# Part 4: Cultural Heritage and International Law

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The earlier chapters in this book have provided much of the historical and social scientific foundation that undergirds the largely legal endeavors to protect cultural heritage since the nineteenth century. Both hard and soft legal measures figure in the six distinct perspectives found in Part 4’s chapters, which detail the main sources of public international law as they apply to the protection of cultural heritage and mass atrocities.

It begins with a comprehensive overview in Chapter 21, “Protecting Cultural Heritage: The Ties between People and Places.” Patty Gerstenblith, a distinguished professor at DePaul University’s College of Law, applies her analytical skills and policy experience in national and international capacities to the legal instruments that circumscribe this volume’s overall emphasis on the links between assaults on cultural heritage and mass atrocities (under the rubrics of genocide, crimes against humanity, and war crimes). Among her many insights is the crucial importance of moving from a preoccupation with cultural heritage as “objects” (or property owned by a specific entity) to their interpretation as a basic human right. Gerstenblith examines the relevance of the emerging norm of the responsibility to protect (R2P) for the protection of cultural heritage; from the perspective of legitimacy and feasibility, she evaluates military intervention, criminal responsibility, involvement of nonstate actors, and safeguarding heritage. One part of the three-pronged responsibility that originally framed R2P is the crucial importance of reconstruction, which is applicable to cultural heritage in particular, and post-conflict economies in general. To be successful, such efforts should reflect the necessity for cooperation and understanding from and genuine participation by local communities, a theme that reinforces the experience depicted in several of the cases examined earlier in this volume. In her view, the activities and projects of international organizations and outside donors can be problematic because almost invariably they are administered from the top down rather than the bottom up. She stresses the critical inputs from those who have experienced, and perhaps continue to experience, the effects of catastrophic heritage destruction. Indeed, she argues, attempts to address the aftermath of cultural heritage destruction must successfully juggle local, regional, national, and international perspectives. Gerstenblith concludes emphatically: “Only such a multifaceted approach is likely to succeed.”

The authors of Chapter 22, “International Humanitarian Law and the Protection of Cultural Heritage,” are Benjamin Charlier, senior legal advisor on international humanitarian law at the International Committee of the Red Cross, and Tural Mustafayev, associate program specialist for culture and emergencies at the UN Educational, Scientific and Cultural Organization (UNESCO). This team of policy analysts with strong legal training spells out the comprehensive nature of the codified provisions of international humanitarian law since the first sketches of the Lieber Code were drafted during the US Civil War. They note that deliberate destruction and collateral damage in recent armed conflicts have attracted increasing academic scrutiny as well as public attention. They caution against overlooking less well-known and less visible sites and monuments, such as local cemeteries and architecturally unexceptional places of worship. While not attracting the widespread media coverage that can trigger international attention and action, such heritage is crucial to the lives of ethnic, religious, and cultural groups worldwide; they too merit international concern. Charlier and Mustafayev are clear about the rationale: “there is an inherent link between the protection of cultural property during armed conflict and the protection of human beings, and this protection is a humanitarian imperative.” They also join others in stressing the need for more ratifications of existing treaties and for political pressure to foster their implementation. Like the other legal and nonlegal voices in this volume’s chorus, they counsel steering away from additional efforts to fine tune elements of the law because “a comprehensive framework exists under international law, both treaty and customary.” Charlier and Mustafayev conclude on a positive note in looking toward the future: “As a side effect of publicized intentional destruction of cultural sites and looting of artefacts in recent armed conflicts, public sensitivity to this issue is also arguably higher today than ever before. This creates in our view an unprecedented opportunity that should be capitalized on.”

The authors of Chapter 23, “International Human Rights Law and Cultural Heritage,” are two scholars with substantial practical experience: Marc-André Renold, professor of art and cultural heritage law and director at the University of Geneva’s Arts-Law Centre, and Alessandro Chechi, a senior researcher there. They explore the synergy between human rights law and the protection of cultural heritage—that is, how international human rights law has contributed to the growth of international cultural heritage law, and vice versa. The discourse of “cultural property” and “cultural heritage” is fluid and evolving. The semantics are less consequential than ongoing efforts to prevent the erasure of memory and history. The authors note that over time the law has become enriched by the actions of such international organizations as UNESCO, which has integrated human rights as essential elements of cultural heritage protection in its normative discussions and operational projects. The authors also argue that the application of international human rights law is at least as pertinent as international humanitarian law for the effective protection of cultural heritage. “Belligerents target such cultural heritage items not only to get rid of them; their real intent is to destroy the morale of the enemy, to annihilate the identity of the people for whom such a heritage is of special significance, and hence to undermine their (cultural) survival.” The authors also point out that much localized destruction does not necessarily occur in armed conflicts but rather in the mistreatment by central governments of local communities such as the Uyghurs and Yazidi. Renold and Chechi point to the possible traction for enhancing the effective protection of cultural heritage afforded by the international goal-setting and monitoring of the Sustainable Development Goals. The key is to make human rights a more integral part of the implementation of the UN’s 2030 Development Agenda because they were insufficiently spelled out and emphasized in this international agreement negotiated in 2015.

The previous two chapters discussed the “hard” features of international humanitarian and human rights law agreed to by state parties, whereas Chapter 24 continues with what are often referred to as the “soft” sources of international law. While they are not codified in black-and-white, these sources nonetheless affect the policies and actions of states. “Customs, General Principles, and the Intentional Destruction of Cultural Property” is the contribution by Francesco Francioni, one of the most authoritative commentators in this arena. He has worked for governments and international organizations and as a distinguished scholar (currently, professor emeritus at the European University Institute in Florence and professor of International Cultural Heritage Law at the LUISS University in Rome). Francioni argues that “in the past half century, international law on the protection of cultural heritage has undergone a spectacular development at the level of standard setting.” The cosmopolitan appreciation of and respect for the beliefs and practices of others provide the very foundations for customary international law as it applies to cultural heritage. Components of custom are often contested sources of law; however, they are not so in this case because so many experts agree about the nature of authoritative sources for this subject, and so many states have articulated their support for them and acted accordingly. As such, these voices provide ample evidence of the general obligations binding all sovereign members of the international community of states and acknowledged by them to prevent and avoid the destruction of cultural heritage. Francioni argues that the specific character of the customary norm or general principle of the obligation to avoid and prevent destruction of cultural heritage may imply that it preempts treaty law within some states’ legal systems. As such, he sees custom and general principles as helpful tools to combat the nationalism and intolerance that threaten the universality of both cultural heritage and public international law.

The biggest difference between domestic and international law, for cultural heritage or other topics, is recognized to be the virtually total lack of enforcement capacity and inadequate compliance mechanisms for the numerous provisions of even “hard” international law. Chapter 25, “Prosecuting Heritage Destruction,” is by Joseph Powderly, associate professor of public international law at Leiden University. He explores this gap and the fledgling but nonetheless consequential efforts to bridge it, as well as various experiments with international criminal justice mechanisms, most specifically through the relatively recent means of the International Criminal Court (ICC). While not yet a quarter-century old and with a single verdict related to the war crime of destroying cultural heritage, there still is evident and ample potential for its future application in the prosecution of cultural heritage as a potential crime against humanity as well as a recognized war crime. As for all public international law, precedents are essential considerations, and here Powderly states unequivocally: “The prohibition of the intentional, wanton destruction of tangible cultural heritage has an unimpeachable pedigree as one of the founding principles of the law of armed conflict.” His historical overview prior to the contemporary ICC deliberations in The Hague begins with nineteenth-century precedents of the Lieber Code—“Abraham Lincoln’s laudable, if admittedly naïve, attempt to limit the ravages of the American Civil War”—and the Hague Conventions. It continues with the League of Nations, the UN War Crimes Commission during and immediately after World War II, the postwar Nuremberg and Tokyo tribunals, and the International Criminal Tribunal for the former Yugoslavia. His essay provides the necessary context of international law’s evolution as we think about the future trajectory of improved accountability for cultural heritage destruction, or how best to punish some criminals as well as to deter would-be iconoclasts in our era, the cultural aggressors acting in tandem with perpetrators of mass atrocities. While the ICC is a “cause for optimism,” Powderly recognizes that “the future of accountability for heritage destruction must be before domestic courts” in order to attenuate this “stain on the very notion of humanity.”

The final essay in Part 4 is Chapter 26, “Fighting Terrorist Attacks against World Heritage and Cultural Heritage Governance.” The subject is explored by Sabine von Schorlemer, UNESCO chair in international relations and chair of international law, European Union law, and international relations at the Technical University Dresden. The link between the destruction of cultural heritage and the plague of international terrorism explains the UN Security Council’s growing interest and decisions. This relationship gathered momentum after the attacks on the United States of 9/11. The interest by many states in the topic of combatting terrorism reflects the vandalizing and looting of cultural heritage as a source of finance for nonstate actors. Ironically, despite decades of deliberations, neither the UN’s General Assembly nor Security Council has an agreed definition of the term—captured by the adage that “my terrorist is your freedom fighter.” In addition, the applicability of international law to nonstate actors is extremely limited. Nonetheless, concrete actions to combat the manifestations of terrorism and attacks on cultural heritage seem possible when the politics are right, when they form part of a security–cultural heritage nexus or a complex cross-sectoral problem to be addressed. As such, identifying the destruction of cultural heritage as a “threat to international peace and security” elevates the issue and provides the basis in the UN Charter for decisions by the world organization’s most powerful entity. The “securitization” of heritage destruction by the Security Council has the advantage of pushing important states to consider acting vigorously rather than remaining on the sidelines. Thus, there is the potential to transform the international legal tools created originally to protect cultural heritage from looting into instruments to combat terrorism more broadly. However, von Schorlemer also points to the downside, namely that the “terrorist” label provides governments with a blank check for repression of dissidents of all stripes. That said, she still finds room for optimism in the shift from a state- to a “people-centered” approach to preventing heritage destruction.