

Law as a mean of International cooperation for the protection of Cultural Heritage

With regards to the Normative Protection of Cultural Property, the United Nations Educational, Scientific and Cultural Organization (UNESCO) was mandated in 1945, right after its creation. Legal measures were taken relatively quickly considering that nine years after its creation, the 1954 Hague Convention for the Protection of Cultural Property in the event of Armed Conflicts was adopted after the convocation of an Intergovernmental Conference. The philosophical background of this Convention resides in the preamble, recognizing that “cultural property has suffered grave damage during recent armed conflicts and that, by reason of the developments in the technique of warfare, it is in increasing danger of destruction”. Moreover, the minds behind the Convention addressed the question of Heritage ownership or non-ownership by stating that “damage to cultural property *belonging to any people* whatsoever means damage to the cultural *heritage of all mankind*, since each people makes its contribution to the culture of the world”.

Whereas the 1954 Convention has obviously been influenced by the atrocities of the war, the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership adopted fifteen years later and applicable in time of peace reveals the consequences of the War regarding Cultural Heritage. Indeed, the controversies over the misappropriation, restitution and traffic of art that occurred after the WWII urged for the adoption of a new Convention.

Regarding the past or ongoing traffic of Culture, the 1954 and 1970 Conventions are often complementary. As it happened during WWII and as it is happening today with the looting of historical sites by non-state actors in Iraq and Syria, the illicit acquisition process in war time, scrutinized under the scope of the Hague Convention, is followed by years of movement out of war zones, thus falling under the scrutiny of the 1970 Convention.

These two Conventions are acting as a relay to overcome in the greatest possible extent any gap and lick on the trafficking road of Cultural Objects. Acting *a priori* as well as on ongoing basis is fundamental to protect and safeguard Cultural Heritage from any Destruction or theft and consequently the Right of people to participate in Cultural Life.

Used as the legal basis for the following developments, these conventions and potential gaps between their scopes and within their scopes will be examined. After having identified those gaps it will be interesting to analyze how Domestic Laws – mostly concerning Protection of Cultural

Heritage – and European Law – mostly concerning its trafficking – have played a role in filling the gaps of International Regulations in these areas.

Considering that the emphasis is put in this paper on the acquisition process of cultural property through pillages and looting in contemporary conflicts rather than on the return process of those properties in the aftermath of conflicts, the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects is just mentioned here to highlight its importance in the legal framework of Cultural Property safeguarding. If the name of the Convention presupposes a broad scope of application, the preamble of the Convention emphasizes that “this Convention is intended to facilitate the restitution and return of cultural objects” and is thus not particularly relevant for the purposes of this paper.

With regards to the acquisition process of Cultural Property in time of war, there has been a historical shift in two ways. At the first level and as it is explained in more details below, the actors removing cultural objects from their territories of origin have changed. From States authorization and organization of pillages in conquest territories, non-state actors are nowadays playing a major role in the looting of their own Cultural Property.

At the Second level and as a consequence of the first observation, western states in the looting process are nowadays mainly passive actors, receiving on their territories an incredible amount of cultural objects entering the art market and making of Europe a central arena of looted property final dealings. From this perspective, states of origins are called “source countries” or “artifacts rich states” and states of arrivals are called “market countries”¹.

These shifts are the result of the rapid “changing face of war” and the economic globalization. From International conflicts opposing States, the current picture of International Relations integrates non-state actors and Non-international conflicts. Moreover, the constant demand of collectors on the art market and the amelioration of means of transportation have accelerated the perpetration of transnational crimes. This change revealed the limits of the existing International Law regulating Conflicts and Cultural Property Protection and urged the International community to adapt its legal framework to that matter.

Contemporary issues related to Cultural Property Protection

1 Blake Janet, International Cultural Heritage Law, Oxford university press, 2015

The “changing face of war”²

The classical scheme of wars and the Law that frames it did not anticipate the issues raised by the current context at two levels.

As mentioned above, states are not anymore the only actors taking part in combats but non-state actors are increasingly present, especially with the rise of Terrorism.

At the empirical level and as developed further in more details, the current conflicts running in Syria and Iraq challenge the law in the area of Cultural heritage with the presence of non-state actors delivering licenses allowing excavations on historical sites by non professionals, prerogatives normally owned by the state.

Taking the example of the middle-eastern region from a contemporary perspective is thus particularly relevant with regards to the deliberated and intentional Destruction of Cultural Heritage that occurred in Iraq and Syria and the trafficking that resulted from it for several years³. If Culture in general and Cultural Heritage in particular are often associated with collateral victims of wars, they are in reality their direct victims, as a mean to reach the people behind it.

How has International Law been adapted to ensure its Protection ? Which International Laws are affected by the Destruction and trafficking of Cultural Property ? How is International Human Rights law relevant to that ?

The development of non international armed conflicts is considered by International Humanitarian Law⁴ but this form of conflict renders difficult the possibilities of concrete actions from the International Community.

Dealing with the illicit trade and movement of cultural objects from the Iraqi region in the contemporary period implies to understand in a nutshell the conflictual issues that are currently going on and the claims of certain non-state actors in those regions that directly or indirectly result in the traffic of cultural objects.

Victim of the first and second Persian Gulf Wars, Iraqi Cultural Heritage has been the target of important destruction and looting such as the looting of the Iraq museum in April 2003⁵. Before the last U.S troops left Iraq in December 2011, the situation degraded in Syria.

2 *idem*

3 For Stop Trafficking Cultural Heritage in Iraq and Syria (UNESCO Theme). Retrieved from <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/awareness-raising-initiatives/help-stop-the-destruction-of-cultural-heritage-in-syria-and-iraq/>

4 Art. 3 Geneva Convention, 1949 : « (...) In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties (...) ». See Additional Protocol II, 1977.

5 Stone Peter, Farchakh Bajjalay Johanne, *The Destruction of Cultural Heritage in Iraq*, 2008, p.4.

Simultaneously to the altercations that occur between the Bachar el-Assad's regime and its opposition since March 2011, new actors entered the conflict.

The Islamic State of Iraq and the Levant (ISIS or Daesh), created in 2006 by Abu Musab Al-Zarqawi and linked to the terrorist organization Al-Qaïda in Iraq, emancipated itself from the latter to become independent in 2014. Authors of numerous exactions in their quest of founding a new sunni Caliphate, the United Nations condemned Daesh as a terrorist group responsible for war crimes, ethnic cleansing and crime against Humanity⁶.

The investigations led by Romain Bolzinger and Geraldine Schwarz give us more details about the systems put in place in conquest territories. As agents of a proto-state, members of Daesh run an administrative and penal system within the different cities under their control, thus excluding any control from the legitimate Iraqi government. In order to become financially self-sufficient, inter alia to finance this system and their armament, Daesh resorted to diverse methods such as the establishment of new taxes, the selling of foreign fighters passports, kidnapping of civilians for ransom payments, etc⁷.

As the investigations above mentioned illustrate it, the destruction of historical sites and the traffic of rooted out cultural property within the Caliphate is among their most lucrative financial resources.

In the introductory part, it was observed that the destruction and looting of cultural property in History had aimed two objectives; to annihilate the identity of the enemy and fund the war efforts. Reproducing this scheme, the Islamic State is tracking and destroying antic temples and pagan statues for two purposes; to eradicate a culture guilty of witnessing the polytheist past of those territories and secondly to target a potential lucrative financial resource on the black art antiquities market⁸.

Providing random excavation permissions to “little hands”, unqualified farmers or individuals in financial needs, offering protection to dealers for the storage and cross-borders transit of these excavations against money, Daesh is emptying its territories from the witnesses of the Past.

In this quest of eradicating idols, the Islamic State have caught the international attention in its propaganda video diffusing the images in Syria of the Palmyra site destruction in August 2015. Qualified as a war crime by the director general of UNESCO Irina Bokova⁹, she urged the

6 Reuter Christoph and Ghaddar Hanin Interview, « Voyage au bout de la Terreur », Courrier International, Octobre/Novembre/Décembre 2015, Hors série, p. 6.

7 Levitt Matthew, « Terrorist financing and the Islamic State », Testimony submitted to the House Committee on Financial Services, November 13 2014.

8 Verner Robin, « L'islam et le crépuscule des idoles (ou pourquoi Daech détruit aveuglément ses racines) », Slate magazine, 01.10. 2015, available at : <http://www.slate.fr/story/107193/islam-le-crepuscule-des-idoles>

9 « Director-General Irina Bokova firmly condemns the destruction of Palmyra's ancient temple of Baalshamin, Syria », speech 24.08.2015, UNESCO website available at : <http://en.unesco.org/news/director-general-irina-bokova-firmly-condemns-destruction-palmyra-s-ancient-temple-baalshamin>

International community to support the effort of safeguarding their heritage and identity.

In several Resolutions examined further¹⁰, the United Nations called the State Parties to block the financing of terrorist groups by, *inter alia*, regulating the trade of art antiquities of looted objects from Syria and Iraq.

+ danger of cultural heritage defenders in those regions

Indeed, domestic regulations are needed to control the lack of scrutiny of auction houses in London, New York and Paris regarding the origins of sold objects. For instance, the principle of good faith is applicable in France regarding the possession of objects. When it comes to movable goods, possession means ownership. The principle of good faith aiming at softening the rigor of written law has posed several problems concerning the Certificate of origins of goods arriving on the french art market.

Considering the practical difficulties to stop the export from “source countries” and the flexibility of auction houses around their import in “market countries”, the question about regulation proposals at the International, European and Domestic – French and Iraqi – levels needs to be raised.

The purpose of this paper is to understand the importance of Cultural Heritage and its trafficking in relation to Individuals rights. More than giving attention to simple objects, attention is given to the consequences of the lack of regulations on individuals and the need for more cooperation on this matter. Tackling Cultural Property trafficking and ensuring its Protection is ensuring to people their right to benefit from cultural heritage and their right to participate in cultural life. Moreover in the contemporary picture, tackling cultural property trafficking is acting against the financing of terrorist groups to prevent them from growing and heightening their exactions. Attacking the financial resources of terrorism is a first step to grow in their scale of actions. It is important to evoke the role of the Law to ensure this process as the witness of the global desire to end a situation of empirical impunity.

(...)

International armed conflict

To understand what International and Non-International Armed Conflicts are from the legal perspective, look should be had to International Humanitarian Law. According to the common Article II to the Geneva Conventions of 1949, an International Armed Conflict occurs in “all cases of declared war or of any other armed conflict which may arise *between two or more of the High Contracting Parties (...)*” or in case of “partial or total occupation of the territory of a High Contracting Party(...)”. A general definition has been proposed by the International Criminal Tribunal for the former Yugoslavia in the Tadic case, stating that “an armed conflict exists whenever there is a resort to armed force *between States*”¹¹.

The main denominator is the role played by the States in the conflict as the only combatants. On the contrary, the information carried by treaty law about Non International Armed Conflict is broader in terms of conflict actors.

Non-international armed conflict (NIAC)

The Common Article 3 of the Geneva Conventions and the 1977 Additional Protocol II to the Geneva Conventions are both relevant.

According to the common Article 3 of the Geneva Conventions, Non International armed Conflicts are “armed conflicts *not of an international character occurring in the territory of one of the High Contracting Parties*”. The International Committee of the Red Cross precised this scope by adding that “one or more non-governmental armed groups are involved”. Here the qualification is important and reveal what was mentioned before regarding the “changing face of war”. The picture of War has changed and does not include exclusively States. Here and for the purpose of this paper is worth mentioning terrorist groups as non-governmental armed groups.

However, to be qualified as such, a conflict must meet certain conditions such as an intensity threshold and organizational element.

The International Criminal Tribunal for the former Yugoslavia considered that “the gravity of attacks and their recurrence; the temporal and territorial expansion of violence and the collective character of hostilities; whether various parties were able to operate from a territory under their control; an increase in the number of government forces; the mobilization of volunteers and the distribution and type of weapons among both parties to the conflict; the displacement of a large number of people owing to the conflict; and whether the conflict is subject to any relevant scrutiny or action by the UN Security Council” were important factors for the qualification of a conflict as a NIAC.

¹¹ICTY, The Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para. 70.

Regarding the second element, the non-state actors involved in the conflict must be in possession of a sufficient armament to launch attacks.

If Syria can be defined as an “Internationalized” NIAC regarding the involvement of the International Coalition and Russia in the Conflict to fight the Islamic State, Iraq presents a different character.

From an International Armed Conflicts that lasted until 2011, the situation has evolved to a Non International Armed Conflict, opposing the Iraqi State to the Islamic State occupying an important part of the North and in confrontation with the Kurds and several minorities. Nonetheless, an international involvement has been illustrated by Coalition airstrikes in Mosul, in March 2016.

However, the qualification of a conflict as internal or international and the presence of non-state actors can have a practical relevance when dealing with trafficking of cultural property but a quasi inexistent legal relevance.

At most, this qualification is relevant for the source countries, considering that the main actors involved in the sourcing of cultural property in war zones and especially in Iraq today are non-state actors and that renders state control difficult on the export of such cultural property. Indeed, the presence of ISIS as a non-state actor opposed to the Iraqi government has an empirical and genuine impact on the trafficking of cultural property. As the government lost control over the territory occupied by ISIS, it goes without saying that their exactions both on individuals and cultural property escape states scrutiny. Regarding the restitution process, the importance of actors in the conflict can however play a role for the source country. If the conflict involves two states like it was the case between Iraq and US during the Second Gulf war, it is more likely that the cultural Property stolen or imported during this time will benefit from more clarity in its follow up and road to market countries. Then, it might be easier for Iraq to ask US for the restitution of objects. In the case where non state actors from the source country are the perpetrators and where the state is completely left out from the export process, it is probably harder both for the source country and arrival country to intercept those objects and thus to retribute them. That is why more scrutiny is needed in this case to not lose the cultural property on the market far from the eyes of states and close from the hands of private collectors.

However, at the legal level, we can wonder to what extent the presence of non state actors and the qualification of a conflict as International or Non International has an impact on “market countries”. In a broad and theoretical perspective, the legal relevance of the qualification of a conflict as International or Non International is quasi inexistent nowadays for them, considering that today,

legal instruments dealing with cultural property encompass both kinds of conflict and that the 2nd protocol of the Hague Convention encompasses situations of non international armed Conflicts as well.

Moreover, the regulations that have been adopted by the UN such as the Regulation 2199 analyzed further on and the measures taken by the EU to tackle the financing of ISIS and thus the trafficking of cultural property target the conflict as such and do not differentiate regarding the nature of a conflict as international and non international.

Indeed this qualification is of low legal relevance when we think both about the acquisition process and the restitution process. When we think about the acquisition process, as it was said above, the difference could only be made if the International Conflict involved a market country such as, for instance, France. In this case, France could be an active agent in looting directly cultural property from the source country. But otherwise, whether the conflict is international and involved other states such as the gulf wars or if the conflict is mostly internal like it is currently the case in Iraq, France is in both case a passive agent receiving cultural property on its territory from a source country in conflict, without consideration for its internal or international character.

To that extent, the Regulations that have been adopted by the UN or measures taken by the EU are targeting countries in conflict without distinction of their nature.

Thus, this qualification is only practically relevant to enlighten the reader on the situation ongoing in Iraq but is not legally relevant when it comes to tackle the trafficking of cultural property.

The concept of Ownership in Cultural Heritage

Coming back to Cultural Heritage and Cultural Property, these raise the question of ownership. It is striking to see that this question has arose the interest of many scholars. If it is hard to find a clear answer about the ownership of Cultural Heritage and Property in Conventions, we can first look for some clues in the abundant flow of doctrine and researches¹².

Why is it important to approach this question ? Depending on who is considered to own Cultural Heritage or Property, it is interesting to see if the possibility for the International Community to take measures for its protection and the basis for those actions will differ under the Law.

During the 19th Century, John Ruskin observed in his book *The seven lamps of architecture*

12 Gibbon F.K, *Who Owns the Past ? Cultural Policy, Cultural Property and The Law*, Rutgers University Press, London, 2005 ; Cuno James, *Who Owns Antiquity ? Museums and the battle Over our Ancient Heritage*, Princeton University Press, 2008.

that the conservation of ancient monuments is not only a matter of convenience or feelings but a matter of belonging. History does not belong to anyone if everyone¹³. For this reason, cultural heritage and ancient monuments are in principle inviolable.

However, as seen above, wars and time have had many opportunities to gainsay this assumption.

The definition of Cultural Heritage and the common sense that emanates from this notion would relate it to and infer it from Humanity, free from any possession. However, the notion of Cultural Property includes in its own terms – “property” – a dimension of possession.

Here a distinction need to be made to avoid any confusion. Cultural Heritage and the philosophical perspective of a Universal heritage should not be mistaken for the concept of “common heritage of mankind”¹⁴. This concept of International Law has been developed in the sixties by the Maltese Ambassador Pardo and target common spaces such as ocean floor or the moon. This concept is more related to natural resources and their exploitation.

Looking at the International Conventions, the 1954 Hague Convention's Preamble recognizes that “damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world”. On the same line, the 1970 UNESCO Convention states in its preamble that “the interchange of cultural property among nations (...) increases the knowledge of the civilization of Man (...)” and “cultural property constitutes one of the basic elements of civilization and national culture”.

From these clauses, it seems that both nations and the international community have a responsibility regarding Cultural Property, implying a sense of belonging.

Here, two dimensions are involved.

First, Cultural property delivered in nation-centered terms sets the basis for state action. Domestic laws are legitimate and necessary to protect Cultural Property, as a pillar of Culture and Nation.

Secondly, Cultural Property delivered in universal terms sets the basis for international cooperation. International cooperation and Law are needed to fully protect Cultural Property, as the core of Humanity heritage, especially in the globalization era.

From this assumption, it will be interesting to observe how Domestic and International Law are articulated to fill each other's gaps in this area. This observation will be based on a two countries case study that are France and Iraq. The International reaction to the destruction of historical sites in the middle-east and the willingness to save the Cultural Heritage of Iraq will be addressed further

13 Ruskin John, *Les sept lampes de l'architecture* (trad. George Elwall), éd. Denoël, 1987, p. 206.

14 Baslar, Kemal. *The Concept of the Common Heritage of Mankind in International Law*, Dordrecht, The Netherlands: Martinus Nijhoff, 1998.

on.

+ What about the individual dimension of right to property ? It is the main issue addressed by the ECHR for instance (doc 2011 Cultural rights in the case law of the ECHR)

Before moving on however, I would like to address the particular burden placed on states by the 1972 World Heritage Convention. In its Article 4, it stipulates that “each state Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, *belongs primarily to that State*”. It explicitly places the International Responsibility at the second level, adding that the state “will do all it can to this end (...) and, where appropriate, with any international assistance and co-operation (...)”.

CULTURAL HERITAGE AND HUMAN RIGHTS

The purpose of this sub-chapter is to analyze which human rights are the most relevant when we talk about Cultural Property Destruction, Trafficking and Protection. This sub-chapter should be kept in mind not only as an independent part of the developments but as a background for all arguments. All the Laws, at the international, european and domestic levels, have been adopted on the basis and with the purpose of granting to present and next generations the capacity to enjoy and witness Cultural Heritage.

Cultural rights

Few words on cultural rights

The Right to participate in cultural life

The link between Cultural Property Protection and Human Rights could seem distended. Indeed, the direct object of this Protection is not the Individual as it is the case with the Universal Declaration for Human Rights. The direct object of Cultural Property protection is materialized by stones, artifacts or all the goods mentioned above. Then, how is it important for Human Rights to protect and safeguard Cultural Property and Heritage ?

If the Article 27 §1 of the UDHR already provided for the right “of everyone to take part in cultural life”, its binding character on states emerged from the adoption of what is called the second generation of Human Rights in 1966 with the International Covenant on Economic, Social and Cultural Rights (CESCR).

The Article 15 of the CESCR recognizes “the right of everyone to take part in cultural life (...)”. However, the 2009 General comment no. 21 of the UN Committee on Economic, Social and Cultural Rights gives more details about its scope and application.

Regarding the concept of “cultural life”;

“The Committee considers that culture, for the purpose of implementing article 15 (1) (a), encompasses, inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and *man-made environments*, food, clothing and *shelter and the arts*, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence (...) »

If this comment gives a large space to intangible property, the terms « man-made environment », « shelter » and « the arts » are broad enough to encompass Tangible Property in the sense of the 1954 Hague Convention and 1970 UNESCO Convention.

The Article is also relevant with regards to the obligation imposed on states parties “to take deliberate and concrete measures aimed at the full implementation of the right of everyone to take part in cultural life” and to adopt necessary steps “for the *conservation*, development and dissemination of science and culture”.

The five elements or conditions to the right to take part in cultural life include availability, accessibility, acceptability, adaptability and appropriateness. Notwithstanding the importance of the four other elements, the condition of Accessibility is particularly relevant to the purpose of this paper. The Committee further elaborates on this condition by stating that it “consists of *effective and concrete opportunities* for individuals and communities to enjoy culture fully, within physical and financial reach for all in both urban and rural areas, without discrimination”. How can people access to Cultural Property in the sense of Article 15(a) if the latter has been destroyed or looted ?

To that extent, a discussion has been launched about the adoption of an independent “right to access to Cultural Heritage”. In 2011, a Consultation has been organized by the Independent Expert in the field of Cultural Rights, Ms. Farida Shaheed, to decide whether access to Cultural Heritage was an independent Human Right.

If no answer has been brought yet from this discussion, UNESCO supports this initiative by promoting in its resources, inter alia, the 2010 Protection of Cultural Property Act adopted by the Montenegrin state that provides a Right to Cultural Heritage.

The Article 5 recognizes that “every person has a right to use cultural property, under equal conditions (...) for the purpose of his or her participation in cultural life” and this “right of access

to a cultural property may be limited only for the purpose of protection of public interest and rights and freedoms of others”. Thus, this article of the Protection of Cultural Property Act would be an adequate basis for the adoption and integration of the right to access cultural Property in International Law, independently or as part of the Right to participate in cultural life .

DOC ECHR; Cultural rights in the case of the ECHR.

See P19 : RIGHT TO THE PROTECTION OF CULTURAL AND NATURAL HERITAGE

Cultural rights of Minorities

Keeping in mind that one of the main relevant feature of Cultural Heritage is the role that it plays in the construction of individual or group identity, “at the level of the local community, region, or nation”, special attention needs to be given to Minorities.

The Article 27 of the ICCPR provides that “in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language ».

In situation of armed conflicts, violations of minorities rights are more likely to happen. In relation to Cultural Heritage and Minorities in time of conflicts, the destruction of places of worship and the trade of religious goods have severely infringed both Article 27 of the ICCPR and Article 18 of the UDHR.

For example in Iraq, even though Shia muslims represent the majority of the population, the bombing of the Al-Askari Mosque in 2006 was disastrous both for the community and for Cultural Heritage. Regarding the christian minority community, it has suffered numerous exactions from the Islamic state since 2014 and the destruction of their places of worship such as the destruction of St Elijah's Monastery, the Virgin Mary Church or more recently the Sa'a Qadima Church.

In the northern region of Nineveh, several minorities are cohabiting. Christians, Yazidis, Shabaks and Turkmen are taken in a conflict that prevent them to practice their customs.

Following structure

II. International cooperation for legal improvement

- the adoption of resolutions by the UN in implementation of the Hague Convention and 1970 UNESCO Convention
- recent and former european law for the protection of cultural heritage

III. French alternative ; an Asylum right for Cultural object in time of war ?