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# International Law and the Protection of Cultural Property in the Event of Armed Conflict: Actual Problems and Challenges

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Cultural property may be under serious threat in the event of armed conflict. In the twentieth century, there were clear developments in international law aimed at preventing and punishing war crimes against cultural property. Despite this, the destruction of cultural property during armed conflict has continued. This article questions whether the existing international law standards with regard to the protection of cultural property during armed conflict are satisfactory, and whether or not a new instrument could be valuable. Although considerable shortcomings remain, instead of pleading for a new instrument, this article advocates raising ratification rates, the enhancement of the implementation of existing instruments, and monitoring and sanctioning mechanisms.

**Keywords** *armed conflict, cultural property, international law*

In the event of armed conflict, cultural property can be endangered in various ways. The damage can be unintentional, when cultural property is demolished during an attack on a military target (collateral damage), for example, or when cultural property is neglected. The archeologists leave countries at war and sites are consequently left unprotected. Museums are temporarily closed and conservation efforts on monuments are halted. The maintenance of cultural property is no longer a priority. Regretfully, the threat to cultural property can also be intentional. In some cases, the destruction of cultural property can become an aim in itself. In identity-bound conflicts, the warring parties can destroy the symbolic goods of the “other” in order to underscore their historic claims to the territory (Van der Auwera 2012). This was the case in Kosovo, for example, when the Serbs attempted to destroy Albanian Muslim heritage and the Albanian Kosovars targeted Serbian Orthodox heritage. Moreover, during armed conflicts, archeological sites and museums are frequently looted (e.g., the looting of the National Museum in Baghdad in 2003 and the looting of archeological sites in southern Iraq).

During the nineteenth and twentieth centuries, the international community introduced a number of different attempts to counter such activities, and international law in particular developed in this regard. Currently, there is an extensive international law system in place for the protection of cultural property during armed conflict (see the overview below). The destruction of cultural

property, however, continues unabatedly. Examples such as the bombing of Dubrovnik (1991), the destruction of the Mostar Bridge (1992), or the looting of the National Museum in Baghdad (2003) are only the tip of the iceberg. More recently, cultural property has been threatened in Egypt, Libya, Mali, and Syria. This article consequently focuses on exploring the lacunae in the existing international law system. It will elaborate on current problems and points of discussion related to these standards and will conclude by questioning the relevance of the development of a new instrument. We will limit ourselves to reviewing the international law instruments. Other measures designed to protect cultural property during armed conflict, such as UNESCO policies and measures, are not discussed here (see, e.g., Van der Auwera 2013). This article concludes that although there are serious shortcomings in the international legal system for protecting cultural property in the event of armed conflict, these are best addressed, not by adding an additional legal document, but by improving ratification, implementation, and sanctioning measures.

### INTERNATIONAL LAW AND THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT: A BRIEF OVERVIEW

As early as 1863, the protection of cultural property in the event of armed conflict was set out in the Francis Lieber Instructions for the Government of Armies of the United States in the Field (the so-called Lieber Code).<sup>1</sup> The Brussels Declaration (1874)<sup>2</sup> and the Oxford Manual (1880)<sup>3</sup> reflect a similar approach. The Hague Conventions of 1899 and 1907 were based on these texts, and resulted *inter alia* in the Convention (IV) respecting the Laws and Customs of War on Land and its annex,<sup>4</sup> which prohibit the destruction and seizure of cultural property. However, the bombing of the Cathedral of Rheims, the burning of the Leuven University Library during the First World War, and the bombing of Dresden in the Second World War highlighted the insufficiency of the existing provisions. The Dutch government and UNESCO decided to organize a diplomatic conference on the matter and, in 1954, the Convention on the Protection of Cultural Property during Armed Conflict<sup>5</sup> was adopted. The treaty generally prohibits the destruction and seizure of cultural property and its use for military purposes, except when military necessity dictates otherwise. Moreover, some more specific measures were established, such as:

- (1) state parties “undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate” (Art. 3);
- (2) “cultural property may bear a distinctive emblem so as to facilitate its recognition” (Art. 6), the so-called Blue Shield;
- (3) provisions to meet the aims of the convention have to be foreseen in military guidelines and defense forces have to establish services or attract specialized personnel; and
- (4) cultural property of “very great importance” can receive more specific protection when its host state applies for special protection.

A First Protocol<sup>6</sup> regulating the export and seizure of cultural property in occupied territory was immediately amended.

Other international humanitarian law instruments, such as the 1977 Protocols to the Geneva Conventions<sup>7</sup> and the 1980 and 1996 Protocols to the Convention on Prohibitions or Restrictions on the use of Mines, Booby-Traps and other Devices,<sup>8</sup> are relevant. The Protocols to the Geneva

Conventions in general prohibit attacks on cultural property and its use for military purposes. Moreover, the possibility of declaring non-defended localities (Art. 59) and demilitarized zones (Art. 60) was enshrined in the First Protocol. These places enjoy immunity, together with the cultural properties that are possibly located therein. The Protocols to the Conventional Weapon Treaty prohibit the use of booby traps which are in any way attached to, or associated with, internationally recognized protective emblems, signs, or signals, such as the Blue Shield of the 1954 Hague Convention. Moreover, they prohibit the use of booby traps which are in any way attached to, or associated with, historic monuments, works of art, or places of worship which constitute the cultural or spiritual heritage of peoples.

The wars in the Balkans and the Middle East led to a revision of the Hague Convention of 1954, and in 1999 a Second Protocol<sup>9</sup> to the convention was amended. The most important innovations with regard to the Convention are the following:

- (1) the entire applicability to non-international armed conflicts;
- (2) the enhancement of individual criminal responsibility;
- (3) the ability to nominate cultural property for enhanced protection; and
- (4) the installation of the Committee and the Fund for the protection of cultural property during armed conflict.

Finally, the Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Statutes of the International Criminal Court (ICC) also prohibit the destruction of cultural property.

Besides international humanitarian legislative provisions, some general international law treaties from UNESCO, UNIDROIT, and the Council of Europe are also relevant here, including the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970),<sup>10</sup> the UNESCO World Heritage Convention (1972),<sup>11</sup> and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005).<sup>12</sup> The latter was drafted in view of the increased liberalization of cultural goods and services, but the definition of cultural expression employed in it is broader and some provisions (i.e., Articles 7 and 8) are certainly also applicable to the protection of cultural property. The UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects (1995)<sup>13</sup> is also relevant. Finally, although only applicable on Council of Europe Member States, the Council of Europe's treaty law might also be valuable here. The European Convention on offenses relating to cultural property (1985)<sup>14</sup> encourages states to act preventively against offenses to cultural property and to punish perpetrators. The Convention for the Protection of the Architectural Heritage of Europe or the Granada Convention<sup>15</sup> and the European Convention on the Protection of the Archaeological Heritage (revised in La Valetta in 1992)<sup>16</sup> stipulate, *inter alia*, that built heritage and archeological heritage have to be protected and maintained, and that inventorying and awareness raising are necessary. The Granada Convention encourages parties to act preventively against the destruction of protected properties and the Valetta Convention to act preventively against illicit excavations. The Council of Europe Framework Convention on the Value of Cultural Heritage for Society, or the so-called Faro Convention (2005),<sup>17</sup> is also relevant as it focuses on the role of cultural heritage in establishing a peaceful and democratic society. The Convention stipulates, for example, that "everyone, alone or collectively, has the responsibility to respect the cultural heritage of others as much as their own heritage, and consequently the common heritage of Europe," but also that parties have to "establish processes

for conciliation to deal equitably with situations where contradictory values are placed on the same cultural heritage by different communities” and “develop knowledge of cultural heritage as a resource to facilitate peaceful co-existence by promoting trust and mutual understanding with a view to resolution and prevention of conflicts.” In this vein, a paradigm shift in heritage law is apparent. The emphasis has changed from a conservation-oriented (or object-oriented) approach towards a value-oriented (or subject-oriented) approach.

## PROBLEMS AND LACUNAE

Although the international legal system protecting cultural property in the event of armed conflict is very extensive, some lacunae have to be addressed. This section focuses on a range of problems which challenge this legal system. Problems related to the content of the texts, as well as problems related to the context (ratification, implementation, monitoring, and sanctioning), are addressed below.

### Problems Related to the Content of the Texts

#### *Definition*

Although the definition of the term “cultural property” is perhaps not the most precarious problem in international law, this article will deal with it first because of its nature (as the subject of this article). The different instruments use different definitions, and these are rather vague. The Hague Rules consider all buildings dedicated to religion, art, science, and charitable purposes, all historic buildings and each work of art, as protected property during armed conflict. An ambitious, but rather vague, definition is used. That is why the architects of the 1954 Hague Convention searched for a somewhat more concrete definition in order to guarantee a higher degree of protection. This was not an easy task due to the intrinsically subjective nature of the concepts of “historic” and “artistic” importance included in this definition. The Convention finally settled on the term “cultural property.” This term is only applicable to the 1954 Hague Convention and its two protocols, and not to subsequent UNESCO standards relating to cultural property (O’Keefe 2006, 102). After 1954, UNESCO adopted two more conventions that are relevant in this context (1970 and 1972). They use significantly different definitions. The former referred to movable objects but, in this regard, was rather comprehensive in that it also included natural heritage such as “rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest.” The latter referred only to immovable cultural heritage, but again extended the scope of the definition by including landscapes. Between 1956 and 1980, UNESCO adopted nine recommendations, all with a different definition of cultural property. The Statutes of the ICTY do not even use the term cultural property, but Article 3(d) provides something that is similar to a definition by referring to “institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.” Hence, a more consistent definition seems to be a necessity, given that a relatively vague definition can lead to omission. The states are responsible for defining and protecting their cultural property and can thus choose to exclude part of their heritage (for example, that of cultural minorities). On the other hand, it is questionable

whether an interpretable definition is not useful, given that it allows a margin for a case-specific completion. During the Kosovo conflict, for example, a great deal of religious heritage, with little or no historic or artistic value, was destroyed. Nevertheless, I would argue that, in this specific case, these properties also deserved protection. The destruction of religious heritage in Kosovo was associated with the ethnic cleansing process, and thus part of the constituting elements of the conflict (Van der Auwera 2012a). Moreover, in regard to contemporary evolution in the heritage discourse, these goods deserve protection. The idea that only property with a historic or artistic value has to be protected undermines the importance that is increasingly attributed today to the value of heritage for society (cf. the Council of Europe Framework Convention on the Value of Heritage for Society, 2005) and to the intangible components of this heritage (cfr. The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage<sup>18</sup> 2003).

In the Hague Convention and its two protocols, the emphasis was on “artistic” and “historic” importance. Religious property with less or no historic or artistic importance is thus not protected. Article 16 of the Second Protocol to the Geneva Convention solves this problem. “Any act of hostility against the historic monuments, works of arts or places of worship which constitutes the cultural and spiritual heritage of peoples” is prohibited. Thus, places of worship are only protected for their spiritual value. Also, for example, the statute of the International Criminal Tribunal of the former Yugoslavia (ICTY)<sup>19</sup> protects “places of worship” as such. Religious property of less or no historic or artistic interest is protected by international humanitarian law when it has religious value.

In this regard, Frulli (2011) refers to the cultural-value oriented approach versus the civilian-use approach. She argues that the Second Protocol (1999) to the Hague Convention is innovative because it advocates a cultural-value oriented approach. The idea to protect “this kind of property for itself, because of its intrinsic value and importance to humanity, above and beyond its everyday use by civilians” is emphasized (Frulli 2011, 205). In her opinion, the statutes of the International Criminal Court (ICC)<sup>20</sup> are more retrograde, because historic buildings are protected in the same way as churches, schools, and hospitals and thus, according to Frulli, “protection is afforded basically only to the building and it serves the main purpose of sparing civilian lives.” The statutes of the ICC thus postulate a civilian-use approach (Frulli 2011, 207). Although, Frulli makes a number of interesting points in her article (e.g., that the ICC does not mention movable cultural property), I do not agree with her on this point. In my opinion, the statutes of the International Criminal Court (ICC) and of the ICTY, in contrast with the Second Protocol, envisage both approaches. Art. 3, Section D of the ICTY Statute and Art. 8, 2b(ix) of the ICC Statute consider the destruction of cultural property as war crimes, and envisage the cultural-value approach, since cultural property has to be protected for its cultural, historic, or artistic value. Art. 5, Section H of the ICTY Statute and Art. 7 of the ICC Statute consider persecutions, and can be interpreted in regard to cultural property destruction when the destruction occurs in the margins of acts of persecution. Under these circumstances, these are crimes against humanity and we can perceive the civilian-use approach, as cultural property has to be protected for its symbolic value and mirrors the identity of certain groups in society. The case law of the ICTY illustrates this. The Miodrag Jokić judgement on the bombardment of the World Heritage Site of Dubrovnik even refers to the insufficiency of the possibility of restoration: “Restoration of buildings of this kind, when possible, can never return the buildings to their state prior to the attack because a certain amount of original, historically authentic material will have been destroyed, thus affecting the inherent value of the building.”<sup>21</sup> In so doing, the Trial Chamber refers to the intrinsic historic

value of the buildings and thus, in my opinion, uses the cultural-value approach (or the idea to protect cultural property for its intrinsic value and importance to humanity, above and beyond its everyday use by civilians). On the other hand, when the destruction of cultural property is seen in the framework of persecutions on political, racial, or religious grounds, and when this is done systematically and is widespread, the Trial Chamber can interpret the acts as crimes against humanity and uses the civilian-use approach. Milomir Stakić, for example, was judged for crimes against humanity for the destruction of seven mosques and two Catholic churches in Central Bosnia (Meron 2005, 45–49).

### *Applicability*

The applicability of international law on the protection of cultural property in the event of armed conflict is probably the most debated topic in this regard. The applicability to non-international conflict and, in addition, to non-state actors in particular remains problematic, according to different authors (e.g., Gerstenblith 2006; Peterson 2007; Desch 2002).

In 1993, UNESCO launched a revision process of the convention. Patrick Boylan was asked to draw up an evaluation report (Boylan 1993). One of the problems which posed a challenge to the convention's applicability was its limited applicability to non-international conflicts, which are considered the most frequently occurring type of armed conflict today (e.g., Harbom and Wallenstein 2007, 626). Although the Second Protocol to the Convention consequently became entirely applicable to non-international armed conflict and installed individual criminal responsibility, some authors (Gerstenblith 2006; Peterson 2007; Desch 2002) argue that this is not enough. According to Desch (2002), the absence of a definition of non-international conflict is problematic since it is unclear whether the protocol is applicable to non-state actors and irregular groups. In this regard, the jurisdiction of the International Court of the Former Yugoslavia solved this issue because non-state actors are prosecuted. This does not imply, however, that the convention is also applicable to non-combatants. Civilian looters are a major factor in the destruction of cultural property in the event of armed conflict. In this regard, Gerstenblith argues in favor of imposing an obligation to protect cultural sites, monuments, and repositories from the actions of local populations (2006, 6). She opines that Article 4, which obliges states to prohibit the theft, pillage, and misappropriation of cultural property, only refers to acts of the nations' own military, given the post-World War II context in which the Convention was written (Gerstenblith 2010). The Second Protocol, however, contains the same provision, was written in a different context, and is entirely applicable to non-international conflict. Consequently, it seems more likely that states also have to protect their property from actions of civilians. States also have to prepare for the foreseeable effects of war in peacetime. The Convention and its protocols are instruments of international humanitarian law and are thus not intended to impose direct obligations on civilians. When states effectively implement the convention and the protocol, vandalism and theft of cultural property by civilians has to be sanctioned by the state in question. Although I am aware of the fact that armed conflicts more often erupt in failed states where law and order broke down (see, e.g., Van der Auwera 2012) and where looters will not be sanctioned, I do not believe that this problem can be solved by an international law instrument, because this would intervene too strongly in the *domaine réservé* of the state and will be unacceptable for most states (see also below, under "Freedom of Choice of Nation States"), and thus have no legitimacy at all.

Another problem is the lack of a coherent legal framework for the applicability on peacekeeping troops. The destruction of cultural property frequently is an intrinsic aspect of the armed conflict. The protection of cultural property should therefore be a task which peace forces should undertake. Peace forces are multinational and not all of them have ratified the relevant instruments, and the UN as such is unable to ratify international treaties. In addition, peace forces are not actively engaged in hostilities. It remains unclear when they are bound by international humanitarian law. Although the United Nations undertook a lot of attempts to solve this problem, it still needs to be resolved in a satisfactory manner. Peace forces seem to have an obligation to protect cultural property, but at the same time it is unclear whether they have an obligation to intervene when violations are committed by other parties in the conflict (Van der Auwera 2010).

### *The Imperative of Military Necessity*

The concept of the imperative of military necessity is another point of discussion. When the destruction of cultural property is unavoidable while conducting a legitimate military action, the imperative of military necessity justifies the damage. However, the definition of military necessity is also vague. Military commanders are conscious of this ambiguity and, according to Forrest (2007, 186), can use it to extenuate offenses to cultural property rather than for limiting actions. Military necessity is a basic principle of international humanitarian law, however. The clause was already used by the Hague Rules and the Hague Convention of 1954 also used it. Nevertheless, there is a lack of instructions with regard to when this principle applies. This lack of definition was a point of discussion in the report by Boylan, who evaluated the Convention of 1954 (Boylan 1993). The designers of the Second Protocol (1999) to the Hague Convention considered the cancellation of the clause. It was decided to retain this general principle with regard to international humanitarian law, since its abolition would probably lead to a lower ratification rate of the Protocol. Although the imperative is defined more precisely in the Second Protocol, the procedure in terms of military necessity is not yet objective. Guidelines aimed at streamlining decisions do not exist.

Some attempts have since been made to define the concept more clearly. Corn, for instance, analyzed the principle of military necessity in the light of the military use of cultural property, which is also prohibited, except when military necessity dictates otherwise by, inter alia, the Hague Convention of 1954 and its Second Protocol. He concluded that the use of cultural property for military purposes is consistent with international humanitarian law when “such use is the only feasible means available for the commander to achieve a valid military objective.” The key consideration in analyzing the permissibility of such use then is “the legitimacy of the conclusion that no other feasible alternate was available to achieve the important military objective” (Corn 2005, 37).

Moreover, the concept of military necessity in general can be better defined with reference to the widely acknowledged definition of the military objective in Article 52 of Additional Protocol I to the Geneva Convention as “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.” In this regard, the Trial Chamber of the ICTY in the *Strugar Case*,<sup>22</sup> on the shelling of Dubrovnik, argues that each case must be determined based on its facts, and that the findings point to the



fact that there were no military objectives in the Old Town of Dubrovnik on December 6, 1991. In other words, the Chamber is of the view that the question of proportionality in determining military necessity does not arise in the facts of this case. The court illustrates that, although military necessity is not clearly defined, this is not a permit to cite the case of military necessity whenever it is thought useful.

### *Freedom of Choice of Nation-States*

Although the idea of cultural internationalism is currently warmly accepted (“cultural property belongs to humanity as a whole”), the protection of cultural property largely remains an exclusive obligation of the state concerned. According to the Hague Convention of 1954 and its Second Protocol, states define their own cultural property, are authorized to assign the Blue Shield, and nominate property for special or enhanced protection. They are also obliged to take appropriate protection measures during times of peace. States have the freedom of choice as to what to protect and how to protect it. There is a tangible risk, in particular for states in which cultural property plays a role in potential conflict, that certain property will be protected and other property will be neglected. The cultural property of the dominant group is more likely to be admitted than that of a suppressed group. In Kosovo, for example, only the medieval Orthodox Monuments are on the World Heritage list as of 2004. No Albanian heritage is listed, since the Serbian government was (and, at the time of writing, still is) the only party which could apply for nominations, given that UNESCO has not yet recognized Kosovo. From a cultural internationalist perspective, however, this attitude is not correct. If some goods belong to the whole of humanity, the state to which the property belongs should not have the exclusive right to make this choice. The concept of territorial sovereignty is, however, firmly embedded in the nature of international politics, and thus in international law. This was, for example, made quite clear by the designers of the Second Protocol. Some participants in the diplomatic conference did not support the applicability on non-international conflict, as this would impact the so-called *domaine réservé*. It was thus decided to add some clarifying paragraphs. Art. 22(3) stipulates that nothing in the Second Protocol “shall be invoked for the purpose of affecting the sovereignty of a state or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the state.” Art. 22(5) states that nothing in the Second Protocol “shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the Party in the territory of which that conflict occurs.” However, when cultural property is concerned, this view is somewhat problematic: cultural goods frequently are the remnants of people with whom the actual state is no longer affiliated. Although there is little chance that this will change in the near future, we need to think about strategies to provide other states, international organizations, and heritage communities with as much of a voice as possible. Although it is far from clear whether these activities are really challenging state sovereignty resistance, some recent evolutions have to be addressed in this regard. Since 1992, the World Heritage Committee has been able to place properties on the List of World Heritage in Danger without the consent of the state in question (with the Dubrovnik case as a precedent) and, since 2007, UNESCO has moved towards further action by delisting sites (Singh 2011, 94–95). Moreover, there are the opportunities presented by the Fund for the Protection of Cultural Property. The Fund only became operational on November 24, 2009. A first request for support from the Fund (from El Salvador<sup>23</sup>) was included

on the agenda of the Sixth Meeting of the Committee for the Protection of Cultural Property during Armed Conflict (December 14–15, 2011). The Committee approved the request with an amount of US\$ 23,500. El-Salvador now has to prepare a report on the use of the financial assistance for the Seventh Meeting of the Committee, with a view to ensuring its appropriate monitoring and evaluation.<sup>24</sup> Although international assistance can be provided, once again the state is responsible for requesting such assistance, and a lack of means and personnel can prevent a state from becoming involved in the demanding process of applying for funding. States that are threatened by armed conflict in most instances are not able to apply for funding. This is problematic, because when the international legal system is only implemented in countries that are not at war, then the system is extremely insufficient.

### *Different Levels of Protection and the Distinctive Emblem*

Furthermore, the two levels of protection system, in its current format, are of debatable value. The Hague Convention of 1954 developed a system of general and special protection. This was a limited success, probably due to the very stringent process involved in applying for special protection. The Second Protocol initiated a new system, incorporating general and enhanced protection. Although the new procedure is more flexible and transparent than the original one, this does not guarantee success. However, we have noted that applications are being submitted very quickly. After the approval of the guidelines for implementation of the Second Protocol in 2009, states were able to apply for nominations on the list. During the Fifth Meeting of the Committee for the Protection of Cultural Property during Armed Conflict (November 22–25, 2010), the first applications were evaluated. Some decisions were postponed to the Sixth Meeting, which took place December 14–16, 2011.<sup>25</sup> Currently, the following goods have been granted enhanced protection: Choirokoitia (Cyprus), Paphos (Site I and II, Cyprus), the painted churches of the Troodos Region (Cyprus), Castel del Monte (Italy), and Kernavė Archaeological Site (Cultural Reserve of Kernavė, Republic of Lithuania). Here again we need to point to the fact that neither Italy nor Lithuania are potentially threatened by conflict.

There is, however, an actual risk that the importance of general protection will decrease. A list with property under enhanced (or special) protection also poses a potential threat. When property that reflects the identity of the “other” party is targeted intentionally in contemporary armed conflicts (Van der Auwera 2012a), such a list indicates important symbols for certain communities, which can thus be identified as property worth targeting. This is also the case for the distinctive emblem of the Hague Convention, which was designed to indicate cultural property. *Mutatis mutandis*, the Preah Vihear case illustrated that the granting of a higher level of protection (in this case, the World Heritage status in 2008) can even aggravate conflict. The Thai perceived this nomination as a reinforcement of the Cambodian claim to the territory in which it is located (Williams 2011, 1–3). The International Court of Justice (ICJ) recognized the link between the aggravation of the conflict and the World Heritage status.<sup>26</sup>

## Contextual Problems

### *Geographic Dispersal of Ratifications*

We note that the Hague Convention of 1954 is a relative success, with 121 ratifications by 193 UNESCO state parties, but the geographic dispersal of ratifications is unequal. We can see this

TABLE 1  
Ratifications of the Hague Convention of 1954 on 27/10/2011

Geographic Classification	State Parties	Ratifications	Ratifications/State Parties
Group I	27	22	81.5%
Group II	25	25	100%
Group III	33	20	60.6%
Group IV	44	17	38.6%
Group V(a)	46	22	47.8%
Group V(b)	18	15	83.3%

if we examine the ratification rates in relation to the geographic classification of the state parties used by UNESCO in order to elect the state parties to the Executive Board (Table 1).

Group I represents Western Europe, the United States, and Canada; Group II South, South-eastern Europe, and the Russian Federation; Group III Central and South America; Group IV South, Southeast Asia, and the Pacific; Group V(a) Sub-Saharan Africa; and Group V(b) the Arabic states. The regions of South and Southeast Asia, and the Pacific and Sub-Saharan Africa, are thus clearly underrepresented. This determination is even more pronounced when we consider the ratifications of the Second Protocol (1999) to the Hague Convention (Table 2).

One of the causes here may be a lack of awareness. Moreover, the implementation cost on which the following section will elaborate can be an obstacle. Further research is needed into the motives of these countries for not ratifying. These countries are particularly vulnerable to armed conflict, and certainly with regard to internal (or non-international) armed conflict. Consequently, the ratification and implementation of the 1954 Hague Convention and its Protocols is of utmost importance for the protection of cultural property. The ratification of the Second Protocol certainly deserves more attention, since it is entirely applicable to non-international armed conflicts and has led to the installation of the Fund for the Protection of Cultural Property during armed conflict. The fund has to “take into account the special needs of the Parties that are developing countries.”<sup>27</sup> A plan of action to encourage ratification on the part of developing countries was included on the agenda of the Fourth Meeting of Parties to the Second Protocol (December 12–13, 2011). UNESCO thus seems willing to improve the situation. However, it is too early for an evaluation of this action plan.

TABLE 2  
Ratifications of the Second Protocol (1999) to the Hague Convention on 27/10/2011\*

Geographic Classification	State Parties	Ratifications	Ratifications/State Parties
Group I	27	12	44.5%
Group II	25	18	72%
Group III	33	17	51.5%
Group IV	44	2	4.5%
Group V(a)	46	4	8.7%
Group V(b)	18	7	38.9%

\*Data from UNESCO CLT-11/CONF/210/INF.1.

### *Implementation Cost*

Being party to the relevant international law instruments does not require an additional financial effort per se. Even contributions to the Fund for the Protection of Cultural Property during Armed Conflict installed by the Second Protocol are voluntary. On a national level, however, the implementation cost can be high, in particular the identification, registration, and distribution of distinctive emblems, the building of shelters, and the establishment of specialized services within the military. Some states already have protection measures in place; for example, in order to protect cultural property from natural disaster. In this case, these countries can act in a more cost-effective manner by adjusting these measures to the particularities of war threats. The cost of implementing international law standards with regard to the protection of cultural property during armed conflict depends, in other words, on the extent to which general cultural property protection measures exist. On the other hand, ratification can also generate financial benefits, in particular due to the possibility of applying for assistance from the Fund. However, the demanding process associated with requesting assistance presumes adequate means and personnel.

### *Implementation*

Finally, the implementation of the Convention and its Protocols leaves much to be desired. The Convention and the Second Protocol stipulate, for example, that state parties have to establish specialized services in their armed forces or have to appoint specialized personnel. However, not all state parties have such personnel or services. Belgium, for example, does not. However, the Belgian armed forces claim that their Advisers in the Law of Armed Conflict fulfill this position.<sup>28</sup> Advice on the protection of cultural property is thus only a part of their remit. Moreover, they are only in charge of the protection of cultural property when it relates to legal questions. UNESCO thus has to establish adequate mechanisms in order to evaluate the implementation of the Convention and its protocols. Such a mechanism does exist, however: according to the Hague Convention, State Parties have to deliver a report on the implementation of the Convention every four years. Based on these reports, UNESCO publishes a compilation report on the degree of implementation in five different languages. These reports are valuable, inter alia, because they could inspire other countries in terms of implementation strategies (Hladik 2001, 61). Regretfully, the submission of the reports is not proceeding that smoothly. In 2004, for example, only twenty-seven of the 113 State Parties submitted a report.<sup>29</sup> In 2010, forty of the 121 state parties did so.<sup>30</sup> Here again, the developing countries are underrepresented. In 2010, only one sub-Saharan country (Mauritius) submitted its report, which was very brief and showed that the Convention and its Protocols have only been implemented to a limited extent. Consequently, UNESCO must introduce more stringent or even sanctioning mechanisms in order to encourage and monitor the implementation of relevant international humanitarian law instruments. Otherwise, these instruments will be considered hollow. On the other hand, some provisions in regard to the protection of cultural property in the event of armed conflict are generally considered as international customary law<sup>31</sup> (Henckaert & Doswaldbeck 2005) and the jurisdiction of the International Criminal Court for the former Yugoslavia is promising and proves that this legal framework is more than a fig leaf.

## TOWARDS A NEW INSTRUMENT?

International law instruments aimed at protecting cultural property during armed conflict were initially developed for sovereign states, the main actors in the majority of the conflicts following the Peace of Westphalia. Legally constituted armed forces consequently accounted for most of the destruction of cultural property. The Hague Convention prohibited the destruction and seizure of cultural property by state parties. In recent decades, however, the nature of armed conflict has altered and now more actors are involved, state actors as well as non-state actors (Van der Auwera 2012). The Second Protocol to the Hague Convention already contains provisions that are more consistent with the current nature of armed conflict. It is entirely applicable to non-international conflicts and it has established the concept of individual criminal responsibility for violations against cultural property. However, several problems still remain. These and other problems could lead to the conclusion that a new instrument is needed (see, e.g., Gerstenblith 2006; Petersen 2007). In my opinion, this argument relies too much on the assumption that “the 2003 Gulf War and subsequent occupation have demonstrated additional shortcomings of international law” (Gerstenblith 2006, 1). Although Gerstenblith recognized that the Convention and its protocols were not ratified by either the U.S. or the U.K., this assumption mainly led to the conclusion that the content of the texts is insufficient (and has to include, e.g., an obligation to protect cultural property from civilians and incorporate cultural resource management principles) (Gerstenblith 2006; 2008). In my opinion, the assumption that the Iraq war highlights the inconsistencies of the international legal framework only implies that a thorough evaluation of the instruments and ratification, implementation, and sanctioning mechanisms are urgently needed. Gerstenblith herself argues that an effective method to accomplish the protection of cultural property is to encourage the major military powers to maintain, within their active military, a corps that is dedicated to the preservation of cultural heritage, such as the Monuments, Fine Arts and Archives Officers during World War II. Naturally, this would be an effective method, but in fact this is required by the Convention for state parties. Only some countries (such as Austria) have adequately implemented this provision. In my opinion, the problems inherent to the texts can be nuanced and must be seen within the specific context in which they were designed and in regard to the particularities of international humanitarian law instruments. The insufficiency of the legal framework is mainly related to a lack of ratification, implementation, and monitoring and sanctioning mechanisms. Moreover, a further proliferation of international legal instruments needs to be avoided. A new instrument is unlikely to increase transparency. It would therefore neither enhance implementation nor increase the rate of ratification. A new instrument would also be unlikely to resolve the existing shortcomings. The designers of the Second Protocol have already attempted to overcome some of the problems (e.g., military necessity), but they were unsuccessful. Other problems are largely related to implementation. UNESCO should consequently encourage states to ratify the existing instruments and to adequately implement them. UNESCO must also develop more efficient monitoring and sanctioning strategies. Without such endeavors, the Convention and its protocols will remain hollow.

It is worth noting some remarkable outcomes of the international legal system on the protection of cultural property during armed conflict. The statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the statutes of the International Criminal Court (ICC) prohibit the destruction and looting of cultural property. Perpetrators can be and were prosecuted for war crimes, and even for crimes against humanity, when the destruction of cultural property

was widespread, when it happened systematically, and when it was carried out within the context of persecution for political, racial, or religious reasons. The case law of the International Court of Justice is also innovative in this regard. In 1962, the court first pronounced a judgement on the Preah Vihaer case.<sup>32</sup> The court ruled that the temple was on Cambodian territory and that the restitution of cultural property seized by the Thais was necessary (Francioni 2011, 12). The territory around the temple continued to be a subject of dispute, however. When the World Heritage Committee decided to include the site on the World Heritage List in 2008, the conflict re-intensified. Since 2011, serious armed violence has been observed here. The Cambodian government decided to ask for a reinterpretation of the 1962 ruling by the Court.<sup>33</sup> On July 18, 2011, the court decided to demilitarize the zone. In 2007, the Court also elaborated on the relevance of cultural property in the context of genocide in the Genocide Case (Bosnia-Herzegovina v. Serbia Montenegro).<sup>34</sup> In this case, the Court referred to previous judgements of the ICTY (i.e., Tadić and Kristić). The Court followed the argumentation of the Kristić case, and ruled that the destruction of cultural property could not be observed as an act of genocide. It could, however, serve “as evidence of an intent to physically destroy the group.” In the current genocide case (Croatia v. Serbia), the court refers to the former case in the framework of the restitution of cultural property.<sup>35</sup> The case, however, is not yet closed. So, although there are still some shortcomings in the international legal system for the protection of cultural property during armed conflict, contemporary jurisdiction demonstrates that the international law on the protection of cultural property during armed conflict is continuously progressing. The existing lacunae are thus best addressed, not by adding an additional instrument, but by improving ratification and implementation and this, in particular, in countries that are vulnerable for armed conflict, such as developing countries, and by introducing monitoring and sanctioning mechanisms.

In closing, I would like to add another remark. This article has focused on international law with regard to the protection of cultural property during armed conflict and thus, on tangible cultural heritage. However, I must point to some shortcomings in this regard. Property refers to ownership and is thus of a contested nature in this context, since ownership (e.g., over territory) is often at stake during armed conflict. The term “cultural heritage” therefore seems to be more appropriate in this context. However, this term also includes intangible heritage, which is not legally protected during armed conflict. The UNESCO Convention on the Safeguarding of Intangible Heritage refers to the intangible cultural heritage in danger (Art. 13(c)) and to “keeping the public informed of the dangers threatening such heritage” (Art. 14(b)). It does not refer to the specific dangers and threats of armed conflict. However, the manner in which intangible heritage is threatened during armed conflict significantly differs from the way in which tangible heritage is intentionally destroyed. Moreover, severe manifestations, and thus an increased experience of intangible cultural heritage, were also observed during armed conflict. In Northern Ireland, for example, parades celebrating past victories such as the Battle of Boyne are interpreted as celebrations of in-group solidarity and therefore as manifestations of Protestant dominance over the Catholic minority. Clearly, they intensify political and cultural differences and often result in violence. These parades enhance in-group solidarity, but intensify out-group competition, prolonging the conflict (Conteh-Morgan 2004, 81–82). The conflict in Northern Ireland has, according to Smith, “been centred on myths of descent founded on rival, mutually exclusive readings of religio-communal history” (Smith 1986, 75). I thus think that more research into the manifestation and disappearance of intangible cultural heritage during armed conflict is needed

in order to rethink an integral protection/safeguarding strategy, including the particularities of intangible cultural heritage.

## NOTES

1. Instructions for the Government of Armies of the United States in the Field (Lieber Code), adopted April 24, 1863, <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument>
2. Brussels Declaration, Brussels, adopted August 27, 1874, <http://www.icrc.org/ihl.nsf/WebART/135-70009?OpenDocument>
3. The Laws of War on Land, adopted September 9, 1880, <http://www.icrc.org/ihl.nsf/FULL/140?OpenDocument>
4. Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, adopted October 18, 1907, <http://www.icrc.org/ihl.nsf/FULL/195?OpenDocument>
5. Convention for the Protection of Cultural Property in the Event of Armed Conflict, adopted May 14, 1954, <http://www.icrc.org/ihl.nsf/FULL/400?OpenDocument>
6. Protocol for the Protection of Cultural Property in the Event of Armed Conflict, adopted May 14, 1954, <http://www.icrc.org/ihl.nsf/FULL/410?OpenDocument>
7. Protocol Additional to the Geneva Convention of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted June 9, 1977, <http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument>; Protocol Additional to the Geneva Convention of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted June 8, 1977, <http://www.icrc.org/ihl.nsf/FULL/475?OpenDocument>
8. Protocol on Prohibitions or Restrictions on the use of Mines, Booby-Traps and Other Devices (Protocol II), adopted October 10, 1980, <http://www.icrc.org/ihl.nsf/FULL/510?OpenDocument>; Protocol on Prohibitions or Restrictions on the use of Mines, Booby-Traps and Other Devices as amended on May 3, 1996 (Protocol II to the 1980 Convention as amended on May 3, 1996), adopted May 3, 1996, <http://www.icrc.org/ihl.nsf/FULL/575?OpenDocument>
9. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, adopted March 26, 1999, <http://www.icrc.org/ihl.nsf/FULL/590?OpenDocument>
10. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted November 14, 1970, [http://portal.unesco.org/en/ev.php-URL\\_ID=13039&URL\\_DO=DO.TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO.TOPIC&URL_SECTION=201.html)
11. Convention Concerning the Protection of the World Cultural and Natural Heritage, adopted November 16, 1972, <http://whc.unesco.org/archive/convention-en.pdf>
12. Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted 20 October 2005, [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=11281&URL\\_DO=DO.TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=11281&URL_DO=DO.TOPIC&URL_SECTION=201.html)
13. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, adopted June 25, 1995, <http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-e.htm>
14. European Convention on Offences Relating to Cultural Property, adopted June 23, 1985, <http://conventions.coe.int/Treaty/EN/Treaties/Html/119.htm>
15. Convention for the Protection of the Architectural Heritage of Europe, adopted October 3, 1985, <http://conventions.coe.int/Treaty/en/Treaties/Html/121.htm>
16. European Convention on the Protection of the Archaeological Heritage (Revised), adopted January 16, 1992, <http://conventions.coe.int/Treaty/en/Treaties/Html/143.htm>
17. Council of Europe Framework Convention on the Value of Cultural Heritage for Society, adopted October 27, 2005, <http://conventions.coe.int/Treaty/EN/Treaties/Html/199.htm>
18. The Convention for the Safeguarding of the Intangible Cultural Heritage, adopted October 17, 2003, <http://unesdoc.unesco.org/images/0013/001325/132540e.pdf>
19. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, adopted May 25, 1993, <http://www.icrc.org/IHL.nsf/FULL/555?OpenDocument>

20. Rome Statute of the International Criminal Court, adopted June 17, 1998, <http://www.icrc.org/IHL.nsf/52d68d14de6160e0c12563da005fdb1b/fb2c5995d7cbf846412566900039e535>
21. IT-01–42/1-S, para. 52.
22. IT-01–42-T, para. 295.
23. Support from the fund is also granted to states not threatened by armed conflict in order to take implementation measures and in order to prepare in peace time for the foreseeable effects of an armed conflict.
24. Sixth Meeting of the Committee for the Protection of Cultural Property During Armed Conflict, UNESCO Paris, December 14–15, 2011, decision 6.COM 6, available on [http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Decisions-en\\_20120216.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Decisions-en_20120216.pdf)
25. Sixth Meeting of the Committee for the Protection of Cultural Property During Armed Conflict, UNESCO Paris, December 14–15, 2011, decision 6.COM 2, available on [http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Decisions-en\\_20120216.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Decisions-en_20120216.pdf)
26. Request for Interpretation of the Judgment of June 15, 1962, in the Case Concerning the Temple of Preah Vihaer (Cambodia v. Thailand), <http://www.icj-cij.org/docket/files/151/16564.pdf>
27. UNESCO, CLT-09/CONF/219/4 REV.:Art. 7.
28. Interview with Alfons Van Heusden, Advisor, Head of Section Humanitarian Law, Belgian Defence Forces, Yves Durieux, Staff Member of Defence, Dep. Operations and Training, Division of Planning, Section Law of Armed Conflicts, Marc Offermans, Legal Advisor, Ministry of Defence, November 23, 2007.
29. UNESCO CLT-2005/WS/6:1.
30. Report on the Implementation of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Two (1954 and 1999) Protocols, 2005–2010, [http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/periodic\\_report\\_2011\\_en.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/periodic_report_2011_en.pdf)
31. At least the rules regarding to respect (Art. 1–7 of the Convention) are considered as customary law.
32. Summary of summary of the Judgment of June 15, 1962, Case Concerning the Temple of Preah Vihaer, <http://www.icj-cij.org/docket/index.php?sum=284&code=ct&p1=3&p2=3&case=45&k=46&p3=5>
33. Request for Interpretation of the Judgment of June 15, 1962, in the Case Concerning the Temple of Preah Vihaer (Cambodia v. Thailand), <http://www.icj-cij.org/docket/files/151/16564.pdf>
34. Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of February 26, 2007, <http://www.icj-cij.org/docket/files/91/13685.pdf>: para. 335–344
35. Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, November 18, 2008, [http://www.icj-cij.org/docket/files/118/14891.pdf#view=FitH&pagemode=none&search=%22cultural property%22](http://www.icj-cij.org/docket/files/118/14891.pdf#view=FitH&pagemode=none&search=%22cultural%20property%22): para. 140–143

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