court's decision in the "Mephisto Case" which was mentioned earlier on:[49] The independence and autonomy of art is guaranteed by Article 5(3) 1st sentence of the Basic Law without reservation, but not without limitations. Thus the limits of the guarantee of artistic freedom are not to be defined by a simple law such as the Animal Welfare Act (or the Criminal Code), but by the constitution itself. Therefore "any conflict to be considered within the framework of the guarantee of artistic freedom shall be resolved by interpreting the constitution in accordance with the system of values enshrined in the Basic Law and by taking account of the unity of that fundamental system of values".[50]

The Higher Regional Court took the view that the chosen form of artistic expression – performance art which aimed to shock in a dramatic way by an explicit presentation, by "celebrating" the [rabbits'] deaths – had been particularly likely to conflict with Article 20a of the Basic Law. It had been demonstrated to the audience just how little effort was required to consciously kill animals of this particular kind.

According to the Higher Regional Court, this interpretation did not diminish the essence of artistic freedom as the defendants had been free to express their intentions in a different way. Moreover, the artist's intention did not require two animals to be killed. Thus animal welfare took precedence and justified limiting artistic freedom.

To sum up, Art is not permitted to do "everything", as could be postulated on the basis of Tucholsky's words. Instead, "the appropriate and best possible balance"[51] has to be found between art and other values that are enshrined in the constitution, such as animal welfare. Thus a great deal is permitted in art. However

[47] As a result of its incorporation in Article 20a of the Basic Law, animal welfare as a national objective is regarded as equal to other constitutional norms, including fundamental rights, cf. Tiergarten Local Court, "Kunst und Recht" 2007, p. 116; A. Epiney, in: H. v. Mangoldt, F. Klein, C. Starck (eds.), *Basic Law*, 6th edn., Franz Vahlen Verlag, München 2010, Section 20a Note 47 with citations.

[48] By the Act to Amend the Basic Law of 26th July 2002, Federal Law Gazette I, p. 2863.

[49] BVerfGE 30, p. 173.

[50] BVerfGE 30, pp. 173 (193).

[51] BVerfGE 83, pp. 130 (143).

– and this is where we disagree with the Higher Regional Court – art need not allow anyone to dictate that it should be exercised in a different manner, one that gives greater consideration to other constitutional values. This is because:

> One cannot without inhibiting the free development of the creative artistic endeavour, prescribe how the artist should react to reality or reproduce his reactions to it. The artist is the sole judge of the "rightness" of his response. To this extent the guarantee of artistic freedom means that one must not seek to affect the manner in which the artist goes about his business, the material he selects, or the way in which he treats it, and certainly not seek to narrow the area in which he may operate or lay down general rules for the creative process.[52]

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- The English translations of extracts from the StGB (Strafgesetzbuch StGB), German Code of Criminal Procedure (Strafprozessordnung StPO) and Basic Law for the Federal Republic of Germany (Grundgesetz GG) were taken from: www.gesetze-im-internet.de/englisch [accessed: 15.11.2015] (English translations provided by the German Ministry of Justice).
- The English translations of extracts from Dutch Criminal Code (Wetboek van Strafrecht, Van Meegeren Case) were taken from: http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafrecht_ENG_PV.pdf (unofficial translation) [accessed: 15.11.2015].
- The English translation of extracts from the decision in the Mephisto Case was taken from: Case reference BVerfGE 30, p. 173 1BVR 435/68 Mephisto Decision (English translation) in the website of The University of Texas School of Law, http://www.utexas.edu/law/academics/centers/transnational/work_new/ [accessed: 15.11.2015], Copyright: Professor Basil Markesinis.

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Scales as a Symbol of Metaphysical Judgement – from *Misterium Tremendum* to *Misterium Fascinosum* An Analysis of Selected Works of Netherlandish Masters of Painting

Abstract: The aim of this article is to analyze the motif of scales in Netherlandish art from the 15th to the 17th century. The motif of scales was present in art from earliest times, but its role and function differed in various historical epochs – antique, the middle ages, and the modern age. The core part of the article is devoted to the symbolic relationship between scales and different aspects of justice. The first painting taken into consideration is Rogier van der Weyden's *Last Judgment* (approx. 1445 to 1450), and the last one – Jan Vermeer's *Woman Holding a Balance* (approx. 1662-1663). The article attempts to answer some crucial questions. What were the meanings attributed to scales during the two centuries examined? How did these meanings evolve, and was the interpretation of the symbol influenced by the ethos characteristic for particular periods and geographical spaces, as well as transient fashions, religious

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and political changes? The article presents paintings selected during the query into Netherlandish art, along with a discussion on their content and information about their creators. It analyzes the symbol of scales in the context of images created by the masters of Netherlandish painting and offers a synthesis of the observed changes in the perception of scales as a symbol during the period discussed.

Keywords: symbol of scales, justice, Last Judgment, Netherlandish painting

Introduction

Symbols can be defined as artists' depictions connected, by means of specific interrelations, with other notions, ideas or spiritual feelings, most often being a part of an upper-level reality.[1] They are mainly centred around a given cultural circle, with only a few functioning as universal symbols. Some items bring about certain associations.

> Referring back to the original meaning of Greek *symbolon*, it can be observed that this word has been always filled with duality, the rule to divide and join, part and meet, forget and re-recognize. [...] A characteristic of a symbol is its indefinite nature, vagueness; it is often fluid, shifting, full of contradictions, not infrequently available only to the initiated.[2]

The usage of symbols can combine reality with abstraction, depictions of things with ideas. According to Jean Hani, real (factual) symbolism is defined by

> an inextricable connection between a physical object and its spiritual meaning; it is a hierarchical and substantial bond, analogous to one between a soul and a body or the visible and unseen reality; this bond is perceived by the mind as an organic whole, a true hypostasis available for a person to understand as a notion by means of an immediate mental synthesis supported by a flash of intuition.[3]

The symbol of scales is exceptionally interesting from the perspective of legal iconography. A comparison of the social, religious, and political history of the Netherlands with the changes happening in the field of arts leads to interesting

[1] *Symbol* [entry in:], D. Forstner, *Świat symboliki chrześcijańskiej*, trans. W. Zakrzewska, P. Pachciarek, R. Turzyński, Instytut Wydawniczy PAX, Warszawa 1990, p. 7.

[2] *Symbol* [entry in:], W. Kopaliński, *Słownik symboli*, Wydawnictwo Wiedza Powszechna, Warszawa 1990, p. 8.

[3] J. Hani, *Symbolika świątyni chrześcijańskiej*, trans. A.Q. Lavique , Znak, Kraków 1998, p. 15.

conclusions. The change in the ways balances are used as symbols corresponds to changes occurring in the legal culture. The motif of scales has existed in arts since time immemorial, differing in both the messages it conveys and its functions – it was different in the ancient or Christian world and in modern times. The aim of this article is to offer an overview of the transition from the ideas of justice present in the medieval mentality and spirituality to those perceptible in the height of the baroque – from the Last Judgement justice to the secular ideas of fair reward, living according to conscience, and secular law. The works selected for this purpose – by Roger van Weyden, Hans Memling and Jan Vermeer – follow the general developmental trends in the depiction and help to understand this phenomenon.

The choice of the Netherlands was intentional because it, like no other region, was full of the tensions typical for the era and, moreover, it developed a large number of schools of painting over a relatively small area. It was a place where all the representative cultural transformations of the continent focused. The changes occurring were the outcomes of the Reformation, the birth of modern nations, and struggles for independence from the universal power of emperors.

The Social, Political and Religious Context of Netherlandish Painting

A distinctive feature of the Netherlandish culture of the 13th and early 14th century was, in comparison with Europe of the time, the presence of a bourgeoisie alongside the court culture. The features of the bourgeois culture, involving realism, particularism, and critical attitudes to established social conditions, left their mark on the development of painting in the region.

The 14th century was a period of unification of the political organisms of the Netherlands. The external catalysts for that change were the growing importance of the Duchy of Burgundy and its expansiveness. The sovereigns of the Duchy gradually led to the unification of the Netherlands under their rule. "In less than a century, a big country was created with the territories spreading throughout Burgundy and most of the Netherlands."[4] It was clear that the gentry was being supplanted from the highest rank in the society by the bourgeoisie. The 15th century was a period of intensive development of the court and knight culture (following the example of the French, gathered around the court of the Dukes of Burgundy and the Dutch Counts' Court in the Hague). It was also the period when the style of the first Netherlandish masters of painting was formed. They were called the Flemish Primitives. The main features of their art were comprised of a complex perception of man inside architectural and landscape sceneries, the illusion of a real,

[4] J. Balicki, M. Bogucka, *Historia Holandii*, trans. K. Dobrzeniecki, 2nd edn., Zakład Narodowy im. Ossolińskich, Warszawa 1989, p. 58.

multidimensional and deep space filled with light and air, enriched with a unique precision in rendering shapes and texture of items and figures.[5]

The death of Charles the Bold without male issue and the enthronement of his daughter Mary, the fiancée of a Habsburg – Maximilian of Austria – started a new stage in the history of the Netherlands. The early period under the rule of the Habsburg was filled with anxieties and rebellions, domestic fights and conflicts between the estates. Charles's many-years conflict with powerful France in the borderlands heightened the feeling of anxiety in the country. In 1548 the Diet of Augsburg officially recognized the Netherlands as a unitary state constituting a part of the Empire. The Netherlands became at the time a hereditary property of the House of Habsburg. It was a really precious land for the dynasty because of the period of prosperity in the area, its dense population (almost three million inhabitants), and highly urbanized structure (around three hundred cities). At that time Dutch cities controlled half of the European trade.

In the years 1477-1581, under the rule of the Habsburgs, the art of painting developed in the spirit of humanism, supported by numerous schools in the north of the country. It was the time when the distinguishing style of northern Netherlands was formed, the southern part of the country being, to a large extent, under the influence of Italy.

The beginning of this period is a continuation of that of the masters of the 15th century; with Gerard David (who died in 1523) being a good example. Apart from the humanistic temperance, revolutionary transformations of the era were also visible. Hieronymus Bosch (who died in 1516) was an exceptionally original Symbolist artist, ahead of his times. The influence of Italian painting can be observed, among others, in the works of Quentin Matsys (around 1465-1530). Also worth mentioning are the exponents of the unique Netherlandish style from the north – Joest van Calcar and Lucas van Leyden. This trend was characterized by a constant need to search for new means of artistic expression. The middle of the 16th century was also the creative period of one of most eminent genre and landscape painters – Peter Bruegel (1525-1569).

In the second part of the 16th century Netherlandish painting was in its heyday, both in its technical aspect and concerning the dynamism of new figurative views. There were two main centres – Antwerpia (in the south) and Haarlem (in the north). Amsterdam was famous for Cornelis Ketel (1562-1638), a precursor of Hals and Rembrandt whereas, among many other artists, Haarlem was the place of work for Cornelis Corneliszoon, a representative of Mannerism.

The 16th century was a time of growing social conflicts, which were the outcome of feudal antagonisms, early capitalism relations, and above all, religion-relat-

[5] D. Folga-Januszewska, A. Ziemba (ed.), *Transalpinum. Od Giorgiona i Dürera do Tycjana i Rubensa. Dzieła malarstwa z Kunsthistorisches Museum Wiedniu, Muzeum Narodowego w Warszawie i Muzeum Narodowego w Gdańsku*, BOSZ, Olszanica 2004, p. 32.

ed issues. The Reformation, which appeared early in the region, gained large public support. Growing conflicts between the estates and the ruler were exacerbated when Philip II became King in 1556. This happened as the result of another war with France and increased fiscal stringency. The estate system of the country did not match the absolutist aspirations of the king from the House of Habsburg.

In the second part of the 16th century the Netherlands was plunged into a civil war. The division in the country was visible. The Catholic provinces of the south signed the Union of Arras in January 1579, whereas the north declared further fights against the Spanish invader and guaranteed freedom of religion by signing the Union of Utrecht two weeks later. This division became an inherent part of the history of the Netherlands, laying the foundations for two countries – Belgium and Holland. In 1648 the independence of the latter was guaranteed by the Peace of Westphalia which ended the Thirty Years' War. The Catholic provinces of the south remained under the Spanish rule until the close of the 18th century.

For northern Netherlands the 17th century was a time of peak development. It was not by coincidence that it was called the golden age of national culture. Holland became the centre of European education, science, and publishing. It attracted plenty of religious dissenters, traders, philosophers, and artists from all over Europe. The art of painting was closely related to the development of social life in the north. Art was becoming more and more democratic. Paintings were easily accessible on the market, even for the lower classes. According to the estimate of Ad van der Woude, the years 1580-1599 saw the creation of 680,000 new paintings within the Dutch Republic, whereas between 1660-1679 saw even more than 1,200,000.[6] Apart from prolific painters, there were also those who reserved more time for the process of creation and did so individually, for instance Jan Vermeer. Among all old and new motifs existing in the 17th century, religious ones were the most common.[7]

The separate course of development of art in the southern Netherlands at the close of the 16th and in the 17th century was one of the outcomes of the Reformation and the religious-political split of the country into two parts. The differences between the dynastic Flemish art and the bourgeois-protestant art of Holland were substantial. This was particularly visible in painting, the art which was of such great significance in the whole of Europe because of the individuality of Rubens. In the first part of the 17th century his studio was the main art centre in the country, inspiring numerous Flemish masters of painting.

The art of the southern Netherlands was formed on the basis of the medieval and Renaissance Netherlandish tradition, combined with a strong influence of the

[6] A. van der Woude, *The Volume and Value of Paintings in Holland at the Time of the Dutch Republic*, in: D. Freedberg, J. de Vries (ed.), *Art in History, History in Art*, Getty Center for the History of Art and the Humanities, Santa Monica CA 1991, p. 315.

[7] J. Balicki, M. Bogucka, op. cit., p. 213.

Counter-Reformation style from Italy. After the war, there was a visible need to redress the wrongs done in the past by the iconoclasts, which manifested itself in the extraordinary development in the field of painting in the first part of the 17th century.[8] This art also displayed a significant originality in motifs.

Robert Genaille presented the dissimilarities in the ways of expression and nuances in displaying artistic sensitivity between the north and the south synthetically: "In the northern provinces of the Netherlands artists intensely felt magical effects of the world, so they expressed in their works the poetry of passing moments and secrets of the human soul. In the art of the southern provinces the interest in experienced reality resulted in the magic of colours."[9]

Scales as a Symbol of Justice. Works of van der Weyden, Memling and Vermeer

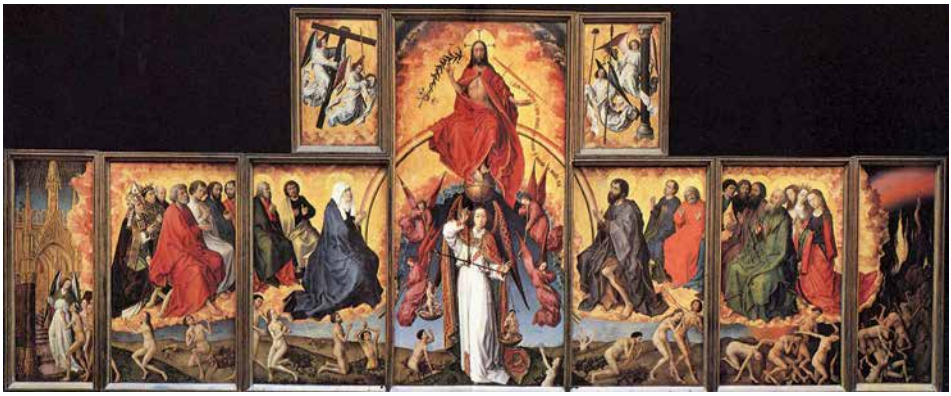
The Book of Revelation (Rev 20:11) and the Gospel According to Matthew (Mt 24:31) were the starting points for displaying the Last Judgement in Christian culture. Byzantine and Western Christianity paintings represented different iconographic models of this topic. One of the common motifs for both branches of Christianity was the weighing of souls. From the 8th to the 9th century the Archangel Gabriel was a very significant figure in the depictions of the Last Judgement, wielding scales and a sword in his hands. The archangel was said to be the one responsible for weighing souls and separating the saved from the damned; the former reached the New Jerusalem, while the latter were chained and dragged by devils who struggled to get to hell, which was surrounded by angels fighting for the souls (psychomachia – the battle of spirits).

There were several ways of separating the 'good' people from the sinners. Painters had to deal with two fundamental issues: first, what was weighed; and second, how to interpret the result. In various depictions of the Judgement the things weighed on the scales differed. One can find souls, symbols of good and bad deeds, "good" and "bad" doubles of the departed (*peccata and virtutes*), or even people who rose from the dead. The two-pan balance shows the result in a form of information about the difference between the weights of the two items. The result, interpreted symbolically or according to theological doctrine, was always ambiguous. Another issue complicating the task was the need to give the action of weighing an artistic expression and synchronize it with the composition of the scenes from the Last Judgement. The scales should overbalance in favour of souls full of grace, pulling the others downwards, which may be naturally associated with the movement

[8] P. Arblaster, *A History of the Low Countries*, Palgrave Macmillan, New York 2006, p. 143.

[9] R. Genaille, *Encyklopedia malarstwa flamandzkiego i holenderskiego*, trans. E. Maliszewska, K. Secomska, Wydawnictwa Artystyczne i Filmowe, PWN, Warszawa 2001, p. 5.

towards hellfire and the awaiting devils who at times, referring to psychomachia, fought for such souls even by pulling the pan to their side. In the end, the results of psychostasia (the weighing of souls) were sometimes interpreted differently.[10] This dichotomy can be observed in the works of van der Weyden and Memling.



Il. 1. Rogier van der Weyden, *The Last Judgement*, polyptych, 1446-1452, oil on wood, 215 × 560 cm, Musée de l'Hôtel Dieu, Beaune

Source: https://commons.wikimedia.org [accessed: 12.11.2015].

Rogier van der Weyden received a commission for *The Last Judgement* (a polyptych created between 1446 and 1552) from a Burgundian chancellor, Nicolas Rolin. The painting presents a two-level composition built around the figure of Christ and the Archangel Michael. Above, on a golden cloud, are the Apostles, judges of the heavenly tribunal, the pope, a bishop, a king, a monk, and three women. The ground is full of resurrected souls either going to heaven or suffering from being sentenced to eternal damnation. The central panel is dominated by the figure of Christ in Majesty (*Maiestas Domini*), with the Mother of God on one side of the rainbow and Saint John the Baptist on the other. The right hand of Jesus is raised in a gesture of benediction, whereas the left condemns those who were punished. This effect is intensified by use of the emblems of a lily for the saved, and a burning sword for the sinners. Below Christ there is a figure of Saint Michael, the leader of the heavenly host. He is portrayed as a young (to highlight his immortality) and handsome (as an embodiment of God's justice) man who wields a balance and weighs souls. The souls are depicted as little naked figures called "Virtule" and "Peccata". Van der Weyden placed on the pans of the balance naked doubles of the dead (his virtues

[10] J. Białostocki, *Ikonografia Dobra i Zła*, trans. K. Dobrzeniecki, "Teka Komisji Historii Sztuki" 1992, Vol. 23(3), p. 19.

and vices) which undergo the process of judgement. The painting was hung in the main hall of the hospital in Beaune and it could be seen by the ill from their beds during the mass.[11]

At the turn of the 1460s and 1470s Hans Memling created *The Last Judgement* triptych. It was commissioned by Angola de Jacopo Tani as a work of art for his ancestral chapel near Florence. By a set of coincidences, including the trade war between Hansa and England, not to mention pirate attacks, the painting found its place in Saint Mary's Church in Gdańsk.

Originally, Memling's *Last Judgement* was supposed to compete with the work by Rogier van der Weyden. Indeed, there are substantial similarities, including some elements of iconography or the way of presenting the main figures (for instance that of Christ), but there are also some differences, such as the change in the harmonization of the arrangement or altered direction of movement of the figures in the work. Memling showed psychomachia (the battle of spirits) clearly. The way he expressed the illusion and the means he used to convey it were a novelty. He did so by introducing the reflection of the spirit world from beyond the painting, in the archangel's armour.[12] According to Jan Białostocki, Memling's efforts refer to Eyck's language of light reflections and constitute "a masterful usage of a mirror leading to a consistent and full depiction of a space".[13] Unlike in van der Weyden's work, Memling presents the segregation not as a process of weighing virtues and vices of the deceased, but two separate people. As a result, one person goes to paradise, the other is condemned.

The comparison of the symbolic usage of scales in their paintings leads to the conclusion that in medieval times it was theology that played the most crucial role in the way justice was perceived and symbolized. A more accidental, but equally vital factor influencing the similarities between the paintings, is undoubtedly the fact that the artists were acquainted. There was a mention by Georgio Vasari that before his arrival to Bruges, Memling spent some time at van der Weyden's studio in Brussels.[14]

The Last Judgement depictions by Memling and van der Weyden differ significantly in the way they portray the symbolic usage of scales. In van der Weyden's work the Archangel Michael wears the vestment of a deacon – priest. The painter makes reference to the sacrament of Eucharist and the sacrifice Jesus made to save the whole of humanity, including the very people from the painting who, at that

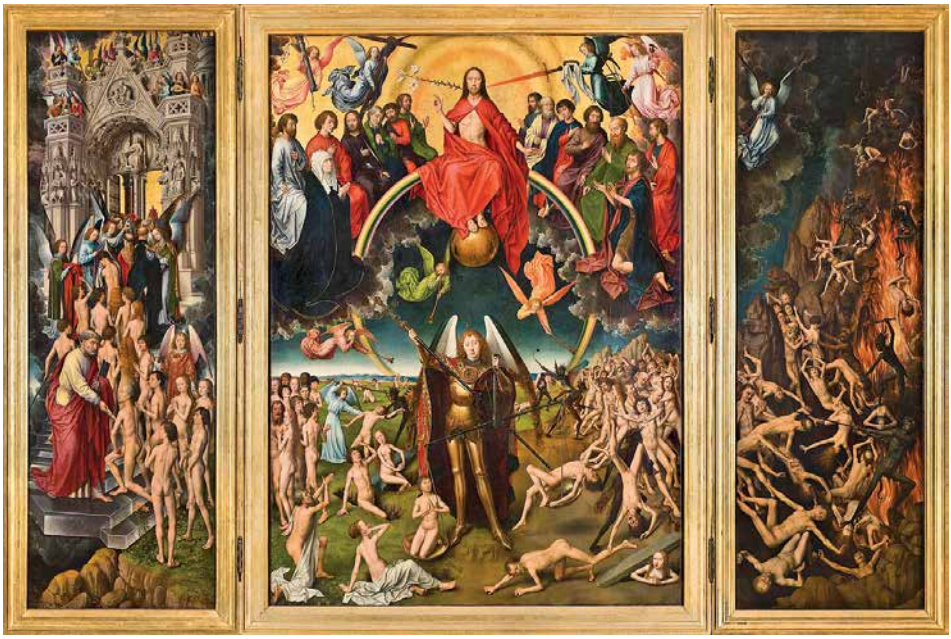
[11] J. Białostocki, *Sztuka XV wieku. Od Parlerów do Dürera*, Wydawnictwo Uniwersytetu Warszawskiego, Warszawa 2010, p. 116.

[12] A. Ziemba, *Sztuka Burgundii i Niderlandów 1380-1500*, Vol. 2: *Niderlandzkie malarstwo tablicowe 1430--1500*, Wydawnictwo Uniwersytetu Warszawskiego, Warszawa 2011, p. 549.

[13] J. Białostocki, *O dawnej sztuce, jej teorii i historii*, trans. K. Dobrzeniecki, Słowo/obraz/terytoria, Gdańsk 2009, p. 127.

[14] R. Genaille, op. cit., pp. 231, 318.

time, were undergoing the process of judgement. The archangel wears an alb and a richly ornamented outer garment pinned together with a brooch with a tracery motif in the form of three interwoven circles symbolizing the Holy Trinity. He is portrayed *en face*, like Jesus. What draws attention is his rich outfit and facial expression full of sensitivity (what is unlike any typical depictions of him).



Ill. 2. Hans Memling, *The Last Judgement* – triptych, 1467-1471, oil on wood, 221 × 161 cm (central panel), 223.5 × 72.5 cm (each side panel), The National Museum in Gdańsk

Source: https://commons.wikimedia.org [accessed: 12.11.2015].

The archangel is presented in the company of four angels playing trumpets. The dead come from beneath the ground and Saint Michael weighs good and bad deeds, which take the form of little naked figures, doubles of the deceased – *peccata* and *virtutes*. Both people on the scales are depicted in a praying position, with the difference that the saved one is turned to the archangel whereas the condemned looks away to a naked women coming out of her grave and reaching out her hand to the sinner. Psychostasia is presented as the rising of the soul of the saved and the falling of the condemned. The decision to choose such a solution could be dictated by his inner need. It does not match the traditional vision from the Book of Daniel 5:27: "you have been weighed on the scales and found wanting".

In the Gdańsk triptych of Memling the Archangel Michael is situated below the figure of Christ in Majesty. Jesus is surrounded by the symbols of grace (the lily)

and punishment (the sword). On the clouds around Christ are the Apostles sitting, and Virgin Mary with Saint John the Baptist kneeling. The archangel is portrayed in a knight's armour. On the pans of the balance he holds there is "a kneeling figure of a soul with his hands folded in prayer […] juxtaposed with a dramatically tossing figure of a 'bad' soul, helplessly reaching for an illusory help".[15]

The archangel weighs good and evil according to the Augustinian theology of grace, which means that people full of grace overbalance the sinners, who weigh as much as nothing. This idea is in line with the Book of Psalms: "Surely the lowborn are but a breath, the highborn are but a lie. If weighed on a balance, they are nothing; together they are only a breath" (Psalms 62:9).

The Archangel Michael symbolizes absolute justice, which is, unlike modern representations of Themis, not blind and, being responsible for the final judgement of humanity, has knowledge about everything.[16] The role of Christ in Glory is to be the judge whose raised right hand ensures the proper course of events. On both paintings it is Jesus who supervises Saint Michael's verdicts.

In Memling's work, similarly to many other depictions of the Last Judgement, the executors of verdicts are angels and devils. The former show the saved the way leading to the Heavenly Jerusalem, while the latter brutally push crowds of sinners to the pit. From time to time devils try to sneak up to the saved area and kidnap an innocent soul, but the angels chase them away.

Rogier van Weyden chose an original way of "executing" a sentence. In his vision of *The Last Judgement* souls go to their destinations voluntarily. Jan Białostocki claims that "a verdict has such a force that men and women led only by their own consciences go to the hellfire on the right or the Heaven's gate on the left. […] No other physical pressure is needed to throw the sinners to hellfire. The scary expressions on their faces result from the inner tragedy of the condemned who are convinced that their verdicts are just and irrevocable."[17] In this way of depiction, van der Weyden represented the opinion that each person was responsible for their own salvation. The painter directly referred to the theory of deeds, having its roots in the Gospel of Matthew.

The third masterpiece, completing the evolution of meaning of the symbol of scales is *Woman Holding a Balance* by Jan Vermeer, the master of Delft. It was created in the years 1662-1663 and constitutes a reflection of the evolutionary processes taking place for more than two centuries in the symbolism and the axiology of Netherlandish painting. This work of art was created as one of a series of portrayals of a woman that Vermeer had painted since 1658. All the works have common characteristics; his paintings present a woman carrying out everyday du-

[15] J. Białostocki, *Ikonografia*..., p. 19.

[16] L. Ryken, J.C. Wilhoit, T. Longman III (eds.), *Dictionary of Biblical Imagery*, InterVarsity Press, Leicester 1998, p. 763.

[17] J. Białostocki, *Sztuka*..., pp. 116-117.

ties, the atmosphere is full of concentration and reverie, the setting is a corner of a room next to a window, a narrow space partly filled with intensive sunlight. In that period, being under the influence of Fabritius, Vermeer devoted a lot of attention to visual-perspective issues, conveying "bright airiness and light in the space depicted".[18]

The uniqueness of *Woman Holding a Balance* comes from the fact that it is unique even compared with the entire artistic output of Vermeer.[19] The play of light and shade and lowering the source of the former introduces the atmosphere of concentration on the inner life of a human being, a special type of silence and contemplation. This makes *Woman Holding a Balance* one of the most allegorical paintings and open to a wide range of interpretations. The painting is striking in its references to artistic means of expression used by Rembrandt. The light illuminates the woman and her face, partly covered in shadow, suggests she must be concentrated on her inner life. The painting hides plenty of secrets and ambiguities, for instance the alleged pregnancy of the woman, the "painting in a painting" phenomenon, or the reason for introducing the mirror and scales. Despite the extended symbolic layer, *Woman Holding a Balance* portrays a flesh and blood person, not a lifeless allegorical figure. As a result, the moral aspect of the painting is more popular, what means that its reception is more accessible for people.[20]

In Vermeer's work nothing is obvious, not to mention the content of the balance. After meticulous analysis, it needs to be stated that the woman does not have pearls on the pans. They are empty and stay in perfect balance. This may be interpreted two ways – either as an attempt to achieve balance between the metaphysical (divine) and earthly (human) values, or as a fight between them.

The painting refers to the depictions of scales in big scenes of the Last Judgement. This happens thanks to the "painting in a painting" technique. The painting hanging on the wall behind the woman presents the Last Judgement. It broadens the range of possible interpretations of the scene from behind the table, making it become complex. What's more, the Last Judgement has the same proportions as the main picture. The figure of a woman is placed on the axis of the Last Judgement and her head is exactly under the aureole of Christ in Glory. The woman covers the part of the painting on the wall that depicts the Archangel Michael wielding a balance. In this way she plays his role; symbolically she is his substitute.[21]

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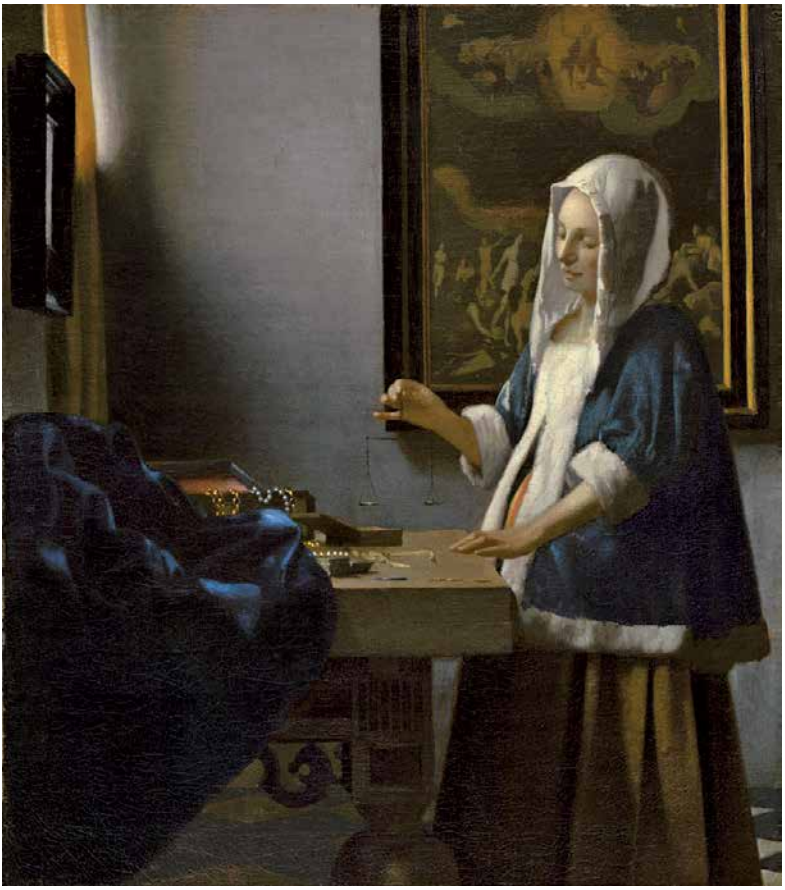
[18] Vermeer, *Johaness* [entry in:] R. Genaille, op. cit., pp. 276-380.

[19] Compare: N. Schneider, *Vermeer. The Complete Paintings*, Taschen, Köln 2007; J. Nash, *Vermeer*, trans. H. Adrzejewska, Arkady, Warszawa 1998.

[20] M.E. Wieseman, *Vermeer's Women. Secrets and Silence*, Yale University Press, New Haven [Conn.] 2011, pp. 82-89.

[21] A.K. Wheelock Jr., *Woman Holding a Balance*, National Gallery of Art, http://www.nga.gov [accessed: 1.10.2014].



Ill. 3. Johannes Vermeer, *Woman Holding a Balance*, 1662-1663, oil on wood, 42.5 × 38 cm, National Gallery of Art, Washington

Source: https://commons.wikimedia.org [accessed: 12.11.2015]

Vermeer's work is filled with a moral message that is used to highlight the importance of conscience and deep thought over oneself. The balance is the central point of composition, the focus of attention. It was used in a natural way, not only referring to well-known iconographic motifs, but also going beyond them. Being combined with the scene presenting the Judgement on the wall and the mirror, the balance acquires a new interpretation. The empty pans of the scales show that this scene is indeed a depiction of weighing spiritual values; it proves that the real process takes place in the soul of the woman, who analyses and judges her life. The atmosphere full of concentration and reverie was created by applying subtle lighting and the shades cast by the curtains. The flickering light reflects off the surface of the balance, the painting, and the mirror. This highlights the importance of these items for interpreting the message of Vermeer's work.

Marjorie Wieseman carried out a survey of major modern interpretations of the painting and most of the authors cited by her claim that this complex and thought-provoking work of art is in fact a paean to one value and virtue – conscience and the ability to make use of it. Such a general statement varies slightly in each interpretation. One of the conceptions is that Vermeer, a devoted catholic who was in contact with the Jesuits, was inspired by *The Spiritual Exercises* by Ignatius of Loyola, where the metaphor of scales as the conscience is clearly visible. According to the text, before meditation a person should put his good and bad deeds on the pans of a balance and assess oneself. That moment, full of reflection, will help to undergo the inevitable God's judgement without fear. When it comes to de Jongh's concept, the balance was used as an attribute of the woman, who was an allegorical representation of the conscience. On the table in front of her lies a box which was, according to tradition, a 17th century container for storing weights that were used to test coins. On the lid of the box there are glued personifications of the Conscience and Justice. This could be interpreted as a call for a constant examination of one's conscience, the need to "know oneself", and finally to match one's conscience with the model example. On the other hand, Herbert Rudolph claimed that the portrayed woman is a personification of vanity.[22] That opinion was popular mainly among older researchers, who took it as a fact that the pans contained jewels. So multiple and varied were the interpretations of the painting that for another researcher, Ivan Gaskell, the woman personified the truth.[23]

Moreover, the literature is full of speculations about the pregnancy of the woman. Referring this fact to the balance she holds, it might be stated that the woman tries to "estimate" the fate of her child. Undoubtedly the ideal of motherhood was different for Vermeer from that of modern painters. For him, motherhood was a state of existence expressed with the feeling of concern for a future child and its morality.[24]

The scales in the painting do not show the result, because the judgement takes place either in the woman's conscience or in her soul. She is a substitute for the Archangel Michael. Lacking his unlimited wisdom and infallibility, the woman has to replace objective evidence with her feelings. Despite that, she does not seem to be jittery or tormented by contradictions. The pans of the scales she holds stay in balance and concentration is written all over her face. Neither the woman's nor her child's fate has yet been determined. They still hang in the balance. According to some interpretations, the woman is a secularized depiction of the Blessed Virgin

22 R. Herbert, *'Vanitas.' Die Bedeutung mittelalterlicher und humanistischer Bildinhalte in der niederländischen Malerei des 17. Jahrhunderts*, in: *Festschrift für Wilhelm Pinder zum sechzigsten Geburtstage*, Verlag E. A. Seemann, Leipzig, 1938, pp. 408-412, 433.

23 I. Gaskell, *Vermeer, Judgment and Truth*, "The Burlington Magazine" 1984, Vol. 126, pp. 557-561.

24 M.E. Wieseman, op. cit., pp. 82-89; A.K. Wheelock Jr., op. cit.

Mary and is said to symbolize sympathy, mercy, and the justice of care rather than the justice of gratitude.[25]

The meaning of the painting is universal. Conscience seems to be universally valid as well, notwithstanding changing religious, social and political conditions. The woman remains in front of the mirror with courage. She thinks about herself, tries to manage her own life in the best way, and this makes her unafraid of Christ's justice.[26]

Conclusions

Scales had appeared in the iconography long before the peak development of Netherlandish painting. They were present in the art of ancient Egypt, Mesopotamia and Persia as well as in Greece, Rome and in the art of many European countries in the Middle Ages. One of the main symbolic meanings associated with scales was God's justice, shown in the scene of weighing souls. Scales – the symbol of judgement – also appeared as a symbol legitimizing the power of politicians and political institutions. Since ancient times they have been the badge of just, fair, and moderate rule, so it may be said that these two meanings of the symbol – both divine and human justice – were taken by the Netherlandish masters from earlier art, both European and world.

The uniqueness of the Netherlandish art lies in combining the trends of the universal European culture with a very characteristic local one. It gave new meanings to the symbol of the scales, which have been developed until the present day. The comparison of *The Last Judgement* by van der Weyden to *Woman Holding a Balance* by Vermeer makes it possible to propose the thesis that what has changed is the way of using the symbol. The reference to the Vermeer's "painting in a painting" technique, and placing *The Last Judgement* on the wall of the depicted room put the reality of God's justice in brackets, left it aside as one of many points of reference for a person, who has free will and his or her conscience.

Van der Weyden and Memling portrayed a vision of the Judgement that fills a person with fear. They are put in front of an act and mystery that go far beyond human measure – the judge is omnipresent, great and all powerful. It is a *misterium tremendum*. Two centuries later, the power of judgement is transferred onto the field of individual choices. God shows only one of many possible solutions, admitting that a person has free will and may not listen to his instructions. The fear is replaced with calmness and concentration. This is called *misterium fascinosum*.

[25] Ibidem.

[26] W. Łysiak, *Malarstwo białego człowieka*, 2nd edn., Vol. 2, Nobilis, Warszawa 2010, pp. 349-353.

Undoubtedly, there was a transition from metaphysical and orthodoxly religious to emotional and sentimental presentations of the issue of a just and correct judgement. Scales were transformed from the symbol of divine power to the attribute of power held by people. Within the space of two centuries their eschatological aspect turned into the immanent; the world of spirits was pushed away by the world of things and their qualities. In the painting of Vermeer the fight between good and evil was transferred from the field of the Final Judgement to the soul of a person. The Last Judgement on the wall and the balance in the hand of the woman orient the viewer of the painting to an allegorical interpretation of the work. *Woman Holding a Balance* is not another lesson about the dogma of the act of absolute justice as a remedy for a world plunged in sin. The pans of the scales are empty and stay in balance.

In their book, Judith Resnik and Dennis Curtis confirm that the iconography of Justice evolves in present times as well. Its visual representations must be coherent with society's current valuing of justice. Some depictions of justice present in court buildings are considered to be outdated in multicultural Western society, e.g. the image of Justice as the traditional white woman with a blindfold.[27]

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[27] J. Resnik, D. Curtis, *Representing Justice: Invention, Controversy, and Rights in the City-States and Democratic Courtrooms*, Yale University Press, New Haven – London 2011, p. 121.

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Military Necessity under the 1954 Hague Convention

Abstract: A system to protect cultural property in the event of an armed conflict has been in place since the 1889 and 1907 Hague Regulations. It was solidified by the conclusion of the 1954 Hague Convention, the main document for the protection of cultural property in armed conflict, and it was recently augmented by the 1999 Second Protocol to the 1954 Hague Convention. However, these instruments contain a waiver to the protection provided, linked to the concept of "military necessity". The purpose of this paper is to examine that concept and its relation to the protection of cultural property in order to demonstrate the true extent of the international protection of cultural property during an armed conflict.

Keywords: international law, 1954 Hague Convention, cultural property, armed conflict, military necessity

Introduction

Cultural property has always been targeted in armed conflicts. However, in the last twenty years the indiscriminate destruction of objects that hold cultural and religious value has intensified. From international armed conflict to internal ones, both secular and sacred artifacts have been destroyed. In the recent conflicts, cultural

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heritage has been used as a way to fund terrorism, used as a way to fund terrorism, via the illicit traffic in cultural property,[1] and to harm the enemy by destroying their cultural landmarks.

As a means to fight terrorism, the United Nations Security Council (UNSC) initiated, in the 1990's, a campaign aimed at addressing the threats to cultural heritage.[2] Reaffirming the rules of the Geneva Conventions and the Hague Regulations of 1907, the UNSC called upon States to respect the cultural heritage located in areas of conflict.[3]

In it's the most recent resolution on threats to international peace and security caused by terrorist acts, Resolution 2199 (2015) of the UNSC addressed the current threats concerning cultural heritage in Syria.[4] However, the resolution primarily focused on the issue of illicit traffic in cultural property, calling upon States to take measures against this practice. Although the destruction of cultural landmarks was condemned by the UNSC, further steps to prevent it were not proposed.

While the illicit trafficking in cultural artifacts is a relevant issue and must be addressed by the international community, the permanent destruction of important landmarks cannot be neglected. For instance, several significant cultural heritage sites were recently destroyed, e.g. the ancient Assyrian site of Nimrud,[5] the old site of Hatra,[6] and the statues at the Ninevah Museum in Mosul.[7]

There are several international instruments that protect cultural property in the event of an armed conflict, but the scope of protection is limited. In order to propose improvements to the present protection of cultural property, it is necessary understand its scope and how it can be extended. With this aim in mind, the present paper analyzes the concept of military necessity linked to the waiver of the

1 I. Bokova, *From Baghdad to Cairo – combating trafficking in cultural property*, "Mondes, Les cahiers du Quai d'Orsay" 2011, No. 8, pp. 81-89.

2 V. Negri, *Legal study on the protection of cultural heritage through the resolutions of the Security Council of the United Nations*, 25 March 2015, http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Study_Negri_RES2199_01.pdf [accessed: 10.11.2015].

3 United Nations Security Council Resolution No. 1267, 15 October 1999, UN Doc. S/RES/1267 (1999), United Nations Security Council Resolution No. 1483, 22 May 2003, UN Doc. S/RES/1483 (2003).

4 United Nations Security Council Resolution No. 2199, 12 February 2015, UN Doc. S/RES/2199 (2015).

5 *ISIS video shows destruction of ancient Assyrian city in Iraq*, "The Guardian", 11 April 2015, http://www.theguardian.com/world/2015/apr/11/isis-video-destruction-ancient-city-militants-iraq-nimrud [accessed: 10.11.2015].

6 *ISIS video confirms destruction at Unesco world heritage site in Hatra*, "The Guardian", 12 April 2015, http://www.theguardian.com/world/2015/apr/05/isis-video-confirms-destruction-at-unesco-world-heritage-site-on-hatra [accessed: 10.11.2015].

7 *ISIS fighters destroy ancient artifacts at Mosul museum*, "The Guardian", 26 February 2015, http://www.theguardian.com/world/2015/feb/26/isis-fighters-destroy-ancient-artefacts-mosul-museum-iraq [accessed: 10.11.2015].

protection of cultural property, established by the Convention for the Protection of Cultural Property in the Event of Armed Conflict (the 1954 Hague Convention) and also contained in its Protocol.

The 1954 Hague Convention

The concern over the fate of cultural property during armed conflict dates back to the 1815 Congress of Vienna,[8] where it was recognized that cultural heritage is important to the construction of a nation's identity and, as such, should be protected.[9] The first legal document prohibiting the indiscriminate destruction of cultural property was the Lieber Code, a US military manual of 1863 which declared, in article 35, that "classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded".[10] At the international level, the first legal instrument of this kind was the 1907 Hague Regulations on respecting the laws and customs of war on land, which protected historic monuments and works of art and science from destruction.[11]

Following the destruction which occurred during the First World War, some draft proposals were made for specific Conventions on the protection of cultural property in the case of armed conflict. At the Seventh International Conference of American States, in 1935, the Roerich Pact was adopted with the aim of protecting artistic and scientific institutions and historic monuments in times of war and peace. However, since it was a regional instrument, it did not have broad global acceptance.[12]

Due to the atrocities committed during the Second World War, the need for an international system of protection of cultural property became evident. Thus, an intergovernmental conference called by the Netherlands to prepare an international convention took place at The Hague from 31 April to 14 May 1954, resulting in the adoption of the Convention for the Protection of Cultural

[8] M. Sørensen, D.V. Rose, *War and Cultural Heritage. Biographies of Place*, Cambridge University Press, Cambridge 2015, p. 4.

[9] Ibidem.

[10] Lieber Code (or Instructions for the Government of Armies of the United States in the Field, General Order No. 100), 24 April 1863, http://avalon.law.yale.edu/19th_century/lieber.asp [accessed: 8.11.2015], Article 35.

[11] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907, 208 Parry's CTS 77 [1907 Hague Convention], Article 27.

[12] Treaty on the Protection of Artistic Scientific Institutions and Historic Monuments, 15 April 1935, 167 LNTS 289 [the Roerich Pact].

Property in the Event of Armed Conflict (1954 Hague Convention).[13] Signed by 126 States,[14] several of its provisions have attained customary law status.[15]

Military Necessity and the 1954 Hague Convention

In order to protect cultural property in the event of an armed conflict, the 1954 Hague Convention established two types of protection: a general one and a special one. The scope of these types of protection was widely discussed during the Intergovernmental Conference and two points of view were exposed relating to waiver of the protection: some States called for a broader protection, while others were concerned with the effectiveness of the Convention. The content and scope of thest two types of protection will be analysed separately.

General Protection

The first regime of protection established by the 1954 Convention is called the general protection. It applies to all cultural property within the scope of the Convention and obliges States to refrain from the exposure of this property to destruction or damage. A waiver to this protection was proposed in the draft of the Convention, linked to the concept of military necessity.[16]

The first relevant remarks on the general protection were made by the United States delegation. According to them, it was necessary to reconcile the protection of cultural property with the military realities. In this sense they argued that past experiences had shown that, when those realities were left aside, earlier projects to limit warfare had failed. Therefore they argued that the Convention should take military concerns into account during the regulation of a conflict.

Military necessity, as pointed out by the delegation, is a complex concept and its interpretation has been a matter of discussion. Three different approaches to military necessity were suggested: (1) the protection must be waived each and eve-

13 14 May 1954, 249 UNTS 240.

14 For the list of States Parties to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, http://www.unesco.org/eri/la/convention.asp?KO=13637&language=E [accessed: 29.09.2015].

15 *Prosecutor v. Tadić*, ICTY Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, § 98; International Committee of Red Cross, *Customary IHL*, Rule 38-41, https://www.icrc.org/customary-ihl/eng/docs/v1_rul [accessed: 15.11.2015]; M. Cornu, J. Fromageau, C. Wallaert (eds.), *Dictionnaire comparé du droit du patrimoine culturel*, CNRS Éditions, Paris 2012, pp. 140-141.

16 In the transcription of the discussion during the Intergovernmental Conference, the concept analyzed was "military necessity", even though in the definitive text the term used was "imperative military necessity". Intergovernmental Conference, *Actes de la conférence convoquée par l'Organisation des Nations Unies pour l'éducation, la science et la cultura tenue à la Haye du 21avril au 14 mai 1954*, Staatsdrukkerij – en uitverijbedrijk The Hague (1964).

ry time a military necessity arises; (2) from a legal standpoint the protection can be waived, however, there is a moral obligation to spare cultural property; and, (3) the protection can be waived only when legal instruments allow it. This last interpretation was adopted by the Nuremberg Tribunals and, according to the United States, should be applied to the Convention.[17]

Moreover, the US delegation stated that even though the Convention establishes a waiver, it requires that States should make their military aware of the importance of cultural property and its preservation, thereby strengthening its protection. It was also noted that any eventual application of the concept of military necessity should be restricted by the Convention; however it was acknowledged that its presence was necessary for the project's success.[18]

The delegation of Greece, on the other hand, remarked that "military necessity" is often used and can be used even outside of the scope of the provision that allows for it in the Convention. As for the protection of cultural property, the delegation understood that customary international law and treaty law did not allow a general waiver. For instance, the 1907 Hague Regulations did not establish a waiver on the basis of military necessity.[19] Therefore, establishing it in the Convention would be a step backwards with respect to the protection given by International Law, since it reduces the protection given by previous documents.[20]

As for the Soviet delegation, its main concern regarded the unclear character of the concept. They argued that a situation of military necessity is recognized during an ongoing battle and does not have a predetermined formula. Invoking the statement of the United States' delegation, the Soviet Union demonstrated that even scholars do not agree on the definition of military necessity. Therefore it was unclear if all armies from different continents would have the same definition. Moreover, the delegation considered that this waiver would allow the mass destruction of cultural property, since allowing the destruction of cultural property for military purposes would endanger the very *raison d'être* of the Convention. The delegation further remarked that while involuntary destruction of cultural property will always be a part of conflict, the proposed waiver would allow for deliberate destruction. The delegation concluded that "it is impossible to give to the military the right to limit the respect for cultural monuments by invoking a military necessity that they themselves will define".[21]

The delegation of the United Kingdom stated that if military necessity was included, it would create a clearer obligation and lead to refraining from the destruction of cultural property in unsuitable situations, as for example allowing it only in

17 Ibidem.

18 Ibidem.

19 See the 1907 Hague Convention, Article 27.

20 Intergovernmental Conference, op. cit, p. 152.

21 Ibidem.

cases of imperative necessity.[22] A more concrete waiver could thus make the Convention more effective.

Accordingly, the delegation of Cuba reminded the delegates that the Geneva Conventions allowed for the use of military necessity in order to avoid compliance with some obligations,[23] and stressed the commentary to the Geneva Convention of Dr. Jean Pictet:

> They realized that imposing formulae were not sufficient to control the forces let loose in war. They saw that nothing was to be gained by making rules which would, in the nature of things, remain a dead letter, and therefore asked for standards which could be observed because they were not incompatible with military necessity.[24]

Stressing the importance of the complexity of armed conflict, Cuba argued for the inclusion of military necessity in the Convention since, according to the delegation, there could come a time when it may be necessary, in order to save thousands of lives, to destroy a cultural property, and in such cases action should be taken.[25]

In the end, the proposal to delete the waiver in case of military necessity from the text was rejected at the Conference by 22 votes against, 8 in favor, and 8 abstentions.[26] Below is the final definitive text establishing the general protection:

> Article 4. Respect for cultural property
>
> 1. The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility, directed against such property.
>
> 2. The obligations mentioned in paragraph 1 of the present Article may be waived only in cases where military necessity imperatively requires such a waiver.

Special Protection

With respect to special protection, immunity was instituted for cultural property of very great importance. However, this immunity can also be waived in the case

[22] Ibidem.

[23] See Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949) 75 UNTS 31, at Article 33. It must be noted that the Geneva Convention does not have a specific provision concerning the protection of cultural property.

[24] J. Picte (ed.), *The Geneva Convetions of 12 August 1949: Commentary*, Vol. 1, International Committee of the Red Cross, Geneva 1952, p. 12, http://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-I.pdf [accessed: 10.11.2015].

[25] Intergovernmental Conference, op. cit, p. 154.

[26] Ibidem.

of an "unavoidable military necessity, and only for such time as that necessity continues".[27]

During the conference, the delegation of Ecuador proposed the deletion of this passage.[28] In a show of support, the Spanish delegation stated that if the above-mentioned provision were present in the text of the Convention, future belligerents would believe that they were permitted to destroy such cultural property, turning an exception into a permanent rule.[29] It was noted that the requirements to gain this protection were many and, therefore, only a limited number of cultural items of utmost importance would qualify. Moreover, if States were given a significant discretionary power over the granting of this special protection, immunity could be undermined.[30] Lastly, the delegation criticized the notion of "unavoidable military necessity", which did not have a legal definition.[31]

The position the British delegation took was that, since the concept of military necessity was included in the provison for general protection, it also needed to be present with respect to special protection.[32] The distinction between the concepts of military necessity for each type of protection should be one of degree, meaning that it should be more difficult to invoke military necessity when it concerned cultural property under special protection.[33] The proposed amendment to delete "unavoidable military necessity" from paragraph 2 of Article 11 was rejected by 22 votes against, 9 in favor, and 6 abstentions.[34]

At the same time, the definition of "military necessity" remained unclear.

The Second Protocol to the 1954 Hague Convention

Since the first Conference of the High Parties to the 1954 Convention, a need was expressed to clarify the definition of "imperative military necessity".[35] The discussion of whether "imperative" and "unavoidable" military necessity should give grounds for a waiver of the protection of cultural property reappeared in the Experts Meetings to discuss the Convention.

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27 See Article 11(2) of the 1954 Hague Convention. Nowadays, only five places are listed under the special protection, they are: the Zentraler Bergungsort (Central Refuge) Oberrieder Stollen in Germany, Zab refuge for cultural property in Netherlands, Zod refuge for cultural property in Netherlands, St-Pietersberg refuge for cultural property in Netherlands, Statodella Città del Vaticano.

28 Intergovernmental Conference, op. cit, p. 181.

29 Ibidem, p. 182.

30 Ibidem.

31 Ibidem, p. 183.

32 Ibidem, p. 213.

33 Ibidem.

34 Ibidem.

35 J. Toman, *Cultural Property in War: Improvement in Protection. Commentary on the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, UNESCO Publishing, Paris 2009, p. 17.

At the Lausowolt Meeting of Experts – a meeting that issued the document that later inspired the Second Protocol to the 1954 Hague Convention – concern over the term "military necessity" was evident.[36] As a result, an article was proposed that would clarify the meaning of Article 4 of the Convention (which establishes the general protection of cultural property), as follows:

> Article 6. Respect for cultural property
>
> With the goal of ensuring respect for cultural property in accordance with Article 4 of the Convention:
>
> a. a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to direct an act of hostility against cultural property when and for as long as:
>
> i. that cultural property has, by its function, been made into a military objective; and
>
> ii. there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective;
>
> b. a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to use cultural property for purposes which are likely to expose it to destruction or damage when and for as long as no choice is possible between such use of the cultural property and another feasible method for obtaining a similar military advantage;
>
> c. the decision to invoke imperative military necessity shall only 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;
>
> d. in case of an attack based on a decision taken in accordance with sub-paragraph (a), an effective advance warning shall be given whenever circumstances permit.

It can be seen that there are several requirements to invoke "imperative military necessity" – an official with the capacity to recognize the presence of an imperative military necessity, the need of an effective warning issued before the attack, and the lack of an alternative measure to obtain a similar military advantage. However, the most remarkable advance was to link military necessity to the more concrete concept of military objective.[37]

According to the First Additional Protocol to the Geneva Conventions, "military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total

[36] See K. Chamberlain, *Military necessity under the 1999 Second Protocol*, in: N. van Woudenberg, L. Lijnzaad (eds.), *Protecting Cultural Property in Armed Conflict – An Insight into the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, Brill-Nijhoff, Leiden – Boston 2010, pp. 43-50.

[37] See J.M. Henckaerts, *New Rules for the Protection of Cultural Property in Armed Conflict*, "International Review of the Red Cross" 1999, No. 835.

destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage".[38]

Moreover, according to the Second Protocol several precautions have to be taken by the attacking State that were not mentioned in the Convention: to verify the nature of the object towards which the attack is aimed; to use means to avoid or to reduce excessive damage to cultural property; to refrain from carrying out attacks that could cause disproportionate damage; to avoid actions that breach the above-mentioned provisions; and to place cultural property as far as possible outside of military objectives.

Furthermore, another type of protection was stipulated by the Second Protocol: enhanced protection. This type of special protection is applied only to cultural property approved by a Committee, established in the 1954 Hague Convention, to receive an immunity that meets the following requirements: being classified as cultural heritage of the greatest importance for humanity; being protected by internal law; and not being allowed to be used for military purposes or to shield military sites.[39]

Similarly to the special protection, meeting the requirements to waive this protection is more difficult: to lose the protection the cultural property must become a military objective. Furthermore, the attacking State must take all precautionary measures as established by the Protocol.[40] It can be observed that the term "military necessity" is not used to define situations in which the protection may be waived, but rather the more concrete concept of "military objective", defined by several international instruments, is used.

However, the advances made by the Second Protocol are only applicable to 67 States-Parties and have not yet attained customary law status.

The Practice of States: A Study of Selected States' Military Manuals

According to article 7 of the Convention the States-Parties must, in times of peace, introduce instructions into their military regulations that ensure the observance of the Convention.[41] Hence a number of military manuals provide specific instructions concerning cultural property.

[38] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3.

[39] See Chapter 3 of Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 May 1999, 2253 UNTS 212 [Second Protocol to the 1954 Hague Convention].

[40] See Article 7 and 8 of the Second Protocol to the 1954 Hague Convention.

[41] See Article 7 of the 1954 Hague Convention.

Several Military Manuals call for respect for cultural property and for refraining from using it for military purposes.[42] However, these protections are granted only if the cultural property is identified as such. The Military Manual of Benin, for instance, limits the protection given to cultural property "to the extent permitted by the tactical situation."[43]

The term "imperative military necessity" is, nevertheless, not often used. For instance, the Socialist Federal Republic of Yugoslavia's Military Manual only requires a military need to waive the protection given to cultural property.[44]

On the other hand, Croatia's Commander Manual specifies that:

> 14. The immunity of a marked cultural object may be withdrawn in case of imperative military necessity. […] 55. [In attack] the immunity of a marked cultural object shall only be withdrawn when the fulfillment of the mission absolutely so requires. Advance warning shall give time for safeguard measures and information on [the] withdrawal of immunity.[45]

A similar provision is also present in Hungary's Military Manual of 1992 and Italy's LOAC Elementary Rules Manual.[46]

As for the Soviet Military Manual, it listed as a prohibited method of warfare the destruction of cultural property that represents the cultural or spiritual heritage of a people.[47] Similar provisions can be found in the Soldier's Manual of Guinea, which establishes that identified cultural property must remain untouched.[48]

Moreover, seminars have been introduced to educate the military about the importance of protecting cultural property[49] by engaging a special division to pro-

[42] International Committee of Red Cross, *Practice Relating to Rule 38*, *attacks against Cultural Property*, *Military Manuals*, https://www.icrc.org/customary-ihl/eng/docs/src_iimima#a [accessed: 10.11.2015]; see Argentina, *Leyes de Guerra* (1967), Australia, *Law of Armed Conflict*, *Commanders' Guide* (March 1994), Burkina Faso, *Règlement de Discipline Générale dans les Forces Armées* (1994), Congo, *Décret no. 86/057* (1986), Djibouti, *Décret no. 82-028/PR/DEF* (1982), Belgium, *Doit Pénal et Disciplinaire Militaire et Droit de la Guerre* (1983), Greece, *Hellenic Territorial Army's Internal Service Code* (1984), Mali, *Règlement du Service dans l'Armée*, (1979).

[43] Ibidem, Benin, *Le Droit de la Guerre* (1995), Indonesia, *The Basics of International Humanitarian Law in Warfare* (1990).

[44] Ibidem, Yugoslavie, *propisi o Primeri Pravila Medjunarodnog Ratnog Prava u Oruzanim Snagama* (1988).

[45] Ibidem, Croatia, *Basic Rules of the Law of Armed Conflict – Commanders' Manual* (1992).

[46] Ibidem, Hungary, *A Hadijog*, *Jegyzet a Katonai*, *Föikolák Hallgatói Részére*, 1992. Italy, *Regoleelementari di dirritto di guerra* (1991).

[47] Ibidem, Russia Federation, *Instruction on the Application of the Rules of International Humanitarian Law by the Armed Forces of the USSR* (1990).

[48] Ibidem, Guinea, *Soldier's Manual* (2010).

[49] NATO has, for instance, promoted seminars to disseminate a deeper understanding of the 1954 Hague Convention. See J.D. Kila, Ch.V. Herndon, *Military Involvement in Cultural Property Protection*, "Joint Force Quarterly" 2014, No. 74, pp. 117-118.

vide guidance during attacks on the protection of cultural property.[50] States and International Organizations are increasingly taking concrete preventive and precautionary measures to protect cultural property in the event of an armed conflict. The MINUSMA, for instance, has developed a brochure to train military, police, and civilian staff on the rules to protect such property,[51] and it was also to draft a *passport* listing the cultural property that should be protected.[52]

One can argue that even though the terms of the 1954 Hague Convention are not transposed to States' military manuals, the protection of cultural property acknowledged by them is similar to that provided by the Convention. However, as already stated the international protection of cultural property has developed the concept of "military objective" – a development first established by the 1977 Additional Protocols to the Geneva Convention. This new approach is not yet present in the majority of manuals.[53]

The Practice of the International Criminal Tribunal for the Former Yugoslavia

The jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) is apt to the analysis of the concept of military necessity, as linked to the protection of cultural property. It should be noted at the outset that the ICTY did not limit the applicable law of the protection of cultural property in the event of an armed conflict to the 1954 Hague Convention, using other instruments containing similar provisions as well.

In the Balkan conflicts, several cultural items were targeted,[54] among them the Old Town of Dubrovnik. Hence, the ICTY dealt with the responsibility of individuals for destroying this property.

In the case *Prosecutor v. Miodrag Jokić* (judgment of 18 March 2004), Miodrag Jokić pleaded guilty to the crime of destruction or willful damage done to institutions dedicated to religion, charity, education, arts and sciences, and to his-

[50] This practice was engaged by UK armed forces during the attacks in Libya in 2011, see R. O'Keefe, *Protection of Cultural Property in Armed conflict*, "Amicus Curiae" 2007, Issue 71, p. 5.

[51] *UNESCO determined to help Mali restore and rebuild its cultural heritage*, UNESCOPRESS, 30 October 2013, http://www.unesco.org/new/en/unesco/resources/unescos-action-in-mali/?utm_source=partner-fotopedia&utm_medium=iphoneapp&utm_campaign=malicampaign&utm_term=donation&utm_content=CLT-WHC [accessed: 10.11.2015].

[52] Ibidem, for furthering reading see Ch. Manhart, *The Intentional Destruction of Heritage: Bamiyan and Timbuktu*, in: W. Logan, M.N. Craith, U. Kockel (eds.) *A Companion to Heritage Studies*, Wiley-Blackwell, Chichester 2016, 289 ff.

[53] This new approach is present in a minority of manuals, e.g. the Germany's Soldiers' Manual (2006), the Military Manual (2005) of the Netherlands, and the UK LOAC Manual (2004) in: International Committee of the Red Cross, *Practice Relating to Rule 38…*

[54] K.J. Detling, *Eternal Silence: the Destruction of Cultural Property in Yugoslavia*, "Maryland Journal of International Law" 1993, Vol. 17, pp. 41-75.

toric monuments and works of art and science by destroying the Old Town of Dubrovnik.[55] According to the Trial Chamber, "this crime represents a violation of values especially protected by the international community".[56]

The Chamber invoked the protection given by the Regulations annexed to the Hague Convention Respecting the Laws and Customs of War on Land (the "Hague Regulations") and the Hague Convention Concerning Bombardment by Naval Forces in Time of War of 18 October 1907. However it recognized that the 1954 Hague Convention establishes a more specific protection and it was preferable to apply it,[57] while noting that this Convention is applicable only to cultural property of great importance to the cultural heritage of all mankind.[58] Since the Old Town of Dubrovnik was listed in the World Heritage List, it was considered that the site was of such importance that it would call for the application of the 1954 Hague Convention.[59] However, since M. Jokić pleaded guilty, the Chamber did not analyze further the obligation to refrain from attacking cultural property.

In the *Hadžihasanović & Kubura* judgment, the Trial Chamber stated that:

> The Chamber considers that the seriousness of the crime of destruction of or damage to institutions dedicated to religion must be ascertained on a case-by-case basis, and take much greater account of the spiritual value of the damaged or destroyed property than the material extent of the damage or destruction.[60]

Moreover, in order to constitute a crime under the Statute,the cultural property must not be used for military purposes.[61]

In the judgment of *Prosecutor v. Dario Kordić and Mario Čerkez*, the Appeal Chamber recognized two types of protection of cultural property: a general one, given by article 52 of the First Additional Protocol to the Geneva Conventions, concerning civilian objects,[62] and a second one given by article 53 of the same Protocol, which applies to historic monuments, works of art, and places of worship, provided they constitute the cultural or spiritual heritage of people.[63]

[55] *Prosecutor v. Miodrag Jokić*, ICTY Case No. IT-01-42/1, Judgment of Trial Chamber, 18 May 2004, at § 46.

[56] Ibidem.

[57] Ibidem at § 47-48.

[58] See Article 1 of the 1954 Hague Convention.

[59] *Prosecutor v. Miodrag Jokić*, op. cit, at § 49-51.

[60] *Prosecutor v Hadžihasanović & Kubura*, ICTY Case No. IT-01-47-T, Judgment of the Trial Chamber, 15 May 2006, at § 63.

[61] Ibidem at § 64.

[62] *Prosecutor v. Kordić and Čerkez*, ICTY Case No. IT-95-14/2-T, Judgment of the Trial Chamber, 26 February 2001, at § 89.

[63] Ibidem at § 90.

Regarding the first protection, it can be waived only when the cultural property in question has been turned into a military object and its partial or total destruction must offer a definite military advantage at the time of the attack.[64] Such waiver differed from the imperative military necessity under the 1954 Hague Convention, since it links the waiver to a more concrete definition: a military objective. However, it must be noted that the Protocol states that it was "without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954", indicating that the Convention's concept of military necessity was to be applied as well.

In the *Brđanin* case the ICTY understood that, in the case of a presence of military objects near cultural properties, the protection of these objects could be waived by the concept of military necessity.[65]

Finally, in the *Pavle Strugar* judgment the Trial Chamber, in applying the 1954 Hague Convention, noted that the obligation to respect cultural property established in Article 4 of the Convention has two explicit limbs.[66] The first is "to refrain 'from any use of the property and its immediate surroundings [...] for purposes which are likely to expose it to destruction or damage in the event or armed conflict",[67] and the second one is to "refrain from any act of hostility directed against such property".[68]

The Trial Chamber attempted to define military necessity. In order to do so, it invoked the definition given by Article 52 of the Additional Protocol I to the Geneva Conventions, i.e.: "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage".[69] However, since no military necessity was recognized in the acts of Pavle Strugar, the matter was not further discussed.[70]

According to Roger O'Keefe, this jurisprudence demonstrates that the protection of cultural property can be waived only when: (1) it is invested with a military purpose; (2) its location provides a military advantage; and (3) its nature provides a military advantage. However, the destruction must be proportional to the concrete advantage acquired and it must be the only way to gain this advantage.[71]

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64 Ibidem at § 89.

65 *Prosecutor v. Brđanin*, ICTY Case No. IT-99-36, Judgment of the Appeal Chamber, 3 April 2007, at § 337.

66 *Prosecutor v. Pavle Strugar*, ICTY Case No. IT-01-42, Judgment of the Trial Chamber, 31 January 2005, at § 309.

67 Ibidem at § 309.

68 Ibidem.

69 Ibidem at § 295.

70 Ibidem at § 309.

71 R. O'Keefe, *Protection of cultural property under International Criminal Law*, "Melbourne Journal of International Law" 2010, Vol. 11, pp. 12-18.

Therefore, according to jurisprudence of the ICTY, in order to waive the protection of cultural property it is not only required to demonstrate a military tactical necessity, but also to for the cultural item to meet the definition of a military object.

Conclusions

Today the concept of military necessity remains unclear, even when linked to the protection of cultural property, in the event of an armed conflict. However, no new definition of this concept has yet been drafted to solve and clarify the situations in which the protection may be waived. Instead, military necessity has been linked to a more concrete definition: military object.

This new definition not only clarifies the situations in which the waiver can be invoked, but also improves the protection by establishing new requirements to be met beforehand. Precautionary actions and advance warnings, for instance, are all steps aimed at trying to prevent an attack against cultural property.

Even though the major treaty on the protection of cultural property, the 1954 Hague Convention as well as states' military manuals do not use the concept of "military object", several new international instruments refer to it. Thus it may be said that even if this new rule has not yet attained customary status, a new practice is arising regarding the protection of cultural property in the event of an armed conflict.

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CULTURAL HERITAGE LAW IN POLAND

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Culture Goods in the *Public Domain* under Polish Law – Acquiring and Disposing Difficulties

Abstract: In the Polish legal system there is no general and coherent legal regulation created with the purpose to set the unified rules for acquiring or disposing of culture goods by public entities. Different legal acts contain few regulations in this matter and it results in difficulties in applying the regulations that are presented in this article. The paper presents a short historical background of two major moves within Polish public culture property – nationalization and municipalisation in the scope of museum property. Then the analysis is focused on those regulations of statutory law that are being applied in cases where the issue of acquiring ownership by public entities is examined, together with case law referring to the possibility to acquire ownership in the public domain via adverse possession. Culture goods are also the element of the estate of local government units and state administration units and in this sphere there are no regulations preventing or influencing the unit

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from disposing of the culture good. It is only when the voivodship is the owner of a movable culture object, when the law introduces the rule that the act of disposition (e.g., sale contract) requires the consent in the form of a resolution of the voivodship management board in order to be valid. When immovable culture goods are to be sold by a public entity, the law requires the consent in the form of the administrative decision of an officer from a historical monument protection office (conservation officer), and there is no reason why the freedom of disposition of movable culture goods in public administration should not be limited in a similar way.

Keywords: ownership, museum, estate, inalienability, culture, public administration

Introduction

This article deals with those legal issues concerning tangible and movable culture goods in the possession of the Polish Treasury or museums as well as other public legal persons distinguished under Polish law. However, its content does not refer to books nor documents or photograph stored in public archives or libraries. In the Polish legal system there is no general and coherent legal regulation created with the purpose to set down the rules for the acquiring or disposing of culture goods by public entities. Different legal acts contain few regulations in this matter and this results in difficulties in applying the law.

The first part of this article presents a short historical background of two major moves within Polish public culture property – nationalization and municipalisation. Then the analysis is focused on the regulations of statutory law that are being applied in cases where the issue of acquiring ownership by public entities is examined, together with case law referring to the possibility to acquire ownership within the public domain via adverse possession. Conclusions contain remarks on the need to create adequate legal rules unifying the rules for the acquiring and disposing of culture goods by all public entities and the assessment of the need to introduce the inalienability rule in this field.

The Polish legal system is derived from Roman law and consists, not surprisingly, of two major branches: public and private law. The question of proprietary issues are regulated mostly under private law, specifically in civil law. In the past, before the major economic changes in the political system in the 1980s, civil law generally recognized the division between public and private property, and within Polish legal theory little attention was focused on public property law regulations. In the 1950s the doctrine of law emphasized that this area was to be examined specifically by jurists of administrative public law theory as this type of property

was intended to be placed outside civil law.[1] As we are able to nowadays assess the academic research conducted under the socialist regime it needs to be pointed out that nothing except for general remarks were made in this regard.[2] Something which may be considered an important reason as to why later this division between public and private property was ousted from legal theory and from the legal notions in statutory law. However, the notion of public property has not totally disappeared from the legal language. Interestingly, it is the domain of culture law where the need for a specific legal treatment of cultural object possessed or owned by public entities is being noticed,[3] with special attention being placed on the copyright derived for these goods in question despite the fact that the Polish legislator did not introduce the principle of the non-alienability of public culture goods as it has been done explicitly in the law of France, Spain or Italy.[4]

As this essays refers to movable things only, ones deemed by the term public culture property, it must be first emphasized that the major form of administration and protection for objects of this type are public museums. A Public Museum is an entity embedded in the structures of public administration, created by a minister within the central administration structures or created by a local government administration with or without its own separate legal personality.[5] Public museum works in the specific sphere of the legal relations of material objects, aimed at the protection and preservation of these items and the question of their origins or proprietary status, have been regarded as of secondary importance. There are few publications on the law regulating the right of ownership of culture goods administered by a museum, however nowadays it is becoming obvious that this is an increasingly urgent need. The object of this article is to present the issue of the ownership relations regarding items housed in public museums, with the possible exception of the legal regulations governing archaeological sites that may be included in a given museum structure.

Public museum usually acts in the market as a private law legal person when a transaction resulting in the acquisition of a culture good takes place and the rules of civil law determine A whether the property has actually been acquired. Civil

1 S. Grzybowski, *Dzieje prawa. Opowieść, refleksje, rozważania*, Ossolineum, Wrocław 1981, p. 241.

2 J. Szachułowicz, *Własność publiczna. Powstanie, przekształcanie, funkcje, zarządzanie*, Wydawnictwo Prawnicze, Warszawa 2000, p. 8.

3 When it comes to the legislation of other European countries in this matter see M. Weber, *Unveräußerliches Kulturgut im nationalen und internationalen Rechtsverkehr*, De Gruyter, Berlin – New York 2002, pp. 423-427; see also: A. Jakubowski, *State Succession in Cultural Property*, Oxford University Press, Oxford 2015.

4 N. Fyderek, W. Szafrański, *Sprzedaż muzealiów – niewykorzystana szansa czy brak konieczności*, in: A. Jagielska-Burduk, W. Szafrański (eds.), *Kultura w praktyce. Zagadnienia prawne*, Vol. 3: *Muzea a rynek sztuki. Aspekty prawne*, Wydawnictwo Poznańskiego Towarzystwa Przyjaciół Nauk, Poznań 2014, p. 11.

5 There are public museum without a separate legal identity, but this form is of little importance in practice.

law is supplemented with statutory regulations created specifically for museums, when representation is the matter under question. It is important though that many museums have existed as an organizational unit for more than a century and as the law changes it is necessary to apply different rules in order to assess the validity of an act performed to acquire the ownership of things stored in a museum's collection. Apart from the acts and legal events regulated by civil law, public domain property may be derived from other sources of its formation; in the case of public property the subject literature presents additional routes: international agreements, nationalization, expropriation, a waiving of the right to property and concealment.[6]

The goal of determining the ownership of some of the things placed in museums is sometimes hard to achieve due to the fact that the origins of public museum collections in Poland date back to the nineteenth century. After the proclaiming of Polish independence in 1918, during the Second Republic, the regulation of public museum activities was postponed or even abandoned, and the legal regulation of the status of museum objects was covered by internal museum rules resulting from the observance of the principle of museum autonomy at that time, especially since the state (the Treasury) was not the major founder of collections those days.[7] The majority of museum funding activity was performed by individuals or local government and private associations. Thus, purchases, donations,[8] legacies and deposit exhibits were regulated by private law i.e. the relevant civil law. After the Second World War the legal succession of culture property in favor of the Polish state (Treasury), including objects listed in the inventories of museums,[9] and formerly in local government units in the annexed areas, was regulated by different national laws and specific regulations were included in international agreements.

There was the tendency to unify the structure of public administration and so the ownership of municipal (local government) entities was liquidated on the date of the coming into force of the Act of 20 March 1950 on local organs of state unitary authority and administration,[10] in connection with the main goal – the

[6] J. Szachułowicz, op. cit., p. 18.

[7] In 1918 there were 99 public museums in Poland, yet none of them was owned by the state, they existed within the organisational structures of local government, foundations, scientific associations etc. (M. Treter, *Muzea współczesne. Studium muzeologiczne. Początki, rodzaje, istota i organizacja muzeów. Publiczne zbiory muzealne w Polsce i przyszły ich rozwój*, Redakcja "Muzeum Polskiego", Kijów 1917). In 1939 only 11 museums were financially maintained from state budget funds (J. Pruszyński, *Dziedzictwo kultury Polski. Jego straty i ochrona prawna*, Vol. 1, Zakamycze, Kraków 2001, p. 381).

[8] A. Jagielska. W. Szafrański, *Darowizny na rzecz muzeów*, in: W. Szafrański (ed.), *Wokół problematyki prawnej zabytków i dzieł sztuki*, Vol. 2, Wydawnictwo Poznańskie, Poznań 2008, pp. 69-80.

[9] At the beginning of the 20th c. museum inventories were kept with a negligible level of details – J. Pruszyński, op. cit., pp. 381-382.

[10] Ustawa z dnia 20 marca 1950 r. o terenowych organach jednolitej władzy państwowej [Act on Unified State Administration dated on 20 March 1950], Dz. U. No. 14, item 130.

liquidation of local government – in accordance with Article 32 paragraph. 2 of this Act. This resulted in former local government property being transferred to the Treasury. Nationalization of communal ownership meant that the Treasury became the owner of vast amounts of property, including also the owner of the property formerly owned by local government and constituting the stock and resources of former local government museums. After the Second World War, the assumption that an item national property belonged solely to the socialist state was considered the supreme rule and it was emphasized that the owner of this property as a whole could only be the people's state i.e., the Treasury. This rule was formed even before the codification of Civil Law itself (1964). The political changes in Poland in 1989 resulted in political and economic changes towards a capitalist system. It was also the time when the idea of the decentralization of public administration was brought back to life. The process of transferring some parts of public property back to municipalities was initiated by specific legal acts and state property has been partially transferred to the newly created local government units on the levels of commune, district and province (Polish: *gmina*, *powiat*, *województwo*). What is very important is that there were no provisions explicitly reversing all the effects of the Nationalization Act of 1950 mentioned above.

Considering the above, one needs to state the rule governing public culture property possessed by state museums before 1990, which is that state administered possessions were not only ones owned by the state . Additionally, the state-owned assets were administered by public museums in 1990, when the municipalisation process was begun: when local government structures were brought back. The municipalisation process of that time was not a simple reversal activity of transferring back all the goods that were first nationalized in 1950. Thus, property acquired by local governments before 1950, in the form of movable objects (exhibits and other objects and documents in the collections of public museums) was often excluded from municipalisation and is now often owned by the Treasury as the legal successor of these units under a general title based on the above-mentioned act on nationalization issued in 1950. The provisions listed in the normative act being the municipalisation legal source[11] contain general rules applied to public property as a whole, and do not relate to specific works of art nor to object in the possession of public museums. In practice, therefore, whether a given work of art has been covered by these normative acts, requires delving into the inventories held by museums at a given time, the content of which does not always allow for an unambiguous identification of the owner of the object itself. From the date of entry into the state register of cultural institutions a museum may be considered to be a separate entity from the State Treasury and can consequently acquire its own property

[11] Ustawa z dnia 10 maja 1990 r. Przepisy wprowadzające ustawę o samorządzie terytorialnym i ustawę o pracownikach samorządowych [Act Implementing the Act on Local Government Structures and the Act on Local Government Employees dated on 10 May 1990], Dz. U. Nr 32, item 191, as amended.

rights. According to the current regulations of Article 33 of the Civil Code, legal persons are: the Treasury and other organizational units, conferred legal personality via specific provisions of legal acts. Pursuant to Article 34 of the Civil Code, the Treasury is in civil-law relations the subject of the rights and obligations that apply to state property not belonging to other state legal persons. Thus, a state legal person, which undoubtedly is the museum vested with legal personality and organized by the Minister of Culture, may be the subject entitled to the property (and other rights *in rem*) of state property. This does not mean, however, that all items of property administered by a public museum belong to one entity. According to Article 27 section 1 of the Law on organizing and conducting cultural activities[12] (referred to hereinafter as the Law of cultural activity), a cultural institution manages independently the assigned and acquired part of the property, guided by the principles of the effectiveness of their use.[13] This provision shows that the museum as a legal person may acquire ownership of state property through legal action. However, specific rules govern the acquisition, storage and administration of archives but this particular issue is beyond the scope of the subject matter covered by this paper.[14]

There are a lot of uncertainties when it comes to the art market, where the acquisition of culture goods in the public sphere is examined.[15] A public museum, according to Article 32 paragraph. 3 of the Act of organising and conducting cultural activity, may receive funds from individuals and legal entities and from other sources, as well as grants from the state budget allocated to cover operating costs and also the costs of art acquisition. Polish law does not provide any formal legal

[12] Ustawa z dnia 25 października 1991 r. o organizowaniu i prowadzeniu działalności kulturalnej, [Act on Organising and Conducting Cultural Activities dated on 25 October 1991], consolidated text: Dz. U. 2012, item 406, as amended.

[13] See K. Zalasińska, *Muzea publiczne. Studium administracyjnoprawne*, Lexis Nexis Polska, Warszawa 2013.

[14] In many public museums there are archives organized as separate units but which do not have a separate legal identity from the museum, they are separated only organizationally and functionally, and their organizational structure is scheduled by the internal regulations of the museum. Materials collected in archives are considered to be part of the national archival collection. The basic legal act governing the principles and functioning of the state archives in Poland is the Act on the National Archival Resources and Archives dated on 14 July 1983 [ustawa z dnia 14 lipca 1983 r. o narodowym zasobie archiwalnym i archiwach], consolidated text: Dz. U. 2015, item 1446, hereinafter referred to as ANARA. Museums are entrusted with only the storage but also the collection and acquisition (obtainment) of archive materials, in accordance with Article 22 section 2 point 2 ANARA. They gather archival materials constituting state archival documents (as defined in Article 15 section 2 ANARA), state archives are also created by materials gathered from the market resulting from the transaction of purchase, donation or by another route.

[15] See also: A. Jagielska-Burduk, D. Markowski, *Wybrane zagadnienia dotyczące sposobów nabywania własności dzieł sztuki i zabytków przez muzea*, "Acta Universitatis Nicolai Copernici. Zabytkoznawstwo i Konserwatorstwo" 2013, Vol. 44; K. Zeidler, *How to Get and not to Give. About Injustice in Restitutions*, in: M. Borák (ed.), *Restitution of Confiscated Art Works – Wish or Reality*, Tilia Publishers, Prague 2008.

framework regarding the value or kinds of object to be bought by a public museum, the Law on museums provide only the general rule that the goal of museums is the administration of cultural objects. Some specific regulations may emanate from the internal statute of a particular public museum, which have to be officially accepted by the Minister or some other higher administrative body that has organized the structure of this museum.

A public museum may also acquire cultural property through the route of inheritance, on its own behalf or on behalf of the Treasury or a local government unit. Only after obtaining legal identity, could public museums begin to acquire the ownership of things by way of succession – as the successor under a will. When statutory inheritance is considered i.e., in the absence of the last will of a deceased person, the municipality or the Treasury may be considered as an heir only when there is no family left or every member of the family has rejected the inherited property. If within the inherited assets are culture goods, their possession may be transferred to the public museum on the base of an act of deposit, as it is the Treasury or municipality who is the owner of the property.

Adverse possession of culture goods and the museums

Adverse possession under Polish Law is the situation where one person performs the factual possession over an object (movable or immovable) which is inconsistent with the title of the true owner, this inconsistency does not necessarily involve the intention to exclude the true owner from having the object or estate which is being possessed.[16] The adverse possessor, when it comes to movables, acquires the ownership title after a period of three years of possession uninterrupted by the owner, but only when the possessor acted in good faith when acquiring the possession and for the entire time afterwards up to 3 years (Article 174 Polish Civil Code[17]). Good faith in this case means that the possessor is convinced, basing themselves on the situation in hand, that they are entitled to ownership, when in reality they are not. Problems arise in the case of objects of unknown provenance where the application of the abovementioned provision of the Civil Code is considered. It is very tempting to apply this institution in favor of a museum, especially when the movable cultural property has been transferred

[16] When under the common law of the United Kingdom, this intention may be rigorously required – G. Brennan, N. Casey (eds.), *Conveyancing*, 7th edn., Oxford University Press, Oxford 2014, p. 435.

[17] Article 174 of the Civil Code [ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny, consolidated text: Dz. U. 2014, item 121, as amended] provides that the holder of movable property not being the owner acquires the property if it has the benefit continuously for three years as the independent and free holder, unless he does so in bad faith or the object is listed in national register of lost culture goods. See also W. Kowalski, *Nabycie własności dzieła sztuki od nieuprawnionego*, Zakamycze, Kraków 2004.

to the museum by way of factual actions or when the type of contract was not specified (e.g., there is no official record or contract testifying to the transfer of property for the relevant acquisition neither is there a protocol or other written document made out by a third person or employees of the museum). It can only be said that the museum holds items without obvious legal title. And although it is generally true that performing adverse possession of movable property in good faith may lead to the prescription of ownership of the object, according to Article 174 of the Civil Code, this is not always the case. The case law on matters relating to the acquisition of the ownership title through the adverse possession by a public entity (Treasury) was established on the basis of the prescription issues of property rights, against this background the courts stated that if the inclusion of objects within the public estate occurred when the state officers were fulfilling public works and when their actions could not be considered as civil law (or private law) actions, the results of those actions must also lie beyond civil law relations. Eventually it was stated that possession acquired by the route of public task performance may not result in creating the possession *in statu usucapiendi* so this does not constitute adverse possession under Civil Law. Hence this possession may not lead to the acquisition of an ownership title. According to the Supreme Court, the essence of adverse possession leading to ownership title must not only be factual possession, which would have its origins in *possessio naturalis*, but also the qualification given by the rule of law comprised in the Civil Code and relating to its scope of regulation, which are only the private law legal relationships (Article 1 of the Civil Code). Objects acquired by the Treasury where the inclusion was exercised within administrative officers' public sphere activity may become included into the private transaction market only based on a specific legal regulation. As state officers always need a legal basis to perform an acquisition, they may not legally act without a legal basis. The need for a legal basis for acts performed as part of the public "imperium" excludes the possession acquired in this mode and prevents its transformation into possession recognized by Civil Law, in particular that leading to ownership.[18] Hence, when it has been determined that the Treasury acquired the cultural object through exercising its power resulting from its public functions, it may not be recognized as the holder under the letter of Civil Law. This reasoning raises obvious implications as to the impossibility of recognizing the period of possession by public agencies or units relating to the prescription time limits under Civil Law. The Highest Court resolution cited above refers also to a situation in which the property was legally included into the estate of the Treasury through actions within the imperium sphere according to law.

[18] The Highest Court resolution of 7 judges dated on 21 September 1993, III CZP 72/93, OSNC 1994, No. 3, item 49.

The Highest Court ruled similarly in another case concerning the effects of possession of immovable property with a historically important monument building, where the inclusion into the Treasury estate was performed legally, on the basis of the Ministry of Culture and Art of 9 May 1946, issued pursuant to Article 17 of the Decree of the President of the Polish Republic of 6 March 1928 on the care of monuments (Dz. U. No. 29, item 265). In its judgment the Supreme Court found that the care performed by the Treasury over the immovable cultural property constitutes an emanation of the imperium power of the State, recognized under public law, and may not be recognized as the performance of its civil activity in the sphere of dominium, within the framework of the matter of civil law. As a consequence, the care performed shall be recognized as a form of factual governance and not possession itself in the civil law sense. All these remarks allow one to advance the thesis: if the inclusion of the possession of culture goods by a public museum (with separate legal identity or more often as an organizational unit of the state[19]) was based on a legal act issued on the basis of statutory law provisions and simultaneously being an act of public administration performed in the sphere of *imperium*[20] it may not be recognized as adverse possession leading to ownership in the sphere of civil law relations.

Only When the Ownership is Legally Acquired, May the Object Be Disposed

Polish law does not provide *exressis verbis* the strict principle of culture goods inalienability within the public domain, yet it may be recognized as an underlying rule when it comes to public museums' activity. Public museum activity is regulated not only by the Museums Law of 1996,[21] but also by a law of a more general nature – the Law on cultural activity.[22] The provision of Article 27 section 2 of the Law on cultural activity states that a cultural institution (public museums are recognized by law as units of cultural institutions) may dispose of its fixed assets. The laws governing the organization and work of museums since 1962 have also enabled museum director with the possibility to transfer the property of culture goods after acquiring the consent of the Minister. However, the cautious practice of museums and the strong public conviction as to mischievousness within this kind of actions generally prevented museums making such unpopular decisions.[23] However, actually culture

19 Called in Latin *statio fisci*.

20 As opposite to the *dominium* sphere.

21 Ustawa z dnia 21 listopada 1996 r. o muzeach [Act on Museums dated on 21 November 1996], consolidated text: Dz. U. 2012, item 987, as amended.

22 Act on organizing and performing cultural activity.

23 N. Fryderyk, op. cit., pp. 17-19; W. Katner, *Problem własności muzealiów a roszczenia windykacyjne dawnych właścicieli*, "Kontrola Państwowa" 1992, No. 1, pp. 68-69.

goods gathered in public museums owned by the Treasury or other public entities may not be strictly called *rei extra commercium*, as the objects are subject to various civil law contracts such as: a lease contract, insurance contract[24] lending agreements,[25] and copyrights contracts as well (license agreements).

Conclusions

In my opinion, the acts of acquiring ownership of culture good into the public domain are not properly regulated and the lack of this results in uncertainty as to the legal status of some objects administered by public museums, which may (and often does) prevent the director of the museum from using the object in exhibitions or from letting other museums (especially foreign ones) to access this object. There is a legal rule that culture goods assembled in public museums may be made available to anyone under the regulations of the Museum Law of 1996 and the Law on Access to Public Information of 2001.[26] Yet, the uncertainty over the ownership status of culture goods influences the possibility to access these objects, as they are not publicly presented in practice. Additionally if there is uncertainty as to who is the owner of an object, it is impossible to dispose of it, and although it stays forever within the public domain and although the costs of administration and renovations are covered from public money, the public exhibition of these objects may not always be considered safe.

Arguably, there is no need to expressly introduce the rule of strict inalienability of culture goods possessed by public museums, as the minister has the power to control and prevent unnecessary dispositions of culture goods. Nowadays public interest is more focused on the issue of free access to visual information of objects collected in museums[27] via the Internet, than on the question of prohibiting the disposition of these objects. However culture goods are possessed also by local government units and the state administration units and in this sphere there are no regulations preventing or influencing the unit from disposing of the culture good. It is only when the voivodship is the owner of a movable culture object, when the law

[24] See I. Gredka, *Ubezpieczenia dóbr kultury w muzeach i zbiorach prywatnych*, Towarzystwo Autorów i Wydawców Prac Naukowych Universitas, Muzeum Pałac w Wilanowie, Kraków – Warszawa 2013.

[25] P. Gwoździewicz-Matan, *Umowa użyczenia muzealium w prawie prywatnym*, Wolters Kluwer, Warszawa 2015.

[26] Ustawa z dnia 6 września 2001 r. o dostępie do informacji publicznej [Act on Access to Public Information dated on 6 September 2001], consolidated text: Dz. U. 2015, item 2058, as amended.

[27] Where the question of the public's access to culture goods made by the public is discussed, actually, the most important issue nowadays is the issue of making visual and graphical data available to the public online, which is covered by the regulations of the Directive No. 2013/37/EU of the European Parliament and of the Council amending Directive 2003/98/EC on the re-use of public sector information, 26 June 2013, OJ L 175, 27.6.2013, pp. 1-8. This directive is being implemented into the Polish legal system and adequate types of work are being performed within the structures of the Ministry of Administration and Digitization.

introduces the rule that the act of disposition (e.g., a sale contract) requires consent in the form of a resolution of a voivodship management board in order to be valid.[28] In any other cases if the piece of art is owned by a public unit, its disposition is conducted in the same way as a non-cultural object, which is not justified, as the value of culture goods does not diminish in time. When immovable culture goods are to be sold by a public entity, the law requires the consent in the form of an administrative decision of an officer from the historical monument protection office (conservation officer),[29] and there is no reason why the freedom of the disposition of movable culture goods in public administration[30] should not be limited in a similar way.

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[28] Article 58, sec. 2 of ustawa z dnia 5 czerwca 1998 r. o samorządzie województwa [Act of Voivodship dated on 5 June 1998], Dz. U. No. 91, item 576, as amended.

[29] Article 26 of ustawa z dnia 21 sierpnia 1997 r. o gospodarce nieruchomościami [Act of Real Estate Management dated on 21 August 1997], consolidated text: Dz. U. 2014, item 518, as amended.

[30] Excluding public museums, but including private museum entities.

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CULTURAL HERITAGE LAW IN POLAND

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The Criminal Threat to Cultural Heritage in Poland – Analysis of the Events of 2014

Abstract: When studying the phenomenon of crime against cultural heritage different methods can be applied to diagnose the level of threat. A year-long study of specific crime cases where the victims are cultural goods allows one to see trends in the activities of the perpetrators and helps one to develop methods to counteract future incidents. Long-term studies of crime cases affecting cultural heritage enable for a complementary way of assessing the level of risk factors and to minimize the risk of their occurrence.
The study is expected to begin an annual series of articles aimed at the systematic presentation of the phenomenon of crime against cultural heritage in Poland. The text presents a selection of cases which, in the opinion of the author, may constitute an auxiliary tool to diagnose the level of the threat to cultural goods within the period indicated. There are presented in a shortened form cases of various types of criminal activities against heritage, such as theft, burglary and the destruction of valuable cultural objects.

Keywords: crime, cultural heritage, robbery, destruction

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Introduction

When analysing the level of security of cultural heritage in Poland, one should pay attention to the impact of crime on the level of threats to individual types of cultural goods. Crime against cultural heritage takes many different forms and is directed against its different components, thus the problem often requires – depending on the specific case – a different approach. The theft of a valuable picture from a museum, the destruction of a Gothic building, historical archive materials taken illegally out of the country or archaeological looting – all of these activities are a threat to cultural heritage broadly understood. The legal classification of such acts, the *modus operandi* of the perpetrators or the level of harm will, however, be different. Using in a study of this phenomenon only quantitative data concerning cases detected by law enforcement authorities can lead to erroneous conclusions. Such statistics will not take into consideration what are known as black crime statistics, which in some cases such as the smuggling of cultural property, is the essence of the problem.[1] As far as a crime directed against cultural heritage is concerned, it should be noted that a *case method* can be complementary to police statistical data in investigating the phenomenon. This method, which consists of a detailed description of the actual case and allows us to draw conclusions as to the causes and results of its course, can be very helpful in assessing the scale of threats to cultural heritage. In favour of this method is the fact that many cultural objects are individual and unique objects, whose loss irreversibly impoverishes cultural heritage. On the basis of individual cases, one can also specify certain patterns in the activities of the perpetrators, which allow one to develop methods of protecting endangered cultural goods.

The major sources of data concerning the scale and characteristics of crime against cultural heritage in Poland

When studying the issue of the nature and scale of crimes against cultural heritage the scholar should use a variety of materials. Only the combined analysis of data available from different sources allows for a proper assessment of the phenomenon.[2]

[1] See O. Jakubowski, *Zjawisko przemytu dóbr kultury*, "Archiwum Kryminologii" 2014, Vol. 36, p. 108.

[2] Different terminology may be a problem in interpreting research material related to the scope of the data presented. In particular the following expressions should be noted: "crimes against historical sites"; "crimes under the Act on the Protection and Guardianship of Monuments; "crimes against cultural property"; "crimes against cultural heritage"; "crimes against archive materials"; "crimes against archaeological heritage"; "crimes in the art market". The above expressions and their scope are often interchangeable and are used in different contexts. For the purpose of this study the author uses the broadest, in his opinion, expression – "crimes against cultural heritage".

One of the main sources of information on crime against cultural heritage is the data compiled by the Polish National Police Headquarters.[3] Data for the years 1998--2011 are published on the Police web sites[4]. Police statistics relating to the phenomenon under discussion for the years 2012-2013 are published in a journal devoted, among others, to the issue of recovering lost cultural goods – "Valuable Priceless Lost".[5] In this magazine there are also published statistics covering data for 2014.

According to police statistics in 2014 there were altogether 1,295 crimes where the subject of which were cultural goods, which means a decrease of 28.8% compared to 2013 when there were 1819 such offences. Of all the offences there were 108 criminal offences prosecuted by the Act of 23 July 2003 on the protection and guardianship of monuments[6] (in 2013 there were 87 crimes). The detection rate of all crimes aimed at stealing national treasures in 2014 accounted for 34.4%, i.e. 3.6% less than in 2013.[7]

In the case of information on the smuggling of cultural goods, the data made available by the police should be complemented by statistics compiled by the Customs Service and the Border Guard, formations which in the course of their duties frequently come into contact with cases of the illegal export of cultural goods.[8]

An important and often underestimated source of data concerning the scale and specificity of crime against cultural heritage is the National Register of Stolen or Illegally Exported Objects of Historical Value. This database, which is regulated under Article 23 of the Act of 23 July 2003 on the protection and guardianship of monuments, is administered by the National Institute for Museums and Public Collections under the authority of the Minister of Culture and National Heritage. It is a commonly available electronic database, managed on a statutory basis, which

[3] Using data from the statistics presented it should be noted that the system of collecting information by the police has changed several times. The increase or decrease in reported crime in the above data was associated with other methods of counting notifications, and not with the real evolution of the phenomenon – see for more: O. Jakubowski, *Karnoprawna ochrona zabytków – rozważania nad kierunkami zmian prawnych*, in: K. Zeidler (ed.), *Prawo ochrony zabytków*, Wolters Kluwer, Warszawa – Gdańsk 2014, p. 475.

[4] http://statystyka.policja.pl/st/wybrane-statystyki/przestepczosc-przeciwk [accessed: 15.09.2015].

[5] The magazine is now published by the National Institute for Museums and Public Collections.

[6] Ustawa z dnia 23 lipca 2003 r. o ochronie zabytków i opiece nad zabytkami [Act on the Protection and Guardianship of Monuments (APGM)], consolidated text: Dz. U. 2014, item 1446, as amended.

[7] See K. Czaplicka, *Przestępczość kryminalna przeciwko dobrom kultury w Polsce w latach 2013-2014*, "Cenne, Bezcenne, Utracone" 2015, No. 1/82-2/83, pp. 94-98.

[8] The journal "Cenne, Bezcenne, Utracone" ["Valuable, Priceless, Lost"] should be recommended for the reports containing detailed statistics of the phenomenon and in-depth analysis by the representatives of these services – see W. Krupiński, *Nielegalny wywóz zabytków w ocenie staży granicznej – w ocenie działań straży granicznej w latach 2012-2013*, "Cenne, Bezcenne, Utracone" 2013, No. 1-4, pp. 139-141; A. Skaldawska, *Rola Służby Celnej w walce z falsyfikatami*, "Cenne, Bezcenne, Utracone" 2009, No. 3; A. Skaldawska, P. Gawroński, *Zabytki na granicy – Działania Służby Celnej w ujawnieniu nielegalnie przewożonych zabytków*, "Cenne, Bezcenne, Utracone" 2015, No. 1/82-2/83, pp. 88-93.

contains information on antiquities lost as a result of criminal actions.[9] It is often seen merely as a tool used to search for relics lost as a result of crime. One cannot, however, ignore its listing function as a tool containing quantitative data, which permits a substantial analysis of the theft or illegal export of cultural goods. Thanks to the information from the list, one can trace both the geographical distribution of crime, as well as assessing the types of individual cultural goods that most commonly fall victim to criminals. However, in order to use correctly the data from the National Register of Stolen or Illegally Exported Objects of Historical Value, one should know the specifics of the procedures and provisions concerning the principles of entering information into the database. Some information about the thefts of antiquities – in the case of the prompt recovery of objects – is on principle not reported by the relevant authorities. Another reason for the non-registration of an object is the lack of adequate documentation which would enable its identification and the lack of knowledge about the obligation to place the object on the register.

The database contains information about the objects sought, seized (in the case of illegal export) or recovered. In 2014 there were 48 cases of theft registered and divided according to the place of the crime:

- museums – 0,
- religious associations – 9,
- cemeteries – 1,
- private collections – 19,
- others – 19 comprising:
  - art galleries – 9,
  - antiquarian bookshop – 1,
  - village council – 1,
  - archaeological sites – 4,
  - shrines – 1.

As a result of the above mentioned crimes the missing objects were registered in the following categories:

- sculpture and minor art figures – 8,
- paintings – 21,
- furniture, wooden products – 1,
- jewellery– 5,
- weapons – 1,
- varia – 1,
- goldsmith items – 5,
- blacksmith and metal products –1,
- cast and forged goods – 2,
- numismatics – 2.

[9] See P. Ogrodzki, *Krajowy wykaz zabytków skradzionych lub wywiezionych za granicę niezgodnie z prawem*, in: K. Zeidler (ed.), *Leksykon prawa ochrony zabytków, 100 podstawowych pojęć*, Zakamycze, Kraków 2010, pp. 148-151.

When pointing out the sources of information concerning the scale of crimes against cultural heritage, one must not forget about research in this area conducted by specialized cultural institutions, such as the National Heritage Board of Poland and the National Institute for Museums and Public Collections. An example would be the survey on the prevention of crimes against cultural heritage started by the Centre for the Protection of Public Collections and maintained by the National Institute for Museums and Public Collections.[10] One should also point out the study on the protection of collections in specific types of facilities, such as the questionnaire on protection against fire and crime at open-air museums[11] or the questionnaire for the National Library Collection.[12]

The data obtained on the basis of the studies of specialized institutes constitutes an important contribution and supplement to statistics of the law enforcement authorities related to crime against cultural heritage.

A selection of crimes against cultural heritage in 2014 in Poland

Given that in Poland, as indicated by police statistics, every year there are hundreds of cases of crimes against cultural heritage, for a comprehensive presentation of the phenomenon it is essential that these events are grouped. The following list is a selection of cases which in 2014 stood out in the context of other similar crimes. The sequence of events concerning crimes against cultural heritage in Poland is presented chronologically.

January

In Mysłakowice, a scrap dealer destroyed a nineteenth-century cotton mill – part of the former "Eagle" Flax Industry. The site was of great historical and cultural value, and was listed in the register of historic objects, which unfortunately did not save it from destruction. The perpetrator did not discontinue activities leading to the destruction of the site, despite the protests of the regional conservator. In the verdict of the court of first instance he was sentenced to two years imprisonment, suspended for five years, a fine of PLN 80,000 and PLN 50,000 in exemplary damages payable to a foundation related to the protection of antiquities. In this process, the regional conservator acted as an auxiliary prosecutor. In May 2015 the appeal court reduced the two year sentence to one year and the fine by half. This

[10] This recent audit, which is repeated periodically, covered the year 2012. It engaged all regional conservators.

[11] A survey on the protection of open-air museums against fire and crime covered the period 2001-2012. It was completed by 28 institutions.

[12] In a survey conducted in 2012 by the National Institute for Museums and Public Collections of the 56 libraries sent a questionnaire, 48 attended: their collections were included at the time in the National Library Collection.

case shows, that as with the destruction of Lange's historic villa in Łódź, the current regulations do not work as a deterrent to an owner who has some interest in destroying a listed building. Even in the face of the obvious and deliberate destruction of the historic site there is no custodial sentence.

In Kalwaria Pacławska two paintings were damaged in the chapels adjacent to the Sanctuary of Christ's Passion and Our Lady of Kalwaria. One of the paintings was partially burnt, on the other the face of Christ was damaged. The chapels themselves were also damaged. It turned out that the vandal was a 19-year old man who reacted in this way to a conflict with his mother.

In Kraków, there was a burglary which resulted in nine paintings being stolen from a private collection, including paintings by Jerzy Kossak and a painting by Vlastimil Hofman as well as other collectibles.

February

In Warsaw, there was a burglary at the Prima Porta gallery. Stolen, among other items, were Chinese art objects of a total value of approx. PLN 350 000, including figurines, cufflinks, a necklace, a sword and amulets.

In Gdańsk Oliwa, a painting by Wojciech Gerson, *Pilgrim*, was stolen from a private collection. The work of art had been bought at the gra-Art Auction House in 2005.

In Western Pomerania there was a burglary on private property, which resulted in the theft of a round table which was leaning on one leg in the shape of a column set on a triangular base – a French product, probably dating back to the late eighteenth century.

March

A small golden palm (a decorative ornament in the form of flower petals), dating back to the turn of the 11th century was stolen from the Poznań Archaeological Museum. The perpetrator stole the property from one of the museum display cases during its exhibition. Thanks to the monitoring system the theft was registered and the perpetrator was caught 5 days after committing the crime. He was charged with the theft of goods of special importance to cultural heritage.

In Głogów there was a burglary in the casemates within the moat, in the collection of the "Fortress Głogów" Association of Friends of Głogów Fortifications. The thief's spoils was a collection of antique weapons.

April

In Łagiewniki there was an attempt to destroy the painting of the Merciful Jesus in the chapel of St. Faustina at the Sanctuary of Divine Mercy. The perpetrator poured liquid on it, but thanks to the special glass security system the work of art was not damaged.

In Gryfów Śląski 2 offenders vandalised and stole a historic roadside shrine. Thanks to an anonymous tip-off the police managed to catch the perpetrators, who had transported their loot by tractor.

June

In Kruszyniany the historic mosque was vandalised. This temple is the oldest building of its kind in Poland. This, along with the mosque in Bohoniki, has been recognized by the President of the Republic of Poland as a historic monument. The basis of the vandalism was most probably ideological. Certain similarities should be pointed out here to the case of arson in October 2013 at the mosque in Gdańsk. These cases indicate an increase in threats to such facilities.

In Warsaw, there was a burglary, as a result of which, among others, a valuable painting by Rafał Malczewski and a triptych by Jerzy Duda-Gracz were stolen from a private collection.

July

In the Auschwitz-Birkenau camp at Brzezinka a German citizen was arrested for stealing from the museum grounds some objects which were evidence from the Holocaust, i.e. a fork, a fragment of scissors, pieces of glass bottles and china. The perpetrator was charged with the theft of goods of special importance to cultural heritage.

September

In Pszczyna there was a burglary in the collection being prepared at the Pszczyna Museum of Military History. The offender, after breaking a double-glazed window, entered the building and stole many valuable objects. These included, among others, helmets, bayonets, and decorations. The stolen exhibits came from the period of the First and the Second World Wars and the Polish uprisings.

October

In Łódź police recovered an antique Egyptian mask offered for sale at auction, dating back to the period 1086-664 BC, which had probably been illegally exported from Egypt. An interesting aspect of the case is the fact that the holders had purchased the object in the US, for which they had appropriate documents. This case points to the issue of the international trade in illegally exported cultural goods, which may frequently be transported between countries before being found.

In Skoczów, an over 270 year old painting of Mary holding Jesus in her arms was damaged by an unknown perpetrator. The vandal made a hole in the canvas and left a deep slash in the place of the image of the face of Mary.

In Rudy Wielkie, the Cistercian church, now the Shrine of Our Humble Lady, was broken into. Valuable relics of St. Valentine and the blessed Karolina Kózkówna were stolen. The perpetrator broke into the shrine through the window of the

side aisle. As indicated by the evidence on the spot, the perpetrator most probably had earlier sawed through the bars in the window.

November

At the State Museum at Majdanek there was a burglary which resulted in the offenders breaking into an unmonitored barrack and cutting a hole in one of the metal cabinets, which held prisoner mementoes. Eight pairs of shoes of former camp prisoners were stolen.

December

In Częstochowa at Jasna Góra there was a robbery at the exhibition held in the Arsenal entitled "Craft in tribute to John Paul II". The perpetrator broke the glass of a showcase at the exhibition and seized a collection of religious medallions. While escaping he attacked the guard with gas. Despite the low monetary value of the lost objects, this case deserves attention owing to the fact that the perpetrator used violence, and that the threat occurred in a place of particular importance to culture.

In Wałcz there was a burglary at the Museum of the Pomeranian Embankment. The perpetrators forced the door and, despite the alarm going off, stole from the collection, among other items, an MG 42 machine gun and an anti-aircraft tripod.

When analysing the events related to crime against cultural heritage that took place in Poland in 2014, the following worrying trends are particularly noteworthy:

1. The threat to private museums and collections of memorabilia and weapons from the period the First and the Second World War – such objects are often poorly protected, while in Poland there is a big market for such memorabilia.
2. The threat of vandalism to shrines – both in the case of the attack on the mosque in Kruszyniany, as well as in the cases of vandalism at the churches mentioned in the text, the ideological basis of the crimes was clear. The destruction of the work of art was not a consequence of theft, but an end in itself. Unfortunately, attacks on shrines due to the hatred of a given religious group may intensify in the coming years.
3. The threat to martyrdom heritage sites and objects – in the last years we have observed the development of a disturbing phenomenon associated with an increased interest on the black market in collectible mementoes from the period of the Holocaust. This results in the rising incidence of theft of such objects. Poland, as a country in which there are many museums of martyrdom, is particularly exposed. This is evidenced by the theft from the former Dachau concentration camp of an iron gate fragment with the inscription "Arbeit macht frei" in Germany, in November 2014; this problem affects other countries as well.

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EVENTS AND CONFERENCES

Cynthia Scott*

"My ACHS Conference": A Review of the Second Biannual Conference of the Association of Critical Heritage Studies,
Canberra, 2-4 December 2014

In early December 2014 the Centre of Heritage and Museum Studies at the Australian National University in Canberra hosted the second biannual conference of the international Association of Critical Heritage Studies. Building on the organization's inaugural conference held in Gothenburg in 2012, scholars gathered from around the world to perform and discuss heritage research and practices across the fields of museum studies, public history and memory studies. This time they brought an especially intensive focus to heritage in Asia, intangible cultural heritage, and issues of multiculturalism. In addition, a number of themes of both contemporary and historical relevance also shaped the program, including: human rights; affect and emotion; conflict and destruction; urbanism; heritage studies theory; tourism; and pedagogy. Engagement with these themes drew

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over three hundred scholars eager to further – and in some instances to question – the Association's mission to engage critically with heritage as traditionally conceived and to promote new ways of thinking about, and practising, heritage.

While the conference themes helped draw a wide range of participants to Canberra, they also shaped the ways attendees could experience the program. With some themes scheduled to include numerous panels across an entire day or even multiple days, attendees were faced with the choice of focusing intensely on particular themes, or to explore a range of particular panels and presentations that would cut across several themes. In this way, the strong thematic approach made the conference experience especially "customizable" for participants. For example, choosing a thematic approach reflecting my particular research interests, rather than one that was cross-cutting, "my ACHS conference" focused intensively on "heritage diplomacy", "redressing colonial wrongs", and "heritage in conflict zones".

With the focus on "heritage diplomacy" on the first day, I connected with new research and thought being advanced on the work of global heritage networks in nineteenth and early twentieth-century Europe; instances of corporate cultural diplomacy in contemporary Russia; what is meant by "mutual" in the post-colonial cultural diplomacy between the Netherlands and Indonesia; and a call by Professor Tim Winter of Deakin University for more research in international relations and diplomacy studies on the entanglement of the material world and global interconnections. As a historian and scholar of heritage and memory, these presentations resonated with my interests in the history of heritage and the contemporary legacies of colonial relations.

On the second day, the double session I co-chaired with Dr. Andrzej Jakubowski on the topic of "redressing colonial wrongs" focused on debate over the restitution or return of cultural property from the colonial era. In particular, it explored the content and parameters of such debate as it has evolved within a global legal framework and emerging concerns for cultural rights, as well as how the vocabulary of the debate has changed through exemplary cases of restitution or return negotiated between metropolises and their former colonies. Presentations ranged from the critical historical analyses of cultural restitution between Belgium and Congo, Italy and Ethiopia, and the Netherlands and Indonesia, to reports of contemporary efforts to achieve restitution of land and law in the Caribbean, of repatriation of human remains in Southern Africa, and of the shifting conceptions of restitution from museums to aboriginal communities in the Australian experience since the 1970s. A final presentation highlighted the failures, or in some cases the limitations, of post-colonial restitution gestures to recognize or advance the legal or moral rights of formerly colonized peoples to their historically dispersed cultural heritage. Following our session, a complementary panel focused on the broader need for the re-theorization of heritage rights, responsibilities and ethics. Led by Professor Charlotte Woodhead of Warwick University, presenters discussed moral entitlement to cultural heritage; defining collective rights to cultural heritage from

an international legal perspective; rights-based struggles of heritage assemblages on "resource frontiers"; and a South Australian case study on the responsibilities of local government for heritage awareness and management.

On the third day, the theme of heritage in conflict zones included a two-part session focused on situations impacted by a range of conflicts. It included, for example, presentations on some of the ways urban resistance – such as protests, riots, urban social movements – produces new spaces, or "commons", that are redefining heritage in the Palestinian-Israeli conflict; the potential of embracing an agonistic as opposed to a "shared" heritage that recognizes the continuation of feelings of hate, mistrust, and fear that persist after armed conflict subsides; and how the dispersed cultural objects of both Greek and Turkish Cypriots in the post-war ruins of Cyprus have created highly ambiguous spaces of "difficult" or "dissonant" heritage. Among others, a gripping presentation came from the Director of Antiquity and Museums of Aleppo, Youssef Kanjou, about the growing damage to the National Museum of Aleppo and strain on its staff that has grown during the military conflict in Syria since 2010. A later session also focusing on heritage in conflict included a presentation in which Diane Siebrandt of Deakin University reflected on her experiences of the relationship between troops in the United States and coalition militaries, Iraqi cultural heritage professionals and the ruins of ancient Babylon during the Iraq War. This was followed by a presentation by Benjamin Isakhan of Deakin University on the first results of a three-year project to study the escalation of ethno-sectarian violence and heritage destruction in Iraq between 2006 and 2007.

While my experience of the ACHS conference enabled me to focus intensively on issues of cultural diplomacy, restitution and rights, and heritage in conflict zones, "my ACHS conference" differed markedly from those who elected to follow other themes or mix things up across themes. Fortunately, there were ample breaks, and a conference dinner at the National Museum of Australia, during which I caught up with colleagues focusing on other themes. In meeting and sharing research with heritage scholars and practitioners from around the world, I was struck again, as I was in Gothenburg in 2012, by the breathtaking intelligence, creativity and diversity of participants, and the tremendous warmth and collegiality facilitated by the conveners of the Association of Critical Heritage Studies conference. The third biannual conference will be held in Montreal, 7-10 June 2016. I highly recommend that you make it "your ACHS conference". For information on the next meeting see: http://www.criticalheritagestudies.org; https://achs2016.uqam.ca/en.

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EVENTS AND CONFERENCES

Jan Słoniewski*

In re Context: Understanding Our Past Is Its Own Reward Cultural Property: Current Problems Meet Established Law, Philadelphia, 26-27 March 2015

On 26-27 March 2015 the Penn Cultural Heritage Center (Penn CHC) at the University of Pennsylvania, Philadelphia, hosted the Sixth Annual Conference for the Lawyers' Committee for Cultural Heritage Preservation (LCCHP), a non-profit organization based in Washington, DC, uniting lawyers and members of the public in their efforts to preserve and protect cultural heritage through education and legal action. Entitled *Cultural Property: Current Problems Meet Established Law*, the conference featured the input of 19 speakers, 18 of whom came from the United States. Consequently, the program's key themes addressed US laws, policy and practice pertaining to issues such as: the protection of underwater cultural heritage (UCH), prevention of looting and international trade in looted cultural objects, the pillage of archaeological sites, museum collections and collecting ethics, due diligence in provenance research and emergency responses to cultural

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plunder in Syria and Iraq. Comprising attorneys, law scholars, archaeologists, scientists, museum professionals, and other individuals the conference hosted distinguished representatives of the public sector, *inter alia* Patty Gerstenblith, Chair of the President's Cultural Property Advisory Committee in the US Department of State and Ole Varmer from the National Oceanic and Atmospheric Administration as well as practitioners from the most prominent practices in art and cultural property law in the United States including Frank K. Lord IV, a partner at Herrick Feinstein LLP,[1] Jim Goold (Of Counsel, Covington & Burling LLP) and Leila Amineddoleh, a partner at Galuzzo & Amineddoleh LLP.

A substantial body of the conference was devoted to underwater cultural heritage (UCH). Both the opening lecture of Mariano Aznar-Gomez (Professor of International Law Universitat Jaume I) as well as a later presentation on archaeological site looting by Ole Varmer addressed the legal status of sunken historic shipwrecks. While Mr. Gomez demonstrated how recent results before US admiralty courts affect the interpretation of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage (CPUH)[2] and should facilitate its ratification by the reluctant States, Mr. Varmer underlined that the US protects its UCH in a manner that does not interfere with the balance of coastal and flag State jurisdiction maintained under the United Nations Convention on the Law of the Sea.[3] Invoking the 4th Circuit of Appeals decision in the case of two sunken Spanish frigates of war, *Juno* and *La Galga*,[4] located in Virginia waters, where the Spanish title was upheld, Mr. Gomez noted how the case proved to be an opportunity for the US to state its position regarding the continued sovereign immunity of sunken warships and the rule of "express abandonment". Indeed, the case was a significant catalyst for formulating US policy on the protection of sunken military vessels, codified in the Sunken Military Craft Act (SMCA, 2004)[5] which protects US sunken military vessels wherever located and foreign vessels located within the US

[1] Frank K. Lord IV is representing Marei von Saher, heiress of the Jewish art dealer Jacques Goudstikker, in her claim in the US Federal Court for the Central District of California for the recovery of Cranach the Elder's "Adam and Eve", held at the Norton Simon Museum of Art in Pasadena, California (see the most recent decision: *Von Saher v. Norton Simon Museum of Art at Pasadena*, Case No. CV 07-2866-JFW [CD Cal Apr 2 2015]). For the case's exceptional impact on California's statute of limitations for actions to recover stolen artwork see K. Ray, *Von Saher: Court Says Statute of Limitations for Recovery of Stolen Art Runs Anew against Subsequent Purchasers/Transferees*, "Cultural Assets. Legal Analysis and Commentary on Art and Cultural Property. A Greenberg Traurig Blog", http://www.gtlaw-culturalassets.com/2015/05/von-saher-court-says-statute-of-limitations-for-recovery-of-stolen-art-runs-anew-against-subsequent-purchaserstransferees/ [accessed: 22.10.2015].

[2] 2 November 2001, 2562 UNTS 3.

[3] 10 December 1982, 1833 UNTS 397.

[4] See *Hunt Inc v. Unidentified Shipwrecked Vessel or Vessels* 221 F 3d 634 (4th Cir 2000).

[5] 10 USC § 113 (2012).

contiguous zone.[6] Similarly, the prevalence of Spanish sovereign rights over other interests with respect to the vessels which no longer exercise their public functions has been affirmed in the seminal 2009 judgment delivered by the US District Court, Middle District of Florida, Tampa Division, concerning *Nuestra Señora de las Mercedes*,[7] a Spanish shipwreck located by the American maritime treasure-hunter company on the now-Portuguese continental shelf. Those cases and State practice reinforcing sovereign immunity of flag States and foreign title to UCH, in the view of Mr. Gomez, change the interpretation of Article 2(8) of the CPUH which implies that whenever the Convention's provisions pertaining to the status of sunken State vessels are at odds with the State practice and international law the latter prevail. This "saving clause" should be viewed as an exception to the "creeping jurisdiction" in Article 7(3) of the CPUH referred to by Mr. Varmer while explaining US concerns over the ratification of the CPUH. Article 7(3) has indeed been perceived by maritime powers as recognizing only a tenuous interest of a flag State in the territorial waters of a coastal State. This is due to the conditional tense employed in connection with the obligation to inform the flag State about the discovery of its sunken craft. Explaining that Article 7 and the provisions of the CPUH relating to exclusive economic zone and continental shelf actually do not create new rights for the coastal States, Mr. Gomez stressed they encourage balanced cooperation between the States. While Mr. Varmer confirmed this opinion, he warned that protective measures, including recovery, are permitted to proceed without the formal cooperation of the flag State in the event of immediate danger to UCH.

Next, the speakers addressed the issue of salvage. They argued that by recognizing the sovereign immunity of foreign vessels, the US federal admiralty courts have, at the same time, denied any rights to commercial discoverers of cultural objects. The law of salvage is restricted and the law of finds is eliminated by the SMCA. This is notwithstanding the enormous amount of money the treasure-hunter companies invest. As treasure commercial salvors often destroy objects of lesser value, the preclusion of salvage reinforces *in situ* protection imposed by the CPUH which *inter alia* aims at preserving contextual integrity.

Preventing the destruction of stratified context as a means of preserving our understanding of the past in fact emerged to be the most underlined issue coming up in different panels. Dr. Lauren Ristvet (Associate Professor of Anthropology, University of Pennsylvania) juxtaposed the Penn Museum's cuneiform tablets collection deriving from the Museum's own excavations in Nippur to the one held by the Yale University Library. While the former collection consists of objects

[6] It has to be observed that the Act does not openly claim sovereign immunity for sunken warships but only perpetual ownership, not extinguishable by the passage of time.

[7] The US 11th Circuit Court of Appeals affirmed, holding that Oddyssey, the salvage company, failed to invoke any of the exceptions to the immunity granted by §1609 of the Foreign Sovereign Immunities Act (28 USC § 1602-1611); *Odyssey Marine Exploration Inc v. Unidentified Shipwrecked Vessel*, 657 F 3d 1159 (11th Cir. 2011), *aff'g* 657 F Supp 2d 1126 (MD Fla 2009).

with untouched physical integrity and its context is intact, the Yale's derives from different, dispersed sources, thus giving much less insight into research on Sumerian culture. In the same vein, Patty Gerstenblith focused on how the legal structure developed in the US has not been utilized to its fullest potential to deter the market in illegally obtained archaeological objects and disincentivize looting on site. While the relatively easy route of restitution achieved through civil forfeiture under legislation enabling the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,[8] i.e. the Convention on Cultural Property Implementation Act (CPIA)[9] is certainly very efficient and wins acclaim of source countries, Ms. Gerstenblith noted it serves as a disincentive to conduct criminal prosecution. What she identified as 'first generation' cases of cultural property restitution involved primarily civil replevin actions brought by foreign countries or institutions bearing the burden of proving by preponderance of evidence that the property was stolen.[10] Those claims are likely to be barred by procedural defences based on statues of limitations or laches. At the same time criminal prosecutions under the National Stolen Property Act (NSPA)[11] founded on the principle that cultural objects removed in violation of source countries' patrimony laws are stolen property in the US,[12] face the challenge of establishing knowledge beyond reasonable doubt. Conversely, CPIA enacted as a Customs statute requires a low standard of proof of probable cause. The routine choice of this action to achieve restitution creates a bad policy of 'catch and release', as most civil forfeitures remain uncontested. The possessors and importers simply walk away. As many authors point out[13] only incarceration would have a deterrent effect on potential perpetrators, who can easily afford the monetary fines imposed. As those perpetrators often appear to be museums Victoria Reed (Senior Curator of Provenance, Museum of Fine Arts, Boston) stressed the institution's efforts to apply even stricter standards of provenance research than those set up by the 2008 Association of Museum Directors (AAMD) guidelines dictating 1970 as a threshold.[14] Beneficial

[8] 14 November 1970, 823 UNTS 231.

[9] 19 USC §§ 2601-2613 (2012).

[10] Ms. Gerstenblith referred to *the Autocephalus Greek-Orthodox Church of Cyprus & the Republic of Cyprus v. Goldberg & Feldman Fine Arts* Inc 717 F Supp 1374 (SD Ind 1989), aff'd 917 F 2d 278 (7th Cir. 1990).

[11] 18 USC §§ 2314, 2315 (2012).

[12] See *United States v. McClain* 545 F 2d 988 (5th Cir. 1977); 593 F 2d 658 (5th Cir. 1979).

[13] S.R.M. Mackenzie, *Going, Going, Gone: Regulating the Market in Illicit Antiquities*, Institute of Art and Law, Leicester 2005, pp. 149-156; L.A. Amineddoleh, *Protecting Cultural Heritage by Strictly Scrutinizing Museum Acquisitions*, "Fordham Intellectual Property, Media and Entertainment Law Journal" 2015, Vol. 24, p. 755; eadem, *The Role of Museums in the Trade of Black Market Cultural Heritage Property*, "Art Antiquity and Law" 2013, Vol. 18, p. 241.

[14] Guidelines on the Acquisition of Archaeological Material and Ancient Art (revised 2013), https://aamd.org/sites/default/files/document/AAMD%20Guidelines%202013.pdf [accessed: 30.11.2015].

as they are, industry guidelines are not incorporated in federal or State laws that would include sanctions or penalties for perpetrators, which makes them practically unenforceable.[15]

In the face of a lack of witness testimony and no access to sites, evidencing intentional damage and destruction to cultural heritage in Syria appears to be crucial, especially in the light of trial of the member of Ansar Dine who allegedly directed the ransacking of Timbuktu, initiated before the International Criminal Court in September. Susan Wolfinbarger (Project Director, Geospatial Technologies and Human Rights Project, American Association for the Advancement of Science, AAAS) referred to the project AAAS has launched with the Penn Museum's CHC, the Smithsonian and the Syrian Interim Government's Heritage Force, which documents current conditions in this area through remote sensing. Submitting such data before regional and international tribunals might face legal challenges in future. She referred to the standard formulated in *Daubert v. Merell Dow Pharmaceuticals*[16] and *European Commission v. United Kingdom*,[17] where the Court of Justice of the European Union clearly admitted and considered satellite imagery data information as evidence. Moreover, ethical challenges have to be carefully considered, and the impact of disclosing research findings has to be balanced against the gains of the local population, its security, possible negative consequences, and undermining people's own efforts to protect themselves. Additionally, Kathryn Hanson (Postdoctoral Fellow, Penn CHC, University of Pennsylvania), presenting satellite evidence of looting from *inter alia* Umma, Umm al-Aqarib, Zabalam in Iraq and Apamea in Syria stressed different types of looting existed, and satellite imagery did not reflect the full scale of plunder. Here, drone- and helicopter-level evidence would prove invaluable. Meanwhile, training seminars organized for the West African Museum Professionals by the Smithsonian Institution and ICOM in response to the damage to the Timbuktu cultural heritage site have to serve as a guidepost for SHOSHI (Safeguarding the Heritage of Syria Initiative) founded by Penn CHC. As noted by Cori Wegener (Cultural Heritage Preservation Officer, Smithsonian Institution) its 2014 summer workshops conducted in cooperation with the Smithsonian as well as the Syrian Interim Government's Heritage Task Force focused on informing cultural heritage professionals and activists on the ground on how to secure museum collections in the case of emergency, and the providing of supplies and equipment (special concern was given to the Ma'arra Museum in Idlib, where 90% of the mosaics that came under ISIS attack were covered with sandbags). Training sessions have so far taken place in Beirut and Southern Turkey.

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[15] L.A. Amineddoleh, *Protecting Cultural Heritage*..., p. 734.

[16] *Daubert v. Merrell Dow Pharmaceuticals* 509 US 579 (1993).

[17] Case C-390/07 *European Commission v. UK* [2009] ECR I-214.

The conclusions of the conference may be summarized as follows.

While the US is reluctant to ratify CPUH, due to the alleged preference it gives to the coastal States, recent US case law and State practice seem to be in conformity with the Convention's provisions severely curtailing salvage and find. It can be even said that SMCA, though pertaining to only a certain type of UCH (State owned craft), can be viewed as an authority to cite while implementing CPUH in future.[18] If seen as preserving the sovereign immunity of warships and State vessels due to the presence of the saving clause, i.e. Art. 2(8), the Convention guarantees balance between the coastal and flag State rights. Notwithstanding the benefits of the approach denying the right to a reward for discoverers aimed at acting as a deterrent to commercial exploitation of UCH it has been raised that such a solution might be paving the way for the cost-free excavation for the States of origin.[19]

Stressing the great scholarly, and thus universal value of the cultural material excavated in adherence with archaeological process the conference addressed the gravity of the elimination of demand for the pillaged cultural objects from the conflicted areas in the end-market countries. As the US remains one of the most important entrepot markets for art trade in the world[20] it is very important for this country to step up in its actions. While stricter and extensive museum acquisition policy as well as due diligence in provenance research is one way of dealing with the problem, taking advantage of available legal tools to criminally prosecute purchasers of looted antiquities might prove the only effective deterrent. It has to be observed that the conference did not address the Protect and Preserve International Cultural Property Act (at the time in the House of Representatives)[21] tracking UN Security Council Resolution No. 2199[22] which had been adopted in February 2015.

[18] This argument has been raised by Ole Varmer; see O. Varmer, *United States: Responses to the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage*, "Journal of Maritime Archaeology" 2010, Vol. 5, p. 135.

[19] P. Vigni, *The Enforcement of Underwater Cultural Heritage by Courts*, in: F. Francioni, J. Gordley (eds.), *Enforcing International Cultural Heritage Law*, Oxford University Press, Oxford 2013, p. 147.

[20] In 2012 the United States, next to the UK was the second largest importer and exporter of art and net importer of art, with imports of €6.1 billion, exceeding exports of €5.8 billion; see C. McAndrew, *TEFAF Art Market Report 2014 – The Global Art Market with a focus on the US and China*, The European Fine Art Foundation (TEFAF), Maastricht 2014, pp. 61-73.

[21] HR 1493 114th Cong (2015-2016).

[22] 12 February 2015, UN Doc. S/RES/2199 (2015).

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EVENTS AND CONFERENCES

Joanna Melz*

"Art and Criminal Law" – a Few Words about the Exhibition "Kunst und Strafrecht"

European University Viadrina, Frankfurt on the Oder
(21 October 2013 – 28 February 2014)
Collegium Polonicum, Słubice (13 October 2014 – 14 January 2015)
The University of Fine Arts, Poznań (3-10 March 2015)
Adam Mickiewicz University, Poznań (24 March – 17 April 2015)
Kazimierz Wielki University, Bydgoszcz (21 April – 08 May 2015)
The Nicolas Copernicus University, Toruń (15 May – 31 July 2015)
The University of Białystok (20 October – 15 November 2015)
The Paris Lodron University of Salzburg
(13 November – 11 December 2015)
The Westphalian Wilhelm University of Münster
(27 January – 26 February 2016)
The University of Warmia and Mazury, Olsztyn
(1 February – 18 March 2016)

The exhibition "Art and criminal law" (German title "Kunst und Strafrecht") was prepared by Prof. Dr. Dr. Uwe Scheffler and the staff of the Chair of Criminal Law, Criminal Procedure Law, Criminology of the European University Viadrina in Frankfurt on the Oder. The idea came about at the end of 2012. The exhibition

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is based on unpublished material in the possession of Prof. Scheffler, who has been involved in the subject for over ten years. From among hundreds of cases twenty were selected and divided into ten thematic groups. The exhibition presents the confrontation of art with its constitutional freedom, criminal damage, theft, forgery, insult, blasphemy, the threat to the state, the glorification of violence, pornography and cruelty to animals. The major challenge was to find case studies whose content could be illustrated by a picture both distinctive and at the same time conveying a strong message. On the first of the eleven boards, which is an introduction to the subject, there are several examples of works of art, some more and some less controversial, such as *Leda and the Swan* by P.P. Rubens or M. Kippenberger's *Feet first*. Given are short quotations from the worlds of art, literature, law and judicial decisions, among others, in order to create interaction between the word and the image.

The idea of the exhibition is innovative and unconventional for several reasons. First, it is worth noting that the main element is the text (it is an exhibition to be read). The concept of the exhibition is based on the interaction between the text and the image which it not only illustrates but also helps to understand better. What is more, there has been so far no exhibition that outlines and details legal issues in such a way. The exhibition is addressed not only to those involved in the everyday practice of the law, but to anyone who is open to art and ready to look at it with a critical eye and from an unusual point of view.

Contact between art and criminal law is an unconscious element of our everyday life. The destruction of a work of art, such as, for example, one that was carried out several years ago by a famous Polish actor at the Zachęta gallery in Warsaw, or the theft of works of art such as that of *The Scream* by Munch from the museum in Oslo, are widely discussed topics in the press and on television. We encounter the destruction of works of art every day, on our way to work, when we pass monuments that are either daubed or missing a fragment. In turn, the destruction caused by art (but is it art?) itself can be seen on the facades of buildings in the form of graffiti; while insults in the shape of caricatures or more or less amusing rhymes, are constantly in the daily press and cabarets. The aim of exhibition is to make the viewers aware of the many more points, beside those mentioned, which art and criminal law have in common and to encourage them to carefully observe the world around them. The exhibition also aims to ask questions such as: what is permissible in art and for the artist, where to draw the line between legality and illegality, or whether what is controversial should be punished, and finally who is an artist and what is art?

Although the exhibition focuses primarily on examples taken from German judicial practice, it also deals with cases from Swiss, American, Austrian, Dutch and French case law. Current events are discussed, such as the case of Wolfgang Beltracchi, hailed by the German media as the forger of the century, or the action for the infringement of personal rights instituted by the mayor of Dresden against

an artist. We may also recall cases from earlier history, such as the "Pear king" – Louis-Philippe or the drawing by Georg Grosz, depicting Christ in a gas mask. Some of the exhibition's content may cause controversy – our aim, however, was not to shock audiences, but to present an accurate and reliable analysis of the existing problems.

The exhibition was created originally in German and was presented in the winter semester of 2013/2014 at our Alma Mater. In the summer of 2014 all texts were translated by our chair's staff into Polish. At the invitation of the Polish-German Research Institute in the autumn of 2014 both language versions visited Collegium Polonicum in Słubice, a joint research unit of the European University Viadrina and the Adam Mickiewicz University in Poznań. The official opening of the exhibition coincided with the start of the academic year. From the Polish-German border, the Polish version of the exhibition went on tour. The second stop was the University of Fine Arts in Poznań, where it was presented in an original way in the auditorium of the university in March 2015 – suspended from the ceiling, the boards were arranged in the shape of a polyhedron. Then, the exhibition could be seen until mid-April 2015 in the lobby of Poznań Collegium Iuridicum Novum, the Adam Mickiewicz University. It is worth mentioning that the idea of the exhibition inspired Poznań law students, who created four boards illustrating Polish case law. Another destination was the Library of the Kazimierz Wielki University in Bydgoszcz, where the exhibition and its Poznań supplement were displayed in the Citizens of Bydgoszcz Memorial Hall till mid-May 2015. The ceremonial vernissage took place on 21 April 2015 and we were very warmly welcomed by the university authorities. The opportunity to present the exhibition was a good occasion for us to establish closer cooperation between our universities. We are open to further joint interdisciplinary projects. After the previous stop at the Faculty of Law and Administration at the Nicolas Copernicus University in Toruń, where it was displayed until the end of July 2015, the exhibition is currently hosted by the Faculty of Law at the University of Białystok till mid-November 2015. At both of the universities the boards are exhibited on easels, giving the impression of the interior of a painter's studio. The next destination will be the Faculty of Law and Administration at the University of Warmia and Mazury in Olsztyn and the Faculty of Law and Administration at the University of Gdańsk.

The twin German version of the exhibition is also on tour. Its first destination in mid-November 2015 is the Faculty of Law, the Paris Lodron University of Salzburg. Then, the exhibition will be presented at the Westphalian Wilhelm University of Münster, the Osnabrück University and the Julius Maximilian University of Würzburg.

We are pleased that the exhibition has been received with curiosity and openness. We hope that the idea behind it and the content presented will inspire many viewers; maybe someone will discover art or law (and not only criminal law) for themselves.

EVENTS AND CONFERENCES

Call for Papers

2(2016)2 *Santander Art & Culture Law Review*

The Directive 2014/60/EU and the Movement of Cultural Objects in the European Union

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Deadlines

Submission Deadline for Papers: April 30, 2016

Topic

By 18 December 2015, the EU Member States were obliged to incorporate the provisions of Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a Member State into their national legal systems. This new instrument recasts Directive 93/7/EEC and amends Regulation (EU) No. 1024/2012 on the Internal Market Information system (IMI) – an IT-based information network that links up national, regional and local authorities across borders. It is intended to further the approximation of laws under Article 114 TFEU and the mutual recognition of relevant national laws. In the first place, it extends the scope of the Directive to include cultural objects other than those classified or defined as national treasures, provided that they are in accord with the relevant provisions of Article 36 TFEU, as well as cultural objects unlawfully removed before 1 January 1993. Moreover, such objects do not have to belong to categories or comply with thresholds related to their age or financial value in order to qualify for return. Secondly, it increases cooperation between Member States through the use of the IMI system specifically customized for cultural objects. Thirdly, it extends the time-limit for determining whether an object found in another Member State is a cultural one and for bringing return proceedings. It also sets out criteria to determine a uniform concept of due care and attention in the acquisition of the cultural object, with burden placed on the possessor to provide proof of it for the purpose of compensation.

While the Directive 2014/60/EU significantly modifies the legal and technical measures for the protection of Member States' cultural heritage within the European Single Market, other current developments in EU legislation are intended to improve control over the movement of cultural objects through the external borders of the Union. Of particular interest are those related to controls over the import of archaeological materials from Syria: Regulation (EU) No. 1332/2013 of 13 December 2013 amending Regulation (EU) No. 36/2012 concerning restrictive measures in view of the situation in Syria, with further amendments; and the UNESCO-EU Emergency Safeguarding of the Syrian Heritage Project launched on 1 March 2014. Other initiatives concern, *inter alia*, proposals aimed at better consolidating the EU system for the return of cultural objects unlawfully removed from the territory of a Member State with that on the export of cultural goods outside the EU common customs area.

Considering these developments within the EU legislation and practice in relation to the circulation of cultural goods, *Santander Art and Culture Law Review* is pleased to invite contributions for its fourth issue, which covers the topic of the movement of cultural objects (export, import and return) in relation to the EU. Scholars, emerging young scholars, as well as practitioners are encouraged to contribute. Our interest is first of all in papers that explore the current status of the implementation of Directive 2014/60/EU in the respective national legal systems of the EU Member States. We are also interested in contributions which ana-

lyze the interlinkages between this new Directive, other relevant EU legislation, such as Regulation (EC) No. 116/2009, and international instruments, in particular the 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects and the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Additionally, we welcome papers that address the issue of cross-border cooperation directed against illicit trafficking in cultural materials, both within the EU and with respect to other international organizations, private actors and NGOs. Furthermore, we invite conceptual papers that extend beyond the analysis of the EU legal framework for the movement of cultural objects, by offering original interpretations and proposals *de lege ferenda* concerning the prospects for and perspectives of the EU legislation and practice in the area of movable cultural heritage. Accordingly, we encourage submissions that focus on the following topics (please note that this list of topics is not exhaustive):

- Protection of national treasures in the EU Single Market;
- Implementation and perspectives on the functioning of Directive 2014/60/EU;
- Directive 2014/60/EU and Regulation (EC) No. 116/2009;
- Directive 2014/60/EU, the 1970 UNESCO and the 1995 Unidroit Conventions;
- Private international law aspects of the return of cultural objects in the EU;
- Import and export of cultural objects and the EU common customs area;
- The EU's role in protecting and safeguarding cultural objects against war and terrorism (prevention, control and safe havens);
- Detection and prosecution of art crimes in the EU;
- Cooperation within the EU, including the exchange of information, digital services, and online databases;
- Cooperation between the EU, other international organizations, private actors and NGOs in matters related to the protection of movable cultural heritage.

Details concerning submissions: content, length, and due date

The deadline for submission of manuscripts is 30 April 2016. Decision letters will be provided to author(s) by 31 May 2016. We expect to publish the issue in autumn, 2016. More information is available at <www.artandculturelaw.ukw.edu.pl>.

Manuscripts should be submitted electronically by either using a storage device or via e-mail – saaclr@ukw.edu.pl in .doc format, and shall not exceed 40,000 characters including spaces and footnotes. A longer article may be accepted only by specific arrangement with the Editors.

More information concerning guidelines for authors and editorial rules are available on the journal's website.

EVENTS AND CONFERENCES

Forthcoming SAACLR Conference:

The Return of Cultural Objects within the European Union – Implementing the Directive 2014/60/EU

21-22 March 2016, Institute of Art of the Polish Academy of Sciences, Warsaw, Poland

On 21-22 March 2016, the Editorial Board of the *Santander Art & Culture Law Review* and the Research Team of the project *HEURIGHT – The Right to Cultural Heritage – Its Protection and Enforcement through Cooperation in the European Union*, a project co-financed by the European Commission (JPI Heritage Plus – Horizon 2020) are organizing an international conference entitled "The Return of Cultural Objects within the European Union – Implementing Directive 2014/60/EU". The conference will be hosted by the Institute of Art of the Polish Academy of Sciences in Warsaw. Its core objective is to debate the foundations, implementing process, and future functioning of Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No. 1024/2012. It also intends to discuss this new EU instrument for the return of unlawfully exported cultural objects within the broader system for the protection of national treasures in the EU Single Market. In particular, it will explore the relationship between Directive 2014/60/EU and EC Regulation 116/2009 *vis-à-vis other legal instruments regulating the circulation of cultural objects in Europe, including the 1970*

UNESCO Convention and the 1995 Unidroit Convention. In addition, the evolving EU regime will be discussed in the context of international trade in cultural material, analyzing the approaches taken by cultural heritage law scholars, art market experts and police experts. Hence, the conference is designed to examine the reform of the EU system for the return of cultural objects unlawfully removed from the territory of a Member State and analyze it within the wider context of international trade and cultural heritage. A selection of final conference papers also will be chosen for anticipated publication in the fourth issue of the SAACLR (publication date 2016).

For the detailed programme, conference abstracts and biograms of the speakers, please consult: www.heuright.eu, www.artandculturelaw.ukw.edu.pl

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BOOK REVIEWS

Katarzyna Zalasińska*

Prawo ochrony zabytków [The Law on the Protection of Monuments] Kamil Zeidler (ed.)

ISBN 978-83-7865-175-8
Wolters Kluwer, Warszawa – Gdańsk 2014

Prawo ochrony zabytków [The Law on the Protection of Monuments] (2014) is undoubtedly the most significant book on the legal protection of monuments in Poland published in recent years. The publication consists of a total of 45 contributions prepared by a group of 48 authors, which makes it at the same time the broadest collection so far released in this area. It is worth noting first the origin of the publication: the book under review is the result of a research project, undertaken at the Faculty of Law and Administration, University of Gdańsk in 2013 on the tenth anniversary of the enactment of the Act on the Protection and Guardianship of Monuments (APGM) – a core instrument on the legal protection of tangible cultural heritage in Poland.

* **Katarzyna Zalasińska** is an Assistant Professor at the Faculty of Law and Administration of the University of Warsaw. She also serves as a SAACLR thematic editor (public law) and a member of the State Council of Protection of Monuments. Katarzyna Zalasińska specializes in administrative legislation and jurisprudence in matters of the protection of cultural heritage.

According to the editor, Kamil Zeidler, Associate Professor at the University of Gdańsk, this book constitutes a *sui generis* commentary to the APGM since its structure mirrors the internal construction of the Act, and each contribution refers to its specific provisions, regulations and the legal institutions defined therein. Following the normative analysis, offering comments *de lege lata*, the authors endeavour to formulate concrete demands *de lege ferenda*, and thus they attempt to indicate the direction of envisaged changes in the existing legislation to ensure their proper performance. The inclusion of many contributors from outside the legal profession, ones who deal on a daily basis with the protection of monuments, has made a comprehensive picture of the problem possible, as well as showing its complexity and the challenges associated with its application. The dialogue between legal theory and practice concerning the existing regime of the APGM has brought excellent results: the book is practical but it also includes stimulating theoretical legal considerations, which should become the starting point for the work on the reform of the law shown here to be inevitable.

Considering the breadth of the book under review it is difficult to refer to each individual contribution. Therefore, I have taken the liberty of referring only to some select contributions. Special attention should be paid to the paper by Piotr Dobosz as it comprehensively systematizes the problem of the development of legal forms for the protection of monuments in Poland. In turn, the contribution by Jacek Brudnicki skilfully analyzes the regulation concerning the procedure of removal from the register of monuments. Importantly, Katarzyna Piotrowska describes the complex issue of legal aspects of heritage management taking the examples of historic monuments and World Heritage Sites. The book also contains other contributions focusing on very concrete, practical and extremely current problems of monument protection. Among these, it is worth paying attention to the very interesting study by Monika Drela exploring the issue of an administrative decision to protect an immovable monument by establishing temporary seizure as a tool for preventing its destruction. Anna Kociołek-Pęksa proposes valuable proposals for changes in the legal protection of monuments, such as a mandatory fire certification for historic properties. The practical and highly significant issue of the status of the regional inspector of monuments as an auxiliary prosecutor in a criminal trial is discussed by Anna Gerecka-Żołyńska. Finally, I would like to mention the analyses by Wojciech Szafrański and Bartłomiej Gadecki referring to the role of criminal law in protecting the authenticity of art objects and preventing forgery in the art market.

Prawo ochrony zabytków is an important contribution to the development of the law on the protection of monuments in Poland. Its versatility and content layout, the diversity of the issues, the experience and achievements of the authors make it the most significant publication on this subject in the last decade. Its high appraisal and positive reception by readers are confirmed by the numerous awards received by the Publisher, among others, the title Book of the Year 2014 awarded by the Association of Monument Inspectors, Gdańsk University Publishing House

Award for the best academic publication in the academic year 2013/2014, as well the Journalists' Award in the competition for the Best Academic Book in 2014 during the 18th Poznań Book Days.

In conclusion, one should note that this publication was dedicated to the Memory of Piotr Ogrodzki, the Director of the Centre for the Protection of Public Collections, following his premature death in 2013.

Information

Article *Myths and pathologies of the trade in works of art* published in SAACLR 2015, No. 1 (pp. 135-172) was prepared by Wojciech Szafrański in frame of the project "Cultural heritage management legal issues". Project was financed with the resources from the National Science Centre. Decision number: DEC-2012/05/D/HS5/02822. Above information is also available in the e-version of mentioned article.

Artykuł Wojciecha Szafrańskiego *Mity i patologie obrotu dziełami sztuki*, opublikowany w SAACLR 2015, nr 1 (s. 135-172), stanowi jeden z rezultatów projektu „Mechanizmy prawne zarządzania dziedzictwem kultury". Projekt został sfinansowany ze środków Narodowego Centrum Nauki, przyznanych na podstawie decyzji numer DEC-2012/05/D/HS5/02822. Stosowna informacja została zamieszczona w wersji elektronicznej artykułu.

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