

International Humanitarian Law and the Protection of Cultural Property in Contemporary Armed Conflict: Current Issues and Challenges

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Abstract

Cultural property can be damaged to varying degrees during armed conflicts, such as the devastating blows inflicted on cultural property during WWII. In reality, when a country is at war, its cultural property is exposed to unintended or purposeful damage. Cultural property has been protected by laws and regulations since the early twentieth century, and humanitarian law provides specific measures on the issue.

This article will examine the causes of attacks on cultural property in the context of today's armed conflicts and analyze the inadequacies of the protection of cultural property in today's international humanitarian law. Despite the growing concern of the international community for cultural heritage, there is still a lack of clear procedures and penalties for crimes against cultural heritage in the context of regional armed conflicts, and the international legal system needs to be further improved.

Keywords: international humanitarian law, cultural property, armed conflict

1. Introduction

In armed conflicts, the cultural property can be damaged in various ways, such as the heavy blows against it in the Second World War. Vattel has stated that “for whatever cause a country is ravaged, we ought to spare those edifices which do honor to human society and do not contribute to increasing the enemy’s strength”. (Emmer de Vattel, 2008) In reality, however, when a country is at war, its cultural property is subjected to violence, either unintentionally or by design. The Temple of Bel in Palmyra was devastated during the Syrian civil war. (Max Abrahms, 2006) During the Kosovo War, cultural heritage in Kosovo, such as Serbian religious sites, was destroyed and required international armed force for protection. (Andrew Herscher, 2010) Cultural property has been protected by laws and regulations since the beginning of the twentieth century, and humanitarian law also contains explicit provisions on the subject. The 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, as well as its Protocol and the 1999 revision to the Second Protocol, are just a few instances.

This paper discusses the protection of cultural property in contemporary armed conflicts, briefly discusses the reasons for attacks on cultural heritage, then analyses the current regulations of international humanitarian law for the protection of cultural heritage, and finally describes the gaps in the current legal system and the challenges facing the protection of cultural property. In the context of armed conflict, the article finds that, notwithstanding the high level of international attention paid to cultural property over the years, the international legal system is insufficient in this regard.

2. Cultural Property and Conflict

2.1 Destruction of Cultural Property

UNESCO's definition of cultural heritage starts primarily from the notion of tangible resources inherited from the past and shared by all humanity: "The cultural heritage may be defined as the entire corpus of material signs-either artistic or symbolic-handed on by the past to each culture and, therefore, to the whole of humankind." (Ji Jokilehto, 2005) It is argued that the meaning of cultural heritage is given by actors in different places? Of time, and that as a result of the different symbolic meanings of cultural heritage, conflicts may emerge in different regions. (Sigrid Van der Auwera, 2019) In addition, cultural heritage discourses in one group may differ from those in another group, which may lead to conflicts. For example, before the 1998-1989 war in Kosovo, Serbian law did not protect Kosovo cultural property such as mosques from the Ottoman period, with only a few exceptions. As a result, Serbian religious historical sites in Kosovo were destroyed after the conflict, and UN military personnel were needed to protect them.¹ In this paper, the term 'cultural property' refers to both immovable and movable cultural heritage, as well as to officially declared World Heritage sites and regional heritage, and religious and folk heritage.

As the value of cultural heritage has grown, so has the number of armed conflicts around the world in which cultural property has become a battleground.

2.2 *Contemporary Armed Conflict*

Most modern armed conflicts no longer react to the confrontation between two centers of power. Instead, they stem from the gradual fragmentation of state structures and economies as societies develop.² The number of armed conflicts has declined markedly since the end of World War II, and the few that have occurred have reflected this fragmentation. In the early 1990s, for example, the Iraqi political system began to disintegrate under the influence of globalization, with the gradual decay and fragmentation of state institutions. (Mary Kaldor, 2006) An armed conflict that actively targets cultural property may have four basic characteristics, according to modern conceptions of nationalism and armed conflict.

2.2.1 Identity

Today's armed conflicts are more likely to arise around small collectives or communities. Economic fluctuations, social unrest, and power vacuums can all lead to a collective demand for identity. Nationalism, born out of this, is used to incite violent conflict. (Oliver Ramsbotham, T. Woodhouse & Hugh Miall, 2006) In an unstable social environment, people are prone to collective fear in the face of hardship and a crisis of confidence in the state or regional authorities when security is not guaranteed. Politicians and some nationalists exploit these feelings to further polarise society, and this potential for strategic divisive activity can lead to violence. (David A. Lake, 1996)

Identities are frequently utilized to reinforce group-group exclusivity in this form of political activity. These identities are not necessarily newly created, but may also have existed previously and been misused in these activities.³ These identities are often culturally determined, and historical cultures can become part of contemporary politics and create a unique collective memory as well as a targeted sense of national cultural identity. As symbolic material beings, cultural property is, therefore, an extremely easy target for contemporary armed conflicts.

2.2.2 The Economy of Illicit war

Non-State disputes do not always receive State support because they do not all occur between states. Therefore, to gain economically, actors need to trade in natural and cultural resources. (Paul Collier, 2000) As the timeline of the conflict lengthens, the more economic support is required, ultimately contributing to the growth of various types of grey trade that are conducted privately. (I. William Zartman, 2005) The illegal trade in cultural property in Afghanistan and Cambodia, for example, has led to the looting and destruction of a large number of archaeological sites. (Neil Brodie & Kathryn Walker Tubb, 2002) In conclusion, the birth of an illicit war economy has made the cultural property a target for sustained financial support for armed conflict.

2.2.3 Occurring in Weak or Defeated States

Criminal organizations become more prevalent due to the lack of enforcement of laws and inadequate security. As a result, weak nations are unable to prevent acts of vandalism against cultural property, and even when protective measures are in place, they are readily disrupted or stopped.⁴

2.2.4 Multi-State and Non-State Acts

One of the hallmarks of these disputes amongst community collectives is the presence of multi-state and non-state parties, which is due to the identity-bound nature of such conflicts. There may be no formal establishment or central authority over these informal armed organizations. They may also be implicated in the deliberate destruction of cultural property. The United Nations Mission for the Referendum in Western Sahara, for example, damaged a historical monument with ancient rock paintings dating back 6,000 years in 2008. (Dalay Alberge, 2008)

3. Causes of Attacks on Cultural Heritage

This section will address why attacks targeting cultural property occur in armed conflict, as well as the motivations for such wars. Four different types of motives will be primarily addressed: conflict objectives, military strategies, signals, and economic objectives. Conflict objectives are about why armed forces fight, while the latter three motives can be categorized as to how armed forces fight.

3.1 Conflict Objectives

Attacks on cultural property can be a way to achieve belligerent objectives. For example, in conflicts resulting from ethnic and religious differences, the cultural property can be destroyed as a highly symbolic and objective presence.

In contemporary armed conflicts, where religious and ethnic differences were a major feature of the conflict, armed forces would choose to attack religious buildings to establish prestige over the enemy and destroy their beliefs. (Helen Walasek, 2015) The destruction of the Ottoman Bridge Stari Most in Mostar by the Croatian forces in November 1993 was a typical attack on cultural property during the war. The main reason for the attack was that the bridge, built in Mostar, symbolized a peaceful multi-ethnic, and multi-religious society. (Scott Sigmund Gartner, 1999) This spiritual symbol prevented the establishment of a new regime and made the goal of waging an armed conflict difficult to achieve. The destruction of this historically significant bridge was therefore an attack on the idea of a multi-ethnic state and would also have prevented the transport of supplies for the Bosnian army.⁵

3.2 Military Strategy

Military strategy is the second motive mentioned, a factor that can be summarised as an attack undertaken to gain a tactical advantage in battle. In all forms of conflict, strategic decisions play a crucial role in whether participants can continue to fight and the course of the outcome of the war. (Martin Coward, 2013) For example, armed forces will destroy or occupy cultural heritage sites when they are located on a hillside or along the main road, or when the design of these buildings is conducive to hiding snipers and spies. And, some particular heritage sites of historical and cultural significance are associated with the social cohesion and national sentiment of the local people, and attacking these cultural heritage sites can destroy the regime's landmarks and thus serve the purpose of breaking resistance. Such as the destruction of Jewish and Catholic cultural property during the German invasion in 1939, and the attack on the historic city of Lambourn in England in 1942.⁶

3.3 Signalling

An armed conflict is one in which there is a discussion between the two sides as to which side should have access to the disputed resources (Thomas C. Schelling, 1958). As a result, all engagement between the two parties, from objectives to discussions to fighting, is a promise and a signal that they are verifying their conflict skills. To get the opponent to make concessions, it is necessary to signal to demonstrate one's power. For example, the M-19 rebel group in Colombia stole the sword and spurs of national hero Simón Bolívar from a museum in Bogotá in 1974.⁷

Regimes don't merely send signals to their adversaries; they also demonstrate their capabilities or make pledges to the international community and civilians. The Taliban, for example, declared independence by demolishing Buddha sculptures in the Bamiyan Valley. These signals could also have been delivered to potential supporters. (Rebecca Knuth, 2006)

In conclusion, symbolic cultural property is of high concern and is rarely adequately protected because it is not of a strategic military nature. The risk of attacking cultural property is, therefore, lower than that of attacking military targets, while at the same time sending a strong signal to achieve the goal of deterrence.

3.4 Economic Incentives

Throughout the history of warfare, victorious armies have often taken cultural property as spoils of war and stolen and looted cultural property has often been used to offset the expenses of the army. An important requirement for an organization to maintain its armed forces is the ability to offer satisfactory rewards to participants who are willing to risk their lives to join armed operations. Such rewards may come from payments specifically made by the organization, or from financial gains made through the spoils of war, and also include being influenced and driven by ideology. (Mark Lichbach, 1998) At the same time, the high expenditure on weapons requires large amounts of money and sufficient financial support to maintain the effective functioning of the organization as a whole. Cultural property is subject to attack because of the fast cash advantages that can be obtained by plundering it. For example, in the contemporary conflict in Syria, many actors have looted cultural property to obtain financial resources to continue fighting. (Matthew S. Weinert, 2021)

Cultural property can therefore be a source of funding for armed groups, and many countries that have been in protracted armed conflict have been looted. Examples include Iraq, Syria, Afghanistan, and other countries with

many historical and cultural sites, and these attacks on the cultural property are frequent in such disputed areas.⁸

4. Current Issues and Challenges

4.1 *The Protection of Cultural Property under International Humanitarian Law*

In contemporary armed conflicts, armed forces carry out attacks on cultural property in pursuit of different interests. These attacks not only destroy cultural heritage, causing incalculable damage to historical artifacts but can also violate people's beliefs and culture. Vattel argues that whatever the motive for an attack on a country, local buildings of human cultural origin should be preserved, not destroyed, and thereby empowered by the enemy.⁹

The protection of cultural property was reflected in the early days of treaties on armed conflict. Attacks against cultural property were already regulated by the Lieber Code and the Hague Regulations of 1907.¹⁰¹¹ These regulations did not prevent the cultural property from being attacked in war. After the Second World War, the looting and destruction of cultural property were prosecuted by tribunals in war crimes trials. This gave impetus to the creation of treaties for the protection of cultural property in times of armed conflict. The Hague Convention for the Protection of Cultural Property was adopted in 1954, bringing various types of cultural heritage into the scope of protection.¹² Parties to the Convention may not make the cultural property the object of attack or use it in a manner likely to make it a target, except in cases of special military necessity.

In addition, Article 53 of the Additional Protocol I, which has a greater extent of coverage than the 1954 Convention, contains requirements for the preservation of cultural property.¹³ And, under Articles 8(2)(b)(ix) and 8(2)(e)(iv) of the Rome Statute, an assault on cultural property that is not for military purposes is deemed a war crime.

Despite the fact that each of these treaties is fundamental in international humanitarian law, historically valuable cultural assets continue to be targeted in armed conflicts. Armed groups frequently refrain from destroying cultural property due to its lack of military value, and only occasionally do they evaluate its cultural value. (Emily Crawford, 2021) In today's world, cultural property is still being assaulted and robbed in armed conflicts, and international humanitarian law faces numerous concerns and obstacles.

4.2 *Problems and Challenges*

The current legal system for the protection of cultural property in the event of the armed conflict already has extensive coverage, but there are still gaps that require attention. This section will discuss a number of issues that arise from this.

4.2.1 Definitions

The interpretation of cultural property is relatively vague in international law, with the 1954 Hague Convention attempting to identify a more specific definition, and the historical and artistic nature of cultural property giving a subjective nature to discussions about it. Ultimately the Convention considers all buildings used for religious, scientific, artistic, and charitable purposes, all historical buildings, and every work of art to be a cultural property that should be protected during armed conflict. However, this definition does not apply to the criteria for cultural property in UNESCO. (Sigrid Van der Auwera, 2013) They extend the scope of cultural property to the field of natural heritage, such as objects involving paleontology.

The scope of the definition has an impact on cultural property, and the fact that many destroyed religious properties do not have a high historical or artistic value does not mean that they do not need to be protected. As mentioned earlier, in contemporary armed conflicts, a collective consciousness based on identity is an important cause of conflict. Attacks on the cultural property for satisfying conflict objectives and military strategies are also closely linked to the identity factor - to destroy the will of the enemy or to declare the independence of the regime. In the Kosovo conflict, for example, armed groups went on a rampage to destroy religious heritage, including many buildings and objects of no historical significance, for ethnic cleansing. These cultural properties do not meet the legal definition in terms of historicity and artistry but are part of the constitutive elements of the armed conflict. (Sigrid Van der Auwera, 2012)

This legal shortcoming has been somewhat supplemented. Article 16 of the Second Protocol to the Geneva Convention shows that any hostile act against historical monuments, works of art, or religious sites that constitute the cultural and spiritual heritage of peoples is prohibited. It is no longer limited to the historical and artistic nature of the cultural property. Furthermore, the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) states that "places of worship" should be protected because of their religious value¹⁴. In other words, the symbolic and spiritual value of the cultural property is recognized, as is its importance to the identity of certain groups in society.¹⁵

4.2.2 Application

As previously stated, today's armed conflicts are marked by the presence of many State and non-State players, as well as the predominance of non-international conflicts. Taking this factor into account, Protocol II to the Geneva Conventions is fully applicable to non-international armed conflicts and a certain extent regulates the conduct of individuals. Nevertheless, many scholars continue to argue that the scope of coverage is not broad enough. Desch suggests that Protocol II lacks a definition of non-international conflicts from which to ascertain the applicability of non-state acts and informal groups. (Thomas Desch, 2002) In its discussion of jurisdiction, the International Court of Justice of the former Yugoslavia held that non-state actors should be subject to prosecution.¹⁶ However, there is still no applicable legal document for the jurisdiction of non-combatants. There is a risk that some citizens will pillage cultural property during times of armed conflict. Gerstenblith argues for the protection of all types of cultural heritage from the local population. She argues that the restrictions in Article 4 of the Convention prohibiting theft, pillage, and misappropriation of cultural property apply only to the military forces of States and not equally to civilians. (Patty Gerstenblith, 2006) Although the behavior of civilian looters has long been an issue in armed conflicts, international legal tools have found it difficult to regulate it adequately.¹⁷

Furthermore, the legal structure of contemporary international law does not allow for the use of peacekeeping forces.¹⁸ Because cultural property damage is an objective aspect of armed conflict, peacekeeping forces are theoretically obligated to protect cultural property. Peacekeeping forces, on the other hand, are multinational organizations with members who are not all signatories to the aforementioned accords. Peacekeepers do not actively participate in armed conflicts by definition, therefore it is impossible to determine when they are subject to international humanitarian law. (Sigrid Van der Auwera, 2010) As a result, determining whether they are obligated to preserve cultural property during armed conflict remains a challenging task.

4.2.3 Military Necessity

The 1954 Hague Convention refers to the exclusion of acts of destruction of cultural property for reasons of exceptional military necessity from its jurisdiction. It is thus clear that military necessity justifies acts of damage. However, this definition of military necessity is unclear, and Forrest claims that armed groups can use the vagueness of this definition to justify their acts against cultural property. (Craig J.S. Forrest, 2002) Military necessity, on the other hand, is a premise that has been put into the law and cannot be simply overturned, according to the current system of humanitarian law. Only the interpretation of this concept can provide a more clear and more reasonable criterion.

The key to this criterion, according to Corn, is the uniqueness of the means to effectively achieve the military objective and the need to prove that no other viable alternative exists. (Geoffrey S. Corn, 2005) The definition of a military objective in Article 52 of Additional Protocol I to the Geneva Conventions can be invoked to explain this: "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage." The Trial Chamber of the ICTY in the *Strugar Case* then repeatedly confirmed the facts based on its findings. The Court found that there was no application of military necessity in this case and that there was no reasonable military objective for the shelling of Dubrovnik¹⁹. Although military necessity is ambiguous, this is not a reason to make use of it to aid the completion of military operations.²⁰

4.2.4 Implementation

Legal treaties have no financial expenses involved with their conclusion, but they do have financial costs associated with their execution. For example, the protection of cultural property by dedicated military forces, the establishment of shelters, or the registration of protected property with a logo.²¹ All of these acts require human and material resources and are even more costly in times of armed conflict. These cumbersome and costly processes are not something that every country is willing to undertake, particularly in developing countries in protracted conflict. Although the foundations set up under Protocol II can assist, there are limitations to the relief that can be provided given the huge costs and difficulties of implementation.

There are many other problems with the implementation of humanitarian law. The Second Protocol requires Parties to have specialized staff to fulfill their responsibility to protect cultural property, but there are still countries that do not implement it. Belgium, for example, has not appointed specialized staff to fulfill the duty to protect. Although their armed forces explain that this responsibility will be carried out by their Law of Armed Conflict advisor, this appears to be a mere shirking of responsibility.²² Furthermore, the Hague Convention requires States Parties to submit a report on the protection of cultural property every four years, but the situation in practice is not promising. In both the 2004 and 2010 reports, less than half of the States Parties complied with this requirement.²³

It is clear that the implementation of international humanitarian law in the field of cultural property protection is not going well and that more monitoring measures are needed to facilitate States Parties to improve their

implementation capacity.

4.3 Prospects for Development

The problems mentioned above are mainly related to the shortcomings of the legal framework. The current international humanitarian law in the field of cultural property protection lacks provisions for ratification, implementation, monitoring, and sanctions. The horizontal development of legal instruments should also be limited while new monitoring mechanisms are established to facilitate the development of ratification and enforcement capacities.²⁴ The expansion of international legal instruments does not necessarily lead to greater efficiency, but rather to the accentuation of existing shortcomings through cumbersome and diverse standards.

The current problems should be addressed by innovative solutions that take into account the characteristics of contemporary armed conflicts and the causes of attacks on cultural property. In 2007, the International Court of Justice analyzed the relationship between genocide and cultural property in the *Bosnia and Herzegovina v. Serbia and Montenegro*.²⁵ The Court cited the case of *Croatia v. Serbia* to demonstrate that the destruction of cultural property can be used as evidence of the deliberate destruction of an ethnic group in cases of genocide. While the international legal system for the protection of indigenous property during armed conflict has several limits, existing jurisdictions show that international law for the protection of cultural property in armed conflict is constantly evolving. The greatest method to close current gaps is to improve ratification and implementation, especially in nations that are susceptible to armed conflict, particularly in developing countries, as well as to establish monitoring and penalty procedures. (Anthony D. Smith, 1986)

5. Conclusions

Contemporary armed conflicts have new characteristics, and the motivation for destroying cultural property in these wars is linked to these traits. In the sphere of cultural property protection, however, today's international humanitarian law system includes significant gaps and flaws. Because of issues with implementation and regulation, the turnover of legal tools has not kept up with the developments in modern armed conflicts. As a result, in order to respond to contemporary economic, political, and cultural trends, the international legal system requires inventive reforms.

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³ Kaldor, (2006).

⁴ Zartman, (2005).

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ Emmer de Vattel, (2008).

¹⁰ Lieber Code, art. 35.

¹¹ Hague IV, (1907), arts. 27, 56.

¹² Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954, The Hague, 14 May 1954, in force 7 August 1956, 249 UNTS 215.

¹³ AP I, art. 53(a).

¹⁴ Sigrid Van der Auwera, (2013), para.12.

¹⁵ Ibid.

¹⁶ Sigrid Van der Auwera, (2013), para.14.

¹⁷ Sigrid Van der Auwera, (2013), para.14.

¹⁸ Ibid.

¹⁹ IT-01–42-T, para. 295.

²⁰ Sigrid Van der Auwera, (2010).

²¹ Sigrid Van der Auwera, (2013), para.26.

²² Interview with Alfons Van Heusden, Advisor, Head of Section Humanitarian Law, Belgian Defence Forces, November 23, 2007.

²³ UNESCO CLT-2005/WS/6:1.

²⁴ Sigrid Van der Auwera, (2013), para.28.

²⁵ 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.

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