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2016

The Criminalisation of the Illicit Trade in Cultural Property

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The Criminalisation of the Illicit Trade in Cultural Property

Ana Filipa Vrdoljak

Introduction

In August 2014, the UN Security Council condemned the gross, systematic and widespread violation of international humanitarian and human rights law by various armed groups in Syria and Iraq including:

[I]ndiscriminate killing and deliberate targeting of civilians, numerous atrocities, mass executions and extrajudicial killings, including of soldiers, persecution of individuals and entire communities on the basis of their religion or belief, kidnapping of civilians, forced displacement of members of minority groups, killing and maiming of children, recruitment and use of children, rape and other forms of sexual violence, arbitrary detention, attacks on schools and hospitals, destruction of cultural and religious sites and obstructing the exercise of economic, social and cultural rights, including the right to education ... (UN 2014a: para.2).

Through its inclusion of acts directed against cultural heritage in this list, the Security Council reaffirmed the opprobrium with which the international community holds them. In later resolutions, and in line with existing customary international law, it condemned the incidental or deliberate destruction and pillage of cultural heritage. More significantly, it recognised that looting and the illicit traffic of cultural objects is used by these groups to raise funds, as they do with other economic resources (oil, precious metals) and illicit activities (kidnapping for ransom). Viewed as facilitating acts which threaten international peace and security, it calls on Member States to repress these activities and ensure that those who engage in such acts be ‘brought to justice’ (UN 2015a).

This chapter considers the criminalisation of illicit traffic of cultural objects in international law and its impact for domestic law. The regulation of the trade in cultural objects has long been resisted in so-called market States, which host major auction houses and art and antiquities dealers. The lobbying was particularly directed against the enforcement of foreign public laws covering export controls in domestic courts (NADAOPA et al 2002). However, the Security Council’s adoption of resolutions that condemned the pillage of Iraqi and Syrian cultural sites has transformed this debate. These resolutions enunciate an obligation to prosecute in domestic courts which covers all UN Member States. It is no longer confined

to States Parties of the relevant international conventions including the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO 1970) and Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention) and First Hague Protocol (UNESCO 1954a and 1954b). This is a significant shift in the criminalisation of the illicit trade in cultural objects. While this chapter does not address in detail the deliberate destruction of cultural heritage, the destruction of cultural diversity through the targeting of cultural patrimony of religious and ethnic groups, and the targeting and killing of heritage professionals, these acts are entwined with the illicit traffic in cultural objects and are increasingly condemned by the international community in the same instruments.

To examine this development in international law, I focus on two seemingly unrelated, recent events. The first part of this chapter examines the discovery of the horde of artworks held by Cornelius Gurlitt in Germany in 2012. It serves as a reminder not only of the systematic confiscation of artworks by the Nazi regime during the 1930s and 40s, and the complicity of art dealers and auction houses, but its lingering legacy. The lessons learned during the mid-twentieth century which transformed international law including human rights law and cultural heritage protection are revisited in the second part. It details the response of the international community in the twenty-first century to atrocities committed in Iraq and Syria and funded by illicit activities including the looting and trade in cultural objects. In 1943 and 2015, the international community condemned such acts, put those engaged in these activities on notice that they would be held to account, and that these transfers of property would not be recognised as licit.

Lessons from the 1930s and Second World War

The list enumerated by the Security Council in 2014 concerning violations of international law committed in Iraq and Syria, and its inclusion of the acts against cultural heritage, was reminiscent of the indictment of the major war criminals before the International Military Tribunal, in Nuremberg at the close of the Second World War. The Nuremberg Tribunal's judgment, and the Allied governments' announcements that preceded it, serve as an important precursor for the international community's response to atrocities being committed today.

Confiscation and forced sales by the Nazi regime

The search by German authorities of Cornelius Gurlitt's Munich apartment in 2012 uncovered a cache of 1,400 odd paintings and drawings by numerous, celebrated Impressionist and Modernist artists (Eddy et al 2013). Gurlitt had inherited the artworks from his father, Hildebrand Gurlitt, a prominent German art dealer during the 1930s, who had died in 1956 (Bohr et al 2013). His father had been one of four art dealers appointed by Joseph Goebbels to sell artworks confiscated from German public collections and Jewish collectors which were designated 'degenerate' because they did not conform to the regime's national cultural narrative (Nicholas 1995:24-25; Chechi 2013:203). Despite the resurgent awareness of restitution claims by Holocaust survivors and their heirs since the end of the Cold War, this discovery again laid bare the complex history and unresolved legacy of Nazi art confiscations during the 1930s and 1940s.

Much contemporary discourse concerning Nazi depredations of artworks focuses on the Shoah and the question of restitution for victims and their heirs. However, after coming to power in 1933 and until the end of the Second World War, they 'acquired' art works through a number of means (IMT 1946; ed. Simpson 1991). Despite the dislocation, loss and destruction of cultural heritage that these acts wrought, they were not necessarily all illegal. In international law, it is important to distinguish the de-accession of art works designated as 'degenerate' from German public collections prior to (and indeed, during) the Second World War by its national authorities which was a matter for domestic law. From their accession to power, the National Socialists commenced a campaign of systematically denuding German public collections of (mainly modern) artworks that were deemed 'degenerate' and did not conform with their vision of an appropriate national culture and the attendant propaganda (Peters 2014). Indeed, the removal of Hildebrand Gurlitt as a director of the Zwickau Museum in 1930 for 'pursuing an artistic policy affronting the healthy folk feeling of Germany' because of a show of 'New German Painting', highlighted that the die was cast prior to 1933 (Nicholas 1995:9).¹ By contrast, as explained below, similar acts which led to the looting of public and private collections in territories occupied by Germany was contrary to international humanitarian law as codified in the late nineteenth and early twentieth centuries. Gurlitt re-emerged by the late 1930s as one of the few dealers sanctioned by the

¹ After 1933, laws were passed which covered the public service including museum directors and other public officials engaged in the arts and those outside the public sector (including art dealers) were covered by the *Reichkulturkammer* (Reich Chamber of Culture). Those excluded by these acts (including Jews, Communists) could neither produce, exhibit or sell artworks or hold any job in the field.

Nazi regime to handle artworks confiscated in Germany and occupied territories, in particular, France (Nicholas 1995:24). Initially, and by contrast, the confiscation of private collections of targeted ethnic, religious, political or other groups in Germany and occupied territories was a more thorny legal issue for the Allied governments and their legal advisers. The acts of the Nazi regime against German nationals were viewed as entirely a domestic concern, falling outside the purview of international law. However, as the scale of the Shoah emerged at the close of the hostilities, these acts were found to be illegal because they were intimately related to crimes against humanity and genocide (Lemkin 1944). The horde discovered by authorities in Cornelius Gurlitt's apartment shed light on the multiplicity of sources from which his father had 'acquired' the artworks, the complexity in determining provenance and the legality or otherwise of his title in them.² It is also why he (and upon his death, his estate) legally retained parts of the collection.³

The Nazi regime's policies and practices towards these artworks invariably involved deliberate destruction and their forced sale. Despite their distaste for the artworks and/or their owners, the Nazi regime recognised their revenue-raising potential through its Commission for the Exploitation of Degenerate Art; whose membership included Alfred Rosenberg, as chair, and Berlin art dealer Karl Haberstock among others (Nicholas 1995:23). It in turn, officially sanctioned a select few leading art dealers (including Gurlitt, Karl Buchholz, Ferdinand Möller, and Bernhard Boehmer), and auction houses to sell the confiscated artworks on behalf of the regime (Nicholas 1995:24). So for example, by November 1941, the Reich Minister in pursuing *Abschiebung* (pushing out of the Jews), had ordered that Jewish property seized which was of value needed to be reported if it was of 'museum value', so that special instructions could be given, with the remainder to be sold (Treue 1952: 238).

Early sales of works seized from German public and private collections realised minimal returns not the least because of the refusal of some foreign buyers, including U.S. and French public institutions, to be seen to be condoning the confiscations and forced sales. This

² See database established by the German and Bavarian taskforce: <<http://www.lostart.de/Webs/EN/Datenbank/KunstfundMuenchen.html>> (viewed on 22 August 2015); and for the difficulties arising under German civil law: Chappell D. and Hufnagel, S. (2015:221).

³ A confidential agreement was reached with Cornelius Gurlitt and Federal German and Bavarian authorities to return artworks to him where it was found that he had legal title in exchange of his cooperation in establishing the provenance of art objects in his possession in Germany: Federal German Commissioner for Culture and the Media et al (2014); and similar agreement with the museum bequeathed the collection upon his death: Agreement between the Federal Republic of Germany, the Free State of Bavaria and the Stiftung Kunstmuseum Bern, 24 November 2014, at <http://www.bundesregierung.de/Content/DE/Anlagen/BKM/2014-11-24-zusammenfassung-englisch.pdf?__blob=publicationFile> [22 August 2015].

phenomenon was reflected in the infamous auction held at the Grand Hotel Lucerne, organised by Haberstock, on the eve of the Second World War (Nicholas 1995:4). It had been preceded by the burning of almost 4,000 artworks in the courtyard of the Berlin Fire Department's headquarters (Nicholas 1995:25). This act of destruction spurred on efforts to sell artworks even for minimal sums to buyers outside Germany, often on the pretext of trying to save them from destruction. This cycle of confiscation from private and public collections, dislocation and destruction, and forced sales to raise revenue to fund the war effort only escalated and spread beyond Germany to occupied territories during the war. Indeed, with civilian populations under occupation in the Netherlands, Belgium and France desperate to realise their assets and flee or just survive, many prominent auction houses reported the war years as their most prosperous (Nicholas 1995:153). The four sanctioned German art dealers were among the chief buyers as they sourced works for the new museum to be established under the Führer's watchful eye in Linz (Bohr et al 2013). However, they did not only confine themselves to artworks approved by the regime. Instead, for example, Gurlitt continued to purchase modern works, which were later inherited by his son.

1943 London Declaration and Nuremberg trials

As the tide of war began to turn and conscious of the ever-heightening risk to artworks by Axis authorities and forces as the war intensified, the Allied forces issued the Inter-Allied Declaration against Acts of Dispossession committed in Territories under Enemy Occupation or Control (1943 London Declaration) on 5 January 1943. It put the governments and individuals in Axis and occupied territories and neutral states that acts of looting and subsequent sale of these art objects would be held to account and these transfers of property would not be recognised at the end of hostilities. It stated that:

This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.

The Regulations annexed to the Convention IV respecting the Laws and Customs of War on Land (1907 Hague IV Regulations),⁴ had outlawed the confiscation of private property (Article 46), forbade pillaging (Article 47), and the 'seizure of, destruction or wilful damage' of public property including artworks held by the State or religious, charitable or educational

⁴ 18 October 1907, in force 26 January 1910, in *American Journal of International Law* (1908), vol.2(supp.), p.90.

institutions (Article 56) from territory under belligerent occupation. They provided that perpetrators would be 'subject to legal proceedings' and liable to pay compensation (Article 56 Annex; Article 3 Hague IV Convention). The International Military Tribunal at Nuremberg when handing down its judgment on the war crimes count of the indictment of the major Nazi war criminals found that the 1907 Hague IV Convention represented customary international law, binding not only those states that had ratified the treaty but on all states (IMT 1947:248-249). However, the more ground-breaking (and contentious) aspect of the indictment was the inclusion of crimes against humanity count. This provision was interpreted to encompass the confiscation of property (including artworks) from targeted civilian populations in Germany and occupied territories during and preceding the war (IMT 1946: vol.1, 10-11).

Some months before the commencement of the Nuremberg Trial, the U.S. Army in Bavaria had come upon Haberstock and Gurlitt living with their families. Not long afterwards they located a warehouse full of artworks (Nicholas 1995:379). They came within the purview of the U.S. Army's Monuments, Fine Arts and Archives (MFAA) Section, that had been established to locate and facilitate the return of confiscated artworks. Already on the Office of Strategic Services (OSS), a precursor to the CIA, wanted list, Haberstock was described by MFAA Officers as 'Hitler's private art collector and, for years, seized art treasures in France, Holland, Belgium and even Switzerland and Italy, using illegal, unscrupulous and even brutal means' (Bohr et al 2013). They described Gurlitt as an 'art dealer to the Führer', who 'acted on behalf of other Nazi officials and made trips to France, from where he brought home art collections' (Bohr et al 2013). Haberstock was taken into custody, relocated, and interrogated. The resulting testimony was vital in the trial of the major war criminals at Nuremberg, particularly Alfred Rosenberg. He was turned over for trial before German courts, where he was exonerated. Gurlitt was placed under house arrest and later released. With the onset of the Cold War, both men and others like them were de-nazified and successfully re-emerged after the war as respected art dealers (Nicholas 1995:376, 435-6). Nonetheless, their testimonies facilitated the conviction of Alfred Rosenberg, and other war criminals, who had been actively involved in the confiscation and forced sale of public and private art collections.

The indictment of the major German war criminals at Nuremberg charged that as part of their 'plan of criminal exploitation', they had destroyed 'cultural monuments, scientific instruments, and property of all types in the occupied territories' (IMT 1946: vol.1, 11-30).

The International Military Tribunal found that Alfred Rosenberg was in charge of the 'entire spiritual and ideological training' of the National Socialist Party. To this end, he had established the 'Hohe Schule' (Centre of National Socialistic Ideological and Educational Research), which instigated the 'Einsatzstab Rosenberg', 'which plundered museums and libraries, confiscated art treasures and collections, and pillaged private houses' (IMT 1947:237). He extended these activities to the occupied territories in Central and Eastern Europe where he directed the Hague Regulations 'were not applicable' (IMT 1947:287). The Court found that this plunder was also driven by a need to raise revenue for the war effort and that these acts constituted war crimes (IMT 1947:274).

The activities of the 'Einsatzstab Rosenberg' also led to Rosenberg being indicted for crimes against humanity before the Nuremberg Tribunal. Article 6(c) of the Charter of the International Military Tribunal of 8 August 1945 (London Charter) provided that crimes against humanity included 'persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.'⁵ Count Four of the Nuremberg Indictment addressed the persecution of Jews 'since 1933 ... from Germany and from the occupied Western Countries and where sent to the Eastern Countries for extermination' (IMT 1947:243-247). It found that the deliberate, systematic and discriminatory confiscation of the property, including cultural objects, of Jewish populations in occupied territories was designed to remove them from the economic life of the nation and was part of policies which were designed to lead to their extermination (IMT 1947:287-8). Rosenberg was found guilty of crimes against humanity, war crimes and other counts of the indictment and sentenced to death. This legal precedent proved vital to the future codification of protection of cultural heritage and criminalization of these acts in international law.

Restitution and codification after the Second World War

In keeping with the 1907 Hague Regulations, the 1943 London Declaration flagged that perpetrators involved in the confiscation of cultural property would be held criminally responsible and that the resulting transfers of property would not be recognised after the war. The post-war Allied restitution program covered acts encompassing not only war crimes, that is, the plunder of public and private property in occupied territories; but crimes against

⁵ Signed and entered into force 8 August 1945, 82 UNTS 279, reprinted in *American Journal of International Law* (1945) vol.39 (supp.), p.258.

humanity, namely the confiscation of private property of persecuted groups in Germany from 1933 to 1945 and occupied territories during the war (Nicholas 1995:407-444).

Reflecting the scale of dislocation of cultural property and recognition that the legal obligation concerning restitution went beyond Germany, the legal instruments adopted or enacted to realise it covered multilateral agreements between the Allied governments covering Germany; domestic laws by the four occupying powers of Germany (and for Austria); dedicated provisions in Peace Treaties with Italy, Romania, Bulgaria and Finland; and domestic laws by neutral states (Switzerland and Sweden) (Vrdoljak 2012:165-187). They encapsulate the obligation of solidarity and cooperation contained in the London Declaration, that transformed long-held principles in domestic legal systems (like the *bona fide* purchaser, statute of limitations etc) that governed the transfer of property but would have impeded restitution.

A few years after the Nuremberg Judgment, UNESCO commenced work on the codification of the protection of the cultural property during armed conflict and belligerent occupation which led to the adoption of the 1954 Hague Convention and First Protocol. A preliminary study prepared by jurist, Georges Berlia, which proposed the inclusion of preventative and punitive measures, also referenced the findings of the Nuremberg Tribunal in respect of acts directed against cultural property (Berlia 1950:12). The Convention's preparatory documents noted that the armistice agreements and peace treaties following the Second World War which enabled restitution of cultural property and the Nuremberg Tribunal had 'introduced the principle of punishing attacks on the cultural heritage of a nation into positive international law' (UNESCO 1952:5).

The 1954 Hague Convention was the first binding, specialist multilateral agreement for the protection of cultural property during war. It covers publicly and privately-owned movable and immovable cultural heritage including 'archaeological sites', 'works of art, books, scientific collections, archives' (Article 1). High Contracting Parties are required to refrain from acts of reprisal against cultural property, and to prohibit, prevent and stop the theft, pillage and misappropriation of and an acts of vandalism towards cultural heritage during armed conflict (Article 4). During belligerent occupation, the occupying power must cooperate with and support the competent national authorities for the protection of cultural heritage (Article 5). The First Hague Protocol, which covers the removal and return of cultural objects, draws on the principles contained in the 1943 London Declaration and the

post-war restitution programs. It requires High Contracting Parties to prevent the export of cultural property from territory under their control (para.1). Those not involved in a conflict must take cultural objects removed from occupied territory into their custody for safekeeping (para.2). Cultural objects removed in contravention of the Protocol must be returned to the competent authorities of the territory immediately after occupation has ceased (para.3). For international armed conflicts, if one of the combatants is not a High Contracting Party, the Convention is binding on any High Contracting Party and any other party that declares that it accepts the obligations (Article 18(3)). For non-international armed conflicts which take place on the territory of a High Contracting Party, each party to the conflict must apply the provisions of the Convention as a minimum standard (Article 19(1)).

The Convention contains a duty to prosecute violations (Article 28), which is elaborated by the 1999 Second Hague Protocol (UNESCO 1999a). High Contracting Parties under the Second Protocol are required to introduce domestic penal law (establishing jurisdiction and appropriate penalties) concerning serious violations occurring within their territory or perpetrated by nationals (Articles 15(2) and 16(1)). Serious violations cover acts committed intentionally and in contravention of the Convention or Second Protocol, including extensive destruction or appropriation of cultural property, and its theft, pillage or misappropriation (Article 15(1)). If a High Contracting Party does not prosecute, it must extradite the perpetrator to a country that can and which meets the minimum standards of international law (Articles 17 and 18). Further, it may introduce legislative, administrative or disciplinary measures which suppress the intentional use of cultural property in violation of the Convention or Second Protocol, and illicitly export, remove, or transfer ownership of cultural property from occupied territory in violation of the Convention or Protocol (Article 21).

By the close of the twentieth-century, international legal obligations prohibiting the deliberate destruction and pillage of cultural property were broadly reaffirmed in the governing statutes of several international criminal tribunals. The related case law has reiterated and elaborated upon the Nuremberg Tribunal's jurisprudence a half century earlier. The Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) (UN 1993) covers '*seizure* of, destruction, or wilful damage done to institutions dedicated to religion, charity, education, the arts and sciences, historic monuments, and works of art and science (Article 3(d)). The ICTY's case law in respect to relationship of acts directed towards the destruction of cultural property as constituting war crimes, crimes against (namely persecution) and evidencing the crime of genocide, were reaffirmed by the International Court of Justice (ICJ 2007; ICJ 2015;

Vrdoljak 2011:37-39; O’Keefe 2010:47-50; Novak 2014). The instruments for the Extraordinary Chambers in the Court of Cambodia for the Prosecution of Crimes perpetrated during the Khmer Rouge regime specifically covers violations of obligations under the 1954 Hague Convention (Ehiert 2013:193-228).⁶ In *Case 002-02*, ECCC Trial Chamber is considering the indictment against high-ranking officials of Democratic Kampuchea for crimes against humanity and genocide against Buddhist and Cham people, including destruction of religious sites and sacred texts (ECCC 2010; ECCC 2014).

The International Criminal Court (ICC), The Hague has also been called to consider the link between deliberate destruction of cultural property and looting as war crimes. The Rome Statute defines war crimes to include ‘destroying or seizing the enemy’s property’ and ‘pillage’ covering international conflicts (Article 8(2)(b)(xiii) and (xvi)) and ‘pillage’ during non-international conflicts (Article 8(2)(e)) (UN 1998). In 2012, Mali requested that the ICC Prosecutor investigate and indict the perpetrators of attacks on religious and cultural sites in Timbuktu (Coulibaly 2012). The UN Secretary General called on the Security Council to impose sanctions on the perpetrators of attacks on sites that are designated as ‘part of the indivisible heritage of humanity’ (Ki-moon 2012: 1). The ICC Prosecutor found a prima facie case for war crimes in respect of acts, including direct attacks against protected objects and pillaging of sites and objects whose ‘value transcends geographical boundaries, and which are unique in character and are intimately associated with the history and culture of the people’ (ICCP 2013: 31, 34). The matter is proceeding to trial.

Iraq, Afghanistan and Syria: Illicit traffic in the twenty-first century

The obligation to cooperate contained in the 1943 London Declaration was revisited in the twenty-first century with UN Security Council resolutions covering Iraq, Afghanistan and Syria, and UNESCO instrument covering the deliberate destruction of cultural heritage. These resolutions are significant because they take this obligation beyond the States Parties to the 1954 Hague Conventions and its Protocols, or the 1970 UNESCO Convention. They

⁶ Art.9, Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, GA Res 57/228B of 22 May 2003, UN Doc.A/RES/57/228B (2003) Annex; Arts 6 and 7, Law on the Establishment of Extraordinary Chambers in the Court of Cambodia for the Prosecution of Crimes committed during the period of Democratic Kampuchea, with the inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).

reinforced the application of a legally binding obligation on all UN Member States whether or not they are parties to these conventions.

UN Security Council Res 1483 of 2003 on Iraq: An obligation for all

The obligations contained in the 1954 Hague Protocol were largely replicated in Security Council resolutions on Iraq during the first Gulf War in 1990 and the Second Iraq War of 2003, which provided for the safekeeping and restitution of cultural heritage removed from that country (UN 2003: para.7). They bound all UN Member States and not just States Parties to the Hague Protocol.

In the months preceding the Second Iraq War, archaeologists raised fears concerning cultural losses caused by looting following the ensuing civil unrest. A petition by international Near East scholars to the United Nations and UNESCO urged the international community to ensure that archaeological sites and museum collections be secured by armed personnel as soon as practicable to prevent theft (UNESCO 2003). U.S. Major Christopher Varhola, a cultural anthropologist, acknowledged: ‘The U.S. military [was] eager to coordinate the task of preservation, which transcend[ed] military and operational necessity’ (Army Takes Steps 2003).

Archaeologists fears regarding looting were heightened when news filtered out that representatives of the American Council for Cultural Policy (ACCP), a group representing antiquities dealers and art lawyers, met with the U.S. Defence officials and the Department of State prior to the commencement of hostilities (D’Darcy 2002). The ACCP had been vocal in its campaign to persuade the U.S. government to amend the *Convention on Cultural Property Implementation Act* (19 U.S. 2603), to lessen the impact of efforts of other States to stem the flow of antiquities from their territories into overseas markets, particularly the United States (McDougall 2003). Andre Emmerich (2003), dealer of Classical, pre-Columbian and contemporary art, wrote: ‘The major lesson to be learned from the Iraq disaster is the desirability of dispersing widely the art of past civilizations....Contrary to what some believe, trade in ancient objects is not the enemy of preservation.... In fact, higher morality, as so often, is best served by the free market.’ On 14 April 2003, several eminent archaeologists co-signed a letter published in *The Guardian* (U.K.) that flagged the imminent danger of large scale looting of cultural sites and institutions and noted that lobbying by the ACCP designed to persuade the U.S. government to ‘relax legislation that protects Iraq’s heritage by prevention of sales abroad, arguing that antiquities will be safer in American museums and

private collections than in Iraq' (Lambrick et al 2003). When looting did occur then U.S. Attorney-General, John Ashcroft advised that: '[T]here is evidence that organized criminals were behind the looting of select, high value items, possibly stolen to order for international clients' (Looted Iraqi Artefacts 2003).

Like the London Declaration 60 years before it, Security Council Resolution 1483 of 2003 recalled the 1907 Hague IV Convention and encompassed a request for cooperation to repress certain acts and to hold perpetrators to account. Paragraph 7 provided:

[A]ll Member States shall take appropriate steps to facilitate the safe return to Iraqi institutions of Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific and religious importance illegally removed from the Iraq ... including by establishing a prohibition on trade in or transfer of such items and items with respect to which reasonable suspicion exists that they have been illegally removed ... (UN 2003).

It also called on them to cooperate with relevant international organisations like UNESCO and INTERPOL. Its transposition into domestic law (even by non-States Parties) was stricter than the obligations under the Hague Convention and Protocols or the 1970 UNESCO Convention. For example, *Iraq (United Nations Sanctions) Order 2003* (UK) shifted the burden of proof from the prosecution to the defendant. He or she had to prove that they 'did not know and had no reason to suppose' that the object was removed illegally from Iraq after the relevant date (Section 8(2) and (3)). In the United States, the *Emergency Protection for Iraqi Cultural Antiquities Act of 2004* extended the application of the existing law to cultural material covered by the Resolution regardless of whether Iraq is a State Party to the 1970 UNESCO Convention. Persistent civil strife and hostilities in Iraq resulted in the Security Council reaffirming these obligations in 2015, discussed below.

UNESCO Declaration on Intentional Destruction of 2003

The rationale contained in the preamble of the 1954 Hague Convention was reaffirmed by the Declaration concerning the Intentional Destruction of Cultural Heritage adopted by the UNESCO General Conference in 2003 (UNESCO 2003). Adopted in response to the destruction of the monumental Buddhas at Bamiyan, Afghanistan, it states that these acts 'affected the international community as a whole' (Francioni and Lenzerini 2003; O'Keefe 2004). It also draws on lessons learned from the mid-twentieth century when it states that: '[C]ultural heritage is an important component of the cultural identity of communities, groups

and individuals, and of social cohesion, so that its intentional destruction may have adverse consequences on human dignity and human rights' (UNESCO 2003). The Declaration covers acts occurring outside the theatre of war and within the territory of a State. In support it invokes, not only the 1954 Hague Convention, 1899 Hague II and 1907 Hague IV Conventions, but the relevant provisions of the Rome Statute and the ICTY Statute and related jurisprudence.

While the 2003 Declaration calls on UNESCO Member States to adhere to conventions and recommendations covering the protection of cultural heritage, the 1970 UNESCO Convention on illicit traffic was not one of them. Nevertheless, during the drafting process the UNESCO General Conference has adopted a resolution which did refer to this treaty and 'note[d] the fundamental principles included in these instruments to prevent the destruction of cultural heritage including looting and illicit excavations' (UNESCO 2001).

Accordingly, the 2003 Declaration is an important reference point because it provides for State and individual responsibility for intentional destruction of cultural heritage (Articles VI and VII); and outlines the obligation to cooperate in respect of protecting cultural heritage against intentional destruction (Article VIII). It calls on States to establish jurisdiction and effective criminal sanctions against individuals who commit or order others to commit such acts. It calls on States to cooperate with one another and UNESCO including through information sharing; consultation in cases of actual or impending destruction; assist in respect of educational, awareness-raising and capacity-building programmes for prevention and repression; and assist judicial and administrative processes. These modalities of international cooperation are important in defining expectations in other contexts.

UN Security Council Res 2199 of 2015: Deliberate destruction and looting

The deliberate destruction of cultural heritage again became the focus of international attention in 2014 with atrocities committed by extremist groups, including Al Nusrah Front (ANF) and Islamic State of Iraq and the Levant (ISIL), in Iraq and Syria. The Security Council strongly condemned the 'destruction of cultural and religious sites and obstruct[ion] of the exercise of ...cultural rights...' (UN 2014a: para.2). The Human Rights Council likewise expressed deep concern for the 'rampant destruction of monuments, shrines, churches, mosques, and other places of worship, archaeological sites and cultural heritage sites' (HRC 2014).

The Security Council tasked the UN Analytical Support and Sanctions Monitoring Team with reporting back on this and other threats. Its report recommended that the Security Council build on SC Res 1483 of 2003 and mandate ‘a world-wide moratorium on the trading of antiquities from the Syrian Arab Republic or Iraq since the passing of resolution 2170 (2014) that *lack clear, certified provenance*’ (UN 2014b:23-24). The report observed that ANF and ISIL could raise funds from the trade in antiquities and while the ban would not eliminate the illicit market, it could depress it. The UNESCO Executive Board noted that such acts ‘damage[d] the cultural heritage of all humankind’ and were a war crime under the Rome Statute (UNESCO 2014a:para.6). It called on ‘all countries and all professional groups involved in the areas of customs and trade, as well as individuals and tourists, to *verify the origin* of cultural property that may have been imported, exported or offered for sale illegally’ (UNESCO 2014a: para.18 (emphasis added)). UNESCO adopted an Emergency Response Action Plan which put Member States, museums and auction houses on notice of the pillaging of Iraqi cultural heritage and called on them to support the international effort to repress it (UNESCO 2014b:3).

The Security Council adopted the Monitoring Team’s recommendation in SC Res 2199 of 12 February 2015. It is binding on UN Member States and takes precedence over any conflicting treaty obligations (Negri 2015:5-6). The resolution dealing with UN Member States obligations concerning atrocities being committed by ANF and ISIL, brings together condemnation of the acts of destruction and looting of cultural heritage in the one instrument. It recognises that their impact is identical – systematic and irreversible loss of cultural heritage. The Security Council condemned incidental or deliberate destruction of religious and cultural sites and objects (para.15). It then noted with concern that ISIL, ANF and other groups and individuals were either directly or indirectly engaged in the ‘looting and smuggling of cultural heritage items from archaeological sites, museums, libraries, archives, and other sites in Iraq and Syria’ (para.16). Since ancient times both acts were designed to demoralise the enemy and civilian populations into submission. As noted earlier, is a strategy condemned and prohibited by the international community since the late nineteenth century.

However, the Security Council acknowledged that cultural heritage has another significant potential for these groups. Like the National Socialists in the mid-twentieth century, the SC Res 2199 of 2015 makes clear that, ISIL and ANF have facilitated the looting and illicit trade in cultural objects in Iraq and Syria to generate revenue ‘to support their recruitment efforts and strengthen their operational capability to organize and carry out terrorist attacks’

(para.16). The deliberate destruction of historic sites for propaganda value had successfully garnered worldwide attention through social and traditional media. However, as Syrian archaeologist Amr Al-Azm, explained the large scale, systematic looting of archaeological sites by all parties in the Syrian conflict was driven not by ‘ideology, but income’ (Kohn 2014). Indeed, the U.S. State Department advised that a cache of archaeological objects had been found with ISIL’s deceased finance chief in a raid in Syria in May 2015 (Duray 2015). The push into the trade in antiquities was seen as precipitated by the bombing of key economic sites like oil fields (Symmes 2015). The Director of Compliance and Facilitation, World Customs Organization noted that ‘plundering of cultural property is one of the oldest forms of organised cross-border crime’ and that its financing of terrorist groups through the trade in cultural objects has become a focus for his organisation (Zhu 2014). SC Res 2199 of 2015 (and SC Res 2170 of 2014) is primarily designed to ensure the cooperation of UN Member States in curbing the sources of funding to terrorist organisations which are viewed as ‘serious threats to international peace and security’ (Preamble). For this reason, it is incorporated in a Security Council resolution adopted under Chapter VII of the UN Charter.

Moving beyond war crimes, these acts of looting to finance terrorist activities are recalibrated by the Security Council more broadly as ‘criminal and unjustifiable regardless of their motivation, whenever, and by whomever they are committed’ (SC Res 2199 (2015), Preamble). SC Res 2199 of 2015 noted that any ‘direct or indirect trade with ISIL and ANF’ could be a violation of obligations imposed to combat terrorist activities, including to ‘ensure that any person who participates in financing ... of terrorist acts or in supporting terrorist acts is brought to justice’ (Preamble). The criminalisation of illicit trade in cultural property was reinforced by UN General Assembly when it reaffirmed obligations under cultural heritage instruments (including the 1954 Hague Convention and Protocols, 1970 UNESCO Convention and 2003 Declaration on Intentional Destruction) and those in the field of organised crime prevention, including the International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences, in respect of international and national efforts to protect Iraqi cultural heritage (UN 2015b; Bokova 2015:3). These guidelines provide detailed strategies in respect of crime prevention, criminal justice policies, and international cooperation.

Like prior Security Council resolutions, SC Res 2199 of 2015 calls on UN Member States to ‘prevent the trade in Iraqi and Syrian cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegal removed’ from these

countries by prohibiting the cross-border trade, facilitating their safe return, and cooperating with international organisations like UNESCO and Interpol (para.17). Under the resolution, Member States are required to report back to the UN Sanctions Committee concerning their compliance with these measures (para.29).⁷ The State Department emphasised that the United States is working with ‘transit and market countries’ to take measures to curb trafficking and aid return ‘to the country of origin when it is safe to do so’; and ‘collaborate with international and national law enforcement, customs officials, and ministries of culture to alert art dealers and collectors’ to plunder artefacts circulating illegally in the market (Ryan 2015). The Federal Bureau of Investigation alerted art collectors and dealers about antiquities from the region that may be in circulation (Duray 2015). Further, there are efforts to transpose these obligations into U.S. domestic law with the tabling of legislation before Congress referencing the deliberate destruction and looting of cultural heritage in Syria, Iraq, Mali and by the Nazi regime in support of the establishment U.S. Coordinator for International Cultural Property Protection.⁸

Despite these initiatives, cultural objects from Syria and Iraq continue to be traded illicitly in transit and market countries (Shabi 2015). For instance, the U.S. Department of Homeland Security in early 2015 returned 60 cultural artefacts including the head from a statue of the Assyrian King Sargon II to the Government of Iraq. U.S. Assistant Secretary of State, Evan Ryan (2015) explaining the State Department’s actions observed: ‘ISIL actions equate to nothing less than ethnic cleansing ... The American people stand with the people of Iraq in their battle against ISIL and others whose goal is to destroy and deny our common humanity.’

Codes of conduct and criminalisation

Reminiscent of the 1943 London Declaration, the General Assembly in its 2015 Resolution on saving Iraqi Cultural Heritage urged:

[A]ll States to take appropriate measures to ensure that all actors involved in the trade in cultural property, including but not limited to auction houses, art dealers, art collectors and museum professionals, are required to provide verifiable documentation of provenance as well as export certificates related to any cultural property imported, exported or offered for sale, including through the internet.

⁷ As at September 2015, the Committee and UNESCO were processing these reports of some Member States.

⁸ Act to protect and preserve international cultural heritage at risk due to political instability, armed conflict, or natural or other disasters, and for other purposes (H.R. 1493).

The standard of conduct expected of those dealing with cultural objects has been defined in codes of ethics or good practice adopted by intergovernmental organisations in the field. The UNESCO International Code of Ethics for Dealers in Cultural Property calls on ‘traders’ not to facilitate the trade in stolen, illegally alienated, clandestinely excavated or illegally exported cultural property and if in possession of such an object will take all legally permissible steps to cooperate in its return to the country of origin in a reasonable time (UNESCO 1999b). The UNESCO Code is closely aligned with the International Council of Museums (ICOM) Code of Ethics for Museums (ICOM 2004). The ICOM Code provides that museum professionals must not directly or indirectly support the illicit trade in cultural objects and cooperate with police and authorities in curbing it (paras 8.5 and 8.8). However, museums are not prevented from ‘acting as an authorised repository for unprovenanced, illicitly collected or recovered specimens or objects from the territory over which it has lawful responsibility’ (para.2.11).

Further guidance as to the requisite standard of conduct expected of persons engaged in the trade in cultural objects is provided by the UNIDROIT Convention on Stolen or Illegally Exported Cultural Property in its definition of due diligence (UNIDROIT 1995). In determining whether the possessor has exercised due diligence in the circumstances consideration should be given to the ‘character of the parties’, the purchase price, whether the possessor sought information from established databases of stolen or missing cultural property, or consulted relevant agencies, or ‘took any other step that a reasonable person would have taken in the circumstances’ (Article 4(4)). A number of countries that host large auction houses have also adopted laws defining due diligence. For example, the Swiss Federal Act on the International Transfer of Cultural Property of 2003 provides that those engaged in the art trade and auction businesses can only transfer cultural property that is not stolen, removed against the will of the owner, or illegally excavated or illicitly exported (Article 16). They must act with due diligence by establishing the identity of the seller, obtaining their written consent that they have a right to transfer the property, advise the customers of current import and export regulations, maintain written sales records for 30 years, and provide data to a central body (Article 16(2)).

The UNESCO Code requires violations to be investigated by a body nominated by participating dealers, with its decision to be made publicly available. By contrast, the 2014 International Guidelines call for States to introduce criminal, civil and administrative sanctions against individuals and corporations engaged in the illicit import and export, theft, looting, laundering of such cultural property (Guidelines 20-31). Leading market States

introduced criminal and civil sanctions for the trade in stolen cultural property in response to SC Res 1483 of 2003 and penal codes that cover handling of stolen property. Nonetheless, experience shows that from the period from the Nuremberg Trials to the present day, the successful criminal prosecution of those engaged in the illicit trade of cultural property is rare (Gerstenblith 2013).

Conclusion

The UN Sanctions Monitoring Team when preparing its report in 2014 on the fate of cultural heritage in Syria and Iraq observed that: '[T]here is a risk that local dealers will stockpile the artefacts until the world is no longer focused on this issue. On this basis, the Monitoring Team recommends a preventative approach' (UN 2014b:24). The story of Cornelius Gurlitt and the horde of artworks collected by his art dealer father during the Nazi period and kept by him in secret during his lifetime bears witness to the reality of this risk. Some art dealers, auction houses, collectors and museum officials then and now have argued that they are seeking to 'save' cultural objects which would otherwise be lost forever.

However, the international community in the mid-twentieth and early twenty-first century recognised that far from 'saving' cultural heritage, the fostering of the market in cultural objects from territories subject to war, occupation or civil strife fuelled its ever increasing dislocation and loss. There has been recognition too that groups and regimes that have engaged in illicit trade in cultural objects have often been motivated by the same nihilist tendencies which drive their destruction of cultural, religious and historic sites and monuments *and* the need to raise funds. It is for this reason that the international community has tied those who participate in the illicit trade of these cultural objects with those who facilitate and engage in other illicit means of funding the gross, systematic and widespread abuses of human rights and international humanitarian law. It had led to the criminalisation of this illicit trade in cultural objects and called on all States to repress the export of cultural objects from these territories, refuse to recognise any transfers as legal, and prosecute those engaged in this illicit trade and cooperate with other States and intergovernmental organisations to this end.

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