

## Two Wrong Ways of Thinking about the Legal Protection of Cultural Property in Armed Conflict

There are many cogent analyses of the norms enshrined in the treaties for the protection of cultural property in armed conflict.<sup>1</sup> Why, then, is there a need for another description of their content, particularly in a book that promises an alternative approach to the subject? The answer is simple: the test of a new proposal's viability will rest first and foremost on a firm understanding of what these treaties actually say. So, in the following chapter, I try to strike a balance between this essential first step and my ultimate aim of suggesting a new way of thinking about the field. To accomplish this, I spell out the treaties' core obligations, but frame the discussion in terms that differ markedly from those generally used in such reviews – that is, I examine the rules for the protection of cultural property, and the history of their enforcement to date, in light of the two strands of thought that arguably dominate legal practice and commentary in the field: “revisionism” and “idealism.” In the process, I show that these approaches are inadequate for tackling the increasingly urgent task of providing effective norms for protecting cultural property in times of war.

Revisionism is, in brief, a trend of thought espoused by those practitioners and scholars who periodically reach the conclusion that the legal regime, as it stands, cannot meet current standards. To borrow a ubiquitous political sound bite, they believe it is not “fit for purpose.” Those who uphold this

<sup>1</sup> See e.g., Forrest, *International Law and the Protection of Cultural Heritage*; Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict* (Cambridge: Cambridge University Press, 2006); Jiri Toman, *The Protection of Cultural Property in the Event of Armed Conflict: Commentary on the Convention for the Protection of Cultural Property in the Event of Armed Conflict and Its Protocol* (Paris: Dartmouth, UNESCO, 1996); Toman, *Cultural Property in War: Improvement in Protection* (Paris: UNESCO Publishing, 2009); Kevin Chamberlain, *War and Cultural Heritage: An Analysis of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* (Leicester: Institute of Art and Law, 2004).

view argue that we need to adopt new rules each time the paradigm of damage and destruction shifts, something that invariably occurs as methods of warfare evolve with time. Revisionism, in this sense, is not an abstract concern; it is intimately related to the history of lawmaking. The analysis of the core obligations of the law for the protection of cultural property in Section 1 of this chapter helps reveal how the revisionist movement has been the main catalyst behind their adoption. The overall claim of idealism, on the other hand, is that the legal regime has in fact made significant progress over the years, and this has primarily been due to a number of important developments<sup>2</sup> – in particular, the establishment of the ICTY and the ICC. Section 2 therefore examines the statutes of these tribunals and the relevant case law of the ICTY, putting the different strands of idealist argument to the test.

The chapter concludes in Section 3 that these ways of thinking stand at either end of the same piece of string, pulling it in opposite directions. Revisionism emphasizes one kind of problem and, in reacting to it, inadvertently creates new ones, while idealism tends to gloss over the problems altogether. The main argument running through this book is the need to discard both of these so-called solutions and to devise a fundamentally new conceptual approach.

## 1 REVISIONISM

Given the extensive devastation wrought by recent armed conflicts on the cultural heritage of many countries around the world – for example, in Syria, Iraq, and Mali, as well as Libya in the aftermath of its 2011 civil war – and the ferocity of the Islamic State, it can be only a matter of time before the revisionist movement reemerges from its short hibernation to propose a new legal instrument of protection. The revisionist opinion that the current legal regime does not meet current requirements, however, is a somewhat trite justification for the adoption of yet another set of rules. There may indeed be lacunae in the protection of cultural property in armed conflict, but I believe this is not the road to follow if we wish to rectify this problem. To understand why this is so, we must reexamine the core rules of the relevant conventions in some depth, starting with the 1907 IV Hague Regulations and finishing with the non-binding 2003 UNESCO Declaration – the most recent instrument to reveal the influence of revisionism.

<sup>2</sup> Hector, “Enhancing Individual Criminal Responsibility,” 75; Schorlemer, “Cultural Heritage Law: Recent Developments,” 158.

1.1 *The 1907 IV Hague Regulations*

The 1907 IV Hague Convention and Annexed Regulations represent customary international law.<sup>3</sup> Take, for example, the razing in May 2000 of the Stela of Matara (an obelisk inscribed with most ancient example of the “old Ethiopic” script in existence) during the Ethiopian occupation of Eritrea. The Eritrea–Ethiopia Claims Commission affirmed that its destruction constituted a violation of customary international law and was prohibited by Article 56 of the 1907 IV Hague Regulations.<sup>4</sup> Indeed, these regulations contain two provisions that specifically touch upon the protection of such cultural artifacts. The first, applicable during armed conflict, is Article 27:

In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes. ... It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.

Article 27 was groundbreaking<sup>5</sup> in its demand that the world pay special attention to certain types of objects and buildings at a time when little distinction was made between military targets and civilian property. However, with hindsight, we can see there was still a long way to go before cultural property reached the position it occupies today in IHL, and in international law in general. This is first and foremost because this provision categorizes cultural institutions with hospitals, institutions dedicated to charitable purposes, and “places where the wounded and sick are collected.” In addition, if the object or institution happened to be destroyed not by siege or bombardment but by some other means, it would only receive the general form of protection

<sup>3</sup> “Judicial Decisions Involving Questions of International Law – International Military Tribunal (Nuremberg), Judgment and Sentences,” 41 *American Journal of International Law* 248 (1947): 248–249; UN Security Council, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Document S/25704, 9 para. 34; see also ICJ, Nuclear Weapons Advisory Opinion, para. 75; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) ICJ Reports 2004 136, 172 para. 89.

<sup>4</sup> Partial Award between the State of Eritrea and the Federal Democratic Republic of Ethiopia (*Eritrea v. Ethiopia*) Central Front Eritrea’s Claims 2, 4, 6–8 and 22 (The Hague, 2004), 26 para. 113.

<sup>5</sup> Save the detail that the 1907 IV Hague Convention superseded the 1899 II Hague Convention and Annex, which already contained an article concerning cultural objects, but without making reference to historic monuments.

awarded to “enemy property.”<sup>6</sup> The defense mounted by Slobodan Praljak, convicted by the ICTY Trial Chamber for his involvement in the destruction of mosques and the Old Bridge in Mostar during the Balkan war, was that the Bosnian Muslims’ failure to provide “distinctive and visible signs” indicating the presence of protected monuments relieved the Croatian army (HVO) of its obligation to abide by Article 27. The Trial Chamber, however, rejected this view, declaring that “*le non-usage de ce signe ne prive en aucun cas le bien de sa protection.*”<sup>7</sup>

The second provision of the 1907 IV Hague Regulations concerning cultural institutions, Article 56, applies during enemy occupation:

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. ... All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

There are two noticeable differences here. First, the article abandons the inclusion of hospitals and “places where the wounded and sick are collected” and instead mentions “works of art,” extending protection to movable objects. Second, there is no waiver to this obligation. Most importantly, its violation triggers some sort of legal responsibility. According to Suzanne Schairer,<sup>8</sup> Article 56 was the basis for the trial of Wilhelm Keitel and Alfred Rosenberg at Nuremberg. In fact, the very term “cultural property” was first used when the Nuremberg Tribunal stated that “the OKW Chief [Wilhelm Keitel] directed the military authorities to cooperate with the Einsatzstab Rosenberg in looting cultural property in occupied territories.”<sup>9</sup> The Einsatzstab Rosenberg was a Nazi educational research institute and museum containing more than 21,000 artworks stolen from countries across occupied Europe, and both Keitel and the chief of the institute, Rosenberg, were found guilty inter alia of the war crime of plunder.<sup>10</sup>

Apart from Articles 27 and 56, the 1907 IV Hague Regulations contain other norms that are relevant – albeit indirectly – to cultural and religious sites,

<sup>6</sup> Article 23(g) of the 1907 IV Hague Regulations according to which it was prohibited to “destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.”

<sup>7</sup> ICTY, *Prosecutor v. Prlić* (Judgment vol. 1) IT-04-74-T (May 29, 2013) para. 177.

<sup>8</sup> Suzanne L. Schairer, “The Intersection of Human Rights and Cultural Property Issues under International Law,” *Italian Yearbook of International Law* 11 (2001): 80.

<sup>9</sup> “Nuremberg, Judgment and Sentences,” 282 (emphasis added).

<sup>10</sup> Jacqueline Nowlan, “Cultural Property and the Nuremberg War Crimes Trial,” 6 *Humanitaeres Voelkerrecht* 4 (1993): 221.

such as the prohibition of pillage (Articles 28 and 47) and the obligation of the occupying power to ensure, circumstances permitting, “public order and safety, while respecting, unless absolutely prevented, the laws in force in the country” (Article 43), something that could be translated as a duty to prevent looting, vandalism or illegal archaeological excavations.

The impact of such events as the destruction of Reims Cathedral in France and the Louvain library in Belgium during the First World War led to various attempts in the interwar years to reform the laws for the protection of cultural property in armed conflict. These included initiatives by the Netherlands Archaeological Society and the Office International des Musées in the League of Nations. However, the only (relatively) successful initiative turned out to be the Washington Treaty of 1935, more commonly known as the “Roerich Pact” after its driving force, Nikolas Roerich, a Russian artist and lawyer, who was nominated three times for the Nobel Prize in peace. The pact declared that monuments, museums, and scientific, artistic, educational, and cultural institutions are neutral, unless used for military purposes.<sup>11</sup> However, it proved to be of more symbolic than practical importance. This is because only ten American states were bound by it,<sup>12</sup> and that meant that it did not apply to the warring parties in the Second World War. Moreover, as all ten states subsequently ratified the 1954 Hague Convention, it can be said it has fallen into desuetude.

Before the outbreak of the Second World War, President Roosevelt, whose administration had been key to ensuring the Roerich Pact’s adoption, urged the governments of Germany, Poland, France, and Britain to agree to safeguard undefended towns and cultural institutions. France and Britain subsequently issued a joint declaration assuring that it was

their intention to conduct the hostilities which have been imposed upon them with the firm desire to protect the civilian populations and to preserve, with every possible measure, the monuments of human civilization.<sup>13</sup>

But a qualification followed: they would respect such monuments only as long as Germany followed suit. Hitler’s administration reciprocated in similar terms:

The views expressed in the message of President Roosevelt, namely to refrain in all circumstances from bombing non-military target is ... a humanitarian

<sup>11</sup> Article V, Roerich Pact: “The monuments and institutions mentioned in article I shall cease to enjoy the privileges recognized in the present treaty in case they are made use of for military purposes.”

<sup>12</sup> Brazil, Chile, Colombia, Cuba, Dominican Republic, El Salvador, Guatemala, Mexico, United States, and Venezuela.

<sup>13</sup> Cited in the “Boylan Report,” 34.

principle, corresponding exactly to my own views ... One obvious condition for the continuation of these instructions is that the air forces opposing us observe the same rules.<sup>14</sup>

Although the Nazis began a war of cultural aggression in the rest of Europe – most prominently in Poland – it is remarkable that, during the first two years of the war, Germany, France, and Britain largely honored this political accord among themselves. However, when Britain broke with the agreement, sending its bombers over the city of Lübeck, Germany swiftly responded by retaliating in kind against Bath, and from that moment the situation escalated.<sup>15</sup> Carpet bombing wreaked devastation on many European cities, with the inevitable destruction of their historic monuments, as well as the looting of many hundreds of works of art – some of which remain at large more than six decades later.<sup>16</sup>

Against this backdrop, the revisionist movement found a receptive audience for its premise that Articles 27 and 56 had aimed too high and, as a consequence, had risked getting too little.<sup>17</sup> It argued that what was needed was “a convention of narrower application, so as to render feasible a higher standard of protection.”<sup>18</sup> As a result, an international conference held in The Hague under the aegis of UNESCO adopted two new sets of rules: the 1954 Hague Convention and its First Additional Protocol.

Despite the merits of the 1954 Hague Convention, it is worth noting that the revisionist justifications for a new legal instrument appear questionable, to say the least: armed forces, rebel groups, and/or individual combatants do not systematically destroy cultural property simply because the outdated character of the legal norms somehow leaves this option open. As the political pact adopted at Roosevelt’s initiative shows, it was not difficult for France, Britain, and Germany to perceive the difference between destroying cultural objects and refraining from doing so. The fundamental question that endures to this day is whether the will exists to act upon that distinction.

<sup>14</sup> Cited in the “Boylan Report,” 33.

<sup>15</sup> Nicola Lambourne, *War Damage in Western Europe: The Destruction of Historic Monuments during the Second World War* (Edinburgh: Edinburgh University Press, 2001), 51–53 and 143. For example, the Cologne Cathedral (Germany) was bombed fourteen times as a consequence of the specially aggressive Allied “thousand bomber” raid against Cologne in May of 1942. This raid triggered in turn the bombing of Canterbury the day after.

<sup>16</sup> Lynn H. Nicholas, *The Rape of Europa: The Fate of Europe’s Treasures in the Third Reich and the Second World War* (New York: Vintage Books, 1995), Kindle edition, location 4457–4459: “The problem ... was not so much battle, but occupation and the limbo period which preceded it, when the natives were apt to succumb to temptation and troops freed from the simple need to survive turned to souvenir collecting and graffiti painting.”

<sup>17</sup> O’Keefe, *Protection of Cultural Property in Armed Conflict*, 101.

<sup>18</sup> *Ibid.*

1.2 *The 1954 Hague Convention*

The 1954 Hague Convention offered the first legal definition of “cultural property.” Article 1 reads:

For the purposes of the present Convention, the term “cultural property” shall cover, irrespective of origin or ownership:

- (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of 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 the property defined above;
- (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in subparagraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a);
- (c) centers containing a large amount of cultural property as defined in subparagraphs (a) and (b), to be known as ‘centers containing monuments’.

This definition spells out the elements that render cultural property a category – namely, any type of goods, movable or immovable, as long as they are of great importance to the cultural heritage of every people. Given that a requirement of this new concept is that the object concerned is specifically defined as *cultural* heritage, buildings of a more diverse nature, such as hospitals and charitable or educational institutions, are deemed to lie outside its scope. Furthermore, by demanding a threshold “of great importance to every people” (that is, every nation),<sup>19</sup> the overinclusiveness of the 1907 IV Hague Regulations, which demanded the protection of every individual historic monument, was finally resolved.

Article 3 of the 1954 Hague Convention also obliges the signatories to begin preparations in peacetime 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.

<sup>19</sup> Roger O’Keefe, “The Meaning of ‘Cultural Property’ under the 1954 Hague Convention,” 55 *Netherlands International Law Review* 26 (1999): 29–30

Although this provision leaves a wide margin of discretion, Resolution II of the Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict of May 1954 (Resolution II of 1954) provides some guidance for the implementation of this task. For example, it recommends that each state establish a national advisory committee to inform the government of “the measures required for the implementation of the Convention in its legislative, technical or military aspects, both in time of peace and during an armed conflict” (paragraph a). The 1954 Hague Convention also contains specific obligations regarding military personnel during peacetime. These include the introduction of its provisions into the state’s military regulations, requiring it to foster a “spirit of respect for the culture and cultural property of all peoples” among the members of its armed forces (Article 7(2)), and the appointment of specialist personnel “whose purpose will be to secure respect for cultural property and to co-operate with the civilian authorities responsible for safeguarding it” (Article 7.2)). The 1954 Hague Convention further demands that the state disseminates its text widely during peacetime, “so that its principles are made known to the whole population, especially the armed forces and personnel engaged in the protection of cultural property” (Article 25). Likewise, it may indicate the presence of cultural property within its borders by marking it with the convention’s distinctive emblem, the so-called blue shield. Hence, despite the apparent vagueness of Article 3, the obligation to prepare during peacetime for the foreseeable effects of war is rendered increasingly more concrete as we scroll through the text.

When engaged in armed conflict, there are four basic obligations. I refer to them as basic or core obligations as these are the only ones whose application is extended to noninternational armed conflicts (Article 19(1)); the rest of the convention’s obligations only come into play in international conflicts. The first of these is that cultural property cannot be used (Article 4(1)) for purposes that could expose it to damage or destruction, and the second prohibits directing acts of hostility against cultural property (Article 4(2)). However, both these obligations may be waived in case of “imperative military necessity,” a crucial concept that was nevertheless left undefined at the time the convention was framed. The last two obligations cannot be lifted. According to the third cardinal obligation, enshrined in Article 4(3):

The High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property. They shall refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party.



Last, Article 4(4) forbids reprisals against cultural property, while Article 4(5) contains a clarification that holds that a state cannot evade its obligations by claiming that its opponent has not applied appropriate safeguards. In fact, the use of the 1954 Hague Convention's "blue shield" is not mandatory. Some states (such as Peru and Oman) do not affix it at all, whereas others (for example, the Netherlands and Poland) do so religiously, and still others, such as Japan, only use the blue shield irregularly.<sup>20</sup> This confusing situation means that, as Roger O'Keefe argues, it is left to each side in the armed conflict to decide what counts as its opponent's cultural property.<sup>21</sup> The absence of a clear means of identification is one of the recognized defects of the 1954 Hague Convention that will be addressed by the interplay between the World Heritage Convention and the 1954 Hague Convention discussed in Chapter 4.

Outside the core obligations, the 1954 Hague Convention foresees a "special protection" regime for certain immovables of "very great importance" (Article 8). Under this regime, immovables can only be used for military purposes or subjected to attack in exceptional cases of "unavoidable military necessity" (Article 11(2)), a concept that is once again left undefined. The special regime is currently considered a dead letter as there are only five properties (all belonging to developed countries) listed on the corresponding "International Register of Cultural Property under Special Protection."<sup>22</sup> In fact, the stringent conditions for eligibility dissuaded some states from seeking to place their cultural properties on the International Register. For example, one of the eligibility requirements for this special regime demands that property be situated at an adequate distance from a military objective, something

<sup>20</sup> UNESCO, "2011–2012 Periodic Reports concerning the 1954 Hague Convention and additional protocols," available at [www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/2011-2012-periodic-reports/#c1369634](http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/2011-2012-periodic-reports/#c1369634). For example, the Japanese report says that "in time of peace, Japan leaves it up to the owners of the cultural properties to decide whether or not to use the distinctive emblem." The Peruvian report indicates that the blue shield has not been deployed because of lack of appropriate resources but, interestingly enough, it also acknowledges that some buildings in the historical center of Cuzco, which do not represent world heritage, use it to attract tourism.

<sup>21</sup> Most of all, this is true in light of the large amount of monuments and artworks that some countries deem to be covered by the 1954 Hague Convention. Indeed, the Netherlands, Bulgaria, Iraq and the United Kingdom have spoken of more than 10,000 immovables and items. The United States may have up to 80,000 properties; see National Heritage Protection Act of 1966 (as amended) of the United States, section 2 and 101; O'Keefe, *Protection of Cultural Property in Armed Conflict*, 103–105.

<sup>22</sup> The five properties inscribed on the Register of Special Protection are the Vatican City, three refuges in The Netherlands (one in Maastricht and two in Zandvoort), another one in Germany (Oberried). The failure of the special system of protection stems not only from the small number of inscriptions, but also from the requests to delist some properties, UNESCO, International Register of Cultural Property under Special Protection UNESCO Doc. CLT/CIH/MCO/2008/PI/46.

that prevented the inclusion of the temples of Abu Simbel along the Nile, as they were considered too close to the Aswan Dam to qualify. Poland, similarly, pointed out that because the majority of its museums and historic monuments lay close to bridges, lines of communication, and railway stations, it could not hope to sign up to this special regime. Switzerland declared “the strict application of Article 8 ... makes it difficult to select this type of property in a small country where all the built-up areas are extremely close together.”<sup>23</sup> Likewise, the Soviet Union complained that, because its most important monuments were situated in its most important cities (for example, Moscow, Tallinn, and Leningrad), their proximity to industrial, urban, and military enclaves precluded their listing in the register.<sup>24</sup> According to Article 8(2), a property may nevertheless benefit from this regime, whatever its location, “if it is so constructed that, in all probability, it will not be damaged by bombs.” But, as Craig Forrest observes, if it will not “in all probability” be damaged, why place it under a special regime of protection?<sup>25</sup>

Article 28, concerning individual criminal responsibility, backs all of the 1954 Hague Convention’s obligations:

The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention.

The article does not elucidate what an act breaching the 1954 Hague Convention (the *actus reus*) or the criminal intention behind it (the *mens rea*) entails. Neither does it offer a definition of the type of punishment such an act should draw down. Although the purpose of leaving the content of this provision open ended was to allow each state to choose the mode of compliance best adapted to its national criminal system, the result is that most states have failed to incorporate a crime based on Article 28 into their criminal codes – and this includes Syria and Mali.<sup>26</sup>

The nature of the wars in the specified countries moves to the fore another doubt concerning the implementation of Article 28: namely, whether it can be

<sup>23</sup> O’Keefe, *Protection of Cultural Property in Armed Conflict*, 146–147.

<sup>24</sup> Toman, *Protection of Cultural Property in the Event of Armed Conflict*, 109–110.

<sup>25</sup> Forrest, *International Law and the Protection of Cultural Heritage*, 98–99.

<sup>26</sup> See, in general, Marina Lostal, “Syria’s World Cultural Heritage and Individual Criminal Responsibility,” *International Review of Law* 2 (2015): 1–17; see also Syrian Directorate General of Museums & Antiquities, *Periodic Report on Implementation of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two (1954–1999) protocols for the period 2005–2010* (2010).

used to prosecute individuals who have destroyed or looted cultural property in noninternational armed conflicts. This is because the provision on individual criminal responsibility is located in Article 28, whereas the only provision applicable in armed conflict, according to the 1954 Hague Convention, is Article 4,<sup>27</sup> where the core obligations are found. This is another matter that will be addressed in Chapter 4.

The number of states party to the 1954 Hague Convention increased progressively after its entry into force in 1956. However, the revisionist policy resurfaced in 1974, the year in which the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts convened in Geneva. At the time, there were sixty-three parties to the 1954 Hague Convention. However, the conference held that because the 1954 Hague Convention had “by no means entered into force worldwide,”<sup>28</sup> each of the ensuing two Additional Protocols of 1977 must also include a provision to reaffirm the protection of cultural property.

### 1.3 *The Two Additional Protocols of 1977*

Although those drafting the 1977 Additional Protocols intended simply to restate the essential obligations of the 1954 Hague Convention, they effectively revised the rules for the protection of cultural property. Article 53 of Additional Protocol I, applicable in international armed conflicts, reads as follows:

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, and of other relevant international instruments, it is prohibited:

- (a) 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;
- (b) to use such objects in support of the military effort;
- (c) to make such objects the object of reprisals.

Article 16 of Additional Protocol II, applicable in noninternational armed conflicts, repeats this wording verbatim, except for the prohibition on reprisals,

<sup>27</sup> Pursuant to Art. 19(1) of the 1954 Hague Convention; see Roger O’Keefe, “Protection of Cultural Property under International Criminal Law,” *Melbourne Journal of International Law* 11 (2010): 361–362; see also UN – Group of Experts for Cambodia, Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135 (1999) para. 76.

<sup>28</sup> *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Convention of 12 August 1949*, ed. Yves Sandoz, Cristoph Swinarski, and Bruno Zimmerman (Leiden: Martinus Nijhoff, 1987), 640, para. 2040.

which does not appear. The first way in which these provisions differ from those of 1954 is in their list of objects: the protocols mention “places of worship,” a category not covered by the 1954 Hague Convention per se. Secondly, they speak about cultural objects and places of worship that represent the “cultural or spiritual heritage of peoples.” Some legal commentators’ understanding of the threshold of the protocols differs from the interpretation applied to the 1954 Hague Convention: they claim that Article 16 refers to “only a few of the most famous monuments, such as the Acropolis in Athens and St. Peter’s Basilica in Rome.”<sup>29</sup> This opinion is quite prominent and has even appeared in the arbitral award in the case between Eritrea and Ethiopia concerning the Stela of Matara.<sup>30</sup> Nevertheless, it appears to be historically inaccurate. The official records of the 1974–1977 Diplomatic Conference reveal that the term “heritage of *peoples*” was preferred to that of “heritage of a *country*” so as to prevent clashes between a state’s predominant culture and the diverse national and religious identities of its minority populations.<sup>31</sup> Therefore, Articles 53 and 16 of Additional Protocols I and II, in effect, refer to cultural property of importance to every nation, and, at least in this sense, they coincide with the scope of the 1954 Hague Convention.<sup>32</sup>

Where the differences between the two Additional Protocols and the 1954 Hague Convention become most evident is in their respective regimes of protection. For one thing, the protocols completely outlaw the use of cultural objects and places of worship by the military (Article 53(b) of Additional Protocol I), whereas the convention allows the use of cultural property and its surroundings for military purposes in the case of “imperative military

<sup>29</sup> *Eritrea v. Ethiopia*, p. 26 para. 113; see also Rosalie Balkin, “The Protection of Cultural Property in Times of Armed Conflict,” in *Developments in International Humanitarian Law*, ed. William Maley, 237–256 (Canberra: Australian Defense Studies Centre, 1995), 247: “[Article 53 covers] a limited class of objects which, because of their recognized importance, constituted part of the special heritage of mankind”; see Karl Josef Partsch, “Protection of Cultural Property,” in *The Handbook of Humanitarian Law in Armed Conflicts*, ed. Dieter Fleck (New York: Oxford University Press, 1995), 381; Rüdiger Wolfrum, “Reflections on the Protection of Cultural Property in Armed Conflict,” in *Festschrift Für Erik Jayme*, ed. Heinz-Peter Mansel (München: Sellier European Law Publishers, 2004), 1793–1794; Ana Filipa Vrdoljak, “Cultural Heritage in Human Rights and Humanitarian Law,” in *Human Rights and International Humanitarian Law*, ed. Orna Ben-Naftali (Oxford: Oxford University Press, 2011), 263.

<sup>30</sup> *Eritrea v. Ethiopia*, p. 26 para. 113.

<sup>31</sup> Sandoz, Swinarski, and Zimmerman, Commentary on the Additional Protocols of June 8, 1977 to the Geneva Convention of August 12, 1949, paras. 2063 and 4841.

<sup>32</sup> See in general Marina Lostal, “The Meaning and Protection of ‘Cultural Objects and Places of Worship’ under the 1977 Additional Protocols,” 59 *Netherlands International Law Review* 3 (2012): 455–472; *Prosecutor v. Dario Kordić and Mario Čerkez* (Appeals) IT-95-14/2-(December 17, 2004), para. 91: “Despite this difference in terminology, the basic idea is the same.”

necessity” (Article 4(2)). Likewise, the convention applies the same waiver to the ban on acts of hostility directed against cultural property, whereas neither Article 53 nor Article 16 of Additional Protocols I and II, respectively, mentions any such disclaimer concerning acts of hostility. The United Kingdom, for example, lowers the bar of protection because it interprets the protocols as allowing attacks against cultural objects and places of worship if these are unlawfully used for military purposes.<sup>33</sup> Although the concept of “imperative military necessity” is not defined in the 1954 Hague Convention, as a result of developments in international customary law, it is out of the question that its mere use for military purposes would be sufficient grounds to allow an attack against a cultural property.<sup>34</sup>

Additional Protocol I is known for its development of individual criminal responsibility. Article 85(4)(d) reads as follows:

In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed willfully and in violation of the Conventions or the Protocol: ... (d) making the 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 there is no evidence of the violation by the adverse Party of Article 53, subparagraph (b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives.

It is difficult to understand why Additional Protocol I attaches so many conditions before an attack against a cultural object can be regarded as a “grave breach” – all of which are also alien to the essential rules of protection put forward by the 1954 Hague Convention. It relies on (1) the display of “clearly recognized” emblems, which the protocol then fails to specify;<sup>35</sup> (2) regimes of special protection awarded by “other international arrangements”; and

<sup>33</sup> United Kingdom of Great Britain and Northern Ireland, Declaration July 2, 2002 to the Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, available at [www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=0A9E03F0F2EE757CC1256402003FB6D2](http://www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=0A9E03F0F2EE757CC1256402003FB6D2).

<sup>34</sup> Lostal, “Meaning and Protection,” 469–471.

<sup>35</sup> The Red Cross, Red Crescent, or Red Lion and Sun can be displayed only to protect “medical units and transports, or medical and religious personnel, equipment or supplies” (see Article 8(1) of Additional Protocol I, and Additional Protocol III of 2005 relating to the Adoption of an Additional Distinctive Emblem). This is unfortunate above all if one considers the great

(3) a condition (that the cultural object must not in the “proximity of a military objective”) that is not mentioned in Articles 53 and 16 of the Additional Protocols – or any other treaty, for that matter. Article 85(4)(d) has never served as the basis for a prosecution for war crimes. Indeed, the need for better and more detailed provisions concerning crimes against cultural property and individual criminal responsibility became one of the primary concerns of the next revisionist wave, which proposed the adoption of yet another new instrument: the 1999 Second Protocol.

#### 1.4 *The 1999 Second Protocol*

The armed conflicts that dominated the end of the 1980s and beginning of the 1990s led legal practitioners and commentators to argue for the adoption of a new instrument to counteract the shortcomings of the 1954 Hague Convention’s outdated or inefficient provisions. In the words of John Henry Merryman:

The widespread adoption of Hague 1954 assured a prominent place for cultural property internationalism in the law of war, *but changes in weapons and modes of warfare since the 1940s and the resulting new threats to cultural property led to concern about its adequacy*. This concern became more general during the early 1990s, particularly during the Gulf War and the wars in the former Yugoslavia.<sup>36</sup>

UNESCO and its member states shared the view that the 1954 Hague Convention was unable to meet the challenges thrown up by new, more deadly methods of warfare. Indeed, the 1992 report by the UNESCO director-general at the time, Federico Mayor-Zaragoza, on “the reinforcement of UNESCO’s action on the protection of the world cultural and natural heritage”<sup>37</sup> maintained:

Various factors seem to indicate that the Hague Convention no longer meets current requirements ... The main criticisms leveled against the instrument

amount of concern that states put into what shape or form should the distinctive emblem of the Geneva Conventions and Additional Protocols adopt, rather than to what type of property it should be attached. In fact, “Afghanistan proposed a red archway; India, a red wheel; Lebanon, a red cedar tree; a red rhinoceros was proposed by Sudan; Syria, a red palm; Zaire, a red lamb; and in a short-lived effort, Sri Lanka sought a red swastika,” Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (New York: Cambridge University Press, 2010), 137. The use of the Red Cross, etc., emblem for marking cultural property would be unlawful pursuant to Article 38 of Additional Protocol I.

<sup>36</sup> John H. Merryman, “Cultural Property Internationalism,” *International Journal of Cultural Property* 12 (2005): 19 (emphasis added).

<sup>37</sup> UNESCO Doc. 140 EX/13.

are as follows: ... it does not take account of the current state of 'military science'; its provisions reflect experience in the Second World War and are not always applicable to armed conflicts occurring at present or that may occur in the future.<sup>38</sup>

Also crucial to this revisionist movement was the report UNESCO commissioned in 1993 from Patrick J. Boylan, the "Review of the Convention for the Protection of Cultural Property in Armed Conflict"<sup>39</sup> (commonly known as the Boylan Report), which suggested a substantial modification of the 1954 Hague Convention's terms.<sup>40</sup>

Different alternative revisions were considered. The option of an amendment was discarded as it depended on achieving unanimity among all the state signatories.<sup>41</sup> The adoption of a separate independent convention was also ruled out so as to prevent fragmentation of the legal regime by the creation of two parallel systems.<sup>42</sup> In the end, it was decided that the best option was to produce another protocol to the 1954 Hague Convention, and so the 1999 Second Protocol was born. Its text revisited those issues deemed no longer to stand the test of time, namely:

- (i) the lack of definition of the waiver of imperative military necessity;
- (ii) the failed system of special protection;
- (iii) the provision on individual criminal responsibility; and
- (iv) institutional matters.<sup>43</sup>

The 1999 Second Protocol therefore supplements the provisions of the 1954 Hague Convention and applies in its entirety to both international and non-international armed conflicts.<sup>44</sup> In order to invoke the waiver of "imperative military necessity" in an assault on cultural property, the 1999 Second Protocol lays down two conditions: first, the cultural property has been turned into a military objective by its function, and, second, there is no other feasible way

<sup>38</sup> *Ibid.*, 3 para. 11.

<sup>39</sup> See in general the Boylan Report.

<sup>40</sup> *Ibid.*, 72 para. 5.47, and 87 para. 7.7.

<sup>41</sup> Article 39(5) of the 1954 Hague Regulations.

<sup>42</sup> Chamberlain, *War and Cultural Heritage*, 172; Andrea Gioia, "The Development of International Law Relating to the Protection of Cultural Property in the Event of Armed Conflict: The Second Protocol to the 1954 Hague Convention," *Italian Yearbook of International Law* 11 (2001): 28.

<sup>43</sup> Jean-Marie Henckaerts, "New Rules for the Protection of Cultural Property in Armed Conflict," 81 *International Review of the Red Cross* 835 (1999): 593; Vittorio Mainetti, "De Nouvelles Perspectives Pour la Protection Des Biens Culturels en Cas de Conflit Armé: L'entrée en Vigueur du Deuxième Protocole Relatif à la Convention de La Haye de 1954," 86 *International Review of the Red Cross* 854 (2004): 344–345.

<sup>44</sup> Articles 2 and 22, 1999 Second Protocol.

to secure an advantage in the war (Article 6(a)). Similarly, armed forces can invoke “imperative military necessity” when using cultural property or its surroundings for purposes likely to expose it to destruction or damage if this is the only feasible way of attaining the military advantage it seeks to secure (Article 6(b)). Only commanding officers or those of similar rank can take such a decision – and, if possible, they must give advance warning.

The 1999 Second Protocol also created an “enhanced regime” of protection that was supposed to replace the 1954 Hague Convention’s “special regime” (Article 10) slowly. The cultural property that qualifies for this enhanced form of protection is then placed on the Enhanced Protection List. The 1999 Second Protocol failed to devise a special emblem at the time. In 2015, the Committee for the Protection of Cultural Property in the Event of Armed Conflict (1999 Second Protocol Committee) adopted another distinctive emblem, consisting of a blue shield with a red background,<sup>45</sup> for cultural property under enhanced protection. It is still unclear whether its deployment will be mandatory. Once a property or object is included on such a list it becomes immune from military use and from attack. The latter prohibition only ceases if it has been turned into a military objective, and the only possible way of ending this situation is by mounting an assault. In such a case, however, the attacking force must take all feasible precautions, and, if circumstances permit, the order to attack must be taken at the highest operational level (Article 13).

Turning to individual criminal responsibility, the 1999 Second Protocol specified the following as serious violations:

- a. making cultural property under enhanced protection the object of attack;
- b. using cultural property under enhanced protection or its immediate surroundings in support of military action;
- c. extensive destruction or appropriation of cultural property protected under the Convention and this Protocol;
- d. making cultural property protected under the Convention and this Protocol the object of attack.<sup>46</sup>

The first three violations are subject to universal criminal jurisdiction, meaning that a state party in whose territory an alleged offender is present has the obligation either to extradite or to prosecute them. Where there is no extradition treaty in force between countries, the Second Protocol can provide the legal basis for extradition (Articles 16–18).

<sup>45</sup> Decision 9.COM 4, CLT-14/9.COM/CONF.203/4/REV2 – annex, figure 6(b).

<sup>46</sup> Article 15, 1999 Second Protocol.



The last revision to be implemented was the creation of the 1999 Second Protocol Committee.<sup>47</sup> This comprises twelve states, elected for a four-year term by a meeting of the state parties. The committee convenes annually, and its main functions are to develop the guidelines for the implementation of the protocol; grant, cancel, or suspend enhanced protection for cultural property; update the Enhanced Protection List; and monitor the protocol's implementation (Article 27).

The drafters of the Second Protocol aimed to update the provisions of the 1954 Hague Convention by incorporating the developments that had taken place in IHL since 1954 without creating another parallel regime of protection, which would risk fragmenting the legal regime. However, as a result of the spirit of revisionism that imbues the 1999 Second Protocol, it has effectively multiplied the existing regimes of protection. The reason for this is illustrated by the rules of the Vienna Convention on the Law of Treaties, which address the application of successive treaties concerning the same subject:

When the parties to the later treaty do not include all the parties to the earlier one ... as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.<sup>48</sup>

As such, the protocol's definition of "imperative military necessity" is not applicable to states that are only party to the 1954 Hague Convention. This means they benefit from a wider margin of interpretation than those who have also acceded to the 1999 Second Protocol. In addition, as long as there are states bound by the 1954 Hague Convention but not by the 1999 Second Protocol (fifty-eight of them at the time of writing), the regime of special protection will continue to apply. As a result, the ordinary, special, and enhanced regimes of protection coexist, running parallel to each other. Indeed, Argentine's delegate to the protocol's preparatory conference predicted such an outcome when he warned that the enhanced protection regime would bring about a "three-tiered system of protection, which ... would bring confusion and be detrimental to the system of special protection."<sup>49</sup> He may well have been right because, as matters stand, the enhanced regime has made little progress beyond the protection afforded by the special system as there are only ten properties registered with the Enhanced Protection List (all of which constitute world heritage sites), not much more than the five included on the International Register of Cultural Property under Special Protection.

<sup>47</sup> Article 24, 1999 Second Protocol.

<sup>48</sup> See Article 30(4)(b) of the Vienna Convention.

<sup>49</sup> Toman, *Cultural Property in War: Improvement in Protection*, 185.

Given the similarities between a property liable to benefit from the enhanced protection regime and one designated as world cultural heritage, the 1999 Second Protocol Committee has highlighted the need to examine the synergies between these two categories – presumably in order to revamp the enhanced protection regime, since there are more than eight hundred cultural sites on the World Heritage List at the time of writing. This is one of the matters examined in Chapter 5.

It was the destruction of a monument of universal value, one of “great importance for all humanity,” that triggered a further call to restate the rules, although this time, as we shall see, the call led to the adoption of a “declaration” (a nonbinding instrument) rather than a fully fledged treaty.

### 1.5 *The 2003 UNESCO Declaration*

As the Taliban had gained control of 90 percent of Afghanistan by 2001,<sup>50</sup> the country could not be characterized as engulfed in conflict. Taliban rule, however, was noted for its “absolute lack of freedom of expression and [its] total ban on pictures,”<sup>51</sup> which were regarded as traces of infidel religions. It was in this context of heightened religious intolerance that the regime ordered the dynamiting of the statues known as the Buddhas of Bamiyan. This act of iconoclasm led some key international actors, such as the then-UNESCO director-general, Koïchiro Matsuura, to speak of “crimes against culture.”<sup>52</sup> Given the impossibility – or inadvisability – of adopting international sanctions,<sup>53</sup> the UNESCO General Conference suggested another response: the adoption of a recommendation “proclaiming the systematic, deliberate and discriminatory destruction of cultural heritage of value for humanity as a crime under international law.”<sup>54</sup> This prompted the 2003 UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage – the most recent example of the influence of revisionism.

In fact, the 2003 UNESCO Declaration does little more than reproduce the basic undertakings of the World Heritage Convention (to which Afghanistan

<sup>50</sup> Stephen Tanner, *Afghanistan: A Military History from Alexander the Great to the War against the Taliban* (Boston: Da Capo Press, 2009), 219.

<sup>51</sup> Francesco Francioni and Federico Lenzerini, “The Destruction of the Buddhas of Bamiyan and International Law,” 14 *European Journal of International Law* 4 (2003): 624.

<sup>52</sup> Francesco Bandarin, “Editorial,” *World Heritage Newsletter*, May–June 2001, 1.

<sup>53</sup> For example, in order for the Security Council to impose sanctions on a state there must have been a threat to international peace, and Francioni and Lenzerini argued that the destruction of the Buddhas could hardly meet that threshold; see “Destruction of the Buddhas,” 630; see also Article 39 of the UN Charter.

<sup>54</sup> *Ibid.*, 643.

was a party), the 1954 Hague Convention, the 1999 Second Protocol, and customary international law. Federico Lenzerini and Lyndell V. Prott are justifiably critical: “There was no need to create a legal instrument condemning such kinds of acts ... [as] it is well known that this course of action was already prohibited by international law.”<sup>55</sup> They declare that since the declaration has no binding force and simply reproduces existing law, “some might therefore argue that it weakens it. Why re-state in a declaration what is already mandatory?”<sup>56</sup> This weakness is exemplified by Article VII, which lays out the terms of individual responsibility:

States should take all appropriate measures, in accordance with international law, to establish jurisdiction over, and provide effective criminal sanctions against, those persons who commit, or order to be committed, acts of 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.

This makes a recommendation out of an obligation that already existed under Article 28 of the 1954 Hague Convention. Moreover, a recommendation of this sort had already been made in Article 47 of the 1972 UNESCO Recommendation Concerning the Protection, at National Level, of the Cultural and Natural Heritage. It is also very troubling that the offense enshrined in Article VII of the 2003 UNESCO Declaration does not encompass the whole range of actions and omissions that would otherwise constitute a violation against cultural property under the various existing binding instruments, for example, the use of cultural property for purposes that may expose it to damage or destruction. Concerning the mens rea (criminal intentions), Article II(2) of the 2003 UNESCO Declaration states that “intentional destruction” means an “act *intended to destroy*”;<sup>57</sup> Article VII would seem to place reckless damage to cultural heritage outside its scope.

The notion of “crimes against culture” was regarded as a far-reaching concept, one that would place cultural and natural heritage within the reach of international law and carry implications far beyond Bamiyan.<sup>58</sup> However, because of its revisionist and therefore ad hoc nature, the 2003 UNESCO

<sup>55</sup> Federico Lenzerini, “The Unesco Declaration Concerning the Intentional Destruction of Cultural Heritage: One Step Forward and Two Steps Back,” *Italian Yearbook of International Law* 13 (2003): 141.

<sup>56</sup> Lyndell V. Prott, “UNESCO International Framework for the Protection of the Cultural Heritage,” in *Cultural Heritage Issues: The Legacy of Conquest, Colonization and Commerce*, ed. James A. R. Nafziger and Ann M. Nicgorski (Leiden: Martinus Nijhoff, 2009), 278–279.

<sup>57</sup> Emphasis added.

<sup>58</sup> Bandarin, “Editorial,” 1.

Declaration may have had the contrary effect, narrowing the focus of what constitutes a violation of cultural heritage.

### 1.6 *Final Remarks*

Each newly adopted instrument, regardless of its form, has led to further changes to the terms under which cultural property is protected. Because of the number of treaties that revisionism has steered into being, the notion of “cultural property” may stand for many very different things: it can encompass the overinclusive list of objects of the 1907 IV Hague Regulations, the narrower definition provided by the 1954 Hague Convention, or the definition of the two Additional Protocols, which includes places of worship in their own right, and whose exact threshold for the “importance” of cultural property still engenders debate among legal scholars. To this we have to add the more exclusive notion of cultural property under “special protection” – not to be confused with property under “enhanced protection” in the 1999 Second Protocol. The same happens with the meaning of “protection,” which can cease to exist if the site is used for military purposes (1907 IV Hague Convention), if it becomes a military objective (Additional Protocols I and II), or in the case of “imperative military necessity,” which in turn triggers different interpretations depending on whether the state is only a party to the 1954 Hague Convention or to its 1999 Second Protocol as well – and so on.

Revisionism has also had the effect of multiplying the number of instruments dealing with the same subject matter. This increases the likelihood of situations in which all the warring parties have committed to respect cultural property in armed conflict as set out in one instrument or another but hold none of these in common. The states involved in the 2003 Iraq War are a case in point, as Chapter 6 shows. Even though the laws for the protection of cultural property in armed conflict suffer from lacunae, the continual adoption of new instruments is not the way to address perceived deficiencies.

## 2 IDEALISM

While adherents of the revisionist approach insist on the repeated creation of further legislation to patch up obvious problems, the idealist trend claims that the laws regarding the protection of cultural property in times of armed conflict have attained sufficient maturity to represent an appropriate solution, or at least are making steady progress in this direction. But idealists do not necessarily all speak with one voice, and in this section I identify four distinct strands of argument. The first believes that the ICTY and ICC Statutes have

significantly strengthened the obligations of the 1954 Hague Convention. The second contends that ICTY case law shows that the central provisions of the 1954 Hague Convention have achieved the status of customary international law. A third tendency argues that the “the general obligation to respect – i.e., to abstain from acts of willful destruction and damage – cultural heritage of significant importance in the event of armed conflict” has developed into a principle that applies to the international community as a whole (*erga omnes*). And finally, the fourth hails the connection that the ICTY has established between the destruction of cultural and religious buildings and the egregious violation of human rights as a remarkable – and major – contribution to the field.

Despite differing from one another in their choice of emphasis, I group these forms of argument together under the label “idealist,” as they hasten to draw optimistic conclusions at the expense of reflecting reality.

### 2.1 *The Effect of the ICTY and ICC Statutes on the 1954 Hague Convention*

One strand of the idealist approach holds that the ICTY and ICC Statutes indicate the “ripening of wartime protections for cultural property into customary law.”<sup>59</sup> Its adherents also claim that these statutes have strengthened the obligations of the 1954 Hague Convention,<sup>60</sup> particularly as they designate the destruction of cultural and religious institutions as war crimes.

Article 3(d) of the ICTY Statute includes acts against cultural objects and places of worship in its list of war crimes:

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to ... seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.

For its part, the ICC Statute, in force since 1 July 2002, depicts a war crime as follows (Article 8(2)(b)(ix)):

Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.<sup>61</sup>

<sup>59</sup> Wayne Sandholtz, “The Iraqi National Museum and International Law: A Duty to Protect,” *Columbia Journal of Transnational Law* 44 (2005–2006): 224.

<sup>60</sup> Schorlemer, “Cultural Heritage Law: Recent Developments,” 148: “The provisions of the 1954 Hague Convention and the Second Protocol were strengthened by the Rome Statute.”

<sup>61</sup> An identical provision, applicable in noninternational armed conflict, can be found in Article 8(2)(e)(iv).

A closer look at the wording of the ICTY and ICC Statutes, however, reveals that the claim that they have helped the existing regime of protection “ripen” into customary international law, or that they reinforce the undertakings of the 1954 Hague Convention, is a rather optimistic reading of their provisions. First, the list of objects encompassed by the ICTY and ICC Statutes was in fact inspired by the 1907 IV Hague Regulations,<sup>62</sup> which were already considered to be outdated by the end of the Second World War. As such, neither of these statutes requires that cultural and religious institutions meet a threshold of relevance, an issue that was pivotal in the drafting of the 1954 Hague Convention, reflecting the fact that “what was wanted was a convention of narrower application.”<sup>63</sup> What is more, the ICC Statute only covers immovable property, and it still includes hospitals and places harboring the sick and wounded with cultural and religious institutions.

Second, the ICTY Statute only regards as war crimes those acts that have *resulted in* the seizure of, or destruction or willful damage to, such institutions, whereas the 1954 Hague Convention prohibits directing acts of hostility against cultural property regardless of the result, and includes the use of such property and its surroundings for purposes that may lead to its damage or destruction. And, third, the ICC Statute labels direct attacks against these institutions as a war crime, unless they become legitimate military objectives, whereas the 1954 Hague Convention refers to the distinctive waiver of “imperative military necessity.”

Despite the fact that the former Republic of Yugoslavia had been a party to the 1954 Hague Convention since 1956<sup>64</sup> and the ICC Statute was adopted in 1998, nothing in the statutes echoes the obligations of the 1954 Hague Convention.

## 2.2 *The ICTY Case Law and the 1954 Hague Convention as Customary International Law*

The second idealist line of argument holds that the jurisprudence of the ICTY shows that “the central provisions of the 1954 Hague Convention, including the obligation to prevent or halt looting of or vandalism to cultural property,

<sup>62</sup> See in general Micaela Frulli, “The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency,” 22 *European Journal of International Law* 1 (2010): 203–217.

<sup>63</sup> O’Keefe, *Protection of Cultural Property in Armed Conflict*, 101.

<sup>64</sup> The Commission of Experts that gave legal advice on the Balkan conflict to the UN with a view to establishing the ICTY made “clear suggestions ... about the need to insert criminal sanctions against these acts, with explicit reference to the rules contained in the 1954 [Hague

have achieved the status of customary international law.”<sup>65</sup> However, aside from the fact that the list of objects included in Article 3(d) bears no resemblance to the definition of “cultural property” of the 1954 Hague Convention, the manner in which the ICTY understands the elements constituting the crime against cultural property is very far from the 1954 Hague Convention’s description of these violations. According to the established jurisprudence of the ICTY, the specific elements of the crime of seizure, destruction, or willful damage of cultural and religious institutions are as follows:

- (i) It has caused damage or destruction to property that constitutes the cultural or spiritual heritage of peoples;
- (ii) the damaged or destroyed property was not used for military purposes at the time when the acts of hostility directed against these objects took place; and
- (iii) the act was carried out with the intent to damage or destroy the property in question or in reckless disregard of the likelihood of the destruction or damage to the institution in question.<sup>66</sup>

The first element does not match the standards of the 1954 Hague Convention as it requires actual damage or destruction, and the same applies to the second, given that the expression “used for military purposes” is directly borrowed from Article 27 of the 1907 IV Hague Regulations. It is therefore untenable to claim that the case law of the ICTY has been instrumental in confirming the central obligations of the 1954 Hague Convention as customary international law.

In this context, it is important to note the recent declaration of the ICTY Trial Chamber in *Prlić et al.* In this judgment, the chamber declared that “the

Convention]”; see Frulli, “Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency,” 208 citing the UN Doc. S/1994/674, part II.

<sup>65</sup> Sandholtz, “Iraqi National Museum,” 238 and 229; see also Patty Gerstenblith, “Protecting Cultural Heritage in Armed Conflict: Looking Back, Looking Forward,” *Cardozo Public Law, Policy & Ethics Journal* 7 (2009): 689. “The earlier Hague Conventions and the 1954 Hague Convention are referenced in some of the individual prosecutions as forming part of customary international law.” See also Jadranka Petrovic, *The Old Bridge of Mostar and Increasing Respect for Cultural Property in Armed Conflict* (Leiden: Martinus Nijhoff, 2012), 217: “These provisions are reflected in the 1954 Convention the core provisions of which are also considered part of customary IHL.”

<sup>66</sup> *Prosecutor v. Pavle Strugar* (Judgment) IT-01-42-T (31 January 2005) paras. 296 and 312; *Prosecutor v. Mladen Naletilić and Vinko Martinović* (Judgment) IT-98-34-T (March 31, 2003) para. 605; *Prosecutor v. Vladimir Đorđević* (Judgment) IT-05-87/H-T (February 23, 2011) para. 1773; *Prosecutor v. Hadžihasanović and Kubura* (Judgment) IT-01-47-T (March 15, 2006) para. 59; *Prosecutor v. Martić* (Judgment) IT-95-11-T (June 12, 2007) para. 96; *Prosecutor v. Pavle Strugar* (Judgment on Sentencing Appeals) IT-01-42-A (July 17, 2008) para. 278.

1954 Hague Convention is regarded as an integral part of customary international law.”<sup>67</sup> However, even though the determination of customary international law has been called “more [of] an art than a scientific method,”<sup>68</sup> there are two important limitations to such an artistic endeavor: proving, or at least trying to argue for, the existence of *opinio juris* (the subjective belief in the obligations of customary law) and state practice, the two components necessary to contend that a norm is customary. The Trial Chamber gave no such justification for its claim in its main text, although it did provide a footnote at the end of its bold statement referring to “*Arrêt Kordić*, par. 92.” Strikingly, however, paragraph 92 of such decision does not even mention the 1954 Hague Convention but says instead that the “Hague Convention IV is considered by the Report of the Secretary-General as being without doubt part of international customary law.”<sup>69</sup> This refers to the 1907 IV Hague Convention and its annexed regulations, not to the 1954 Hague Convention. Hence, there is no basis whatsoever to say that ICTY case law shows that the whole of the 1954 Hague Convention, or its core obligations, reflects customary international law.

### 2.3 *The Erga Omnes Nature of Cultural Heritage Obligations*

A third idealist strand argues that the principle of respect for cultural property during times of conflict is one that belongs to “the general category of norms establishing *erga omnes* obligations [that is, obligations owed to the international community as a whole], a category recognized by the International Court of Justice in the well-known *Barcelona Traction* case.”<sup>70</sup> In order to

<sup>67</sup> Own translation of *Prlić et al.* (vol. 1) para. 174. The original text reads: “La Convention de La Haye de 1954 est considérée comme faisant partie intégrante du droit international coutumier” (footnotes omitted).

<sup>68</sup> Jan Klabbers, *The Concept of Treaty in International Law* (The Hague: Kluwer Law International, 1996), 1.

<sup>69</sup> *Prlić et al.* (vol. 1) para. 174 (emphasis added), making reference to Report of the Secretary-General, para. 35, which in turn says: “The part of conventional international humanitarian law which has beyond any doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; 3/ the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; 4/ the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; 5/ and the Charter of the International Military Tribunal of 8 August 1945.”

<sup>70</sup> Francesco Francioni and Federico Lenzerini, “The Obligation to Prevent and Avoid Destruction of Cultural Heritage: From Bamiyan to Baghdad,” in *Art and Cultural Heritage: Law, Policy, and Practice*, ed. Barbara T. Hoffman (New York: Cambridge University Press, 2006), 34; see also Francesco Francioni, “The Human Dimension of International Cultural Heritage Law: An Introduction,” 22 *European Journal of International Law* 1 (2011): 13; Vrdoljak, “Cultural Heritage in Human Rights,” 300.



support this view, several explanations are provided, all stressing the idea that the preservation of cultural heritage represents an important universal value.<sup>71</sup> These explanations range from reminding us that UNESCO has helped elevate cultural heritage to the rank of an “international public good”<sup>72</sup> to the fact that the preamble of the 1954 Hague Convention refers to “people” as opposed to states. The argument is that the 1954 Hague Convention did so in order 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.<sup>73</sup>

By contrast, it is not at all clear that importance or value alone can give rise to an *erga omnes* obligation. This is illustrated by the words of the International Court of Justice in the *South West Africa* cases:<sup>74</sup>

It has been suggested, directly or indirectly, that humanitarian considerations are sufficient in themselves to generate legal rights and obligations, and that the Court can and should proceed accordingly. The Court does not think so. *It is a court of law, and can take account of moral principles only in so far as they are given a sufficient expression in legal form.* Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered.<sup>75</sup>

The statement in the 1954 Hague Convention’s preamble is not sufficient to give legal form to generate rights and obligations toward the international community as a whole. This is not only because preambles are nonbinding, but primarily because Article 18 of the 1954 Hague Convention limits the application of the convention to its state parties and, at most, to those other states that agree to respect its provisions. So, to paraphrase O’Keefe, cultural heritage can indeed be

<sup>71</sup> See e.g., Vrdoljak, “Cultural Heritage in Human Rights,” 300 (footnotes omitted): “the obligation to protection cultural heritage is not confined to states parties to the relevant human rights, humanitarian law, nor specialist cultural heritage instruments but extends to all states. This development intrinsically arises from the notion that if the protection of cultural heritage at the international level is grounded in its importance to all humanity, and this is a ‘value especially protected by the international community’, then all states have ‘a legal interest in [its] protection’.”

<sup>72</sup> Francesco Francioni “A Dynamic Evolution of the Concept and Scope: From Cultural Property to Cultural Heritage,” in *Standard Setting at Unesco: Normative Action in Education, Science and Culture* (vol I), ed. Abdulqawi Yusuf (Leiden: Martinus Nijhoff, 2007), 221 and 236.

<sup>73</sup> Francioni, “Human Dimension,” 13.

<sup>74</sup> *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)* Second Phase, ICJ Reports 1966, 6.

<sup>75</sup> *Ibid.* para. 49 (emphasis added).

considered as the concern of the international community as a whole, but not as the object of *erga omnes* obligations.<sup>76</sup>

#### 2.4 *The Human Dimension of Cultural Heritage Law?*

The ICTY established that the destruction of cultural and religious institutions could be regarded as persecution and thus amount to a crime against humanity,<sup>77</sup> and that sometimes it can even be proof of the *mens rea*, or intention to commit the crime of genocide.<sup>78</sup> This jurisprudential trend is generally seen as representing “the human dimension of international cultural heritage law,”<sup>79</sup> and some legal commentators have greeted its appearance with enthusiasm. It is not clear, though, whether they regard this development as a complement to what some call the “traditional”<sup>80</sup> protection of cultural property or as a complete shift in the law’s internal rationale toward a more anthropocentric understanding of cultural property.<sup>81</sup> Either way, a closer scrutiny of the

<sup>76</sup> Roger O’Keefe, “World Cultural Heritage: Obligations to the International Community as a Whole?,” 53 *International and Comparative Law Quarterly* 1 (2004): 208; see also Sjöstedt, “Role of Multilateral Environmental Agreements in Armed Conflict,” 141.

<sup>77</sup> *Prosecutor v. Dario Kordić and Mario Čerkez* (Judgment) IT-95-14/2-T (February 26, 2001) paras. 206–207; see also, *Prosecutor v. Blaskić* (Judgment) IT-95-14-T (March 3, 2000) paras. 227 and 233; *Prosecutor v. Tihomir Blaskić* (Judgment in Sentencing Appeals) IT-95-14-A (July 29, 2004) para.149. *Prosecutor v. Milomir Stakić* (Judgment) paras. 765–768; *Prosecutor v. Momčilo Krajišnik* (Judgment) IT-00-39-T (September 27, 2006) para. 781; *Prosecutor v. Nikola Šainović* (Judgment) IT-05-87-T (February 26, 2009) para. 205; *Prosecutor v. Vladimir Đorđević* (Judgment) IT-05-87/1-T (February 23, 2011) para. 1771.

<sup>78</sup> *Prosecutor v. Krstić* (Judgment) IT-98-33-T (August 2, 2001) para. 580: “The Trial Chamber ... points 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.”

<sup>79</sup> See volume 22 of the *European Journal of International Law* entitled “The Human Dimension of International Cultural Heritage Law.” The term and the arguments made here with regard to such a human dimension of international law concern the connection between persecution as a crime against humanity or genocide and the crime of destruction of cultural property, not to the other sides of this human dimension included in the symposium.

<sup>80</sup> Federico Lenzerini “The Role of International and Mixed Criminal Courts in the Enforcement of International Norms Concerning the Protection of Cultural Heritage,” in *Enforcing International Cultural Heritage Law*, ed. Francesco Francioni and James Gordley (Oxford: Oxford University Press, 2013), 55.

<sup>81</sup> See e.g., Vrdoljak, “Cultural Heritage in Human Rights,” 250–251 and 300: the “rationale [for the protection of cultural heritage] has undergone a significant recalibration. It was originally based on its importance for the advancement of the arts and sciences, and knowledge generally. This has now been eclipsed by an emphasis on the significance of cultural heritage in ensuring the contribution of all peoples to humankind”; cf. Ana Filipa Vrdoljak “Intentional Destruction of Cultural Heritage and International Law,” in *Multiculturalism and International Law*, *Xxxv Thesaurus Acroasium*, ed. Kalliopi Koufa (Thessaloniki: Sakkoulas, 2007), 377–396 (emphasis

link between the destruction of cultural heritage and acts of persecution and genocide reveals that (1) a complete recalibration of rationale would limit the scope of the laws protecting cultural heritage, and (2) this “human dimension” cannot be regarded as a complement to the protection of cultural property *per se*. We should therefore approach this jurisprudential development with caution.

In the first instance, reorienting the law to emphasize its human dimension would transform it into a completely anthropocentric understanding of cultural heritage, and as a result, the scope of its protection would be severely curtailed. On top of proving all contextual elements of crimes against humanity,<sup>82</sup> the crime of persecution requires that the cultural or religious property under threat is symbolic of the identity of a certain human group;<sup>83</sup> if it cannot be determined that the damaged site “belongs to a given civilian population,”<sup>84</sup> there is no case to answer. This would imply abandoning important examples of cultural heritage that are of significance not to a particular group but to humanity in general – for example, the lack of a thriving Buddhist community in contemporary Afghanistan would leave little room to argue that the destruction of the Bamiyan Buddhas amounted to persecution. Moreover, even where there is no doubt that a cultural or religious site is connected to a living community, the crime of persecution operates solely in those cases when there is a *clear intention* to discriminate against the civilian population.<sup>85</sup>

added): “The emphasis by the international community on protecting and promoting cultural diversity has created a decisive shift in the primary rationale fuelling contemporary international initiatives. Rather than protecting cultural heritage *per se*, they afford protection because of its importance to ‘peoples’, ‘groups’, ‘communities’ and ‘individuals.’ This acknowledgement of the interests of non-state groups in cultural heritage complements the extension of protection afford cultural heritage during non-international armed conflicts and peacetime”; see also, Lenzerini, “Role of International and Mixed Criminal Courts,” 55–59.

<sup>82</sup> See paragraphs 1 and 2 of Article 7, ICC Statute.

<sup>83</sup> For a discussion on the concept of victim in the crime of persecution, see *Prosecutor v. Dusko Tadić* (Judgment) IT-94-I-T (May 7, 1997) para. 644. *Prosecutor v. Sainović et al.* (Judgment) IT-05-87-T (February 26, 2009) para. 204 (emphasis added): “it is now settled by the Appeals Chamber that ‘destruction of property’, which belongs to a given civilian population, can be punished pursuant to Article 5(h) depending upon the extent and the nature of that destruction and provided all the elements of Article 5(h) are satisfied. The ICTY has maintained that, when determining the seriousness of the crime, it has to consider ‘the number of people killed, the physical and mental trauma suffered and still felt by those who survived, and the consequences of the crimes for those close to the victims. The Chamber may also consider the economic and social consequences suffered by the targeted groups, including the consequences of destruction of the property of its members and their cultural and religious monuments’”; see also, *Prosecutor v. Momčilo Krajišnik* (Judgment) IT-00-39-T (September 27, 2006) para. 1148.

<sup>84</sup> *Sainović et al.* (Judgment) para. 204.

<sup>85</sup> See e.g., *Kordić and Čerkez* (Judgment) para. 199; *Prosecutor v. Kupreškić* (Judgment) IT-95-16 (January 14, 2000) paras 622–624; see also *Prosecutor v. Dusko Tadić* (Judgment) IT-94-I-T (May 7, 1997) paras. 650–659.

Although this is a marked tendency in wars of aggression such as the Balkan conflict,<sup>86</sup> not all destruction of cultural and religious property results from the desire to harm a particular group of people. For instance, in Syria, when Bashar Al-Assad's army captured the ancient citadel of Aleppo, to the alleged accompaniment of the cry "Bashar, or we burn the country down,"<sup>87</sup> it would be difficult to prove that its purpose was to harm the Syrian community rather than to use the citadel to blackmail the rebel forces.

When it comes to genocide, the International Court of Justice stated in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* that "the targeted group must in law be defined positively, and thus not negatively as, for example, the 'non-Serb' population."<sup>88</sup> So, even when it is clear that a specific community has been intentionally subjected to harm, a stringent requirement comes into play: its members must represent a group with a positive identity, rather than being singled out by the religion they do *not* profess, the language they do *not* speak, or any cultural aspect they do *not* possess.

Beyond these limitations, there is yet a further point of contention to consider: does this way of thinking represent, in the words of Theodor Meron, a "doctrinal contribution ... to international law protecting cultural property in times of military conflict"?<sup>89</sup> The evidence is not entirely convincing. The ICTY has primarily used the destruction of cultural sites as an instrument to prove persecution or the mens rea of genocide. For this reason, the object of redress is the affected civilian group and not the cultural site per se. Therefore, rather than representing *the human dimension of international cultural heritage law*, the attitude of the ICTY toward cultural property in cases of persecution and genocide can be better characterized as the *cultural heritage dimension of human rights law*. This conceptual distinction underscores the fact that the values protected by the proscription of the destruction of cultural property in wartime may be interconnected with, but are not the same as, those violated by the crime of persecution. The distinction matters: it can make all the difference in, for example, the argument for replacing war crimes

<sup>86</sup> The ICC Statute does not require the existence of an armed conflict for the crime of persecution and genocide; see Articles 6 and 7.

<sup>87</sup> See L. M. Rey, "La ciudadela de Alepo, dañada por la artillería siria," *El Mundo*, August 10, 2012.

<sup>88</sup> Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*) Judgment, ICJ Reports 2007, para. 196.

<sup>89</sup> Theodor Meron, "The Protection of Cultural Property in the Event of Armed Conflict within the Case-Law of the International Criminal Tribunal for the Former Yugoslavia," 57 *Museum International* 4 (2005): 56 (emphasis added).

with crimes against humanity<sup>90</sup> – a line of reasoning that seems bound to gain increasing acceptance among scholars, given that the ICC collapses the *actus reus* of persecution into other forms of war crimes.<sup>91</sup> Such a shift to a complete anthropocentric understanding of cultural heritage would limit our capacity to call certain acts of destruction international crimes.

### 3 CONCLUSION

The constant work of the revisionists has given rise to a “complex web of conventional structures and provisions.”<sup>92</sup> Despite the fact that they all have the same goal, this profusion of laws has rendered what is meant by “cultural property” and the concept of “protection” increasingly uncertain. It has also led to the absurd situation in which the more international an armed conflict is, the less likely there is to be one single instrument protecting cultural property that could be applied to all the warring parties, aside from the outdated 1907 IV Hague Regulations.

Since the 2003 Iraq War, new revisionist voices have emerged demanding the adoption of a new protocol – an addition to the Additional Protocol of 1999:

Just as the experiences of the Balkan Wars during the decade of the 1990s led to re-evaluation of the efficacy of the 1954 Hague Convention and then to the writing of the Second Protocol to address these shortcomings, so the war in Iraq has demonstrated both a lack of clarity and lacunae in the provisions of the [1954 Hague] Convention that should now be addressed. These changes should be embodied in a new protocol to the Convention that would have the main goals of clarifying existing goals and adding new provisions that reflect a modern understanding of cultural heritage resource management.<sup>93</sup>

Given the current wave of destruction we are witnessing around the world, especially in the Sahel region and the Middle East, it can only be a matter of time before a further revisionist movement takes wing. However, as this chapter shows, this way of thinking is bound to add to, rather than solve, the

<sup>90</sup> See William J. Fenrick, “Should Crimes against Humanity Replace War Crimes?,” *Columbia Journal of Transnational Law* 37 (1998–1999): 767–785 recalling that this argument had been suggested by L. Green. The author posits that crimes against humanity should not replace war crimes “yet.”

<sup>91</sup> See Article 7(1)(h)(4) ICC Elements of Crimes.

<sup>92</sup> Forrest, *International Law and the Protection of Cultural Heritage*, p. xxi.

<sup>93</sup> Patty Gerstenblith, “From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century,” *Georgetown Journal of International Law* 37 (2006): 342. See also Sarah Eagen, “Preserving Cultural Property: Our Public Duty: A Look at How and Why We Must Create International Laws That Support International Action,” *Pace International Law Review* 13 (2001): 410.

problems it sets out to tackle. There are armed groups and/or individuals who are plainly lawless, no matter what the law says or how it says it, so revisiting the rules over and over again will not affect them. Instead, it will simply complicate matters for those who are law-abiding.

In contrast, most idealist forms of argument have a narrower focus: they claim that the obligations of the 1954 Hague Convention, or at least its core obligations, already represent customary international law or belong to the international community as a whole (*erga omnes*). As I have argued, these observations rest on faulty assumptions. Above all, they overlook the fact that, save for the issue of reciprocity, turning the 1954 Hague Convention into customary international law would not dissipate the problems in this field: the lack of clarity would persist, as would the lack of a specific regime for world cultural heritage and of rules governing cultural property protection in those twilight periods that fall short of open armed conflict.

By pulling in opposite but equally mistaken directions, revisionism and idealism fail to focus on the fundamental problem of this field: that is, the lack of a proper legal framework. The term “framework” is defined by the *Oxford English Dictionary* as “a basic structure underlying a system, concept, or text.” Throughout this book I seek to establish that it is possible to identify the presence of an underlying system of laws concerning the protection of cultural property in armed conflict, and that the World Heritage Convention stands ready to provide the basic structure that could bind these laws together.