



British Institute of
International and
Comparative Law

The Protection of Cultural Heritage in Conflict

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Seminar Report

24 April 2013

Executive Summary

On 24 April 2013, the British Institute of International and Comparative Law hosted a seminar entitled 'The Protection of Cultural Heritage in Conflict', which was chaired by Kevin Chamberlain CMG (barrister and former Deputy Legal Adviser at the Foreign and Commonwealth Office). The panel speakers included Professor Francesco Francioni (Academy of European Law at the European University Institute), Professor Janet Ulph (University of Leicester), Professor Peter Stone OBE (Newcastle University and Chair of the UK's National Committee of the Blue Shield) and Dr Lamia Al-Gailani Werr (UCL Institute of Archaeology and SOAS).

In his introductory remarks, Kevin Chamberlain set the stage by explaining the importance of protecting cultural heritage. He mentioned examples of the destruction of cultural property in the past decade and stressed that it is vital that all participants in armed conflict are made aware of their obligations under international law to protect cultural property, as well as the importance of effective mechanisms in place to repress breaches of these obligations.

Professor Francesco Francioni focused on the role of international Law in the protection of cultural heritage, starting with an overview of the legal instruments that govern the treatment of cultural property in times of war. He then developed on two international law approaches to address the issue of cultural property under international law: individual criminal responsibility and the duty to protect. With regard to individual criminal responsibility, he highlighted the jurisprudence of the ICTY (specifically the Tadić case, the Kordić & Čerkez case, the Jokić case

and the Krstić case) and their impact in the development of individual criminal responsibility for the destruction of cultural property, as well as their influence on the decision making process of other courts and mixed tribunals. With regard to the duty to protect, he suggested extending this doctrine to cover crimes against cultural heritage. He strongly argued in favor of state responsibility, stating that it is absurd if states do not face the same responsibility for the very same criminal acts that individuals face under international law. International law cannot be *à la carte* (one for individuals and one for the states) but should apply in the same manner towards all relevant actors. Finally, he also warned of the risk of Article 48 of the ILC Draft Articles on State Responsibility (Invocation of Responsibility by a State other than an Injured State) falling into oblivion. He urged the audience to keep that article in mind in relation to cultural property-related crimes which may involve *erga omnes* obligations. Destruction and damage to cultural property, says Professor Franconi "means damage to the heritage of all human kind".

Professor Janet Ulph discussed the United Kingdom ('UK') Consultation Paper (2005) and the Draft Cultural Property (Armed Conflicts) Bill relating to the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict 1954. Professor Ulph suggested that the UK Government had been too literal in their transferring of the Hague Convention into legislation. She said that the biggest problems derived from defining 'cultural property', with the risk being that the list could be so expansive that it would ultimately be unmanageable. Another issue discussed by Professor Ulph concerned criminal offences. In particular, she highlighted whether money laundering legislation could be utilised in combating the import and export of cultural property originating from armed conflict zones.

Professor Peter Stone OBE discussed the change in approach towards cultural property since the Second World War and the stark difference between the Second World War and Iraq in 2003 where property had been looted and destroyed. Professor Stone's reasoning highlighted insufficient troop deployment in Iraq, as well as the almost non-existent relationship between the heritage community and the military, which meant that the armed forces lacked information and awareness regarding cultural property. He noted that, as a result of the 'lessons learned' process from the deployments in Afghanistan and Iraq, NATO had begun to develop the so-called 'comprehensive approach' that saw conflict as more than a series of battle to be won and that could include protection of cultural property. He stressed the need for the UK to ratify the 1954 Convention and also that some form of specific legislation was required in relation to Syria as had happened for Iraq regarding the illicit removal of antiquities and other cultural property. Finally he mentioned the need to raise the profile of the UK National Committee of the Blue Shield.

Dr Lamia Al-Gailani Werr gave a heartfelt account of the destruction of cultural property which occurred during and following the 2003 invasion of Iraq. Whether it was “ignorance or negligence or not a priority, I don't know”, expressed Dr Al-Gailani Werr. She showed images of the Iraqi museum and its collections before and after the ally invasion, some stolen, others destroyed or trampled on. According to her, “people were looking for antiquities or for gold and they just took things or destroyed them when they didn't find them”. In addition to the museum, libraries were burnt and entire buildings were destroyed, including the Royal Palace. Others were not only looted but dismantled piece by piece, such as a 2nd century Babylonian Temple. Archeological sites were tainted not only through looting but also because they were used by the military as camp sites or heliports.

FULL REPORT

Kevin Chamberlain CMG

In an armed conflict, sometimes loss of cultural property can be accidental, sometimes it's the result of indiscriminate attacks, but also sometimes regrettably as a result of deliberate acts by one or other opposing forces.

Why is the protection of cultural property so important? Cultural property is particularly threatened by armed conflicts and in some cases by any resulting occupation. As cultural property reflects the life, history and identity of the community, its preservation helps to rebuild a broken community, re-establish its identity, and link its past with its present and future. In addition, the cultural property of any people contributes to the cultural heritage of human kind. Thus, loss or damage to such property impoverishes human kind.

In this past decade or so, we have seen several examples of destruction of cultural property. One can only quote the destruction of the Bamiyan Buddhas in Afghanistan, the looting of the Iraq museum as a result of the 2003 conflict. More recently we have seen the extensive destruction of cultural heritage in Syria, and earlier this year the looting of the library in Timbuktu (Mali).

It is in my view vital that all participants in armed conflict are made aware of their obligations under international law to protect cultural property. It is also vital that there are effective mechanisms in place to repress breaches of these obligations.

Professor Francesco Francioni

I will discuss war and cultural heritage from a legal point of view, including the instruments that govern the treatment of cultural property in times of war. Law in this area has greatly developed in the past 15 years. The 1954 Hague Convention gained an additional protocol - the second protocol of 1999. It obtained a much-awaited ratification by the US in 2009, bringing the number of parties to the Convention to a comfortable level so that the Convention may be considered today as almost part of general international law.

The general conference of UNESCO adopted by unanimous vote the Declaration on the Intentional Destruction of Cultural Heritage. Offenses against cultural property have now become part of the catalogue of international crimes and are now an integral part of the statutes of international courts and tribunals. In spite of this intense normative action, in particular at the UNESCO level, there is a continuing destruction of cultural property in recent armed conflict. In Aleppo, the old market was destroyed and the Umayyad Mosque was attacked. In Mali, the old manuscripts and the libraries were attacked by the Islamic forces.

There is a mixed record however in recent conflict zones. The Iraq experience in 2003 led to the looting of the museum and to the Security Council resolution adopted in 2003 which demanded the cooperation of all Member States of the UN to bring about the restitution of looted items. This was an unprecedented resolution of the Security Council under Chapter 7 of the Charter. In recent conflicts like in Egypt in 2011 for example, there was basically no damage of cultural property because of the reaction of the people, which included human string chains protecting the Egyptian museums in Cairo. This led to a very different result as compared to the Iraqi experience in 2003. Similarly in Libya, careful curatorial storage of the Tripoli museum and some restraint on the part of the coalition forces facilitated by information networks prevented the destruction and looting that might have otherwise occurred. Even in Afghanistan, despite the abysmal record of human loss, the treasures of the Kabul museum were successfully protected.

What is the role of international law in this area? I have two ideas to suggest, following two approaches:

- 1) Approach based on individual criminal responsibility for the attacks on cultural property. This is part of the existing law and where the applicable international law currently stands (*de lege lata*).
- 2) Approach based on the responsibility to protect, the doctrine developed in relation to gross violations of human rights which requires

a response by the international community. My idea would be that we could extend this doctrine to apply to egregious assaults on cultural property. This has to be further developed in the law (*de lege ferenda*).

The first approach, based on individual criminal responsibility, has emerged from the ruins and tragedies of the Balkan wars. As a matter of fact, the Second Protocol to the Hague Convention was the result of the attack of the Serbian forces on Dubrovnik and the reaction within UNESCO to counteract these attacks. The development of the Second Protocol led to the idea of an international individual responsibility of persons involved in these types of attacks. Negotiations for the Second Protocol took place immediately after the attack on Dubrovnik. The jurisprudence of the International Criminal Tribunal for Yugoslavia ('ICTY') helped to consolidate this idea of individual criminal responsibility. Article 3 (d) of the Statute of the ICTY contemplates the specific categories of crimes against cultural property, and other provisions indirectly include assaults on cultural property within the category of crimes of war or crimes against humanity.

The ICTY jurisprudence landmarks concerning cultural heritage can be summarized as follows:

- The *Tadić* case was the first case decided by the ICTY which developed the idea that the prohibition of destruction of cultural property applies also in a non-international armed conflicts. It went beyond the paradigm of the Hague Convention of 1907 when the protection of cultural property was indirectly envisaged as protection of state sovereignty over the property that was at stake. Here instead we are taking the cultural property as the object of protection, and that prohibition applies also in the non-international armed conflict. The importance of the *Tadić* jurisprudence is that there is a strong assertion that this prohibition is part of customary international law.
- The *Kordić & Čerkez* case established that an attack on cultural property becomes part of the crimes against humanity for an important and simple reason: targeting property with a discriminatory intent may amount to a criminal act of persecution. We are attacking cultural property not because we want to pursue an advantage in a conflict but rather because we want to annihilate and suppress the identity of the enemy through the symbols the enemy cherishes.
- The *Jokić* case considered that an attack on cultural heritage becomes a crime against humanity because of the importance of that particular item for humanity as a whole. In this case, the city of Dubrovnik, which is registered in the world heritage site, is therefore declared part of the heritage of humanity. It is no longer the loss of the community but the loss of human kind as a whole that makes the assault on property an international crime.

- The *Krstić* case reached an even more advanced level of criminalization because the Tribunal went as far as contemplating the destruction of cultural property as an element of *mens rea* in the crime of genocide. In other words, you are not going to commit genocide just by attacking property, you need to destroy people as well but the systematic destruction of cultural property may be an indicator that there is a crime of genocide. This was then followed up in 2007 by the International Court of Justice in the *Genocide Case (Bosnia v Serbia)*. The ICJ confirmed the approach of the ICTY in the *Krstić* case.

These are the new elements that we find in this jurisprudence. Influence of this jurisprudence has been extraordinary. It has been followed in other international criminal tribunals or mixed tribunals, such as by the Extraordinary Chambers in the Courts of Cambodia in its case 002, where extensive destruction of religious sites and monuments were subsumed under the category of great breaches of the Geneva Convention and of crimes against humanity. Finally, in the Mali conflict there was a self-referral by Mali to the International Criminal Court and the prosecutor launched a preliminary investigation into cultural-related crimes in Timbuktu.

The second approach is based on the responsibility to protect doctrine. The progress that is being made on the doctrine of the responsibility to protect should be taken advantage of and expanded to cover crimes against cultural heritage. The responsibility to protect doctrine has been developed in relation to a fairly narrow range of international crimes: in genocide, war crimes, crimes against humanity, ethnic cleansing and their incitement. In the development of this doctrine, there was no express reference to the abundance of jurisprudence of the ICTY, so there was no express intention of bringing crimes against cultural heritage under the mantle of the responsibility to protect. However, we have a clear indication that, at least at the level of individual criminal responsibility, crimes against cultural property may be characterized as war crimes or crimes against humanity. So it seems the following argument can be made: if international law is developing quite quickly and effectively at the level of individual criminal responsibility, it would be quite absurd if states do not face the same responsibility for the very same criminal acts that individuals face under international law. This would be a sort of schizophrenia and would not make sense. There cannot be one international law *à la carte* (one for individuals and one for the states). International law should apply similarly to all relevant actors.

We also need to expand this doctrine because the Security Council itself has in a way accepted this doctrine. In the 2003 resolution regarding the looting of the Bagdad museum, the Security Council applied the concept of the responsibility to protect. We have to

protect not only against mass atrocities, but also against those who commit senseless and irresponsible acts of destruction of items that are so important for the history, for the spirituality, for the culture of humanity. Reference is here made to an element of coherence. Individual criminal responsibility cannot exist while states are insulated from analogous responsibility; that is not going to last. Even if the states do attempt to protect their sovereignty by immunity etc., it won't last because of the force of events. Furthermore, there is an element in the ILC Article 48(1)(b) that establishes that breaches of obligations owed to the international community as a whole may justify the adoption of proper remedial measures by states which are not technically injured states. Therefore, in situations where we have extensive destruction like in Timbuktu, if there is some reaction, that reaction could come under the responsibility to protect and the idea that non-injured states may have an interest in stopping the destruction.

As a result, Article 48 of the 2001 Draft Articles should not fall into oblivion. It needs to be kept in mind to reinforce possible reactions towards crimes that involve cultural property, as *erga omnes* obligations. The idea behind it is that destruction and damage to cultural property means damage to the heritage of all human kind.

Professor Janet Ulph

Professor Ulph stated that she would concentrate upon the issue of implementation of the Hague Convention and its Protocols. She began by noting that it had taken the UK 50 years to declare its intention to ratify the Hague Convention 1954. This declaration in May 2004 was followed by a Consultation Paper in September 2005, issued by the Department of Culture, Media and Sport (DCMS). The Consultation Paper explained that the UK had delayed ratifying the Convention until agreement was reached upon the Second Protocol, so that an effective regime was in place.

Professor Ulph argued that the popularity of cultural heritage instruments amongst states depended upon the detail and strictness of the obligations imposed. She highlighted some interesting figures. Both the UNESCO Convention (1970) signed and ratified by 123 states, and the Hague Convention (1954), which has been ratified by 125 states, give states a great deal of discretion in choosing how they will fulfil the obligations imposed. In contrast, the Second Protocol to the Hague Convention provided more detail in relation to Contracting States' obligations and created criminal offences: as a consequence, its provisions were less flexible and might be more difficult to absorb into a state's domestic law. Unsurprisingly perhaps, the Second Protocol has only been ratified by 62 states.

It was argued that the UK Government has been too literal in its attempt to transfer the Hague Convention into legislation by way of a draft Cultural Property (Armed Conflict) Bill. While the Hague Convention and its Protocols are complex, its Preamble encompasses the spirit of the Convention: a straight lift of all the provisions into UK law by way of a specially drafted statute was not essential.

A particularly difficult problem is how 'cultural property' should be defined so that it might receive special care. Half of the responses to the Consultation Paper were devoted to defining such property. Article 1 of the Convention lists both movable property (such as "objects of artistic, historical or archaeological interest") and immovable objects, such as buildings. Although Article 1 states that these objects should be of 'great importance,' it makes it clear that the list could include objects which are of great importance to local groups of people and not merely to a government. The list in Article 1 is non-exhaustive and has the potential to be too wide. The Consultation Paper stated that the list had to be restricted in order to make it manageable. Unfortunately, the suggestions made in response were not always helpful: for example, some people suggested that parish churches should be included, which would involve registering over 16,000 churches in the UK.

A further issue which arises relates to the cost of implementing the Convention and Protocols. Article 3 of the Hague Convention requires cultural property to be safeguarded, and Article 5 of the Second Protocol requires inventories of movable and immovable cultural property to be prepared so that steps can be taken to protect them. The Consultation Paper assumed that this would be a straightforward matter. However, although a number of museums have inventories (particularly national museums), a regional museum might not have a comprehensive list. The Paper also assumed that, in relation to cultural property which was privately owned, ratification would not mean that private owners were forced to make extra efforts. The Consultation Paper might be seen as overly optimistic in relation to the costs of ensuring that all of the cultural property which needs protection is properly documented and protected.

Professor Ulph proposed that criminal offences could be divided into two categories, and their application would depend upon whether the offender was part of the armed forces or not. It was suggested that, even if the draft legislation created offences to deal with misconduct by the military, civilians could be dealt with by existing criminal law. In particular, current legislation might well be sufficient to deter civilians from dealing in cultural property which had been unlawfully exported from a state which was being occupied.

As regards criminal offences and the armed forces (see Article 4 of the Hague Convention and Article 15 of the Second Protocol), the military would require precise guidance in any implementing legislation. The

draft Cultural Property (Armed Conflict) Bill created offences involving the armed forces and might lead, upon conviction, to a sentence of imprisonment for up to 30 years. In order to avoid any uncertainty over the scope of the offences created (which would be incompatible with the accused's human rights) it is essential to define cultural property and distinguish which cultural property benefited from enhanced protection.

The same concerns relating to precision and clarity would also exist where civilians were accused of having dealt with unlawfully exported cultural property. This offence is created in Clauses 17 and 18 of the Draft Bill. Auction houses, dealers and collectors would be concerned about the mental ingredient which the prosecution must establish. Clause 18 provides that it must be shown that the accused knew or had 'reason to suspect' that the object had been unlawfully exported. It might be unclear when a person would be viewed as having 'reason to suspect' that an object was unlawfully exported. Professor Ulph questioned whether the offence needed to be included in any implementing legislation because dealers and others could always be prosecuted for a money laundering offence if, for example, they attempted to import objects without paying customs duties. Furthermore, the Dealing in Offences (Cultural Property) Act 2003 made it an offence to dishonestly deal in certain types of cultural object which had been unlawfully removed from monuments, buildings, etc. in the UK or abroad. Existing law should suffice and would provide a more effective deterrent, as the accused will face a maximum term of 14 years of imprisonment upon conviction for either handling stolen goods or a principal money laundering offence (rather than the 7 years proposed under the Draft Bill).

In conclusion, there is a need to draw a distinction between offences involving the military, which will need to be created by new legislation, and offences committed by civilians such as dealers, which could be dealt with by *existing* UK law. Ratification of the Convention does not necessarily require a new and highly complex statute on the lines put forward in the draft Cultural Property (Armed Conflict) Bill. Ratification of the Convention could be viewed as a simple step and a positive one.

Professor Peter Stone OBE

Professor Stone OBE started by recounting a memorandum from the Office of the Supreme Allied Commander,

Inevitably in the path of our advance, will be found historical monuments and cultural centres, which symbolize to the world all that we are fighting to preserve. It is the responsibility of every commander to protect and respect these symbols wherever possible.

This memorandum was signed in 1944 by President D Eisenhower. Professor Stone highlighted the stark difference between the approach taken in relation to cultural property in World War Two (WWII) and Iraq (2003). He showed that cultural property during WWII was removed and returned safely, whereas in Iraq, cultural property had been looted and destroyed.

The then Prime Minister Tony Blair, in March 2003, made reference to the Geneva Conventions in relation to the protection of cultural property and the UK's obligations but this rhetoric was remarkably different to the actions on the ground in Iraq.¹ Immediately before the invasion, archaeologists provided the Government with a list of 30 sites, which were a top priority to avoid, along with further advice that the critical period for cultural property protection was the period immediately following military action, before stable government had been reestablished in Iraq. It was clear from previous experience that attempts would be made to loot museums and archaeological sites. Unfortunately, the military were not ordered to protect cultural property, sites were not marked on combat maps and looting and destruction therefore occurred. The looting of museums was a major tragedy but the real catastrophe was the looting of sites as, by definition, there were no inventories of what was lost.

Professor Stone discussed the reasons as to why this happened in Iraq. First of all not enough troops were deployed: the US figures on the minimum number of troops required were calculated at 350,000 but only 148,000 were actually deployed. There was a failure to comprehend possible post conflict scenarios in Iraq. Another failure was a lack of understanding of the importance of the cultural heritage to the Iraqi population. Finally, there was also a failure of the heritage community to engage with the military. Cultural property protection expertise had been lost by the military after WWII and the relationship between cultural heritage professionals and the military had deteriorated drastically between WW II and 2003. Cultural property exports have become wary of the military.

In addition, despite both the US and UK governments employing archaeologists to protect archaeological sites and landscapes situated within home training areas, these skills were not used abroad. There were also issues of co-ordination within the DOD and MOD respectively, often with different sections unaware of such expertise. The staff of the MOD who sought external advice in 2003 did not know that archaeologists worked for their organisation. Professor Stone mentioned that such problems still exist.

However, since 2003, there has been growing press coverage on issues relating to cultural property and the failure of the UK Government to

¹ See Hansard, 19 March 2003, col. 940.

ratify the Hague Convention. During the Chilcot Inquiry, a group of 13 cultural and heritage organisations were asked to give evidence and it is hoped that one of the recommendations to eventually come from the upcoming publication of the Chilcot Inquiry will be a recommendation to ratify the Hague Convention.

In the future, more needs to be done, including holding workshops and rekindling links with the military. NATO's relative success in Libya, where some cultural property had been protected as it was on a list provided to NATO by the cultural heritage community, has led to a report in December 2012 which will hopefully lead to NATO including cultural property protection in its doctrine. The UK needs to ratify the Hague Convention and there is also a need for legislation dealing with antiquities in relation to Syria, as there had been for Iraq. Professor Stone's suggested a 4-tier plan for the military towards cultural property, which needs to be accepted and embedded. This 4-tier approach includes:

- long-term awareness training at all levels
- specific pre-deployment training regarding host country/region
- during conflict
- post-conflict

This approach has been cautiously welcomed by the UK military and NATO.

Finally a Centre devoted to the issue should be established in order to highlight and lobby issues in relation to cultural property and conflict.

Dr Lamia Al-Gailani Werr (UCL Institute of Archeology and SOAS)

Dr Lamia Al-Gailani Werr questioned whether the looting in Iraq resulted from ignorance, negligence or a lack of prioritisation. She mentioned that the first damage was done to the Assyrian gate to the museum, by a gun fired from a tank. It is said that the commander who did it was a historian and therefore realized that it was an 'ancient thing' and stopped. The looting of the Iraq museum followed, demonstrating absolute ignorance of how to protect its collections. Even after 3 or 4 days of looting, no American soldier appeared to protect the museum. The director was eventually asked to pinpoint where the museum was, showing there was complete ignorance of its location. The looting did not only focus on the antiques, but also on all the offices, including the precious photographic department. Looters were looking for antiquities or for gold in those offices, taking any relevant object or tearing apart what was deemed of no value.

Inside the museum, there were some pieces which were left behind because they were built into the ground or to the walls, rendering their loot impossible. Other objects in the exhibition halls were put into a safe

place. It was mostly the storerooms which were looted in the museum, with some 15,000 objects taken away. Inside the exhibition halls, second millennium statues of the lions, when the looters couldn't remove whole statues they just cut their head. The museum has unique collection of Phoenicians ivories, which Lebanon itself do not have. They were war trophies won by the Assyrian kings in the first millennium BC; many were thrown on the ground and trampled on by the looters. One more great loss happened in the corner of a storeroom where smaller items were stored, including 100,000 coins, over five thousands seals and amulets made of semi-precious stones were stolen. Thankfully the coins were saved but only because the looters did not have the keys to the cabinets.

Archeological sites were also looted. Dr Al-Gailani Werr showed some telling photographs of lunar landscapes, showing numerous excavated holes on known archaeological sites. A second millennium temple of Babylonia was dismantled. The looters started taking the tiles off the walls in search for gold or other objects they thought might be hidden.

In Bagdad itself, not only the museum suffered. There were other properties such as religious foundations, the national library, most of the university libraries, the palace of the royal family of the early 20th century were burnt, damaged or destroyed. The Iraqi government put their heritage sites in danger by putting their radio communication in the Royal Palace, leading to bombings of the site by the ally forces. There were cultural buildings in Iraq that the Americans, as occupying power, should have protected but did not. Some sites were systematically looted for months without anyone paying attention to them. She showed a picture of a heritage building where every window, every door, even the tiles, lights, electric wiring, water pipes were taken. 18 shrines were also damaged. In fact, after the looting of the museum, no attention was paid to the other occurrences of loot.

Another problem was the behavior of the military, which was camping next to the archeological sites, including in the proximity of Babylon. At one point, they even started doing helicopter landing on the site. The army would even bring sand bags from other sites, contaminating the sites. This also happened in Samarra, which has a unique racecourse from the ninth century, perhaps the only one in the world. The army built right through it, even putting an observation post on top of a minaret there.

Finally, she noted that the statues of Saddam were also destroyed. Four of them were on top of the presidential palace, which became the American embassy. The statues' heads were eventually saved. It may be questioned whether representations of an authoritarian figure

should also be protected. They are also cultural objects after all, part of a country's history.

This Report was prepared by Patricia Regules and Rebecca Francis.

For any further information on this seminar, please contact Kristin Hausler on k.hausler@biicl.org