Introduction

What do we expect of the law? In general, we expect it to provide us with a coherent set of norms that can address current concerns and problematic situations. However, when it comes to the protection of cultural property during armed conflict, this expectation appears destined to remain unfulfilled. In fact, if we take a close look at the field, we find that it is composed of "many laws but little law"[1] as such.

The cultural value of the objects in need of protection, and the often-intense and dangerous nature of the circumstances in which the law must be applied, require rules that are straightforward and transparent. Yet the norms of this field and their relationship to each other are so complex that even the meaning of the terms "cultural property" and "protection" is far from self-evident. This is partly due to the atomization of the rules: there are five binding legal instruments (to date), each with its own state parties, which may or may not coincide with those of the other "non-identical-twin" instruments. As a consequence, because these instruments all work on the basis of reciprocity, the more international an armed conflict, the less probable it is that – when it comes to protecting cultural property – any single treaty will govern the overall conduct of the warring parties.

Amid this sea of conventions, world cultural heritage is universally recognized as the most outstanding of all the categories of cultural objects. Indeed, when the Taliban dynamited the monumental statues of the Buddhas in Bamiyan, Afghanistan, it provoked an international outcry – as did the destruction of the Sufi shrines of Timbuktu in Mali and the destruction of the Temple of Bel and Baalshamin in Palmyra. Yet, despite the proliferation of legal norms, the astonishing fact is that world cultural heritage lacks a specific regime of protection

[1] This expression was used by Nicolas de Sadeleer in his book *Environmental Principles: From Political Slogans to Legal Rules* (New York: Oxford University Press, 2002), 262.

during times of armed conflict. Furthermore, this constellation of rules is helpless in the face of the recent shift in the paradigm of destruction: dynamiting, shelling, stoning, and desecrating a country's cultural heritage are part of the "infidel-cleansing" agenda of the violent fundamentalist groups currently operating in the Sahel and the Middle East. Furthermore, because the situation in some of the affected countries, such as 2011 postwar Libya, did not reach the defining threshold of "armed conflict," its cultural property was left without protection, even though it faced the same threat of systematic destruction as in, say, Syria or Iraq. The rules are designed solely for times of war.

Time and again, in the aftermath of an armed conflict that has taken a particularly heavy toll on cultural heritage, the international community has decided to adopt another new instrument to reinforce protection. This was the impulse behind the Hague Convention for the Protection of Cultural Property in Armed Conflict (the 1954 Hague Convention), drafted in reaction to the devastation caused by the Second World War, and its 1999 Second Additional Protocol (the 1999 Second Protocol), adopted after the war in the Balkans. While they may spring from the best of intentions, these policies simply serve to multiply the number of treaties in the field and thus perpetuate its problems. Trying to counteract the law's failure with more laws is, at least in this context, a nonsensical endeavor.

I argue here that a resolution to these dilemmas can only be found within the existing law, and not by adding more noise to the legal cacophony. For this reason, this book is based on the central premise that if we place the 1972 Convention Concerning the Protection of Cultural and Natural Heritage (the World Heritage Convention) at the center of the field, as its common legal denominator, it will enable us to untangle the complex web of conventions and integrate the different legal norms, and thus resolve or mitigate the issues outlined in the following.

1 ISSUES IN THE FIELD

1.1 *Lack of Clarity*

Irina Bokova, director-general of UNESCO (the United Nations Educational, Scientific and Cultural Organization), when commenting on the plight of cultural property in war-torn Mali in 2013, called attention to the fact that government soldiers and combatants need training and access to simple, accurate information.[2] She is not alone in drawing this conclusion: previous

[2] "Syria: The Director-General of UNESCO Appeals to Stop Violence and to Protect the World Heritage City of Aleppo," *UNESCO News*, March 22, 2013, http://whc.unesco.org/en/news/990; see also "'Stop the Destruction!' Urges UNESCO Director-General," *UNESCO News* August 30, 2013, http://whc.unesco.org/en/news/1067/.

UNESCO directors general have also emphasized that military lawyers need to "have a text which is easy to understand and easy to teach, for they have a great responsibility … once conflict breaks out."[3] However, the multiplication of legal instruments concerning the protection of cultural property in armed conflict has made this essential task extremely complicated, particularly as each of them proffers a slightly different conception of "cultural property" and a slightly different regime of protection. The result is a complex web of overlapping international conventions,[4] which tests the ingenuity of anyone trying to forge a coherent whole from these disparate norms.

The *Australian Defense Force Manual* is a living example of this problem. Under the heading of "specially protected objects," it lists the following:

> **Cultural objects**
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> 9.27 The LOAC [Law of Armed Conflict] provides for the specific protection of cultural objects and places of worship, which supplements the general protection given to civilian objects. Buildings dedicated to religion, science or charitable purposes, and historic monuments, are given immunity from attack as far as possible, so long as they are not being used for military purposes. Such places are to be marked with distinctive and visible signs, which must be notified to the other party.
>
> **Cultural property**
>
> 9.28 Cultural property is *also* protected. Cultural property includes movable and immovable objects of great importance to the cultural heritage of people, whether their state is involved in the conflict or not, such as historical monuments, archaeological sites, books, manuscripts or scientific papers and the buildings or other places in which such objects are housed. Obligations are placed upon all parties to respect cultural property by not exposing it to destruction or damage in the event of armed conflict and by refraining from any act of hostility directed against such property. These obligations may be waived where military necessity requires such waiver, as in the case where the object is used for military purposes.

[3] UNESCO, Address by Mr. Federico Mayor Director-General of UNESCO at the opening of the Diplomatic Conference on the draft Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1999) UNESCO Doc. DG/99/9, 4.

[4] Craig Forrest, *International Law and the Protection of Cultural Heritage* (Oxon: Routledge, 2010), xxi.

> 9.29 Historic monuments, places of worship and works of art, which constitute the cultural and spiritual heritage of peoples, are protected from acts of hostility. These objects must not be used in support of any military effort or be the subject of reprisals.[5]

The manual provides three different sets of instructions, one for each of its respective categories: (1) grant immunity as far as possible; (2) do not commit any acts of hostility or use these objects, except in case of military necessity; and (3) do not commit any acts of hostility, use these objects, or make them the object of reprisals with no apparent waiver. The question is, however, to what extent are the "cultural objects" in the first section of the manual any different from the "cultural property" in the second, or from the "historic monuments, places of worship and works of art" in the last? This illustrates that although the use of the phrase "the protection of cultural property in armed conflict" is commonplace, there is no agreed understanding of what the terms "cultural property" and "protection" actually represent.

1.2 *Lack of Coherence*

Despite the incessant production of rules, not one of these instruments has devised a specific regime of protection in armed conflict for world cultural heritage. World cultural heritage is defined by the World Heritage Convention as comprising monuments, buildings, and sites of outstanding universal value,[6] and thus, this is perceived to represent the most important existing layer of tangible cultural heritage in the world. The 1954 Hague Convention reserved a special regime of protection for property of great value, but this proved unsuccessful – it attracted few nominations from the convention's state parties. The 1999 Second Protocol sought to remedy this by creating an enhanced regime for cultural heritage "of the greatest importance for humanity," a category whose defining features appear very similar to those of world heritage sites. However, there are (at the time of writing) only ten properties on the List of Cultural Property under Enhanced Protection (Enhanced Protection List),[7] whereas the World Heritage List contains more than eight hundred.

This legal void at the center of the field is at odds with the urgent need for a clear mandate to counter the growth of belligerent practices that

[5] Australian Department of Defense, *Law of Armed Conflict* (Defense Publishing Service, 2006) ADDP 06.4 [Australian Defense Manual] chapter 9; see also chapter 5, rules 5.45 and 5.46, giving additional instructions for the protection of cultural objects.

[6] See Article 1 of the World Heritage Convention.

[7] The list, last updated in March 2014, can be accessed here: www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/19542P-enhanced-protection-list-en_20140320.pdf.

deliberately target world heritage sites, which, arguably, are damaged or destroyed precisely *because* of their universal value. In Iraq, after the Islamic State wreaked havoc in the Mosul Museum in February 2015, it went on to attack Nimrud and Hatra.[8] The former is part of the Iraqi Tentative List of world heritage, and the latter is a declared world heritage site. In August 2015, the group also destroyed ancient ruins in the site of Palmyra, in Syria. It is open to question whether the Islamic State is strategically following the lists of the World Heritage Convention when planning its iconoclastic line of action. In Mali (the case study in Chapter 5) a spokesman for the fundamentalist group allegedly responsible for destroying several of the shrines in the world heritage site of Timbuktu proclaimed that "there [was] no world heritage. It does not exist. Infidels must not get involved in our business."[9]

Far from heeding this warning, however, key actors on the international stage have indeed become involved in this "business," declaring that the damage suffered by world heritage sites is of particularly serious concern. For example, in Resolution 2056 (2012), the Security Council condemned "the desecration, damage and destruction of sites of holy, historic and cultural significance [in Mali], *especially* but not exclusively those designated UNESCO World Heritage sites, including in the city of Timbuktu."[10] The Special Group on Mali of the Economic Community of West African States (ECOWAS) further requested that the International Criminal Court (ICC) initiate an investigation "into war crimes committed by rebels in the North of Mali, referring specifically to the destruction of historical monuments in Timbuktu and the arbitrary detention of persons."[11] The ensuing report of the Office of the Prosecutor focused primarily on the damage caused to Timbuktu, because of its world heritage status, and noted in passing that "the destruction of religious and historic monuments (not UNESCO World Heritage sites) outside Timbuktu ha[d] also been reported."[12]

[8] See Michael D. Danti, Ali Cheikhmous, Paulette Tate, Allison Cuneo, Kathryn Franklin, LeeAnn Barnes Gordon, and David Elitz, "Planning for Safeguarding Heritage Sites in Syria and Iraq" In *ASOR Cultural Heritage Initiatives (CHI):* American Schools of Oriental Research, April 6, 2015; see also Michael Danti, Scott Branting, Paulette Tate, and Allison Cuneo, "Report on the Destruction of the Northwest Palace at Nimrud," in *ASOR Cultural Heritage Initiatives* (*CHI*): American Schools of Oriental Research, May 5, 2015.

[9] Cited in Irina Bokova, "Culture in the Cross Hairs," *New York Times*, December 2, 2012, International Cultural Heritage Law in Armed Conflict-FORMATTED.docx.

[10] Security Council Resolution 2056 of 2012, adopted at its 6798th meeting on July 5, S/RES/2056 (2012) para. 14 (emphasis added).

[11] Office of the Prosecutor of the International Criminal Court, "Situation in Mali: Article 53(1) Report" (January 2013) para. 20.

[12] Ibid, para. 112.

In a similar vein, Security Council Resolution 2139 (2014) called on all parties to the Syrian conflict to "save Syria's rich societal mosaic and cultural heritage, and take appropriate steps to ensure the protection of Syria's World Heritage Sites."[13] UN Secretary-General Ban Ki-Moon, UNESCO's Irina Bokova, and the Joint Special Representative for Syria Lakhdar Brahimi issued a joint statement on Syria's cultural heritage that draws attention first and foremost to the fact that "world heritage sites have suffered considerable and sometimes irreversible damage."[14] In fact, more than a decade ago, the International Criminal Tribunal for the Former Yugoslavia (ICTY) clearly understood that a property inscribed on the World Heritage List has special status and took this into account when evaluating the gravity of the shelling of the Old Town of Dubrovnik.[15] What this highlights is the anomalous situation when, on the one hand, the international community voices its mounting concern over the fate of the world's heritage, and, on the other, international law fails to afford these sites a distinct regime of protection in times of war.

1.3 *Reciprocity versus Atomization of the Rules*

The commitment to respect cultural objects in times of armed conflict was affirmed and reaffirmed throughout the twentieth century on different occasions and through different texts. The first of these was the 1907 IV Hague Regulations respecting the Laws and Customs of War on Land[16] (the 1907 IV Hague Regulations), which have become customary international law – that is, they are binding on all states. This was followed by the 1954 Hague Convention and the two Additional Protocols to the 1949 IV Geneva Convention relating to the protection of victims (Additional Protocols I and II), adopted in 1977 and applicable in international and noninternational armed conflicts, respectively. The last binding instrument to be drafted was the 1999 Second Protocol, which has only sixty-nine state parties, mostly developed countries. All these treaties work on the basis of reciprocity – that is, state parties are

[13] Security Council Resolution 2139 of 2014, adopted at its 7116th meeting on February 22, S/RES/2139 (2014) para. 8.

[14] UN and UNESCO, "Statement by Mr. Ban Ki-Moon, United Nations Secretary-General; Ms. Irina Bokova, UNESCO Director-General; and Mr. Lakhdar Brahimi, Joint Special Representative for Syria: The Destruction of the Cultural Heritage of Syria Must Stop" (March 12, 2014) para. 2.

[15] *Prosecutor v. Miodrag Jokic*, ICTY Trial Judgment (March 18, 2004) IT-01-42/1-S, paras. 66 and 67; see also *Prosecutor v. Pavle Strugar*, ICTY Trial Judgment (January 31, 2005) IT-01-42-T, para. 461.

[16] The 1899 Hague Convention with Respect to the Laws and Customs of War on Land and its Annexed Regulations was the first binding instrument that introduced an obligation to spare objects of a cultural nature, but they were superseded by the 1907 IV Hague Regulations.

obliged to follow their rules, but only if they concern other states that are party to the same treaty.[17] The result is that when a conflict is international in nature, there is little chance that the conduct of hostilities will be constrained by any single, overarching convention.

This problem is most likely to move to the fore in conflicts that involve coalitions of armed forces. Each of the member countries participating in the hostilities will take its own disparate set of obligations to the war. For example, of the first four countries that deployed forces in the 2003 Iraq War, a number that would eventually increase to thirty-seven,[18] the United Kingdom was (and still is) only bound by Additional Protocol I; Australia and Poland were both parties to the 1954 Hague Convention and Additional Protocol I; and all of them were under the command of the United States, which was party to neither of those instruments at the time. In a word, the coalition had no legal instrument in common with the command-and-control entity, save the 1907 IV Hague Regulations that applied qua customary international law. This was unfortunate since the rules for the protection of cultural objects enshrined in the 1907 IV Hague Regulations were already considered outdated by the end of the Second World War, let alone by 2003. As Chapter 6 illustrates, the handling of cultural property in the Iraq War proved to be nothing less than catastrophic.

This type of scenario, in which no one significant set of rules applies because of the principle of reciprocity, may be legally accurate but defies common sense. Most countries have expressed their commitment to safeguarding cultural objects through one convention or another, showing they do not oppose the application of rules for the protection of cultural property in armed conflict. It is ironic, then, that these very same rules mutually ensure that states are unable to apply them.

1.4 *Destruction during "Peacetime"*

As we have seen in postwar Libya up to 2015, a situation need not meet the formal threshold of armed conflict for cultural heritage to face premeditated, systematic destruction. It is well known that Islamist forces engage in erasing

[17] Article 18(3) of the 1954 Hague Convention foresees the possibility of making state parties involved in an armed conflict remain bound by the convention with regard to nonstate parties "if the latter has declared, that it accepts the provisions thereof and so long as it applies them." This prerogative has not been used to date. Article 3(2) of the 1999 Second Protocol allows the same possibility but it seems that being bound by the 1954 Hague Convention – or at least having accepted it – is a requisite to make use of this option.

[18] Stephen A. Carney, *Allied Participation in Operation Iraqi Freedom* (Washington, DC: Center of Military History of the United States Army, 2011), 1.

any "infidel" traces they come across, from Christian churches to the mosques and shrines of those Muslims who do not espouse their fundamentalist interpretation of Islam.[19] In January 2012, after the end of the Libyan war, Islamist militants mounted a series of methodically planned attacks, particularly in the area of Tripoli, that were still continuing three years later.[20] However, since Libya was not deemed to be in a state of armed conflict or under occupation at the time,[21] the various conventions that could otherwise be called upon to cast a cloak of protection over its cultural property did not apply. This reopens the wound caused by the Buddhas of Bamiyan: the fact that these statues were destroyed in a period of so-called peace (that is, in the absence of armed conflict) raised questions at the time as to how such an action could escape the prohibition of international law.

1.5 *Revisionism and Idealism*

Two ways of thinking about the protection of cultural property in armed conflict dominate the field, and neither is particularly fit for the purpose. "Revisionism" is the name I give the policy movement that regularly reaches the conclusion, on a seemingly cyclical basis, that because the legal regime is in some way incapable of meeting current needs, the answer is to draft an additional instrument. This line of reasoning, normally triggered in the aftermath of an armed conflict that has had a particularly devastating impact on cultural heritage, is the driving force behind most of the field's instruments. The 1954 Hague Convention was adopted after the Second World War because the 1907 IV Hague Regulations were thought to be outdated, and the articles concerning cultural objects and places of worship in Additional Protocols I and II[22] were included because the 1954 Hague Convention was still not good enough in terms of ratification. Similarly,

[19] See Susan Kane, "Archaeology and Cultural Heritage in Post-Revolution Libya," 78 *Near Eastern Archaeology* 3 (2015): 204–211.

[20] See e.g., Roni Amelan, "UNESCO Director-General Condemns Destruction of Libya's Murad Agha Mausoleum and Offers Heritage Preservation Support," *UNESCOPRESS*, November 29, 2013. Stating that the attack "comes in the wake of a series of attacks on cultural heritage sites in the country which began in January 2012."

[21] The Security Council Resolution 2174 of 2014, adopted at its 7251st meeting on 27 August concerning the situation in Libya S/RES/2174 (2014) refers to "increased violence" but the term "armed conflict" is altogether omitted. Likewise, Irina Bokova issued a call to protect Libyan cultural heritage in the "context of the deterioration of the security situation in Libya and in support of efforts towards an inclusive political dialogue to put an end to the current situation"; see "UNESCO Director-General Calls on All Parties to Protect Libya's Unique Cultural Heritage," *UNESCOPRESS*, November 18, 2014. By contrast, Security Council Resolution 2238 of September 10, 2015, openly uses the expression "armed conflict."

[22] Articles 53 and 16, respectively.

after the Balkan War, "various factors seem[ed] to indicate that the [1954] Hague Convention no longer [met] current requirements"[23] and an additional protocol was needed (the 1999 Second Protocol). The 2003 UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage (the 2003 UNESCO Declaration), a nonbinding instrument but with legal relevance, was specifically adopted in response to the "tragic destruction of the Buddhas of Bamiyan that affected the international community as a whole,"[24] in order to demonstrate that acts of deliberate destruction are contrary to international law. Revisionism has proved shortsighted and counterefective: it only aggravates the issues listed previously, particularly the atomization of the rules.

I use the term "idealism" to refer to the current of thought running counter to revisionism, which tends to claim either that cultural property is a recognized public good and the obligation to protect it is owed to the international community as a whole (regardless of reciprocity or the *pacta tertiis* rule whereby nonparties to a treaty are not bound by its obligations), or that the 1954 Hague Convention's obligations have attained customary status and thus are applicable to all the states in the world. However, the arguments of the idealist current rest on faulty assumptions and are mainly value oriented. They have the effect of concealing the underlying problems that plague this field of law by contending, in very general terms, that the protection of cultural property in armed conflict is simply at a stage in its onward progress.[25] This trend resonates with a more or less common way of thinking about international that has drawn criticism. For example,

> in his usual mild manner, Giorgio Gaja, in one of his seminal works, chided over-idealistic authors for asserting all sorts of norms protecting the community interest. This was not the way to do it, according to Gaja. Instead, he wrote, "I believe that an international lawyer's concern for those interests

[23] UNESCO, Report by the Director General on the reinforcement of UNESCO's action for the protection of world cultural and natural heritage (1992) UNESCO Doc. 140 EX/13, 3 para. 11; see also Patrick J. Boylan, Review of the Convention for the Protection of Cultural Property in Armed Conflict (1993) UNESCO Doc. CLT-93/WS/12, 33–34 [hereinafter "Boylan Report"] 72 para. 5.47 and 87 para. 7.7.

[24] Preamble of the 2003 UNESCO Declaration, first paragraph.

[25] Mireille Hector, "Enhancing Individual Criminal Responsibility for Offences Involving Cultural Property – the Road To The Rome Statute and the 1999 Second Protocol," in *Protecting Cultural Property in Armed Conflict*, ed. Nout van Woudenberg and Liesbeth Lijnzaad (Leiden: Martinus Nihjoff, 2010), 75; see also, Sabine von Schorlemer, "Cultural Heritage Law: Recent Developments in the Laws of War and Occupation," in *Cultural Heritage Issues: The Legacy of Conquest, Colonization and Commerce*, ed. James A. Nafziger and Ann M. Nicgorski (Leiden: Martinus Nijhoff. 2009), 158.

should rather show itself in exposing the reality as it is and the need for improvement – if possible, also in suggesting some ways to this end."[26]

Both ways of thinking are explained and rejected in Chapter 1. This book proposes an alternative based on the synergies among the treaties that will tackle a number of the field's problems simultaneously.

2 CONTRIBUTION TO THE FIELD

I intend this book to contribute to the field in four ways – by developing the sort of coordinated approach to the protection of cultural property in armed conflict that practitioners have frequently requested; by establishing the foundations of an international cultural heritage law as a branch of law in which the whole is greater than the sum of its parts; by identifying the legal principles underpinning the field of cultural property protection in armed conflict, rendering the discipline easy to understand and easy to teach; and, finally, by examining the background to recent and ongoing conflicts, and the role that cultural heritage plays in them, thus providing a long-overdue and timely analysis of each situation on an individual basis.

2.1 *A Coordinated Approach*

I aim to develop a coordinated approach to cultural property in armed conflict that lays the foundations for a more synergetic and coherent field, one that will solve or ameliorate many of the issues mentioned earlier. For example, this approach awards world cultural heritage a specific regime of protection; it also eliminates the situation whereby the only fallback position for states is to default to the customary rules of protection enshrined in the 1907 IV Hague Convention; and it spells out accessible and comprehensible instructions on the treatment of cultural property in times of war to be used in the training of military and paramilitary forces.

This is achieved by turning the World Heritage Convention into the common legal denominator of the field from which to orchestrate a coordinated and comprehensive response to the protection of cultural property. The convention possesses certain features that render it ideal for such a role: among other attributes, it is applicable in armed conflict and compatible with all

[26] Jan Klabbers "Beyond the Vienna Convention: Conflicting Treaty Provisions," in *The Law of Treaties beyond the Vienna Convention* in Enzo Cannizzaro, ed. (New York: Oxford University Press, 2011), 193 citing Giorgio Gaja, 'Jus Cogens beyond the Vienna Convention,' 172 *recueil des cours* (1981-iii): 289.