



Vrije Universiteit Brussel

FACULTEIT RECHT EN CRIMINOLOGIE

# International Legal Protection of Cultural Heritage: An Efficient Mechanism?

Thesis submitted to obtain the degree of Master of Laws by

**Liselotte Marnef**

2014-2015

Promotor: Prof. dr. E. Franckx







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**TABLE OF CONTENTS**

- ACKNOWLEDGMENTS ..... 5
- TABLE OF CONTENTS ..... 6
- INTRODUCTION..... 8
- 1. Defining cultural heritage in international law.....10
  - 1.1. A closer look at 'Cultural Heritage' .....11
  - 1.2. Cultural Property vs. Cultural Heritage .....12
  - 1.3. Tangible and Intangible Cultural Heritage .....16
  - 1.4. Destruction of tangible Cultural heritage in armed conflicts.....16
- 2. International Legal Protection Measures of Cultural Heritage in Armed Conflicts .....18
  - 2.1. Protection of Cultural Heritage in International Conventions: a *lex specialis* .....18
    - 2.1.1. 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.....20
      - 2.1.1.1. Preliminary Draft International Convention for the Protection of Historic Buildings and Works of Art in Times of War .....20
      - 2.1.1.2. The road towards the 1954 Convention.....22
      - 2.1.1.3. The 1954 Hague Convention.....24
        - 2.1.1.3.1. Scope of Application of the Convention.....24
        - 2.1.1.3.2. Protection of cultural property .....25
          - 2.1.1.3.2.1. General Protection of cultural property .....25
          - 2.1.1.3.2.2. Special protection of cultural property.....30
          - 2.1.1.3.2.3. Sanctions in the 1954 Hague Convention .....32
    - 2.1.2. The 1954 First Protocol to the 1954 Hague Convention .....33
    - 2.1.3. 1972 Convention for the Protection of the World Cultural and Natural Heritage.....34
      - 2.1.3.1. Scope of Application of the WHC .....35
      - 2.1.3.2. Protection of Cultural Heritage in the WHC .....36
        - 2.1.3.2.1. General Protection of 'Cultural Heritage' in the WHC.....36
        - 2.1.3.2.2. Special Protection of 'Cultural Heritage' in the WHC .....38
        - 2.1.3.2.3. Sanctions in the WHC.....40
    - 2.1.4. The 1999 Second Protocol to the 1954 Hague Convention .....41
      - 2.1.4.1. Innovations of the 1999 Second Protocol .....42
    - 2.1.5. Comparison between the 1972 Convention for the Protection of the World Cultural Heritage and the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.....45
      - 2.1.5.1. Commonalities.....45
      - 2.1.5.2. Differences.....45

3.	Supranational judicial decisions .....	46
3.1.	Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) .....	47
3.1.1.	Violation of the Territorial Sovereignty and Territorial Integrity of Cambodia. .....	48
3.1.2.	The ICJ Judgment of 11 November 2013 .....	51
3.2.	Case of the ICTY, Prosecutor v. Pavle Strugar (31 January 2005) .....	53
4.	State Practice: The Case of The Bamiyan Buddhas (2001) .....	57
4.1.	The destruction of the Bamiyan Buddhas as an Internationally Wrongful Act....	59
4.1.1.	Attribution of the Conduct .....	59
4.1.2.	Breach of an International Obligation .....	60
	CONCLUSION .....	62
	BIBLIOGRAPHY .....	66
I.	Multilateral Treaties .....	66
i.	Preparatory Works .....	67
II.	National Legislation .....	67
III.	United Nations Documents .....	67
i.	General Assembly .....	67
ii.	Security Council .....	67
iii.	International Law Commission .....	68
iv.	Other UN Documents .....	68
IV.	Judicial Decisions .....	69
i.	Permanent Court of International Justice .....	69
ii.	International Court of Justice .....	69
iii.	International Criminal Tribunal for the former Yugoslavia .....	70
iv.	Permanent Court of Arbitration .....	70
V.	Writings of Learned Authors .....	70
i.	Treatises and other Books .....	70
ii.	Chapters in Books .....	72
iii.	Articles and Essays .....	73
VI.	Miscellaneous .....	74
VII.	Internet References .....	75
	ANNEX - Figures .....	79

## INTRODUCTION

*"The destruction of funerary busts of Palmyra in a public square, in front of crowds and children asked to witness the looting of their heritage is especially perverse. These busts embody the values of human empathy, intelligence and honor the dead. They also represent a wealth of information on costumes, jewelry, traditions and history of the Syrian people. Their destruction is a new attempt to break the bonds between people and their history, to deprive them of their cultural roots in order to better enslave them."*<sup>1</sup>

This quote of Director-General of UNESCO, Ms. Irina Bokova, condemns the destruction of cultural heritage on the World Heritage Site of Palmyra, Syria at the beginning of July 2015. It refers to the wealth of the cultural heritage for humanity on the one hand, and the brutality of the extremist groups that destroyed this heritage ignorantly on the other hand.

Due to the appearance of several other recent cases in media, one might get the impression that destruction of cultural heritage in armed conflicts, whether deliberately or not, only recently arose and that there are no legal measures to protect the cultural heritage.

In this study we would like to get a clear view on the protection of cultural heritage in international law, in situations of armed conflict. Under 'protection' we understand ordinarily: *"to make sure that somebody/something is not harmed, injured, damaged, etc."*<sup>2</sup> When talking about the effectiveness of the protection system, we mean that the purpose of the protection of the cultural heritage is successful and thus, this heritage has stayed unharmed and intact.

When analyzing the phenomenon of 'destruction of cultural heritage', we have to clarify what is meant by the notion 'destruction'. The ordinary meaning is *"the act of destroying something; the process of being destroyed."*<sup>3</sup> *The Dictionary of the International Law of Armed Conflict* defined 'destruction' as follows: *"demolishing manufactured products, installations and materials, or interrupting them or putting them out of order, for offensive or defensive purposes in the course of military operations."*<sup>4</sup> Although also pillage and illicit traffic of cultural heritage are forms of destruction of cultural heritage, this research will not focus on the latter types of destruction.

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<sup>1</sup> UNESCO, "Irina Bokova condemns latest destruction of cultural property from the site of Palmyra in Syria", 3 July 2015, [www.unesco.org/new/en/media-services/single-view/news/irina\\_bokova\\_condemns\\_latest\\_destruction\\_of\\_cultural\\_property\\_from\\_the\\_site\\_of\\_palmyra\\_in\\_syria/#.VcN2V\\_ntmko](http://www.unesco.org/new/en/media-services/single-view/news/irina_bokova_condemns_latest_destruction_of_cultural_property_from_the_site_of_palmyra_in_syria/#.VcN2V_ntmko) (accessed on 28 July 2015).

<sup>2</sup> OXFORD DICTIONARIES, [www.oxforddictionaries.com/definition/learner/protect](http://www.oxforddictionaries.com/definition/learner/protect) (accessed 18 July 2015).

<sup>3</sup> OXFORD DICTIONARIES, [www.oxforddictionaries.com/definition/learner/protect](http://www.oxforddictionaries.com/definition/learner/protect) (accessed 18 July 2015).

<sup>4</sup> P. VERRI, *Dictionary of the International Law of Armed Conflict*, Geneva, International Committee of the Red Cross, 1992, 40-41.



In order to get a clear view on the international legal protection of cultural heritage in international law we will ask ourselves the following questions in the present research paper:

**Is there an effective mechanism in International Law protecting the world's cultural heritage in situations of armed conflict?**

In order to formulate an answer to this question we will elaborate on the following sub-questions:

- \* What can be understood as cultural heritage worthy of protection in International Law?
- \* How is cultural heritage protected by the following internationally agreed conventions: the 1954 Hague Convention and the 1972 World Heritage Convention?
- \* What is the legal basis on which the destruction of cultural heritage is prosecuted by supra-national courts?

## 1. Defining cultural heritage in international law

In each of the UNESCO Conventions<sup>5</sup> on cultural heritage we read the phrase "*for the purpose of this convention*" preceding the definition of cultural heritage. Every Convention thus contains its own specific definition of cultural heritage, taking into account the relevant issues of cultural heritage at the time the conventions were concluded into account and reflecting the economic, social and political context of that time.<sup>6</sup> The first UNESCO Convention on cultural 'property' [emphasis added] was concluded in 1954 in the Hague<sup>7</sup>, the last one (so far) in 2003 on the safeguarding of intangible cultural heritage.<sup>8</sup>

Scholars have not put forward a unequivocal description of what can be understood as cultural heritage either.<sup>9</sup> Therefore we can conclude that there is no single, firmly aligned definition of 'cultural heritage'.<sup>10</sup> In order to get an overview, the Working Group 'Heritage and Society' of the International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM)<sup>11</sup> collected all different definitions of cultural heritage in an in-depth study.<sup>12</sup>

The lack of a clear and unequivocal definition of cultural heritage in international law could be a hindering factor in the effective protection of cultural heritage and the fight

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<sup>5</sup> As decided in Article IV(b)(4) of the Constitution of the United Nations Educational, Scientific and Cultural Organization (London, 16 November 1945, 4 UNTS 275) on Conventions: "*The General Conference shall, in adopting proposals for submission to the Member States, distinguish between recommendations and international conventions submitted for their approval. In the former case a majority vote shall suffice; in the latter case a two-thirds majority shall be required. Each of the Member States shall submit recommendations or conventions to its competent authorities within a period of one year from the close of the session of the General Conference at which they were adopted.*"

<sup>6</sup> See for example Article 1 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 14 May 1954, 249 UNTS 240) and Article 1 of the Convention Concerning the Protection of the World Cultural and Natural Heritage (Paris, 16 November 1972, 1037 UNTS 151); C. FORREST, *International Law and the Protection of Cultural Heritage*, London, Routledge, 2010, 20, 29 [Hereinafter: 'C. FORREST']; R. O'KEEFE, *Protection of Cultural Property in Armed Conflict*, Cambridge, University Press, 2006, 102 [Hereinafter: R. O'KEEFE, 2006].

<sup>7</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954, 249 UNTS 240.

<sup>8</sup> Convention for Safeguarding of Intangible Cultural Heritage, Paris, 17 October 2003, 2368 UNTS 1.

<sup>9</sup> According to Prott and O'Keefe, cultural heritage should be understood as '*manifestations of human life which represent a particular view of life and witness the history and validity of that view*' (in: L.V. PROTT and P. O'KEEFE, 'Cultural Heritage or Cultural Property', *International Journal of Cultural Property*, 1992, vol. 1, 30.); According to Koboldt, cultural heritage is '*an expression or representation of the cultural identity of a society in a particular period*' (C. KOBOLDT, "Optimising the Use of Cultural Heritage" in M. HUTTER and I. RIZZO (eds.), *Economic Perspectives on Cultural Heritage*, Basingstoke, MacMillan Press, 1997, 68.); As far as Loubanski is concerned, cultural heritage is about '*culture and landscape that are cared for by the community and passed on to the future to serve people's need for a sense of identity and belonging*' (T. LOUBANSKI, "Revising the Concept of Cultural Heritage: The Argument for a Functional Approach", *International Journal of Cultural Property*, 2006, vol. 13, 209.)

<sup>10</sup> C. FORREST, 29.

<sup>11</sup> ICCROM is an intergovernmental organization dedicated to the conservation of cultural heritage. Its members are individual states which have declared their adhesion to it. It exists to serve the international community as represented by its Member States, which currently number 134. It is the only institution of its kind with a worldwide mandate to promote the conservation of all types of cultural heritage, both movable and immovable. <http://www.iccrom.org/about/what-is-iccrom/> (accessed on 23 July 2015)

<sup>12</sup> ICCROM, "Definition of Cultural Heritage", 15 January 2005, [http://cif.icomos.org/pdf\\_docs/Documents%20on%20line/Heritage%20definitions.pdf](http://cif.icomos.org/pdf_docs/Documents%20on%20line/Heritage%20definitions.pdf).

against its destruction<sup>13</sup>, since there is no textual international agreement on the matter. An advantage of this amoeba-like concept is, as referred to above, that each of the conventions developed its own definition of cultural heritage with regard to the specific purpose of the convention.

### 1.1. A closer look at 'Cultural Heritage'

Both the notion 'culture' and 'heritage' are discussed in literature.<sup>14</sup> According to Blake, 'culture' applies to every aspect of contemporary society.<sup>15</sup> Hutter puts it stronger by stating that in a way "*culture is society*".<sup>16</sup> When we look at the ordinary meaning<sup>17</sup> of the concept, 'culture' is interpreted as follows: "*the customs and beliefs, art, way of life and social organization of a particular country or group*".<sup>18</sup> 'Heritage' on the other hand, is called in literature "*an elastic term that attaches easily to anything considered cultural*".<sup>19</sup> The ordinary meaning of 'heritage' is: "*the history, traditions and qualities that a country or society has had for many years and that are considered an important part of its character*".<sup>20</sup> Put together as 'cultural heritage', these concepts became the object of several international conventions.

The phrase "*cultural heritage*" for the first time appeared in the World Heritage Convention (1972)<sup>21</sup> (see below). This Convention deals with the protection of cultural heritage, but also with the conservation of natural heritage.<sup>22</sup> The idea to create a convention for the preservation of both cultural and natural sites originated in the United States of America, where in 1965 a White House Conference launched the idea of a 'World Heritage Trust' to stimulate international cooperation in the protection of 'the world's superb natural and scenic areas and historic sites for the present and the future of the entire world citizenry'.<sup>23</sup> A couple of years later, in 1972 these ideas made it to the

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<sup>13</sup> C. EHLERT, *Prosecuting the Destruction of Cultural Property in International Criminal Law*, Leiden, Martinus Nijhoff Publishers, 2014, 101-103 [Hereinafter: 'C. EHLERT'.]

<sup>14</sup> C. FORREST, 1-3.

<sup>15</sup> J. BLAKE, *Commentary on the UNESCO 2003 Convention on the Safeguarding of the Intangible Cultural Heritage*, Leicester, Institute of Art and Law, 2006, 22.

<sup>16</sup> M. HUTTER, "Economic Perspectives on Cultural Heritage: An Introduction", in M. HUTTER and I. RIZZO (eds.), *Economic Perspectives on Cultural Heritage*, Basingstoke, MacMillan Press, 1997, 3.

<sup>17</sup> Article 31(1) Vienna Convention on the Law of Treaties, Vienna, 22 May 1969, 1155 UNTS 331.

<sup>18</sup> OXFORD DICTIONARIES, <http://www.oxforddictionaries.com/definition/learner/culture> (accessed 19 July 2015).

<sup>19</sup> M. HUTTER, "Economic Perspectives on Cultural Heritage: An Introduction", in M. HUTTER and I. RIZZO (eds.), *Economic Perspectives on Cultural Heritage*, Basingstoke, MacMillan Press, 1997, 3.

<sup>20</sup> OXFORD DICTIONARIES, <http://www.oxforddictionaries.com/definition/learner/culture> (accessed 19 July 2015).

<sup>21</sup> C. FORREST, 25.

<sup>22</sup> Convention Concerning the Protection of the World cultural and Natural Heritage, Paris, 16 November 1972, 1037 UNTS 151.

<sup>23</sup> UNESCO WORLD HERITAGE CENTRE, "Linking the protection of cultural and natural heritage", s.d., <http://whc.unesco.org/en/convention/> (accessed 20 July 2015).

United Nations Conference on Human Environment in Stockholm and all parties agreed to the text of the 'World Heritage Convention'.<sup>24</sup>

## 1.2. Cultural Property vs. Cultural Heritage

In literature, some authors choose 'cultural property' while others prefer the notion 'cultural heritage' and often they both have no intention to mean anything different by their choice of terminology. For the completeness of this chapter, some clarification regarding both concepts is necessary.

The first UNESCO Convention on the matter was concluded in 1954 and titled *Convention for the Protection of Cultural Property in the Event of Armed Conflict* [hereinafter: 1954 Hague Convention].<sup>25</sup> This Convention originated in the context of the world after the Second World War, in which a lot of art and cultural objects, especially Jewish property were confiscated by the Nazis and many historical buildings were destroyed.<sup>26</sup> The first proposition of the preamble specifically refers to this context by stating: *"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."*<sup>27</sup> We cannot fail to notice that with recent destruction of cultural objects and historical monuments in the Middle-East in mind, regretfully this provision is currently very relevant.<sup>28</sup>

The Constitution of UNESCO was signed in 1945, not long before the 1954 Hague Convention.<sup>29</sup> One of the purposes of UNESCO is to *"maintain, increase and diffuse knowledge: By assuring the conservation and protection of the world's inheritance of books, works of art and monuments of history and science, and recommending to the nations concerned the necessary international conventions."* This constitution does not mention 'cultural property' nor does the notion 'cultural heritage' appear. The 1954 Hague Convention was the first internationally agreed convention to turn this UNESCO purpose, namely the protection of the world's cultural 'property', into the object of a separate convention.

Article 1 of the 1954 Hague Convention puts forward its own definition of cultural property:

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<sup>24</sup> UNESCO WORLD HERITAGE CENTRE, "Linking the protection of cultural and natural heritage", s.d., <http://whc.unesco.org/en/convention/> (accessed 20 July 2015).

<sup>25</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954, 249 *UNTS* 240 [Hereinafter: '1954 Hague Convention'.]

<sup>26</sup> C. FORREST, 20-21.

<sup>27</sup> 1954 Hague Convention.

<sup>28</sup> See for example on the conflicts in Yemen: UNESCO, "Emergency Action Plan for the Safeguarding of Yemen's Cultural Heritage announced", 16 July 2015, <http://en.unesco.org/news/emergency-action-plan-safeguarding-yemen-s-cultural-heritage-announced> (accessed 23 July 2015).

<sup>29</sup> Constitution of the United Nations Educational, Scientific and Cultural Organization, London, 16 November 1945, 4 *UNTS* 275.

*"For the purposes of the present Convention, the term 'cultural property' shall cover, irrespective of origin or ownership:*

*(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;*

*(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);*

*(c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as 'centers containing monuments'."*

As shown in the first line of this definition, the concept 'property' is connected with ownership. Some authors suggest that because of the greater public value attributed to this cultural property, the rights of the owner of this cultural property could be restricted in terms of import and export controls and protection of this property against destruction.<sup>30</sup> Furthermore, in contrast with 'cultural heritage', a commercial value is attached to the term 'cultural property', which is perceived as not being conducive to its protection.<sup>31</sup> For these reasons, the term 'cultural heritage' meanwhile largely replaced 'cultural property' in the Conventions<sup>32</sup> and literature, although until today authors often mix both notions. Another author even prefers to drop both concepts and uses 'cultural resources' instead.<sup>33</sup> Nevertheless, the latter suggestion stands on its own and cannot be found in any international convention.

A later UNESCO Convention (1970) on the *Means of Prohibition and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*<sup>34</sup> also put an emphasis on the aspect of ownership connected with 'cultural property'. This Convention is the only other UNESCO Convention, next to the 1954 Convention that deals with 'cultural

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<sup>30</sup> C. FORREST, 24.

<sup>31</sup> C. FORREST, 24.

<sup>32</sup> For example the Convention on the Protection of the Underwater Cultural Heritage (Paris, 2 November 2001, 41 *ILM* 40) drops the notion 'property' completely.

<sup>33</sup> J. KILA, "Lecture on the Protection of Cultural Heritage on the battlefield", at INTERMINISTERIAL COMMISSION FOR HUMANITARIAN LAW, *International Symposium on the Implementation of the Second Protocol of 1999 to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, Brussels (Belgium), Egmont Palace, 12-13 December 2013.

<sup>34</sup> Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Paris, 14 November 1970, 823 *UNTS* 231.

property'. When discussing the protection of cultural property in armed conflict, authors often avoid discussing the 1970 Convention.<sup>35</sup> This ruleset specifically deals with the question of theft and illicit trafficking of cultural property. According to O'Keefe it is a *"vast topic in its own right implicating, in many instances, both private and public international law, fields outside the author's expertise."*<sup>36</sup> For the same reason we will not discuss this Convention any further in the following chapters.

It might seem striking that subparagraph (a) of Article 1 of the 1954 Hague Convention refers to *"property of great importance to the cultural heritage of every people."*<sup>37</sup> According to Green, this signifies that not every cultural object or part of the national heritage is granted the protection of this convention. Only the cultural property of great importance to the whole international community will receive protection.<sup>38</sup>

O'Keefe on the other hand reads this notion in combination with the preamble of the Convention in which was declared *"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."*<sup>39</sup> He suggests that in case cultural property of a nation in the sense of Article 1 of the 1954 Hague Convention is damaged, it has to be seen as damage to the world's heritage.<sup>40</sup> A former president of the International Court of Justice, Nagendra Singh, put forward this same interpretation and referred to this Convention while saying that *"cultural objects and properties which make up [one state's] national heritage [are], consequently, the world's heritage."*<sup>41</sup> Also Judge Weeramantry in his dissenting opinion to the Advisory Opinion of the ICJ in the *Legality of the Threat or Use of Nuclear Weapons* case, referred to the world's cultural heritage which is protected by the 1954 Hague Convention when stating that *"a nuclear attack on a city such as Cologne would thus deprive Germany, in particular, and the world community in general, of a considerable segment of their cultural inheritance, for a single bomb would easily dispose of all 9000 monuments, leaving none standing."*<sup>42</sup>

The latter opinion leaves us with the idea that when cultural heritage is qualified by the State as its national cultural property, this cultural property is considered world cultural property and protected by the 1954 Hague Convention.

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<sup>35</sup> C. EHLERT, 2.; R. O'KEEFE, 2006, 3.

<sup>36</sup> R. O'KEEFE, 2006, 3.

<sup>37</sup> Article 1, 1954 Hague Convention.

<sup>38</sup> L. GREEN, *The Contemporary law of armed conflict*, Manchester, Manchester University Press, 2008, 179.

<sup>39</sup> Preamble, 1954 Hague Convention.

<sup>40</sup> R. O'KEEFE, 2006, 104.

<sup>41</sup> Former President of the ICJ, Nagendra SINGH at the celebration of the 13th anniversary of the Hague Convention (SINGH, N., "Speech at the celebration of the 13th anniversary of the Hague Convention", *ICJ Reports* 1984, 14-15.)

<sup>42</sup> ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports* 1996, 226.

Turning to the notion 'cultural heritage', as we mentioned above, this notion appeared next to cultural property in article 1 of the 1954 Hague Convention in order to define cultural property. The first convention that left aside the terminology of cultural property and instead focused on the notion 'cultural heritage' was the World Heritage Convention in 1972 [hereinafter referred to as 'WHC'].<sup>43</sup> With this particular choice of words, the drafters moved away from the concept of cultural heritage as (private) property, to which other private rights and the economic character are attached (see above). Instead they recognized the collective and public character of cultural heritage.<sup>44</sup>

The definition of cultural heritage as defined in the World Heritage Convention reads as follows:

*"For the purposes of this Convention, the following shall be considered as 'cultural heritage':*

*monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;*

*groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;*

*sites: works of man or the combined works of nature and of man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view."*

By displaying both definitions, on the one hand the definition of cultural property as established in the 1954 Hague Convention, and on the other hand the definition of cultural heritage as put forward in the 1970 Convention, we do not have the intention to compare both notions extensively. This would lead us into a lexicological discussion which we want to avoid. The reason why we wanted to briefly shed light on these two concepts, is that they are both adopted in the language of the UNESCO Conventions and the relevant literature. Although both conventions clearly put forward their own emphasis, it is nevertheless clear that both definitions share a large part of their terminology. For that

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<sup>43</sup> Convention Concerning the Protection of the World cultural and Natural Heritage, Paris, 16 November 1972, 1037 UNTS 151 [Hereinafter: '1972 World Heritage Convention'].

<sup>44</sup> C. FORREST, 25.

reason we will use cultural heritage and cultural property in the following chapters as synonyms.

### **1.3. Tangible and Intangible Cultural Heritage**

For the sake of completeness, we have to separate tangible from intangible cultural heritage. Examples of the latter are oral history and literature, music, dance, agriculture and manufacturing skills, rituals and use of symbols, traditional medicine, culinary traditions and traditional sports and games.<sup>45</sup> Although this distinction is clearly established in the UNESCO Conventions and the literature, according to Forrest, it is in many ways a useless distinction since a lot of the heritage qualified as 'tangible' in the conventions, relies on an intangible element that gives the tangible heritage its cultural context.<sup>46</sup> Because of its specific character and *ditto* conventions, intangible heritage will not be addressed in the present research paper.<sup>47</sup> The focus of this research paper lies on the destruction of tangible heritage in the situation of armed conflict, therefore we will only address this type of heritage.

### **1.4. Destruction of tangible Cultural heritage in armed conflicts**

The International Conference held at UNESCO Headquarters in December 2014, called for an in-depth analysis of 'cultural cleansing' as a process, in connection with the protection of human rights and the prevention of genocide.<sup>48</sup> Referring to cases such as Aleppo<sup>49</sup> and Apamea<sup>50</sup>, Ms. Irina Bokova, Director-General of UNESCO, illustrated how heritage currently is targeted and destroyed as part of a violent and well thought out cultural cleansing strategy.<sup>51</sup>

The contemporary examples of Aleppo, Apamea and even more recently Palmyra put on display, including in mainstream media<sup>52</sup>, how cultural heritage falls prey to destruction

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<sup>45</sup> C. FORREST, 362-387.

<sup>46</sup> C. FORREST, 28.

<sup>47</sup> For more on intangible cultural heritage see: Convention for Safeguarding of Intangible Cultural Heritage, Paris, 17 October 2003, 2368 UNTS 1.; J. BLAKE, *Commentary on the UNESCO 2003 Convention on the Safeguarding of the Intangible Cultural Heritage*, Leicester, Institute of Art and Law, 2006, 180 p.

<sup>48</sup> UNESCO, Report of the International Conference: Heritage and Cultural Diversity at Risk in Iraq and Syria, Paris, UNESCO, 3 December 2014, 4, [www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/CLT/pdf/IraqSyriaReport-en.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/CLT/pdf/IraqSyriaReport-en.pdf).

<sup>49</sup> UNESCO WORLD HERITAGE CENTRE, "UNESCO Director-General deplors continuing destruction of ancient Aleppo, a World Heritage site", 23 April 2013, <http://whc.unesco.org/en/news/1002/> (accessed 23 July 2015).

<sup>50</sup> On Syrian heritage: UNESCO, "Safeguarding Syrian Cultural Heritage", [www.unesco.org/new/en/culture/themes/illicit-traffic-of-cultural-property/emergency-actions/syria/](http://www.unesco.org/new/en/culture/themes/illicit-traffic-of-cultural-property/emergency-actions/syria/) (accessed 23 July 2015).

<sup>51</sup> Due to lack of time and space, our study will not give an in-depth analysis of 'cultural cleansing'.; UNESCO, Report of the International Conference: Heritage and Cultural Diversity at Risk in Iraq and Syria, Paris, UNESCO, 3 December 2014, 5, [www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/CLT/pdf/IraqSyriaReport-en.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/CLT/pdf/IraqSyriaReport-en.pdf).

<sup>52</sup> D. DARKE, "How Syria's ancient treasures are being smashed", *BBC News* 10 July 2015, [www.bbc.com/news/magazine-28191181](http://www.bbc.com/news/magazine-28191181) (accessed 23 July 2015); L. PORTER, "Syria war: drone footage shows destruction of Aleppo's heritage sites", 13 March 2015, [www.telegraph.co.uk/travel/destinations/middleeast/syria/11468349/Syria-war-Aleppos-heritage-sites-destroyed.html](http://www.telegraph.co.uk/travel/destinations/middleeast/syria/11468349/Syria-war-Aleppos-heritage-sites-destroyed.html) (accessed 23 July 2015); K. SHAHEEN, "Isis destroys Palmyra shrines in Syria", 23 June 2015; [www.theguardian.com/world/2015/jun/23/isis-destroys-palmyra-shrines-in-syria](http://www.theguardian.com/world/2015/jun/23/isis-destroys-palmyra-shrines-in-syria) (accessed 23 July 2015); K. SHAHEEN, "Palmyra: historic Syrian city falls under control of Isis", 21 May 2015,



in situations of armed conflict. On the one hand, cultural heritage is demolished due to collateral damage of a military target.<sup>53</sup> On the other hand, it becomes a target of iconoclasm itself.<sup>54</sup> Regarding the latter, UNESCO Director-General put forward that "*if culture is targeted in times of war it is because culture carries the values and identities of people. If culture is attacked it is to weaken the social fabric of societies and communities, once it is destroyed, collective identity disappears*".<sup>55</sup>

The spotlight that has been put on the recent cases of deliberate destruction of cultural heritage in armed conflicts in for example Iraq, Syria, Egypt and Yemen, followed by the necessary emergency actions by UNESCO<sup>56</sup>, might give the impression that this phenomenon arose only recently. The opposite is true: intentional destruction of cultural heritage already existed in the earliest days of mankind. For example in 391 A.D. the Temple of Serapis in Alexandria was deliberately destroyed by the Roman Emperor Theodosius, in order to obliterate what was left of the non-Christians.<sup>57</sup> The burning of the University Library of Leuven in 1914 by the German troops can be seen as another, more close-to-home example.<sup>58</sup> Another more recent example is the destruction in 1992 of Sarajevo's Vijećnica, the city hall in which millions of rare books, manuscripts, maps and other Bosnian items were stored.<sup>59</sup>

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[www.theguardian.com/world/2015/may/20/syrian-city-of-palmyra-falls-under-control-of-isis](http://www.theguardian.com/world/2015/may/20/syrian-city-of-palmyra-falls-under-control-of-isis) (accessed 23 July 2015.)

<sup>53</sup> P.G. STONE and J. FARCHAKH BAJJALY (eds.), *The Destruction of Cultural Heritage in Iraq*, Woodbridge, Boydell Press, 2008, 7.

<sup>54</sup> On Iconoclasm see: F. FRANCONI and F. LENZERINI, "The Obligation to Prevent and Avoid Destruction of Cultural Heritage: From Bamiyan to Irak", B.T. HOFFMAN (ed.), *Art and Cultural Heritage: Law, Policy, and Practice*, Cambridge, University Press, 2006, 28; F. FRANCONI and F. LENZERINI, "The Destruction of the Buddhas of Bamiyan and International Law", *EJIL* 2003, 619-620; J. KILA and M. BALCELLS, *Cultural Property Crime*, Leiden, Brill, 2015, 170 etc.

<sup>55</sup> UNESCO, "Irina Bokova: Culture and heritage are powerful tools for dialogue and social cohesion", 16 April 2014, [www.unesco.org/new/en/media-services/single-view/news/irina\\_bokova\\_culture\\_and\\_heritage\\_are\\_powerful\\_tools\\_for\\_dialogue\\_and\\_social\\_cohesion](http://www.unesco.org/new/en/media-services/single-view/news/irina_bokova_culture_and_heritage_are_powerful_tools_for_dialogue_and_social_cohesion) (accessed 9 July 2015).

<sup>56</sup> For example the most recent emergency action in Yemen: UNESCO, "Emergency Action Plan for the Safeguarding of Yemen's Cultural Heritage announced", 16 July 2015, <http://en.unesco.org/news/emergency-action-plan-safeguarding-yemen-s-cultural-heritage-announced> (accessed 23 July 2015)

<sup>57</sup> F. FRANCONI and F. LENZERINI, "The Obligation to Prevent and Avoid Destruction of Cultural Heritage: From Bamiyan to Irak", B.T. HOFFMAN (ed.), *Art and Cultural Heritage: Law, Policy, and Practice*, Cambridge, University Press, 2006, 28 [Hereinafter: 'F. FRANCONI and F. LENZERINI, 2006'.]

<sup>58</sup> R. O'KEEFE, 2006, 39; B. SCHULZ, "The History of cultural destruction as a propaganda tool", *The Art Newspaper* 2005, No. 266, <http://old.theartnewspaper.com/articles/Lost-libraries-and-broken-Buddhas-war-iconoclasm-and-social-media/37165> (accessed 10 July 2015); W. STEVENS, "Cultureel erfgoed en militaire uitzondering", *unpublished article* March 2014, 2.

<sup>59</sup> F. FRANCONI and F. LENZERINI, 2006, 28.; D.-L. FRIEZE, "The Destruction of Sarajevo's Vijećnica. A case of genocidal cultural destruction?", in A. JONES (ed.), *New Directions in Genocide research*, New York, Routledge, 2012, 58.

## 2. International Legal Protection Measures of Cultural Heritage in Armed Conflicts

### 2.1. Protection of Cultural Heritage in International Conventions: a *lex specialis*

This chapter explores the protection of cultural heritage in armed conflict situations through the relevant international legal conventions. One question we can ask is how cultural heritage is protected by the internationally agreed conventions. In doing so, we emphasize the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict<sup>60</sup> and the 1972 Convention for the Protection of the World Cultural and Natural Heritage.<sup>61</sup> With these two conventions we selected the two most relevant International Conventions concerning the protection of cultural heritage in armed conflicts. It is not our purpose to give an exhaustive and historical overview of how these conventions came into being in this chapter, as several authors already have done.<sup>62</sup> However it is inevitable to touch briefly on the context of these conventions.

Both cultural heritage conventions were concluded after World War II, in the second half of 20<sup>th</sup> century, and were created with the assistance of UNESCO. With respect to the same period, the ILC noticed and described the following phenomenon: '*the splitting up of the law into highly specialized "boxes" [emphasis originally provided] that claim relative autonomy from each other and from the general law*', they called this process the 'fragmentation' of the law.<sup>63</sup> Because of the creation of some specialized conventions concerning cultural heritage, we cannot fail to notice the contribution of the cultural heritage regime to this process of fragmentation of international law. In the present chapter we focus on the specialized character that can be attributed to the cultural heritage regime, in comparison with general public international law.<sup>64</sup> For that reason the title of this chapter suggests we can call this regime a *lex specialis*.

Two corollaries of the fragmentation of international law are relevant for the case of the cultural heritage legal protection system. Firstly, a greater autonomy comes forth from this special legal regime. Although this does not mean that the general principles of

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<sup>60</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954, 249 *UNTS* 240.

<sup>61</sup> Convention Concerning the Protection of the World cultural and Natural Heritage, Paris, 16 November 1972, 1037 *UNTS* 151.

<sup>62</sup> See for an exhaustive historical overview: C. EHLERT, *Prosecuting the Destruction of Cultural Property in International Criminal Law*, Leiden, Martinus Nijhoff Publishers, 2014, 252 p.; R. O'KEEFE, *The Protection of Cultural Property in Armed Conflict*, Cambridge, University Press, 2006., 404 p.

<sup>63</sup> M. KOSKENNIEMI, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission", *UN Doc.A/CN.4/L.682* 13 April 2006, Para.13, [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf). [Hereinafter: 'M. KOSKENNIEMI'.]

<sup>64</sup> M. KOSKENNIEMI, Para. 13.

international law are disregarded.<sup>65</sup> On the contrary, we consider general public international law as the default *lex generalis*-regime. Secondly, as a consequence of the fragmentation many specialized regimes established their own dispute settlement mechanisms. However, no specialized dispute settlement was set up to enforce the cultural heritage legal protection system.<sup>66</sup> Conflicts regarding cultural heritage are therefore currently dealt with in several peaceful dispute settlement mechanisms: for example diplomatic negotiation, mediation, arbitration and litigation before domestic courts or supra-national tribunals.<sup>67</sup> The variety of dispute settlement methods might lead to different solutions and conflicting judgments. Mainly the latter might cause trouble because of the application of different rules for the resolution of the same legal problems, the different interpretations of the rules and the inconsistent development of cultural heritage law and its enforcement mechanism.<sup>68</sup>

Instead of penal measures, most of the conventions concerning cultural heritage have a system to prevent offences regarding cultural heritage matters.<sup>69</sup> This is for example the case for the 1972 World Heritage Convention. The 1954 Hague Convention on the other hand contains penal measures (see below). The idea of prevention of conflicts with regard to cultural heritage is similar to the idea of Lauterpacht which stated that the "*first rule of international litigation is to avoid it if at all possible. International litigation should be turned to as a last resort.*"<sup>70</sup>

Furthermore, the proliferation of specialized international courts and tribunals did not lead to one structured international order with a centralized authority, as an equivalent to domestic court systems.<sup>71</sup> Judges came to the same conclusion in the ICTY *Tadić* case, which said that: "*International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labor among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided).*"<sup>72</sup>

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<sup>65</sup> A. CHECHI, "Dispute Settlement in the Cultural Heritage Realm", in A. CHECHI, *The Settlement of International Cultural Heritage Disputes*, Oxford, University Press, 2014, 2 [Hereinafter: 'A. CHECHI, in A. CHECHI'.]

<sup>66</sup> A. CHECHI, in A. CHECHI, 2.

<sup>67</sup> A. CHECHI, in A. CHECHI, 4.

<sup>68</sup> A. CHECHI, in A. CHECHI, 4.

<sup>69</sup> Although the Second Protocol to the 1954 Hague Convention does provide penal sanctions for serious violations of this Protocol; C. FORREST, 403.

<sup>70</sup> E. LAUTERPACHT, "Principles of Procedure in International Litigation", *RCADI* 2009, Vol. 345, 485.

<sup>71</sup> A. CHECHI, in A. CHECHI, 2-3.

<sup>72</sup> ICTY, *Prosecutor v. Tadić*, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-I (2 October 1995), para. 11.

### **2.1.1. 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict**

#### **2.1.1.1. Preliminary Draft International Convention for the Protection of Historic Buildings and Works of Art in Times of War**

The idea to draft a comprehensive convention concerning the protection of cultural property existed already a lot earlier than 1954. The destruction of many irreplaceable works of art during the Spanish Civil War (1936-1939) brought the matter up and placed it on the agenda of the League of Nations.<sup>73</sup> In October 1936 it resulted in a *Preliminary Draft International Convention for the Protection of Historic Buildings and Works of Art in Times of War*, initiated by the International Museums Office.<sup>74</sup> The Preamble of this first Draft stated that *"Whereas the preservation of artistic treasures is a concern of the community of States and it is important that such treasures should receive international protection; Being convinced that the destruction of a masterpiece, whatever nation may have produced it, is a spiritual impoverishment for the entire international community."*<sup>75</sup> This first Draft has similarities to the preamble of the earlier Roerich Pact (1935)<sup>76</sup>, a treaty that was concluded as an American Treaty in which the idea was established that cultural property is the heritage of humankind and for that reason it must enjoy international protection.<sup>77</sup> The Roerich Pact is also known as the 'Washington Pact' to which the preamble of the 1954 Hague Convention refers.

In Article 5(1) of the Draft Convention the Concluding Parties decided it to be *"their joint and several duty to respect and protect all monuments of artistic or historic interest in time of war."* In this article we read the customary obligation to take all the precautionary measures to spare all monuments in case of bombarding.<sup>78</sup> In Article 5(2) there was decided upon a measure of 'special protection' that certain monuments could enjoy if they met certain conditions. Regrettably these conditions were never specified.<sup>79</sup> This idea of a special protection is later also developed in Chapter II of the 1954 Hague Convention (see below).

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<sup>73</sup> R. O'KEEFE, 2006, 53 etc.

<sup>74</sup> Draft International Convention for the Protection of Historic Buildings and Works of Art in Times of War, November 1938, s.l., *LNOJ*, 19th Year, No. 11, 937; R. O'KEEFE, 53-54.; P. O'KEEFE and L. V. PROTT, *Cultural Heritage Conventions and other instruments. A Compendium with Commentaries*, Builth Wells, Institute of Art and Law Ltd., 2011, 16.

<sup>75</sup> Second and third recitals, Preamble of Draft International Convention for the Protection of Historic Buildings and Works of Art in Times of War, November 1938, s.l., *LNOJ*, 19th Year, No. 11, 937.

<sup>76</sup> Also known Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments. (Washington, 15 April 1935, 167 *LNTS* 290.) The Pact remains in force in peacetime and war (Article 1) among eleven American States.; R. O'KEEFE, 2006, 51-52.

<sup>77</sup> See Preamble and Article 2 of the Roerich Pact, as published in the Appendix III, Review on the 1954 Convention, 177; A.F. VRDOLJAK, *International Law, Museums and the Return of Cultural Objects*, Cambridge, Cambridge University Press, 2008, 136-137.

<sup>78</sup> R. O'KEEFE, 2006, 54-56.

<sup>79</sup> R. O'KEEFE, 2006, 57.

Furthermore, Article 4 of the Draft Convention provided a system of immunity for works of artistic or historical value (Article 4(1) and (3)). In practice this signified a limited number of 'refuges' for artworks that a state could set up, in order for the artwork to be immune from all acts of hostility (Article 4(2)). The immunity meant that there was an absolute prohibition on the attacks on these refuges (Article 4(1)).<sup>80</sup> The first paragraph of Article 4 only talks about "*works of art or historic interest that may be threatened by military operations*", no further details are given on whether immovable works of art are excluded by this provision. Since it is impossible to relocate monuments or groups of monuments of highly artistic value, we assume this immunity-system would primarily only count for movable works of artistic or historical value. Theoretically it could also count for immovable monuments in case these monuments were used as shelter to protect the movable artworks. But since it would amount to neutralizing a whole town the idea could not count on too much support among the Drafters of the Convention.<sup>81</sup>

In Article 3(3) of the Draft Convention the Parties established the provision to "*punish in time of war any person looting or damaging monuments and works of art.*"<sup>82</sup> We have to emphasize that this was, at the moment of writing in 1936, not the first attempt by the international community to include penal sanctions for destruction of cultural property in armed conflict. Already in 1863 the Lieber Code contained penal sanctions for similar crimes. Although the Lieber Code was only binding for the armed forces of the United States, it largely reflected the laws and customs of war that existed at the time.<sup>83</sup> Article 44 of the Lieber Code stated that "*all destruction of property not commanded by the authorized officer, (...) are prohibited under penalty of death or such other severe punishment as may seem adequate for the gravity of the offense.*"<sup>84</sup>

The influence of the Lieber Code is still visible in today's 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. Next to the penal sanctions for destruction of cultural property in armed conflict (Article 28 of the 1954 Hague Convention), the Lieber Code also encouraged the development of the Hague Conventions of 1899 and 1907 on warfare<sup>85</sup>, to which the 1954 Hague Convention still refers in the Preamble.<sup>86</sup>

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<sup>80</sup> R. O'KEEFE, 2006, 57.

<sup>81</sup> R. O'KEEFE, 2006, 58.

<sup>82</sup> R. O'KEEFE, 2006, 61.

<sup>83</sup> Instructions for the Government of Armies of the United States in the Field, Washington DC, 24 April 1863, [also known as 'Lieber Code']; C. EHLERT, 19.

<sup>84</sup> Article 44 Lieber Code, as published online <https://www.icrc.org/ihl/INTRO/110?OpenDocument> (accessed on 26 July 2015); C. EHLERT, 19.

<sup>85</sup> Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 29 July 1899, 32 *Stat* 1803, *TS* No. 403.; Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, 36 *Stat* 2227, *TS* No. 539.

<sup>86</sup> C. EHLERT, 19.

Another important concept that stemmed from the Lieber Code and that is still included in the 1954 Hague Convention is the 'military necessity' that could waive the protection of cultural property.<sup>87</sup> Because there was no clear definition of the 'military necessity' provided in the 1954 Convention, this provision (in Article 4 of the 1954 Hague Convention) caused a lot of interpretation trouble and misunderstandings.<sup>88</sup> In order to deal with this difficulty, the Second Protocol (1999) to the 1954 Hague Convention elaborated on military necessity (Article 6 of the Second Protocol).<sup>89</sup>

Another remarkable article in the Draft Convention was Article 10(1) which provided for the situation in which monuments or artworks were threatened by internal disturbances or armed conflicts within a country. The Parties to the Draft concluded to *"lend their friendly assistance to the contending parties for the purpose of safeguarding the threatened historic and artistic treasures."*<sup>90</sup> It seems that with this regime the international community accepted to have the fundamental principle of state sovereignty overthrown in order to protect threatened artworks.<sup>91</sup> According to the Bolivian delegate at the Conference for the Draft Convention, the reasoning behind this article was the following: *"non-interference in political matters was the whole foundation of wisdom (...). Non-interference in humanitarian and artistic matters would be the expression of an indifference incompatible with the demands of contemporary sensibility and culture."*<sup>92</sup> This view received the support of the Director of the International Museum Office (IMO) who was responsible for the Conference<sup>93</sup> and confirmed that since the *"convention was conceived in a spirit of international solidarity, it was only natural that it should envisage the dangers which threaten monuments and works of art during civil disturbances."*<sup>94</sup>

Regrettably for the completion and impact of the Draft Convention, the Second World War broke out in 1940 and the completion process of the Draft convention never succeeded.

### **2.1.1.2. The road towards the 1954 Convention...**

After the Second World War, together with all the destroyed cultural heritage, the illusion that international law could provide effective protection was shattered. Both public and

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<sup>87</sup> C. EHLERT, 19.

<sup>88</sup> J. HLADÍK, "Diplomatic Conference on the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, Netherlands" (March 15 - 26, 1999), *International Journal of Cultural Property*, Vol 8, No. 2, 1999, 528.

<sup>89</sup> J. HLADÍK, "Diplomatic Conference on the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, Netherlands (March 15 - 26, 1999)", *International Journal of Cultural Property* 1999, Vol. 8, No. 2, 528.

<sup>90</sup> Article 10(1) of the Draft Convention (1938); R. O'KEEFE, 2006, 59-60.

<sup>91</sup> A.F. VRDOLJAK, *International Law, Museums and the Return of Cultural Objects*, Cambridge, University Press, 2008, 137; R. O'KEEFE, 2006, 59.

<sup>92</sup> R. O'KEEFE, 2006, 59-60.

<sup>93</sup> R. O'KEEFE, 2006, 54.

<sup>94</sup> R. O'KEEFE, 2006, 60-61.

private cultural property fell prey to destruction, be it wanton destruction or unfortunate collateral damage.<sup>95</sup>

The destructions of the Second World War presented thus the reasons for international cooperation in protecting, preserving and restoring cultural heritage more concretely than ever before. The applicable Hague Conventions on warfare of 1899 and 1907 turned out ineffective to prevent the great cultural losses. Because of the use of aerial bombings, great damage was caused to a great number of cultural heritage sites in European cities such as Cologne, Hamburg, Canterbury and York, but also in Japanese cities like Osaka and Nagoya.<sup>96</sup> Both the British and the French Government declared that they wanted to preserve 'in every way possible those monuments of human achievement which are treasured in all civilized countries.' But they admitted that when the bombing of important military objects was required they could not prevent damage to beautiful or ancient buildings near them.<sup>97</sup> Therefore, when collateral damage was caused to cultural heritage it was assumed to be lawful and within the scope of military necessity.<sup>98</sup>

Dwight Eisenhower, in an order to the commanders before fighting in Italy, specifically referred to the value of cultural heritage when stating: *"Today we are fighting in a country which has contributed a great deal to our cultural inheritance, a country rich in monuments which by their creation helped and now in their old age illustrate the growth of the civilization which is ours. We are bound to respect those monuments so far as war allows."*<sup>99</sup> As a result, the city of Rome for example was greatly spared of destruction, but other cities like Florence were less fortunate.<sup>100</sup>

After the War had ended, the Nuremberg Military Trial was set up in 1945.<sup>101</sup> *"The plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity"* were stated as a war crime in Article 6(b) of the Charter of the Tribunal and was regarded by the Tribunal as customary international law.<sup>102</sup>

In 1949, four Conventions<sup>103</sup> were adopted on a Diplomatic Conference in Geneva and were ratified by all States. For this reason they are assumed to have a customary

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<sup>95</sup> C. FORREST, 73-76.

<sup>96</sup> C. FORREST, 73-75.

<sup>97</sup> R. O'KEEFE, 2006, 65.

<sup>98</sup> C. FORREST, 73; R. O'KEEFE, 2006, 65.

<sup>99</sup> General D. Eisenhower, "Order of the Day", 24 December 1943, as cited in R. O'KEEFE, 2006, 74 and C. FORREST, 73.

<sup>100</sup> C. FORREST, 74.

<sup>101</sup> C. FORREST, 75.

<sup>102</sup> Based on this provision, A. Rosenberg was found guilty of war crimes and received the death sentence (C. FORREST, 75 and 122); R. O'KEEFE, 2006, 88 etc.

<sup>103</sup> Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949, 75 UNTS 31); Convention (II) for the Amelioration of the Condition of Wounded and Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949, 75 UNTS 85); Convention (III) relative to the

international law status.<sup>104</sup> It was Convention number four<sup>105</sup> that contained relevant provisions for the protection of cultural property.<sup>106</sup>

Despite these diplomatic efforts in 1949, the need for a specialized convention on the protection of cultural heritage was still felt.<sup>107</sup>

### **2.1.1.3. The 1954 Hague Convention**

It was the initiative of the Netherlands and UNESCO to pick up the Draft Convention and organize a new Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict at the Hague, from 21 April to 14 May 1954, to continue the intergovernmental process to protect cultural heritage.<sup>108</sup> It turned out a hard nut to crack to find a balance in the Convention between military necessity on the one hand and the protection of cultural property on the other hand.<sup>109</sup>

According to current doctrine the 1954 Hague Convention does not reach a balance between military necessity and the protection of cultural property. Instead, it caused even more tensions between these two interests. Kila puts forward that it is crucial to have the interests balanced on the matter, in order to have an effective realization of the protection of cultural property methods and strategies in the future.<sup>110</sup>

#### **2.1.1.3.1. Scope of Application of the Convention**

The title of the 1954 Convention already gives away what is decided in Article 18 of the Convention, namely that the Convention is applicable *"in the event of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by, one or more of them."* A formal declaration of war is henceforth not required for the applicability of the Convention.<sup>111</sup>

Article 19 is concerned with the situation of an intra-state conflict. In the situation 'not of an international character', according to Article 19, parties to the conflict at hand still have to apply at least the provisions that are put forward in this Convention (Article 19(1)). Nevertheless, a textual interpretation of paragraph 1 of Article 19 causes doubt

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Treatment of Prisoners of War (12 August 1949, 75 UNTS 135); Convention (IV) relative to the Protection of Civilian Persons in Time of War (12 August 1949, 75 UNTS 287).

<sup>104</sup> C. EHLERT, 38.

<sup>105</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War (12 August 1949, 75 UNTS 287).

<sup>106</sup> See Article 27, Article 33(3), Article 53 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War (12 August 1949, 75 UNTS 287).

<sup>107</sup> C. EHLERT, 42.

<sup>108</sup> UNESCO, Actes de la conférence convoquée par l'organisation des nations unies pour l'éducation, la science et la culture tenue à la Haye du 21 avril au 14 mai 1954, The Hague, Staatsdrukkerij- en uitgeverijbedrijf, 1961, 1, <http://unesdoc.unesco.org/images/0008/000899/089916mb.pdf>; C. EHLERT, 42-43; C. FORREST, 78-80; R. O'KEEFE, 2006, 93.

<sup>109</sup> J. KILA, *Heritage under Siege. Military Implementation of Cultural Property Protection Following the 1954 Hague Convention*, Brill, Leiden, 2012, 169; R. O'KEEFE, 2006, 93.

<sup>110</sup> J. KILA, *Heritage under Siege. Military Implementation of Cultural Property Protection Following the 1954 Hague Convention*, Brill, Leiden, 2012, 169.

<sup>111</sup> C. EHLERT, 45.



about the applicability of the whole 1954 Hague convention in the situation of an intra-state conflict. Since, literally speaking, only Article 4 of the 1954 Hague Convention deals with 'respect for cultural property'.<sup>112</sup> This could mean that the rest of the articles of the Convention, included Article 28 which deals with the violation of the Convention, would not be applied in the case of an intra-state conflict.<sup>113</sup>

O'Keefe disagreed with the statement that Article 28 would not be applicable in intra-state conflicts. In his view, destruction of cultural property in an intra-state conflict would be a violation of the domestic rules that had to be installed under Article 28 of the 1954 Hague Convention. Therefore, at the same time the destruction of cultural property in the intra-state conflict would signify a breach of Article 4 of the 1954 Hague Convention.<sup>114</sup>

Additionally, the ICTY in the *Tadić*-case stated that Article 19 of the 1954 Hague Convention is customary international law.<sup>115</sup> Consequently, Article 19 is applicable at all times, even when the opposing parties are not parties to the 1954 Convention.<sup>116</sup>

#### **2.1.1.3.2. Protection of cultural property**

The protection of cultural property in the cultural heritage conventions falls into two categories: one concerns the physical protection of the cultural property and the preventive measures against harm and destruction of the property, the other concerns the penal measures that provide punishment and criminal responsibility for the destruction of cultural property.<sup>117</sup>

We begin by discussing the physical protection of cultural property in the 1954 Hague Convention which is divided into two systems: firstly there is the 'general protection' (see Chapter I of the 1954 Hague Convention), secondly there is the 'special protection' (see Chapter II), which applies to a stricter range of cultural property. Next, we will elaborate on the sanctions that are provided by the 1954 Convention against destruction of cultural property.

##### **2.1.1.3.2.1. General Protection of cultural property**

Article 2 specifies that the protection of cultural property for the purpose of the 1954 Convention means the 'safeguarding of and respect for such property'.<sup>118</sup> Both concepts of this provision are further elaborated on in, respectively, Article 3 ('safeguarding of

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<sup>112</sup> C. EHLERT, 46

<sup>113</sup> C. EHLERT, 46.

<sup>114</sup> C. EHLERT, 47; R. O'KEEFE, 2006, 22.

<sup>115</sup> ICTY, *Prosecutor v. Tadić*, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-I (2 October 1995), para. 98.

<sup>116</sup> C. EHLERT, 47.

<sup>117</sup> UNESCO, Measures for Ensuring the Co-operation of Interested States in the Protection, Preservation and Restoration of Antiquities, Monuments and Historical sites; and Possibility of Establishing an International Fund to Subsidize Such Preservation and Restoration, *UNESCO Doc.5C/PRG/6*, 27 March 1950, Annex I, 12, <http://unesdoc.unesco.org/images/0012/001260/126055EB.pdf>.

<sup>118</sup> Article 2, 1954 Hague Convention.

cultural property')<sup>119</sup> and Article 4 ('respect for cultural property').<sup>120</sup> Article 3 states that State Parties have to prepare in time of peace 'against the foreseeable effects of an armed conflict on the cultural property situated within their own territory'.<sup>121</sup> Under these preventive measures can be understood: the marking of cultural property with an emblem as is mentioned in Article 6 of the Convention.<sup>122</sup> The marking of the cultural property can also be found in Article 3 of the Roerich Pact and in Article 7 of the Draft Convention. Each of these articles provides a different emblem. The use of the emblem in the 1954 Convention is not compulsory ('cultural property may bear a distinctive emblem').<sup>123</sup> The purpose of the emblem attached to cultural property is to facilitate their recognition as such.<sup>124</sup>

Article 16 of the 1954 Convention contains the description of the emblem: "*[it] shall take the form of a shield, pointed below, persaltire blue and white (a shield consisting of a royal-blue square, one of the angles which forms the point of the shield, and of a royal-blue triangle above the square, the space on either side being taken up by a white triangle.)*"<sup>125</sup> (see photo in Annex, fig. 1). This emblem is known as the "*Blue Shield emblem*". The emblem is considered the cultural equivalent of the Red Cross.<sup>126</sup>

The second paragraph of Article 16 states that 'the emblem shall be used alone' or shall be 'repeated three times in a triangular formation'.<sup>127</sup> It shall be used alone when the cultural property enjoys general protection, in other words when it does not enjoy special protection (see Article 8 and 9 of the 1954 Hague Convention).<sup>128</sup> The other single use of the emblem is to identify persons who are responsible for the duties of control as is stated in the Regulations for the execution of the 1954 Hague Convention (Article 17(2)(b)) or to identify members of the staff who are involved in the protection of the cultural property (Article 17(2)(c)).<sup>129</sup>

In only three cases the repeated emblem can be used (Article 17(1)): firstly for 'immovable cultural property under special protection' (see Article 8 and 9 of the 1954 Convention, and below for the special protection); secondly for the 'transport of cultural

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<sup>119</sup> Article 3, 1954 Hague Convention.

<sup>120</sup> Article 4, 1954 Hague Convention.

<sup>121</sup> Article 3, 1954 Hague Convention.

<sup>122</sup> See for more on the 'distinctive marking': R. O'KEEFE, 2006, 116 etc.

<sup>123</sup> R. O'KEEFE, 2006, 117.

<sup>124</sup> Article 6, 1954 Hague Convention.

<sup>125</sup> Article 16(1) 1954 Hague Convention.

<sup>126</sup> Connected with the emblem of the Blue Shield is the International Committee of the Blue Shield, founded in 1996, which comprises representatives of the five Non-Governmental Organizations working in this field (ICORP, "About The Blue Shield", s.d., <http://icorp.icomos.org/index.php/what-we-do/blue-shield>) (accessed on 25 July 2015)

<sup>127</sup> Article 16(2) 1954 Hague Convention.

<sup>128</sup> Article 17(2) 1954 Hague Convention.

<sup>129</sup> Article 17(2) 1954 Hague Convention.

property under the conditions of Articles 12 and 13'; thirdly for 'improvised refuges, as is decided upon in the Regulations for the execution of the 1954 Hague Convention.'<sup>130</sup>

Using the Blue Shield emblem outside the provisions of the 1954 Hague Convention and 'for any purpose whatever of a sign resembling the distinctive emblem', during an armed conflict is forbidden (Article 17(3)).<sup>131</sup> It is also not allowed to place the emblem on immovable cultural property without the display of an authorization at the same time, duly dated and signed by the competent authority of the State Party (Article 17(4)).<sup>132</sup>

The critique on the use of the emblem to identify cultural property is not far-fetched. Scholars question the effectiveness of a small emblem in the event of an attack, especially when making use of contemporary long range artillery.<sup>133</sup> Nevertheless, in the ICTY *Strugar*-case (see below) the provided video evidence was accepted by the Court. In this footage the emblems on the protected buildings and structures in the Old Town of Dubrovnik on 6 December 1991 were clearly visible.<sup>134</sup>

Furthermore the military measures as stated in Article 7 of the 1954 Convention, are also measures that, according to Article 3, have to be prepared in times of peace. More specifically, the Contracting Parties have to 'introduce into their military, regulations or instructions as is foreseen in the present Convention.'<sup>135</sup> And they have to 'foster amongst the members of their armed forces a spirit of respect for the culture and cultural property of all peoples.'<sup>136</sup> Kila, scholar and former Lieutenant-Colonel in the Royal Netherlands Army, described the evolution that took place in the military mindset towards cultural property. He stated that "*soldiers used to loot objects, including cultural objects, as a form of pay, but today they have been transformed into protectors of cultural property.*"<sup>137</sup> Regrettably Kila did not provide examples of looting by soldiers in the past nor did he elaborate on when the evolution in the mindset of the military took place.

Additionally, Kila describes the military technique called 'Civil-Military Cooperation' (CIMIC)<sup>138</sup> which, for a commander, is a way to facilitate their mission 'by creating and

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<sup>130</sup> Article 17(1) 1954 Hague Convention.

<sup>131</sup> Article 17(3) 1954 Hague Convention.

<sup>132</sup> Article 17(4) 1954 Hague Convention.

<sup>133</sup> R. O'KEEFE, 2006, 117.

<sup>134</sup> ICTY, *Prosecutor v. Pavle Strugar*, Trial Chamber Judgment, Case No. IT-01-42-T (31 January 2005), para. 329.

<sup>135</sup> Article 7, 1954 Hague Convention.

<sup>136</sup> Article 7(1) 1954 Hague Convention.

<sup>137</sup> J. KILA, *Heritage under Siege. Military Implementation of Cultural Property Protection Following the 1954 Hague Convention*, Brill, Leiden, 2012, 30.

<sup>138</sup> According to the US Department of Defense dictionary, 'Civil-Military Operations' are defined as "*Activities of a commander performed by designated civil affairs or other military forces that establish, maintain, influence, or exploit relations between military forces, indigenous populations, and institutions, by directly supporting the attainment of objectives relating to the reestablishment or maintenance of stability within a region or host nation.*" (US DEPARTMENT OF DEFENSE, *Department of Defense Dictionary of Military and Associated Terms*,

keeping good relations with the local population'.<sup>139</sup> In practice this could mean that armed forces make use of cultural experts on their mission. According to Kila, "*military commanders are rarely spontaneously interested in cultural property*", or worse, "*some commanders tend to use the military necessity excuse for not paying attention to cultural property protection or consider it a good career move to only make high-visibility quick-impact project statements (...) instead of implementing measures for the protection of cultural property.*"<sup>140</sup> For these reasons, military commanders could be advised on the relevance of the protection of cultural property by cultural experts.<sup>141</sup> Since NATO stimulated the use of the CIMIC-technique, several countries implemented it in their military missions. An example of good practice could be found in the Austrian Federal Army that has implemented the 'Cultural Property Protection Officer'.<sup>142</sup> Regrettably, 'most countries' lacked the resources to have cultural experts in their armed forces. Kila described that Dutch CIMIC projects in conflict areas are mainly regarding 'water sanitation, bridge construction, and commerce'.<sup>143</sup> By elaborating on the military measures, we wanted to provide a view on what kind of practices the provisions in Article 7 of the 1954 Hague Convention might concern.

The first paragraph of Article 4 of the 1954 Convention elaborates on the obligation to respect cultural property whether it is situated in the territory owned by the Contracting Parties or in the territory of other Contracting Parties.<sup>144</sup> Since this provision contains that Parties should refrain from damaging cultural property, or 'from any act of hostility against such property'<sup>145</sup>, this provision touches upon the core of the obligations of the Parties as put forward in this Convention.<sup>146</sup>

In the same line lie the obligations of the third paragraph of Article 4: "*The High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property. They shall refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party.*"<sup>147</sup> And also the

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s.l., Military Studies Press, 2013, 480p. and [www.dtic.mil/doctrine/new\\_pubs/jp1\\_02.pdf](http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf)); Although Kila added that there are different views on the exact definition of this concept: see J. KILA, *Heritage under Siege. Military Implementation of Cultural Property Protection Following the 1954 Hague Convention*, Brill, Leiden, 2012, 45, fn. 21 [Hereinafter: 'J. KILA, 2012'].

<sup>139</sup> J. KILA, 2012, 47.

<sup>140</sup> J. KILA, 2012, 111.

<sup>141</sup> J. KILA, 2012, 47.

<sup>142</sup> J. KILA, 2012, 111.

<sup>143</sup> J. KILA, 2012, 46.

<sup>144</sup> Article 4(1) of the 1954 Hague Convention.

<sup>145</sup> Article 4(1) of the 1954 Hague Convention; C. EHLERT, 52; 'Hostility' is defined as "acts of violence by a belligerent against an enemy in order to put an end to his resistance and impose obedience" (VERRI, P., *Dictionary of the International Law of Armed Conflict*, Geneva, International Committee of the Red Cross, 1992, 113).

<sup>146</sup> R. O'KEEFE, 2006, 120.

<sup>147</sup> Article 4(3) of the 1954 Hague Convention.

obligation in the fourth paragraph, namely that Parties should refrain from reprisals against cultural property.<sup>148</sup>

The second paragraph of Article 4 of the 1954 Convention contains the much discussed<sup>149</sup> 'waiver of military necessity', by stating that: "*the obligations mentioned in paragraph 1 of the present article may be waived only in cases where military necessity imperatively requires such a waiver.*" Several States believed that the inclusion of the waiver would signify a weaker protection of the cultural property.<sup>150</sup> Other States disagreed and conditioned their signatory of the Convention on this point.<sup>151</sup> Since the concept of military necessity had been established already long before the Hague Conference<sup>152</sup>, the Drafters of the Convention did not elaborate on the specific circumstances in which the waiver could 'imperatively' be applied to deny the cultural property of the protection as stated in Article 4, paragraph 1 of the 1954 Hague Convention.<sup>153</sup> This shortcoming was addressed by Article 6 of the Second Protocol (1999) to the 1954 Hague Convention (see below). The emphasis on the 'imperative necessity' includes a careful evaluation of the situation with on the one hand the military objective and on the other hand, the protection of the cultural property.<sup>154</sup>

Ultimately, the fifth paragraph of Article 4 contains a prohibition for the Parties to evade their obligations under Article 4 in case one of them did not apply the proper measures to safeguard cultural property as stated in Article 3 of the 1954 Hague Convention.<sup>155</sup> The latter article does not elaborate on which measures a State should take, therefore it is left to the State to decide.<sup>156</sup> Forrest provides the example of the looting of cultural property from the museum of Bagdad<sup>157</sup> in 2003: the failure of Iraq to take satisfactory measures to protect the property and prevent the looting, does not affect the obligation of the other Parties, *in casu* the coalition forces, to still respect the cultural property.<sup>158</sup>

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<sup>148</sup> Article 4(4) of the 1954 Hague Convention.

<sup>149</sup> The waiver was heavily discussed on the Conference of 1954 in the Hague: UNESCO, Actes de la conférence convoquée par l'organisation des nations unies pour l'éducation, la science et la culture tenue à la Haye du 21 avril au 14 mai 1954, The Hague, Staatsdrukkerij- en uitgeverijbedrijf, 1961, para. 299, <http://unesdoc.unesco.org/images/0008/000899/089916mb.pdf>; C. EHLERT, 53; R. O'KEEFE, 2006, 121-122.

<sup>150</sup> Opponents of the waiver were f.e. the USSR and Spain (C. EHLERT, 53; R. O'KEEFE, 2006, 122).

<sup>151</sup> Proponents of the waiver were the UK and the USA (C. EHLERT, 53; R. O'KEEFE, 2006, 122).

<sup>152</sup> The principle was taken from the 1907 Hague Regulations (C. EHLERT, 53); The principle of military necessity is related to the concept of proportionality and is an essential component of the law of armed conflict. In armed conflict the legitimate purpose is to weaken the military capacity of the opponent party. 'Military necessity' permits measures that are necessary to achieve the military purposes. (C. PARRY, J.P. GRANT & J.C. BARKER, *Encyclopaedic dictionary of International Law*, Oxford, University Press, 3th edition, 2009; ICRC, "Military Necessity", 5 June 2012, <https://www.icrc.org/casebook/doc/glossary/military-necessity-glossary.htm> (accessed 26 July 2015).

<sup>153</sup> R. O'KEEFE, 2006, 122.

<sup>154</sup> C. EHLERT, 54.

<sup>155</sup> Article 3 and Article 4 of the 1954 Hague Convention.

<sup>156</sup> C. FORREST, 92.

<sup>157</sup> R.M. POOLE, "Looting Iraq", *Smithsonian Magazine* February 2008, [www.smithsonianmag.com/making-a-difference/looting-iraq-16813540/?no-ist](http://www.smithsonianmag.com/making-a-difference/looting-iraq-16813540/?no-ist) (accessed 26 July 2015).

<sup>158</sup> C. FORREST, 92.

According to some scholars the obligation to respect cultural property as stated in Article 4 of the 1954 Hague Convention reflects customary international law.<sup>159</sup> Other authors<sup>160</sup> go even further by suggesting that this obligation is an *erga omnes* obligation<sup>161</sup> because of the importance of cultural heritage for humanity.<sup>162</sup> Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts [hereinafter 'ARSIWA'] maintains that 'a breach of this obligation is owed to the international community as a whole', and therefore "any State other than an injured State is entitled to invoke the responsibility of another State (...)."163

### **2.1.1.3.2.2. Special protection of cultural property**

This supplementary regime of protecting cultural property is laid out in Article 8 of the 1954 Hague Convention.<sup>164</sup> It involves putting in place a register, the *International Register of Cultural Property under Special Protection* (Article 8(6) and Article 12 of the Regulations for the Execution of the 1954 Hague Convention)<sup>165</sup>, that includes firstly 'a limited number of refuges intended to shelter movable cultural property in the event of armed conflict' and secondly 'centers containing monuments and other immovable cultural property of very great importance.'<sup>166</sup> The special protection is only granted to cultural property that is listed in the International Register. Cultural property is not granted an automatic listing, the Contracting Party has to submit an application to the Director-General of UNESCO to request this status.<sup>167</sup> As mentioned earlier, this special protected cultural property may carry the 'triple Blue Shield-emblem' (see Article 10, Article 6, Article 16 and Article 17 of the 1954 Hague Convention). This is only obligatory during an armed conflict.

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<sup>159</sup> C. EHLERT, 55; J.M HENCKAERTS and L. DOSWALD-BECK, *Customary International Humanitarian Law*, Cambridge, Cambridge University Press, 2005, 127-132.

<sup>160</sup> P.-M. DUPUY, "The Impact of Legal Instruments Adopted by UNESCO on General International Law", in: A.A. YUSUF, *Standard Setting in UNESCO*, Leiden, Martinus Nijhoff, vol. 1, 2007, 361; F. FRANCIONI and F. LENZERINI, "The Destruction of the Buddhas of Bamiyan and International Law", *EJIL* 2003, 633-634.

<sup>161</sup> According to Parry and Grant, an 'erga omnes-obligation' is "opposable to, valid against all the world, i.e. all other legal persons, irrespective of consent on the part of those thus effected" (C. PARRY, J.P. GRANT & J.C. BARKER, *Encyclopaedic dictionary of International Law*, Oxford, University Press, 3th edition, 2009); See F. FRANCIONI, "A Dynamic Evolution of Concept and Scope: From Cultural Property to Cultural Heritage", in A. YUSUF, *Standard Setting at Unesco*, 221 etc.

<sup>162</sup> The ICJ confirmed the existence of norms that are binding upon all states in the *Barcelona Traction case*. (ICJ, *Barcelona Traction, Light and Power Company Ltd* (Belgium v. Spain), Judgment, *ICJ Reports* 1970, 3, at 33-34).

<sup>163</sup> Art. 48(1)(b) ILC, Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of Its 53rd Session (31 May 2001) *UN Doc. A/56/10* [hereinafter: 'ARSIWA'].

<sup>164</sup> Article 8, 1954 Hague Convention.

<sup>165</sup> UNESCO, "International Register of Cultural Property under Special Protection", 13 April 2014, [www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Special-Protection-Register\\_en.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Special-Protection-Register_en.pdf) (accessed 27 July 2015).

<sup>166</sup> Article 8(1) 1954 Hague Convention.

<sup>167</sup> Article 13(1) of "The Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict", in UNESCO, *Final Act of the Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict*, The Hague 1954, 44-67, <http://unesdoc.unesco.org/images/0008/000824/082464mb.pdf>.

Article 8(1) puts forward two cumulative requirements in subparagraphs (a) and (b) for the refuges or the centers to be listed: they have to be located 'at an adequate distance from any large industrial center or from any important military objective that might constitute a vulnerable point, for example a broadcasting station, a port or a railway station' (article 8(1)(a)); they cannot be used for military purposes (article 8(1)(b)).<sup>168</sup>

The Drafters of the Convention did not specify the meaning of the notion 'cultural property of very great importance'. It could indicate the selectivity of the property that is placed under the Special Protection.<sup>169</sup> The aspect 'at an adequate distance' in subparagraph (a) caused also trouble for interpretation because the Drafters did not put forward a specific definition of this notion either.<sup>170</sup> Literature calls this provision for that reason 'unworkable'.<sup>171</sup> Nevertheless, cultural property that enjoys special protection exists, although the number of properties is extraordinarily small. At the moment there are four refuges<sup>172</sup> and one center containing monuments listed and thus enjoying special protection. Since 1960 the only listed 'center with monuments' is the whole territory of the Vatican City. Four other refuges have been cancelled meanwhile.<sup>173</sup>

The cultural property under special protection is granted immunity under Article 9 of the 1954 Convention.<sup>174</sup> This means that the Parties are obliged to refrain from "*any act of hostility directed against such property and (...) from any use of such property or its surroundings for military purposes.*"<sup>175</sup> According to this provision it is already prohibited to direct an act of hostility against the cultural property, which means that the property should not be damaged in order to have a violation of Article 9.<sup>176</sup> Article 11 contains the waiver of immunity "*only in exceptional cases of unavoidable military necessity, and only for such time as that necessity continues.*"<sup>177</sup> This military necessity can only be established by a high-ranked military officer.<sup>178</sup> We notice that Article 11 provides more detailed information and leaves less room for discretion and interpretation by the Parties, compared to Article 4 that provided the general protection of cultural property and the waiver in case of 'imperative military necessity'. Article 4(2) contained therefore a lower

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<sup>168</sup> Article 8(1) 1954 Hague Convention.

<sup>169</sup> C. FORREST, 98.

<sup>170</sup> C. EHLERT, 56; C. FORREST, 98.

<sup>171</sup> C. EHLERT, 56; C. FORREST, 98.

<sup>172</sup> At the moment of writing, there are four refuges on the list: one in Germany ('Zentraler Bergungsort' in Oberried) and three in the Netherlands (the 'Zab refuge' and the 'Zod refuge' both in Zandvoort; the 'St-Pietersberg refuge' in Maastricht).

<sup>173</sup> UNESCO, "International Register of Cultural Property under Special Protection", 13 April 2014, [www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Special-Protection-Register\\_en.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Special-Protection-Register_en.pdf) (accessed 27 July 2015); UNESCO WORLD HERITAGE COMMITTEE, Convention concerning the Protection of the World Cultural and Natural Heritage, World Heritage Committee, Eighteenth session, Phuket, Thailand 12-17 December 1994, *UN Doc. WHC-94/CONF.003/INF.12*, 16 November 1994, <http://whc.unesco.org/archive/1994/whc-94-conf003-inf12e.pdf> (accessed 27 July 2015).

<sup>174</sup> Article 9 1954 Hague Convention.

<sup>175</sup> Article 9 1954 Hague Convention.

<sup>176</sup> C. EHLERT, 57-58.

<sup>177</sup> Article 11(2) 1954 Convention.

<sup>178</sup> Article 11(2) 1954 Convention; C. EHLERT, 58.

threshold to apply the waiver of the general protection.<sup>179</sup> Scholar Nahlik stays very critical on the norms as described in Article 11. He does not see much difference in practice between 'an imperative military necessity' and 'an unavoidable military necessity' and wondered whether a high-ranked military officer would know enough of art history to prevent the destruction of a cultural object of major importance.<sup>180</sup>

### **2.1.1.3.2.3. Sanctions in the 1954 Hague Convention**

So far we have discussed the physical protection of the cultural property and the preventive measures against harm and destruction of the property. We will continue by elaborating on the penal measures in the 1954 Hague Convention that foresee punishment and criminal responsibility for the destruction of cultural property.<sup>181</sup>

Article 28 of the 1954 Convention goes as follows: *"The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention."*

On the 1954 Conference in the Hague, the USSR delegation in an amendment proposed a more elaborated article with specified crimes against cultural property.<sup>182</sup> Instantly it became clear that because of its distribution of competences, it would be impossible for the United States of America to accept an international Convention that contained specific sanctions. As a federal government, the USA did not want for its States to be forced to implement a new series of penal rules concerning crimes against cultural property.<sup>183</sup> We have to add that international criminal law was at the point of drafting still in its early stages.<sup>184</sup> A compromise between the Drafters was found in the adoption of the UNESCO-proposal for this penalizing Article 28.<sup>185</sup> Therefore this article turned into a broad article that leaves room to the Parties to decide on the specific crime and required sanctions.<sup>186</sup> The present Article 28 thus contains no list of specific violations that require criminal sanctions, nor does it stipulate punishable breaches or an

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<sup>179</sup> C. EHLERT, 58; C. FORREST, 101.

<sup>180</sup> S.E., NAHLIK, "International Law and the Protection of Cultural Property in Armed Conflicts", *Hastings Law Journal* 1976, Vol. 27, 1081.

<sup>181</sup> UNESCO, Measures for Ensuring the Co-operation of Interested States in the Protection, Preservation and Restoration of Antiquities, Monuments and Historical sites; and Possibility of Establishing an International Fund to Subsidize Such Preservation and Restoration, *UNESCO Doc.5C/PRG/6*, 27 March 1950, Annex I, 12, <http://unesdoc.unesco.org/images/0012/001260/126055EB.pdf>.

<sup>182</sup> UNESCO, Actes de la conférence convoquée par l'organisation des nations unies pour l'éducation, la science et la culture tenue à la Haye du 21 avril au 14 mai 1954, The Hague, Staatsdrukkerij- en uitgeverijbedrijf, 1961, 259, <http://unesdoc.unesco.org/images/0008/000899/089916mb.pdf> [Hereinafter: 'Actes de la conférence'].

<sup>183</sup> Actes de la conférence, 260.

<sup>184</sup> R. O'KEEFE, 2006, 188.

<sup>185</sup> Actes de la conférence, 260.

<sup>186</sup> C. EHLERT, 59-60.



elaboration on the mental element (*mens rea*) of the crime.<sup>187</sup> For this reason we can state that the drafting of this article was a missed opportunity to include a detailed penalization of the destruction of cultural property in the international convention. Nevertheless, beside the efforts done at drafting Article 28 in the present broadly scoped article, several states refused to include this article in their domestic penal codes.<sup>188</sup>

For example, the USA ratified the 1954 Hague Convention only in 2009 despite having signed the Convention already in 1954.<sup>189</sup> Only recently, on 21 June 2015, was announced that the United Kingdom (UK) would ratify the 1954 Hague Convention.<sup>190</sup> The UK Government, also despite signing the Convention in 1954<sup>191</sup>, declared its hesitation to ratify the Convention at the moment of drafting "*because it considered that it did not provide an effective regime for the protection of cultural property.*"<sup>192</sup> Besides some incorrect media coverage<sup>193</sup>, on the moment of writing the UK has not officially deposited its ratification documents at UNESCO.

### 2.1.2. The 1954 First Protocol to the 1954 Hague Convention

Together with the 1954 Hague Convention was the First Protocol to this Convention developed and opened for signature. The First Protocol concerned the prevention of exportation of movable cultural property<sup>194</sup> (as defined in Article 1 of the 1954 Hague Convention) from occupied territory during an armed conflict (see Chapter I of the First Protocol). Initially the Drafters of the 1954 Hague Convention had not intended to create a separate Protocol.<sup>195</sup> The separation of the matter of the seizure of the property became inevitable since it would otherwise have become a burden to the signing and ratifying of the 1954 Hague Convention.<sup>196</sup> Since this research paper does not elaborate

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<sup>187</sup> C. EHLERT, 59-60; R. O'KEEFE, 189.

<sup>188</sup> C. EHLERT, 60.

<sup>189</sup> The USA signed the 1954 Hague Convention on 14 May 1954 (UNESCO, "Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954", [http://portal.unesco.org/en/ev.php-URL\\_ID=13637&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html) (accessed 30 July 2015); UNESCO OFFICE OF THE SPOKESPERSON, "The United States of America deposits its instrument of ratification of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict", 16 March 2009, [http://portal.unesco.org/en/ev.php-URL\\_ID=44806&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=44806&URL_DO=DO_TOPIC&URL_SECTION=201.html) (accessed 30 July 2015).

<sup>190</sup> BBC, "UK to adopt Hague Convention to protect artefacts in war zones", 21 June 2015, [www.bbc.com/news/uk-33213911](http://www.bbc.com/news/uk-33213911) (accessed 30 July 2015); J. MERRICK, "Britain to sign up to 1954 Hague Convention on protecting world's ancient cultural sites", 20 June 2015, [www.independent.co.uk/news/uk/home-news/britain-to-sign-up-to-1954-hague-convention-on-protecting-worlds-ancient-cultural-sites-10334107.html](http://www.independent.co.uk/news/uk/home-news/britain-to-sign-up-to-1954-hague-convention-on-protecting-worlds-ancient-cultural-sites-10334107.html) (accessed 30 July 2015).

<sup>191</sup> UNESCO, "Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954", [http://portal.unesco.org/en/ev.php-URL\\_ID=13637&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html) (accessed 30 July 2015).

<sup>192</sup> UK DEPARTMENT FOR CULTURE, MEDIA AND SPORT (DCMS), "Hague convention 1954", s.d., [http://old.culture.gov.uk/what\\_we\\_do/cultural\\_property/6630.aspx](http://old.culture.gov.uk/what_we_do/cultural_property/6630.aspx) (accessed on 30 July 2015).

<sup>193</sup> T. HELM, "Britain signs convention on protecting treasures in war zones", 21 June 2015, <http://www.theguardian.com/world/2015/jun/21/britain-signs-up-to-protect-cultural-treasures-war-zones> (accessed 30 July 2015).

<sup>194</sup> L. LIJNZAAD, "Sleeping Beauty, the untold story of the (first) Protocol to the 1954 Hague Convention", in N. VAN WOUDEBERG and L. LIJNZAAD, *Protecting Cultural Property in Armed Conflict*, Leiden, Martinus Nijhoff Publishers, 2010, 147 [Hereinafter: 'L. LIJNZAAD'].

<sup>195</sup> L. LIJNZAAD, 147.

<sup>196</sup> L. LIJNZAAD, 147.

on the crimes of illicit traffic of cultural property<sup>197</sup> we will not discuss this First Protocol any further.<sup>198</sup>

### 2.1.3. 1972 Convention for the Protection of the World Cultural and Natural Heritage

In this chapter we emphasize the cultural heritage protection as laid out in the 1972 World Heritage Convention [hereinafter also referred to as 'WHC'].<sup>199</sup> We research the protective measures that are foreseen in this Convention and will compare these afterwards with the measures that are stated in the 1954 Hague Convention.

In the 1972 World Heritage Convention the international community wanted to establish the protection of both the world's cultural and the natural heritage.<sup>200</sup> As mentioned above, the 1972 WHC uses the term 'cultural heritage', instead of the notion 'cultural property'.

The preamble of the World Heritage Convention puts forward the purpose to establish an *"effective system of collective protection of the cultural and natural heritage of outstanding universal value, organized on a permanent basis and in accordance with modern scientific methods."*<sup>201</sup> In order to come to the effective international protection of the world cultural heritage 'a system of international cooperation and assistance' was created to support the State Parties (Article 7 WHC)<sup>202</sup>, since the Parties to this Convention recognize that the protection of the world heritage is a 'duty of the international community as a whole to cooperate' (Article 6(1) WHC).<sup>203</sup> The international cooperation to protect the world heritage is assumed to be the core of the Convention.<sup>204</sup>

The context that lead towards the adoption of this international Convention was the many-faced Post Second World War-context, an era filled with the emergence of industrialization, urbanization and decolonization.<sup>205</sup> The need arose to protect on the one

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<sup>197</sup> See UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Paris, 14 November 1970, 823 *UNTS* 231.

<sup>198</sup> See for an in-depth study on the First Protocol: L. LIJNZAAD, 147-156.; See for the official text and the State Parties: UNESCO, "The State Parties", s.d., [www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/the-states-parties/#P1](http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/the-states-parties/#P1) (accessed on 1 August 2015).

<sup>199</sup> This Convention entered into force on 17 December 1975, in line with Article 33 of the Convention, *"three months after the date of the deposit of the twentieth instrument of ratification, acceptance or accession."* (A.A. YUSUF, "Introductory note. Convention concerning the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972", *UN Audiovisual Library of International Law* 2013, <http://legal.un.org/avl/ha/ccpwnh/ccpwnh.html>. (accessed on 27 July 2015).

<sup>200</sup> Preamble of the Convention Concerning the Protection of the World cultural and Natural Heritage, Paris, 16 November 1972, 1037 *UNTS* 151 [Hereinafter: '1972 WHC'].

<sup>201</sup> Preamble 1972 WHC.

<sup>202</sup> Article 7 1972 WHC.

<sup>203</sup> Article 6(1) 1972 WHC.

<sup>204</sup> C. FORREST, 229; K. RAO, "The World Heritage Convention: looking ahead", in UNESCO, *Proceedings of the Closing Event of the Celebration of the 40th Anniversary of the World Heritage Convention 6–8 November 2012 – Kyoto International Conference Centre, Kyoto, Japan*, Paris, UNESCO, 2013, 82-83 and <http://openarchive.icomos.org/1466/1/activity-828-1.pdf>.

<sup>205</sup> C. FORREST, 226.

hand the world's natural heritage, and on the other hand the nation's cultural and natural heritage.<sup>206</sup>

Several events certainly lead towards a greater focus of the international community on the shared common interest in protecting the world's cultural 'heritage'. Around the time of drafting this Convention we notice a shift from 'cultural property' to 'cultural heritage', the latter as the emergence of the world's common interest.<sup>207</sup> For example there was the building of the Aswan High Dam on the Upper Nile in Egypt (1959) that would result in the flooding of the adjoining land and the loss of several archeological sites and monuments.<sup>208</sup> Egyptian and Sudanese governments appealed to save the cultural heritage. Consequently, UNESCO launched a campaign to fund the international cooperative actions that followed to save the treasures from being drowned.<sup>209</sup> A few years later there were catastrophic floods in Venice and Florence (1966) with great damage to Renaissance heritage, that alarmed the international community and requested international assistance.<sup>210</sup> These are examples that contributed to the emergence of the world's communal concepts of natural and cultural heritage that needed to be preserved and protected including outside the situation of armed conflict.<sup>211</sup> In this context, in 1972, the protection system of cultural heritage in the UNESCO World Heritage Convention was developed.

#### **2.1.3.1. Scope of Application of the WHC**

The preamble of the WHC refers to the increasing threats of destruction that cultural heritage and natural heritage have to deal with. Amongst these threats are mentioned: the traditional causes of decay and the changing social and economic conditions.<sup>212</sup> Article 11 mentions a few other serious and specific dangers that would allow the heritage to be listed on the List of World Heritage in Danger. Amongst others is specifically referred to "*the outbreak or the threat of an armed conflict, calamities and cataclysms.*"<sup>213</sup> We can therefore conclude that the WHC is not only focused on the destruction of cultural heritage in the situation of armed conflict, but instead protects cultural heritage against a broader range of causes of destruction, also in peacetime.<sup>214</sup> Scholars confirm this while stating that the WHC does not cease to be applicable in the

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<sup>206</sup> C. FORREST, 226.

<sup>207</sup> FRANCIANI, F., "A Dynamic Evolution of Concept and Scope: From Cultural Property to Cultural Heritage", in A.A. YUSUF, *Standard Setting at Unesco*, Leiden, Martinus Nijhoff Publishers, 2007, 228 [Hereinafter: 'F. FRANCIANI, in A.A. YUSUF'].

<sup>208</sup> C. FORREST, 226; F. FRANCIANI, in A.A. YUSUF, 228.

<sup>209</sup> C. FORREST, 227; F. FRANCIANI, in A.A. YUSUF, 228.

<sup>210</sup> C. FORREST, 229; F. FRANCIANI, in A.A. YUSUF, 228.

<sup>211</sup> F. FRANCIANI, in A.A. YUSUF, 228.

<sup>212</sup> Preamble 1972 WHC.

<sup>213</sup> Article 11 1972 WHC.

<sup>214</sup> C. EHLERT, 61.

situation of armed conflict.<sup>215</sup> Additionally we find the same reasoning in the ICTY *Strugar*-case, where is mentioned that "the Old Town is also legally distinct from the rest of the wider city because the Old Town, in its entirety including the medieval walls, enjoys a World Heritage listing and the protections and immunities that are consequent on that listing."<sup>216</sup>

### **2.1.3.2. Protection of Cultural Heritage in the WHC**

Above mentioned is the two-pronged protection system of cultural heritage: on the one hand the physical protection and the preventive measures against destruction, on the other hand the penal measures in case of destruction of cultural property.<sup>217</sup> With regard to the WHC we can only discuss the physical protection and preventive measures since there were no penal measures developed in the WHC.

#### **2.1.3.2.1. General Protection of 'Cultural Heritage' in the WHC**

Similar to the 1954 Hague Convention we identify a dual character in the protection system of cultural heritage in the 1972 WHC: firstly there is the general protection of cultural heritage, secondly the special protection of cultural heritage.<sup>218</sup> Before heading to the special protection system, we will firstly discuss the general protection of cultural heritage in the WHC.

The general protection system is laid out in Chapter II of the WHC. Chapter II of the WHC is titled "*National protection and international protection of the cultural and natural heritage.*" The WHC shows thus that through the general protection system both types of heritage, cultural and natural heritage, are protected in the national and the international way. Similar to the 1954 Hague Convention the WHC is not a self-executing convention. This signifies that both Conventions must be enacted into specific domestic law. We have to add that this is considered a weak point of the Conventions.<sup>219</sup>

Chapter II follows upon Article 3 in the WHC which stated that each State Party has to 'identify and delineate the different properties situated on its territory' that meet the definitions of respectively cultural (Article 1) and natural heritage (Article 2) as put forward in the WHC.<sup>220</sup> In order to do so, each State Party has to determine which of the

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<sup>215</sup> C. EHLERT, 61; R. O'KEEFE, 312; J. TOMAN, *Protection of Cultural Property in the Event of Armed Conflict. Commentary on the Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocol, signed 14 May 1954*, Aldershot, Dartmouth Publishing Company Ltd, 1996, 369.

<sup>216</sup> ICTY, *Prosecutor v. Pavle Strugar*, Trial Chamber Judgment, Case No. IT-01-42-T (31 January 2005), para. 279.

<sup>217</sup> UNESCO, Measures for Ensuring the Co-operation of Interested States in the Protection, Preservation and Restoration of Antiquities, Monuments and Historical sites; and Possibility of Establishing an International Fund to Subsidize Such Preservation and Restoration, *UNESCO Doc.5C/PRG/6*, 27 March 1950, Annex I, 12, <http://unesdoc.unesco.org/images/0012/001260/126055EB.pdf>.

<sup>218</sup> C. EHLERT, 63.

<sup>219</sup> EUROMED HERITAGE and UNESCO, *Proceedings of the Workshop Preventing and Fighting Illicit Traffic in Cultural Property*, Beirut (Lebanon), UNESCO Regional Office, 9-11 November 2009, 50-52.

<sup>220</sup> Article 3 1972 WHC.

properties located on its territory are 'cultural heritage' and has to submit this list to the World Heritage Committee<sup>221</sup> (Article 11(1) WHC).<sup>222</sup> The national properties on the list could be included by the Committee in the World Heritage List (Article 11(2) WHC).<sup>223</sup> At this point the national protection of the cultural heritage blends into the international protection system as provided in the WHC.

To continue with the national protection measures of cultural heritage in the WHC: Article 4 provides that it is the duty of each State Party to ensure 'identification, protection, conservation, presentation and transmission to future generations of cultural and natural heritage.'<sup>224</sup> This duty has to be connected with the sovereign rights of the States over their heritage located in their territory. The notion of sovereignty is also mentioned in Article 6(1) of the same Chapter II: *"Whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage (...) is situated."*<sup>225</sup> Next to this notion, Article 6(1) provides that the cultural heritage as mentioned in Article 1 of the WHC, *"constitutes a world heritage for whose protection is the duty of the international community as a whole to cooperate."*<sup>226</sup>

We can conclude that in the general protection system of the WHC, on the one hand there is the duty of the sovereign national State Party to protect its national heritage (Article 4). On the other hand, because this national heritage constitutes a world heritage, there is the duty of the international community to cooperate in the protection of this (cultural) heritage (Article 6(1)). These duties exist in peacetime and continue to exist in situations of armed conflict.

Furthermore, State Parties to this Convention also have the duty to *"ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage on its territory."*<sup>227</sup> This purpose is laid out in the subparagraphs of Article 5 WHC, for example, Parties have to 'adopt a general policy which aims at giving the heritage a function in the community' (Article 5(a) WHC); Parties have to 'take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage' (Article 5(d) WHC).<sup>228</sup>

Another clear and significant duty of the State Parties to the purpose of this WHC is *"not to take any deliberate measures which might damage directly or indirectly the cultural*

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<sup>221</sup> See Chapter III of the 1972 WHC.

<sup>222</sup> Article 11(1) 1972 WHC.

<sup>223</sup> Article 11(2) 1972 WHC.

<sup>224</sup> Article 4 1972 WHC; C. FORREST, 241.

<sup>225</sup> Article 6 1972 WHC; C. FORREST, 241.

<sup>226</sup> Article 6 1972 WHC; C. FORREST, 241.

<sup>227</sup> Article 5 1972 WHC; C. EHLERT, 63.

<sup>228</sup> Article 5 1972 WHC.

and natural heritage referred to in Articles 1 and 2 situated on the territory of other States Parties to this Convention."<sup>229</sup> (see below for the Case of Preah Vihear). This article is the only article that refers in this specific way to the deliberate destruction of heritage by another state, of which destruction during armed conflict can be an example. A reference to destruction of heritage in case of armed conflict is made in Article 11(4) of the WHC (see below).

### **2.1.3.2.2. Special Protection of 'Cultural Heritage' in the WHC**

This system of special protection existed in the World Heritage Convention, in the establishment of the *Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage* (also called 'the World Heritage Committee').<sup>230</sup> The primary task of the World Heritage Committee was the development of the *World Heritage List*.<sup>231</sup>

The World Heritage List is "*a list of properties forming part of the cultural heritage and natural heritage, as defined in Article 1 and 2 of this Convention [i.e. the WHC], which it considers as having outstanding universal value in terms of such criteria as it shall have established.*"<sup>232</sup> The listing of a 'property'<sup>233</sup> cannot happen without the consent of the State (see below for the listing of the Preah Vihear Temple which was contested by Thailand).<sup>234</sup> At time of writing, there are 802 cultural properties listed on the World Heritage List, next to 197 natural properties and 32 'mixed properties'.<sup>235</sup>

Next to the World Heritage List, the World Heritage Committee also established the *List of the World Heritage in Danger* (Article 11(4)).<sup>236</sup> This is a list containing only the properties of the World Heritage List (both natural and cultural heritage) that are threatened by serious and specific dangers like accelerated deterioration, earthquakes, floods, urban or touristic development, destruction caused by changes in use or ownership of the land, the threat of an armed conflict etc. (Article 11(4)).<sup>237</sup> The purpose of the List of the World Heritage in Danger is "*to inform the international community of conditions which threaten the very characteristics for which a property was inscribed on the World Heritage List and to encourage corrective action.*"<sup>238</sup>

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<sup>229</sup> Article 6(3) 1972 WHC; C. EHLERT, 64.

<sup>230</sup> See article 8, 9, 10 of the 1972 WHC.

<sup>231</sup> C. EHLERT, 64.

<sup>232</sup> Article 11(2) 1972 WHC

<sup>233</sup> Note that article 11(3) uses the term 'property' instead of 'heritage', which is unusual in the WHC.

<sup>234</sup> Article 11(3) 1972 WHC.

<sup>235</sup> UNESCO WORLD HERITAGE CENTRE, "World Heritage List", s.d., <http://whc.unesco.org/en/list/> (accessed on 29 July 2015).

<sup>236</sup> C. EHLERT, 65.

<sup>237</sup> Article 11(4) 1972 WHC; UNESCO WORLD HERITAGE CENTRE, "World Heritage in Danger", s.d., <http://whc.unesco.org/en/158/> (accessed on 29 July 2015).

<sup>238</sup> UNESCO WORLD HERITAGE CENTRE, "World Heritage in Danger", s.d., <http://whc.unesco.org/en/158/> (accessed on 29 July 2015).

With the description in Article 11(4) of the threats against heritage, we immediately notice a difference with the purpose of the 1954 Hague Convention. The latter Convention focuses on the threats against cultural heritage in the situation of armed conflict. The WHC however aims to protect the heritage of the world against a broad range of forms of destruction (see also above: scope of the WHC).

In order for heritage to be included on the List of the World Heritage in Danger, the World Heritage Committee defined certain criteria (Article 11(5)).<sup>239</sup> Article 13 of the WHC, as well as the *Operational Guidelines for the Implementation of the WHC*<sup>240</sup> elaborated on the role of the Committee and the procedure that States have to follow when they want to include heritage on the list.<sup>241</sup> The fact that cultural property is included on this list means that there are 'major operations necessary and assistance under the World Heritage Convention is asked.'<sup>242</sup> Therefore this property gains priority funding and technical assistance to pursue its preservation and protection. Regrettably, this does not translate into a higher form of physical protection as the case of the destruction of the Old Town of Dubrovnik showed (see below for the *Strugar Case*).<sup>243</sup> The Old Town was destroyed deliberately despite its being on the List of the World Heritage in Danger at the time.<sup>244</sup> The effectiveness of the special protection measures as put forward in the World Heritage Convention is thus challenged by cases like the ICTY *Strugar Case*.

Currently there are 48 properties on the List of the World Heritage in Danger, both cultural and natural heritage, since there are no separate lists for each specific type of heritage.<sup>245</sup> For example the Syrian site of Palmyra<sup>246</sup> is inscribed on the List of the World Heritage in Danger since 2013, but had in fact already been on the World Heritage List since 1980. The Bamiyan Valley in Afghanistan was added simultaneously to the World Heritage List and to the List of the World Heritage in Danger in 2003, after the destruction of the Buddha Statues (2001).<sup>247</sup> Recently the Old Walled City of Shibam<sup>248</sup>

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<sup>239</sup> Article 11(5) 1972 WHC.

<sup>240</sup> UNESCO WORLD HERITAGE CENTRE, "Operational Guidelines for the Implementation of the World Heritage Convention", *UN Doc. WHC. 13/01* July 2013, <http://whc.unesco.org/archive/opguide13-en.pdf> (accessed on 29 July 2015).

<sup>241</sup> Article 13 1972 WHC.

<sup>242</sup> Article 11(4) 1972 WHC.

<sup>243</sup> C. EHLERT, 65.

<sup>244</sup> ICTY, *Prosecutor v. Pavle Strugar*, Trial Chamber Judgment, Case No. IT-01-42-T (31 January 2005), Third Amended Indictment, 10 December 2003, para. 29.

<sup>245</sup> UNESCO WORLD HERITAGE CENTRE, "World Heritage List", s.d., <http://whc.unesco.org/en/list/?&order=year&danger=1> (accessed on 29 July 2015).

<sup>246</sup> UNESCO WORLD HERITAGE CENTRE, "World Heritage, Site of Palmyra", s.d., <http://whc.unesco.org/en/list/23> (accessed on 29 July 2015).

<sup>247</sup> UNESCO WORLD HERITAGE CENTRE, Cultural Landscape and Archaeological Remains of the Bamiyan Valley, <http://whc.unesco.org/en/list/208> (accessed on 29 July 2015).

<sup>248</sup> Inscribed on the World Heritage List since 1982: UNESCO WORLD HERITAGE CENTRE, "Old Walled City of Shibam", s.d., <http://whc.unesco.org/en/list/192> (accessed on 29 July 2015).

and the Old City of Sana'a<sup>249</sup>, both located in Yemen were added to the List of the World Heritage in Danger.<sup>250</sup>

Only in 1978, during the second session of the World Heritage Committee, was decided on an emblem<sup>251</sup> that identifies the cultural (and natural) heritage that is inscribed on the World Heritage List (see Annex, fig.3).<sup>252</sup> Nothing is mentioned in the Convention regarding the emblem, but the Operational Guidelines to the WHC provide the State Parties with information on how to use the emblem: once a property is included on the World Heritage List, the State Party should place this emblem joined by the UNESCO logo, to memorialize the inscription on the List.<sup>253</sup> With this emblem, the 1972 Convention reminds us of the Blue-Shield emblem that was adopted in the 1954 Hague Convention. Since nothing is mentioned in the Operational Guidelines to the WHC on the use of both emblems on one cultural property, we assume that one property can carry both emblems.

#### **2.1.3.2.3. Sanctions in the WHC**

When going through the WHC, we notice the absence of provisions regarding penalization of the violation of the Convention. This is a significant difference with the 1954 Hague Convention which contained a penalizing provision (Article 28 of the 1954 Hague Convention). The only sanctioning power that the World Heritage Committee has is the exclusion of the cultural property from the World Heritage List, or putting the cultural property against the will of the territorial State on the List of the World Heritage in Danger. However, the effect of such measures would be counter-productive to the purpose of protection of the cultural property in the WHC.<sup>254</sup> Therefore we can only conclude that effective sanctions were left out of the WHC.

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<sup>249</sup> Inscribed on the World Heritage List since 1986: UNESCO WORLD HERITAGE CENTRE, "Old City of Sana'a", s.d., <http://whc.unesco.org/en/list/385> (accessed on 29 July 2015).

<sup>250</sup> UNESCO, "Emergency Action Plan for the Safeguarding of Yemen's Cultural Heritage announced", 16 July 2015, <http://en.unesco.org/news/emergency-action-plan-safeguarding-yemen-s-cultural-heritage-announced> (accessed 29 July 2015).

<sup>251</sup> UNESCO WORLD HERITAGE CENTRE, "World Heritage Emblem", s.d., <http://whc.unesco.org/en/emblem/> (accessed on 29 July 2015).

<sup>252</sup> UNESCO WORLD HERITAGE CENTRE, "Operational Guidelines for the Implementation of the World Heritage Convention", *UN Doc. WHC. 13/01* July 2013, 69 <http://whc.unesco.org/archive/opguide13-en.pdf>.

<sup>253</sup> UNESCO WORLD HERITAGE CENTRE, "Guidelines for using the Emblem at World Heritage Properties", s.d., <http://whc.unesco.org/en/emblem/> (accessed on 29 July 2015).

<sup>254</sup> C. FORREST, 277, 402.



#### 2.1.4. The 1999 Second Protocol to the 1954 Hague Convention

UNESCO<sup>255</sup> along with several scholars confirmed that the war in former Yugoslavia and the destruction of heritage listed on the World Heritage List such as the Old City of Dubrovnik (see below) delivered the major argument for adopting the Second Protocol to the 1954 Hague Convention.<sup>256</sup> The existing protection system of the International Conventions (1954 Hague Convention and the 1972 World Heritage Convention) of cultural heritage had obviously failed to be effective. Not only was there the war in former Yugoslavia, but there were also the conflicts in South-East Asia, the Middle East and Cyprus in a period from the 1960's to the 1980's which showed the failure of the protection system of cultural heritage.<sup>257</sup>

Various shortcomings showed the need for an improvement of the 1954 Hague Convention: very few States used the system of special protection (Chapter II of the 1954 Hague Convention) since the conditions for registration (see Article 8) were called 'unrealistic' and the clause of military necessity (Article 4(2)) allowed exceptions<sup>258</sup>; very few State Parties were adequately prepared during peacetime to safeguard their cultural property as foreseen in Article 3 of the 1954 Hague Convention; the notion of protection of cultural property in intra-state conflicts (Article 19) was unclear and needed more precision.<sup>259</sup> Because of the significant shortcomings, the 1954 Hague Convention could not count on the unequivocal support of the international community.<sup>260</sup>

Nevertheless, several studies executed for UNESCO since 1992 showed that *"there was nothing fundamentally wrong with the 1954 Convention and the First Protocol, but that there were serious problems in terms of its interpretation and practical application."*<sup>261</sup>

For the above mentioned reasons, a Second Protocol to the 1954 Hague Convention was required. This Protocol complements the existing general protection of cultural property, as stated in the 1954 Hague Convention, and is applicable for its States Parties. The

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<sup>255</sup> UNESCO, Introduction by Irina Bokova, Director-General of UNESCO to Basic Texts for the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two (1954 and 1999) Protocols, April 2010, <http://unesdoc.unesco.org/images/0018/001875/187580e.pdf>.

<sup>256</sup> C. EHLERT, 81; J. TOMAN, "The Road to the 1999 Second Protocol", in N. VAN WOUDEBERG and L. LIJNZAAD, *Protecting Cultural Property in Armed Conflict*, Leiden, Martinus Nijhoff Publishers, 2010, 10; S. VAN DER AUWERA, "International Law and the Protection of Cultural Property in the Event of Armed Conflict: Actual Problems and Challenges", *The Journal of Arts Management, Law, and Society*, Vol.43, No. 4, 177.

<sup>257</sup> Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999, 38 *ILM* (1999) 769; P.J. BOYLAN, "Implementing the 1954 Hague Convention and its Protocols: legal and practical implications", s.l. 2006, 3, <http://culturalpolicy.uchicago.edu/protectingculturalheritage/papers/Boylan.paper.pdf>.

<sup>258</sup> Article 8 and Article 4(2) of the 1954 Hague Convention; J-M. HENCKAERTS, "New rules for the Protection of Cultural Property in Armed Conflict", in N. VAN WOUDEBERG and L. LIJNZAAD, *Protecting Cultural Property in Armed Conflict*, Leiden, Martinus Nijhoff Publishers, 2010, 31; J. TOMAN, "The Road to the 1999 Second Protocol", in: N. VAN WOUDEBERG and L. LIJNZAAD, *Protecting Cultural Property in Armed Conflict*, Martinus Nijhoff Publishers, Leiden, 2010, 15 [Hereinafter: 'J. TOMAN, 2010'.]

<sup>259</sup> J. TOMAN, 2010, 15.

<sup>260</sup> J. TOMAN, 2010, 15.

<sup>261</sup> P.J. BOYLAN, "Implementing the 1954 Hague Convention and its Protocols: legal and practical implications", s.l. 2006, 3, <http://culturalpolicy.uchicago.edu/protectingculturalheritage/papers/Boylan.paper.pdf>.

Second Protocol contains a higher level of protection (see below) compared to the 1954 Hague Convention. This system of 'enhanced protection' is only applicable for the State Parties to the Second Protocol.<sup>262</sup> Only when a State has ratified the 1954 Hague Convention, can it become a party to the Second Protocol.<sup>263</sup>

#### **2.1.4.1. Innovations of the 1999 Second Protocol**

According to experts, the following four innovative provisions of the Second Protocol are the major achievements of the 1999 Second Protocol.<sup>264</sup>

Firstly, in order to limit the abuse of the notion the Drafters decided upon a more precise provision regarding 'military necessity' that could waive the protection of the cultural property in situations of armed conflict.<sup>265</sup> Therefore, Article 6(a) states:

*"a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to direct an act of hostility against cultural property when and for as long as:*

- i. that cultural property has, by its function, been made into a military objective; and*
- ii. there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective;"<sup>266</sup>*

Secondly, since the special protection regime of cultural property did not turn out to be effective, a system of 'enhanced protection' was elaborated in the third Chapter of the Second Protocol.<sup>267</sup> Nevertheless, the special protection regime of the 1954 Hague Convention has not been replaced by the regime of enhanced protection. The latter regime supplements the former system which is still active but because of its practical requirements rarely used by the States Parties.<sup>268</sup> Remarkably, the first condition of Article 10 of the Second Protocol that concerns the enhanced protection states that *"it is*

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<sup>262</sup> Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999, 38 *ILM* (1999) 769, [Hereinafter: '1999 Second Protocol'.]

<sup>263</sup> J.-M. HENCKAERTS, "New rules for the Protection of Cultural Property in Armed Conflict", in N. VAN WOUDEBERG and L. LIJNZAAD, *Protecting Cultural Property in Armed Conflict*, Leiden, Martinus Nijhoff Publishers, 2010, 23 [Hereinafter: 'J.-M. HENCKAERTS, 2010'.]

<sup>264</sup> J. HLADÍK, "Diplomatic Conference on the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, Netherlands (March 15 - 26, 1999)", *International Journal of Cultural Property*, Vol. 8, No. 2, 1999, 528; S. VAN DER AUWERA, "International Law and the Protection of Cultural Property in the Event of Armed Conflict: Actual Problems and Challenges", *The Journal of Arts Management, Law, and Society*, Vol. 43, No. 4, 177.

<sup>265</sup> C. EHLERT, 85; J. HLADÍK, "Diplomatic Conference on the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, Netherlands (March 15 - 26, 1999)", *International Journal of Cultural Property*, Vol. 8, No. 2, 1999, 528, [Hereinafter: 'J. HLADÍK'.]

<sup>266</sup> Article 6(a) of the 1999 Second Protocol.

<sup>267</sup> See article 10, article 11, article 12, article 13 and article 14 of the 1999 Second Protocol; J.-M. HENCKAERTS, 2010, 31.

<sup>268</sup> C. EHLERT, 88-89; J. HLADÍK, 1999, 528.

*cultural heritage of the greatest importance for humanity*"<sup>269</sup>, hereby bringing the definition of Article 1 of the 1972 World Heritage Convention into mind (see above).<sup>270</sup>

Thirdly, the Second Protocol contains strict sanctions for serious violations against cultural property.<sup>271</sup> This signifies the enhancement of the individual criminal responsibility for the crimes against cultural property (see Article 15) and the conditions for prosecution are put forward as well (see Article 17). Less serious violations against cultural property are dealt with in Article 21. It is very clear that the Second Protocol elaborates much more on the violations and the sanctions against cultural property in comparison with the 1954 Hague Convention.<sup>272</sup>

Fourthly, in order to coordinating, for example, the granting of the enhanced protection, to decide on requests for international assistance and to supervise the implementation of the Second Protocol, the Drafters of the Second Protocol installed the Intergovernmental Committee for the Protection of Cultural Property in the Event of an Armed Conflict (Article 24 until Article 28)<sup>273</sup>, together with the Fund for the Protection of Cultural Property during Armed Conflict (Article 29)<sup>274</sup>.<sup>275</sup> Although the idea of installing a Committee to the Convention was not new<sup>276</sup>, the realization of the Committee for the Protection of Cultural Property in the Event of an Armed Conflict in the Second Protocol can be considered the most important achievement since it installed a supervisory structure to the Convention and its Protocols that will help States Parties with the implementation of the Convention and the Protocols.<sup>277</sup>

Besides these innovations in the Second Protocol, there are a few other provisions worth mentioning:

The 1954 Hague Convention gave rise to different interpretations whether it was in its entirety applicable to intra-state conflict situations. Article 22 of the Second Protocol

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<sup>269</sup> Article 10 of the 1999 Second Protocol.

<sup>270</sup> C. EHLERT, 89.

<sup>271</sup> J. HLADÍK, 528.

<sup>272</sup> C. EHLERT, 92.

<sup>273</sup> For more on the Committee: UNESCO, "Committee for the Protection of Cultural Property in the Event of Armed Conflict", s.d., [www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/the-committee/](http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/the-committee/) (accessed 1 August 2015).

<sup>274</sup> For more on the Fund: UNESCO, "The Fund for the Protection of Cultural Property in the Event of Armed Conflict", s.d., [www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/the-fund/#c291154](http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/the-fund/#c291154) (accessed 1 August 2015).

<sup>275</sup> J. HLADÍK, 528.; S. VAN DER AUWERA, "International Law and the Protection of Cultural Property in the Event of Armed Conflict: Actual Problems and Challenges", *The Journal of Arts Management, Law, and Society*, Vol. 43, No. 4, 177.

<sup>275</sup> C. EHLERT, 85.

<sup>276</sup> Although not installed as a real committee, the International Committee of the Red Cross makes an older example that functions similarly. Also the World Heritage Centre works in a similar way to the World Heritage Convention (J. TOMAN, "The Road to the 1999 Second Protocol", in: N. VAN WOUDEBERG and L. LIJNZAAD, *Protecting Cultural Property in Armed Conflict*, Martinus Nijhoff Publishers, Leiden, 2010, 16-17).

<sup>277</sup> UNESCO, "Committee for the Protection of Cultural Property in the Event of Armed Conflict", s.d., [www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/the-committee/](http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/the-committee/) (accessed 1 August 2015); J. HLADÍK, 528.

clarified that this Protocol is in its entirety applicable in situations of intra-state conflicts. Scholars deduced from this provision that the Protocol applies to all parties to the conflict, whether they are governmental or insurgent forces.<sup>278</sup>

Article 5 of the Second Protocol deals with the preparatory measures State Parties have to take in peacetime. This article states more explicitly, in comparison with the 1954 Hague Convention, the measures that can be taken in advance to protect cultural property.<sup>279</sup>

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<sup>278</sup> Article 22 of the 1999 Second Protocol; J-M. HENCKAERTS, "New rules for the Protection of Cultural Property in Armed Conflict", in: N. VAN WOUDEBERG and L. LIJNZAAD, *Protecting Cultural Property in Armed Conflict*, Martinus Nijhoff Publishers, Leiden, 2010, 40.

<sup>279</sup> Article 5 of the 1999 Second Protocol.

## **2.1.5. Comparison between the 1972 Convention for the Protection of the World Cultural Heritage and the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict**

### **2.1.5.1. Commonalities<sup>280</sup>**

1. Both Conventions recognize the importance of the world's cultural heritage and pursue the protection of this cultural heritage.
2. Both Conventions included the notion of risk preparedness, which means that the State Parties have to take measures in peacetime in order to be prepared for situations of armed conflict.
3. Both Conventions are non-self-executing Conventions and therefore demand adequate domestic rulings in the domestic law of the State Parties.
4. Both Conventions have a Committee connected to it, functioning as the operative organ of the Convention: on the one hand, the World Heritage Committee; on the other hand the Intergovernmental Committee for the Protection of Cultural Property in the Event of an Armed Conflict.
5. Both Conventions have provisions regarding financial assistance. Each of them established a Fund: the World Heritage Fund and the Fund for the Protection of Cultural Property during Armed Conflict.
6. Connected to both Conventions are their own logos which identify the cultural heritage listed on the World Heritage List and mark the cultural property that enjoys protection by the 1954 Hague Convention.

### **2.1.5.2. Differences<sup>281</sup>**

1. Both notions of the protected cultural objects differ: each of the specific defining articles mentions different cultural objects; additionally WHC protects natural heritage and mixed heritage.
2. Both Conventions have a different scope of application: 1954 Hague Convention applies in situations of armed conflict; WHC applies both in peacetime and in times of conflict.
3. Only the 1954 Hague Convention contains provisions for the breaches of the Convention. There are no similar provisions in the WHC.

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<sup>280</sup> Inspired by the lecture of F. DESMARAIS, "Lecture on the role of the Blue Shield on National and International Level", at INTERMINISTERIAL COMMISSION FOR HUMANITARIAN LAW, *International Symposium on the Implementation of the Second Protocol of 1999 to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, Brussels (Belgium), Egmont Palace, 12-13 December 2013.

<sup>281</sup> Inspired by the lecture of F. DESMARAIS, *ibid.*

### 3. Supranational judicial decisions

This chapter will investigate how the destruction of tangible<sup>282</sup> cultural heritage is prosecuted by supranational courts. We will research the legal foundations on which the charges in the cases are built and deduce whether these judicial decisions lead up to a prohibition of destruction of tangible cultural heritage in general public international law. By doing so we leave aside domestic jurisdiction on the matter.

Since cultural heritage falls within the competence of UNESCO, and this international organization is a special institution of the United Nations, disputes between countries on cultural heritage fall within the competence of the International Court of Justice (ICJ).<sup>283</sup> For this reason we will firstly discuss the ICJ Case concerning the *Temple of Preah Vihear* (Cambodia v. Thailand).<sup>284</sup> Secondly we will elaborate on the ICTY *Judgment of Prosecutor v. Pavle Strugar*.<sup>285</sup>

The legal value of case law before the International Court of Justice, as stated in Article 38(1)(d) of the Statute of the International Court of Justice (ICJ), lies in the fact that the Court can apply these as subsidiary means for the determination of rules of law.<sup>286</sup> It can be argued that based on Article 38(1)(d), judicial decisions do not constitute a 'proper' source of International Law [emphasis added].<sup>287</sup> Nevertheless, we would like to emphasize the importance of supranational jurisdiction, in the first place, as a means to identify customary international law and, in the second place, as a method to determine the appropriate interpretation of international law as written in international conventions and treaties.<sup>288</sup>

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<sup>282</sup> As mentioned above, intangible heritage will not be discussed in detail in this research paper. For more on intangible cultural heritage see: UNESCO Convention for Safeguarding of Intangible Cultural Heritage, Paris, 17 October 2003, 2368 UNTS 1; J. BLAKE, *Commentary on the 2003 UNESCO convention on the safeguarding of the intangible cultural heritage*, Leicester, Institute of Art and Law, 2006, 180; UNESCO, "Intangible Cultural Heritage", s.d., <http://en.unesco.org/themes/intangible-cultural-heritage> (accessed 9 July 2015).

<sup>283</sup> A. CHECHI, "Some reflections on International Adjudication of Cultural Heritage-related cases", *Transnational Dispute Management* 2013, Vol. 10, No.5, 1.

<sup>284</sup> ICJ, *Case concerning the Temple of Preah Vihear* (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, *ICJ Reports* 1962, 6.

<sup>285</sup> ICTY, *Prosecutor v. Pavle Strugar*, Trial Chamber Judgment, Case No. IT-01-42-T (31 January 2005).

<sup>286</sup> Art. 38(1)(d) Statute of the International Court of Justice, San Francisco, 26 June 1945, 15 UNCTAD 355.

<sup>287</sup> A. CASSESE, *International Criminal Law*, Oxford, Oxford University Press, 2008, 26-27;

C. EHLERT, *Prosecuting the Destruction of Cultural Property in International Criminal Law*, Leiden, Martinus Nijhoff Publishers, 2014, 12.

<sup>288</sup> A. CASSESE, *International Criminal Law*, Oxford, Oxford University Press, 2008, 26-27;

C. EHLERT, *Prosecuting the Destruction of Cultural Property in International Criminal Law*, Leiden, Martinus Nijhoff Publishers, 2014, 12.

### 3.1. Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)<sup>289</sup>

In 1959 Cambodia submitted an application to the International Court of Justice (ICJ), pursuant to Article 36 of the ICJ Statute, to settle its dispute<sup>290</sup> with Thailand concerning the question of territorial sovereignty in the area where the ruins of the Temple of Preah Vihear<sup>291</sup> were situated.<sup>292</sup> Cambodia alleged a violation of its territorial sovereignty in this area on behalf of Thailand, since Thai military forces occupied the Temple area and its vicinity since 1954.<sup>293</sup> In its Judgment on the merits the ICJ decided upon the establishment of the discussed frontier between both countries and confirmed that the Temple of Preah Vihear lied within the territory under the sovereignty of Cambodia. Furthermore, according to the Judgment Thailand was under the obligation to withdraw its military and police forces from the area and was obliged to restore to Cambodia the objects that had been removed by the Thai authorities from the Temple and its surroundings.<sup>294</sup>

Based on research, we can state that this was the first case in which the ICJ clearly obliged one State, *in casu* Thailand, to restore the cultural heritage of another state, Cambodia.

In a joint declaration Judge Tanaka and Judge Morelli explained their vote against the operative provisions of the Judgment concerning "*the restoration of any objects which may have been removed from the temple*" by Thailand to Cambodia.<sup>295</sup> Although they did not question the foundation of Cambodia's claim for the restoration of the objects, namely the sovereignty of Cambodian territory, they put forward their belief that the Court should have refrained from judgment on that claim since it had been made in an application of Cambodia that had to be considered 'out of time'.<sup>296</sup> Furthermore, they assert that the consequence of Cambodian sovereignty over the territory of the Temple, more precisely the obligation of Thailand to restore to Cambodia 'any objects that may

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<sup>289</sup> ICJ, *Case concerning the Temple of Preah Vihear* (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, *ICJ Reports* 1962, 6 [Hereinafter: 'ICJ, *Temple of Preah Vihear*, 1962'].

<sup>290</sup> A legal dispute between two States is "*a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons*" (PCIJ, *Mavrommatis Palestine Concessions*, Judgment, No. 2, 1924, *PCIJ Series A*, No. 2., 11).

<sup>291</sup> The Judgment on the merits of 15 June 1962 describes the temple as follows: "*The Temple of Preah Vihear is an ancient sanctuary and shrine situated on the borders of Thailand and Cambodia. Although now partially in ruins, this Temple has considerable artistic and archaeological interest, and is still used as a place of pilgrimage.*" (ICJ, *Temple of Preah Vihear*, 1962, 15).

<sup>292</sup> ICJ, *Temple of Preah Vihear*, 1962, 19.

<sup>293</sup> ICJ, *Case concerning the Temple of Preah Vihear* (Cambodia v. Thailand), Preliminary Objections, Judgment of 26 May 1961, 22.

<sup>294</sup> ICJ, *Temple of Preah Vihear*, 1962, 36-37.

<sup>295</sup> ICJ, *Case concerning the Temple of Preah Vihear* (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, 36-37, Joint Declaration, Judge TANAKA and Judge MORELLI.

<sup>296</sup> In a submission at hearing on 5 March 1962 the claim on behalf of the Government of Cambodia was put forward: "*To adjudge and declare that the sculptures, stelae, fragments of monuments, sandstone model and ancient pottery which have been removed from the Temple by the Thai authorities since 1954 are to be returned to the Government of the Kingdom of Cambodia by the Government of Thailand.*" (ICJ, *Temple of Preah Vihear*, 1962, 9.); ICJ, *Case concerning the Temple of Preah Vihear* (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, 36-37, Joint Declaration, Judge TANAKA and Judge MORELLI.

have been removed from the Temple', was not contained in the Application of Cambodia. Both Judges regret they were unable to concur in the majority opinion of the Court on this clause.<sup>297</sup> This joint declaration shows that the statement of the Court on the restoration of the cultural objects did not enjoy unanimous support (see Annex, fig.4).

### 3.1.1. Violation of the Territorial Sovereignty and Territorial Integrity of Cambodia

In its application and memorial, Cambodia made the request to adjudge and declare that *"the territorial sovereignty over the Temple of Preah Vihear belongs to the Kingdom of Cambodia."*<sup>298</sup> Max Huber, sole arbitrator in the *Island of Palmas* case (1928) (The Netherlands v. United States) explained that *"Territorial sovereignty (...) involves the exclusive right to display the activities of a State. This right has corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability."*<sup>299</sup> The Judgment of the *Preah Vihear-Case* of 15 June 1962 does not mention territorial 'integrity'. However, the concept of territorial integrity and sovereignty are intertwined: territorial integrity on the one hand and political independence on the other hand are two concepts providing the foundation of the sovereignty of the state.<sup>300</sup>

In the case at hand, the occupation of the cultural heritage site of Preah Vihear on Cambodian territory by Thai military forces implied a violation of the territorial integrity of Cambodia. Thailand hereby breached customary international law<sup>301</sup> next to article 2(4) of the UN Charter<sup>302</sup> and the first Principle of International Law, as stated in the 'Friendly Relations Declaration': *"The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations."*<sup>303</sup>

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<sup>297</sup> ICJ, *Case concerning the Temple of Preah Vihear* (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, 36-37, Joint Declaration, Judge TANAKA and Judge MORELLI.

<sup>298</sup> ICJ, *Temple of Preah Vihear*, 1962, 9.

<sup>299</sup> *Island of Palmas Arbitration* (The Netherlands v. United States), Award (4 April 1928), *UNRIIAA* 1928, Vol. II, 838-839, M. HUBER.

<sup>300</sup> S.K.N. BLAY, "Territorial Integrity and Political Independence", *Max Planck Encyclopedia of Public International Law* 2010, <http://opil.ouplaw.com>. (accessed 17 October 2014); M.N. SHAW, *International Law*, Cambridge, Cambridge University Press, 2008, 487.

<sup>301</sup> ICJ, *Corfu Channel Case* (UK v. Albania), Merits, Judgment of 9 April 1949, *ICJ Reports* 1949, 35; ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, *ICJ Reports* 2010, para. 80.

<sup>302</sup> Article 2(4) Charter of the United Nations, San Francisco, 26 June 1945, 1 *UNTS* XVI: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."

<sup>303</sup> UNGA Res 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (24 October 1970), *UN Doc. A/RES/25/2625* (1970).



Thailand's reactions to the ICJ Judgment in 1962 were sharp with several conflicts taking place in the following months.<sup>304</sup> Thailand claimed to interpret the definition of the words 'vicinity of the Temple' in the Judgment of 1962 unilaterally and acted upon its own interpretation of these provisions of the Judgment.<sup>305</sup> More specifically, according to Thailand, its obligation to withdraw was limited *"to the ruins of the Temple and the ground on which the Temple stood."*<sup>306</sup> A barbed wired fence was installed by Thailand to demarcate the vicinity of the Temple, putting signs that stated *"the vicinity of the Temple of Preah Vihear does not extend beyond this limit."*<sup>307</sup>

Since 7 July 2008, despite strong opposition of Thailand, the Temple of Preah Vihear is included on the World Heritage List of UNESCO (see above).<sup>308</sup> In line with the World Heritage Convention of 1972, accepted by Cambodia (in 1991)<sup>309</sup> and Thailand (in 1987)<sup>310</sup>, *"the States Parties to this Convention recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate."*<sup>311</sup> Furthermore, in Article 6(3) of the WHC, a prohibition for the Parties is put forward to undertake 'any deliberate measures which might damage directly or indirectly the cultural and natural heritage (...) situated on the territory of other States Parties to this Convention.'<sup>312</sup>

On 15 July 2008, a large number of Thai military troops crossed the border of Cambodia and occupied the Cambodian vicinity of the Temple, more specifically the site of the Keo Sikha Kiri Svava Pagoda.<sup>313</sup> While continuing the occupation of the area, on 15 October 2008, Thai soldiers crossed the border again at three locations<sup>314</sup> and opened fire on

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<sup>304</sup> ICJ, *Request for interpretation of the Judgment of 15 June 1962 in the case concerning the Temple of Preah Vihear* (Cambodia v. Thailand), Application of 28 April 2011, 11, para. 12, [www.icj-cij.org](http://www.icj-cij.org).

<sup>305</sup> *"That Thailand is under an obligation to withdraw any military or police forces, or other guards or keepers, stationed by her at the Temple, or in its vicinity on Cambodian territory."* (ICJ, *Case concerning the Temple of Preah Vihear* (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, *ICJ Reports* 1962, 37); ICJ, *Request for interpretation of the Judgment of 15 June 1962 in the case concerning the Temple of Preah Vihear* (Cambodia v. Thailand), Application of 28 April 2011, 23, para. 27, [www.icj-cij.org](http://www.icj-cij.org).

<sup>306</sup> ICJ, *Request for interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear* (Cambodia v. Thailand) (Cambodia v. Thailand), Merits, Judgment of 11 November 2013, *ICJ Reports* 2013, 297, para. 38.

<sup>307</sup> ICJ, *Request for interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear* (Cambodia v. Thailand) (Cambodia v. Thailand), Merits, Judgment of 11 November 2013, *ICJ Reports* 2013, 297, para. 38, 41.

<sup>308</sup> ICJ, *Request for interpretation of the Judgment of 15 June 1962 in the case concerning the Temple of Preah Vihear* (Cambodia v. Thailand), Application of 28 April 2011, 13, para. 14, [www.icj-cij.org](http://www.icj-cij.org); UNESCO WORLD HERITAGE CENTRE, "Temple of Preah Vihear", <http://whc.unesco.org/en/list/1224> (accessed 10 July 2015).

<sup>309</sup> On 28 November 1991 (<http://whc.unesco.org/en/statesparties/kh/>) (accessed 10 July 2015).

<sup>310</sup> On 17 September 1987 (<http://whc.unesco.org/en/statesparties/th/>) (accessed 10 July 2015).

<sup>311</sup> Article 6(1), UNESCO, Convention Concerning the Protection of the World cultural and Natural Heritage, Paris, 16 November 1972, 1037 *UNTS* 151 [Hereinafter: '1972 WHC'.]

<sup>312</sup> Article 6(3) of the 1972 WHC.

<sup>313</sup> *"This Pagoda was built by Cambodia in 1998 and had not previously given rise to any protest from Thailand."* (ICJ, *Request for interpretation of the Judgment of 15 June 1962 in the case concerning the Temple of Preah Vihear* (Cambodia v. Thailand), Application of 28 April 2011, 13, para. 14, [www.icj-cij.org](http://www.icj-cij.org)).

<sup>314</sup> The three locations were the following ones: Keo Sikha Kiri Svava Pagoda, Veal Intry and the hill of Phnom Trap, situated 700 metres, 1,120 metres and 1,600 metres respectively from the frontier, inside Cambodian territory. (ICJ, *Request for interpretation of the Judgment of 15 June 1962 in the case concerning the Temple of Preah Vihear* (Cambodia v. Thailand), Application of 28 April 2011, 27, para. 33, [www.icj-cij.org](http://www.icj-cij.org)).

Cambodian soldiers, two of whom were killed and two others were injured.<sup>315</sup> Cambodia drew the attention of President of the Security Council concerning these events. Temporarily the relations between both military troops calmed down. But on 3 April 2009, Thai troops launched a military offensive and entered Cambodian territory, using heavy artillery. They destroyed the office of the Preah Vihear Authority, the market around the Temple and seriously damaged the stairway that formed an integral part of the Temple.<sup>316</sup> This is the first record of a case before the ICJ in which the cultural heritage of one state, Cambodia, was damaged as part of the military invasion by another state, Thailand.

Up until 2011, Thailand refused to withdraw its military troops from the area, while ignoring the repeated request by the Government of Cambodia to comply with the ICJ Judgment.<sup>317</sup> In April 2011 Cambodia reacted by submitting an application to the ICJ, pursuant to Article 60 of the ICJ Statute and Article 98 of the Rules of the Court, in which a new interpretation of the Judgment of the Court of 15 June 1962 was requested.<sup>318</sup>

Cambodia, in its request in April 2011 to the ICJ for a new interpretation of the Judgment of 1962, describes the situation of February 2011: *"Thailand provoked further incidents by advancing into the Temple area, using in particular heavy artillery and fragmentation shells which caused many casualties among the Cambodian armed forces and civilians, as well as material damage to the Temple itself."*<sup>319</sup>

On 8 February 2011, UNESCO announced that it would send a Special Envoy to Bangkok and Phnom Penh in order to discuss the safeguarding of the World Heritage of the Preah Vihear Temple.<sup>320</sup> Ms. Bokova declared that *"the world's cultural heritage should never be a cause for conflict."*<sup>321</sup>

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<sup>315</sup> ICJ, *Request for interpretation of the Judgment of 15 June 1962 in the case concerning the Temple of Preah Vihear* (Cambodia v. Thailand), Application of 28 April 2011, 27, para. 33, [www.icj-cij.org](http://www.icj-cij.org).

<sup>316</sup> ICJ, *Request for interpretation of the Judgment of 15 June 1962 in the case concerning the Temple of Preah Vihear* (Cambodia v. Thailand), Application of 28 April 2011, 27, para. 34, [www.icj-cij.org](http://www.icj-cij.org).

<sup>317</sup> ICJ, *Request for interpretation of the Judgment of 15 June 1962 in the case concerning the Temple of Preah Vihear* (Cambodia v. Thailand), Application of 28 April 2011, 11, [www.icj-cij.org](http://www.icj-cij.org).

<sup>318</sup> ICJ, *Request for interpretation of the Judgment of 15 June 1962 in the case concerning the Temple of Preah Vihear* (Cambodia v. Thailand), Application of 28 April 2011, 5-7, [www.icj-cij.org](http://www.icj-cij.org).

<sup>319</sup> ICJ, *Request for interpretation of the Judgment of 15 June 1962 in the case concerning the Temple of Preah Vihear* (Cambodia v. Thailand), Application of 28 April 2011, 27, para. 34, [www.icj-cij.org](http://www.icj-cij.org).

<sup>320</sup> UNESCO WORLD HERITAGE CENTRE, "UNESCO to send mission to Preah Vihear", 8 February 2011, <http://whc.unesco.org/en/news/708/> (accessed 11 July 2015).

<sup>321</sup> UNESCO WORLD HERITAGE CENTRE, "UNESCO Special Envoy on Preah Vihear to meet with prime ministers of Thailand and Cambodia", 22 February 2011, <http://whc.unesco.org/en/news/715/> (accessed 11 July 2015).

### 3.1.2. The ICJ Judgment of 11 November 2013

In its Judgment on 15 June 1962, which the Court rendered in the case concerning the Temple of Preah Vihear, the operative part of which read as follows:

"The Court,

*finds that the Temple of Preah Vihear is situated in territory under the sovereignty of Cambodia;*

*finds in consequence, that Thailand is under an obligation to withdraw any military or police forces, or other guards or keepers, stationed by her at the Temple, or in its vicinity on Cambodian territory; and*

*that Thailand is under an obligation to restore to Cambodia any objects of the kind specified in Cambodia's fifth Submission which may, since the date of the occupation of the Temple by Thailand in 1954, have been removed from the Temple or the Temple area by the Thai authorities.*"<sup>322</sup>

Since the principle dispute between both States concerned mainly the Second Finding of the Court in the operative part of the Judgment, the Application of Cambodia focused on this part, as did the Judgment of 2013.

In its interpretative Judgment of 2013, the Court considered the First Finding as clear.<sup>323</sup> Concerning the Second Finding, the Court stated that the meaning of the 'vicinity' depended on the natural features surrounding the area of Preah Vihear.<sup>324</sup> Subsequently, the Court specified the frontiers of the area in all directions with great detail<sup>325</sup> and elaborated that Thailand had to withdraw from this whole territory any Thai personnel stationed there.<sup>326</sup>

Furthermore the Court recalled that the Temple of Preah Vihear is listed as World Heritage by UNESCO and referred to Article 6 of the WHC according to which both Cambodia and Thailand "*must cooperate between themselves and with the international community in the protection of the site as a world heritage.*"<sup>327</sup> Additionally, the Court stated that "*each State is under an obligation not to "take any deliberate measures which might damage directly or indirectly" [emphasis originally provided] such heritage. In the*

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<sup>322</sup> ICJ, *Case concerning the Temple of Preah Vihear* (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, *ICJ Reports* 1962, para. 21 [Hereinafter: 'ICJ, *Temple of Preah Vihear*, 1962'].

<sup>323</sup> ICJ, *Temple of Preah Vihear*, 1962, para. 80.

<sup>324</sup> ICJ, *Temple of Preah Vihear*, 1962, para. 89.

<sup>325</sup> ICJ, *Temple of Preah Vihear*, 1962, para. 89-90.

<sup>326</sup> ICJ, *Temple of Preah Vihear*, 1962, para. 98.

<sup>327</sup> ICJ, *Temple of Preah Vihear*, 1962, para. 106.

*context of these obligations, the Court wishes to emphasize the importance of ensuring access to the Temple from the Cambodian plain.*"<sup>328</sup>

The reference made by the Court to the 1972 World Heritage Convention is remarkable because we found that this was the first Judgment in which the ICJ explicitly referred to the 1972 World Heritage Convention. The Court went even further by confirming the obligation to cooperate on the protection of the world heritage site on the one hand, and not to take any deliberate measures which might damage directly or indirectly the cultural heritage on the other hand.

For these reasons we could consider the statements by the ICJ as an indication of an *opinio juris* concerning the obligations to protect cultural heritage as put forward by the 1972 World Heritage Convention.<sup>329</sup> State practice on the other hand shows a universal support in favour of the protection of world's cultural heritage.<sup>330</sup> Therefore we can conclude that the obligation to protect cultural heritage has been established as a rule of international customary law.

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<sup>328</sup> ICJ, *Temple of Preah Vihear*, 1962, para. 106.

<sup>329</sup> O. CORTEN, *Méthodologie du droit international public*, Bruxelles, Editions de l'Université de Bruxelles, 2009, 149.

<sup>330</sup> UN, "UN General Assembly calls for an immediate halt to 'wanton' destruction of Iraq's cultural heritage", 28 May 2015, [www.un.org/apps/news/story.asp?NewsID=50992#.VcM9g\\_ntmko](http://www.un.org/apps/news/story.asp?NewsID=50992#.VcM9g_ntmko) (accessed 3 August 2015); UN Security Council resolution (2199) in which the destruction of cultural heritage in Iraq and Syria was clearly condemned (Resolution 2199 (2015) Adopted by the Security Council at its 7379th meeting (12 February 2015), *UN Doc. S/RES/2199* (2015)); The UN SC Res. 2199 could count on an overwhelming support by the Security Council Members (UNESCOPRESS, "UNESCO Director-General welcomes UN Security Council Resolution to step up protection of cultural heritage in Syria and Iraq", 12 February 2015, [http://www.unesco.org/new/en/media-services/single-view/news/unesco\\_director\\_general\\_welcomes\\_un\\_security\\_council\\_resolution\\_to\\_step\\_up\\_protection\\_of\\_cultural\\_heritage\\_in\\_syria\\_and\\_iraq/#.VcMzzfntmko](http://www.unesco.org/new/en/media-services/single-view/news/unesco_director_general_welcomes_un_security_council_resolution_to_step_up_protection_of_cultural_heritage_in_syria_and_iraq/#.VcMzzfntmko) (accessed on 3 August 2015); The fact that there are at the moment of writing 191 States Parties to the World Heritage Convention (UNESCO, "States Parties: Ratification Status", 15 August 2014, <http://whc.unesco.org/en/statesparties/>) (accessed on 3 August 2015).

### 3.2. Case of the ICTY, Prosecutor v. Pavle Strugar (31 January 2005)

The United Nations established the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 in order to investigate and prosecute individuals responsible for the war crimes committed during the Balkan wars between 1991 and 1995 on the territory of the former Yugoslavia.<sup>331</sup>

In the Statute of the ICTY, "*wanton destruction of cities, towns or villages, or devastation not justified by military necessity*", "*seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science*" and "*plunder of public or private property*" are all qualified as 'violations of the laws or customs of war'.<sup>332</sup> In Article 2(d) of the Statute we read that "*extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly*" can be prosecuted by the International Tribunal since they are 'grave breaches of the Geneva Conventions of 1949'.

The *Strugar* case concerned the unlawful attacks against the Old Town of Dubrovnik, on 6 December 1991 by the Yugoslav People's Army (JNA) of which General Pavle Strugar was the military commander.<sup>333</sup> The Old Town of Dubrovnik had been inscribed on the World Heritage List since 1979<sup>334</sup> "*because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science*" (Article 1(3) WHC).<sup>335</sup> For this reason, and confirmed as well by the ICTY, the Old Town 'enjoyed therefore the protection and immunities' that were foreseen in the World Heritage Convention.<sup>336</sup> Nevertheless, the protection under the World Heritage Convention could not prevent the attacks against the Old Town of Dubrovnik and the destruction of the cultural heritage.

As described in the Judgment on the merits, the Old Town of Dubrovnik is surrounded by medieval walls and physically distant from the wider city.<sup>337</sup> These elements made the protected cultural heritage visible from a distance and therefore support the conviction of

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<sup>331</sup> ICTY, "About the ICTY", s.d., [www.icty.org/sections/AbouttheICTY](http://www.icty.org/sections/AbouttheICTY) (accessed 18 July 2015.)

<sup>332</sup> Article 3(b), 3(d) and 3(e) of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (25 May 1993, *UNSC Res 827* (1993)); A. CHECHI, "Some reflections on International Adjudication of Cultural Heritage-related cases", *Transnational Dispute Management* 2013, Vol. 10, No.5, 5.

<sup>333</sup> S. SOMERS, "Investigation and prosecution of crimes against cultural property", in N. VAN WOUDEMBERG and L. LIJNZAAD (eds.), *Protecting Cultural Property in Armed Conflict*, Leiden, Martinus Nijhoff Publishers, 2010, 77.

<sup>334</sup> UNESCO WORLD HERITAGE CENTRE, "Old City of Dubrovnik", s.d., <http://whc.unesco.org/en/list/95/>.

<sup>335</sup> ICTY, *Prosecutor v. Pavle Strugar*, Trial Chamber Judgment, Case No. IT-01-42-T (31 January 2005), para. 327 [Hereinafter: 'ICTY, *Strugar*, Judgment'.]

<sup>336</sup> ICTY, *Strugar*, Judgment, para. 279; Until 1992 the Socialist Federal Republic of Yugoslavia formed part of the USSR, that had ratified the WHC in 1988 (WHC, "States Parties: Ratification Status", 15 August 2014, <http://whc.unesco.org/en/statesparties/> (accessed 18 July 2015)); See Article 4, 5, 6 and 7 of the 1972 WHC Convention.

<sup>337</sup> ICTY, *Strugar*, Judgment, para. 279.

the Court that the targeting and shelling of the Old Town of Dubrovnik had been isolated and distinct from the wider city of Dubrovnik.<sup>338</sup> Furthermore, the Court established that there was no military necessity (see above) for the attack on the Old Town<sup>339</sup> and that the objects and persons located in the Old Town were civilians and civilian objects.<sup>340</sup> Hence, the Court found that the intention of the attack was to target these civilians and civilian objects.<sup>341</sup> The attacks caused the death of two civilians, injured several others and caused grave damage to civilian objects.<sup>342</sup>

Evidence showed that in December 1991, although the site was protected by the World Heritage Convention, it was still a living town with a resident population between 7000 and 8000 people. For this reason, the Old Town was a centre of commercial, governmental and religious activities.<sup>343</sup> And because of its World Heritage status, certain civilians believed that the Old Town in particular would be protected from military attacks.<sup>344</sup>

The accused in this case, Strugar, was charged with the 'devastation not justified by military necessity' which forms part of Article 3(b) of the ICTY-Statute.<sup>345</sup> The Court found that there was no military necessity that could justify the destruction of the property in the Old Town on 6 December 1991.<sup>346</sup> Furthermore, the Court took the context of the destruction of the buildings in the Old Town of Dubrovnik into account and decided that in this case the second part 'devastation not justified by military necessity' equaled the first part of Article 3(b) of the Statute which regards 'wanton destruction of cities, towns or villages'.<sup>347</sup> Among the destroyed buildings by the attack on 6 December 1991 were monasteries, churches, a mosque, a synagogue and palaces, but also residential blocks, shops and public places.<sup>348</sup>

Furthermore Strugar was charged with *"the destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science, punishable under Article 3(d) of the Statute."*<sup>349</sup> This provision relates to cultural property. Henceforth the Court concluded that the attack of JNA of 6 December 1991 was 'an attack directed against cultural

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<sup>338</sup> ICTY, *Strugar*, Judgment, para. 279.

<sup>339</sup> ICTY, *Strugar*, Judgment, para. 280; 284.

<sup>340</sup> ICTY, *Strugar*, Judgment, para. 284.

<sup>341</sup> ICTY, *Strugar*, Judgment, para. 288.

<sup>342</sup> ICTY, *Strugar*, Judgment, para. 289.

<sup>343</sup> ICTY, *Strugar*, Judgment, para. 285.

<sup>344</sup> ICTY, *Strugar*, Judgment, para. 285.

<sup>345</sup> ICTY, *Strugar*, Judgment, para. 291; Article 3(b) of the ICTY-Statute codifies two crimes: "wanton destruction of cities, towns or villages, or devastation not justified by military necessity."

<sup>346</sup> ICTY, *Strugar*, Judgment, para. 328.

<sup>347</sup> ICTY, *Strugar*, Judgment, para. 291.

<sup>348</sup> ICTY, *Strugar*, Judgment, para. 320.

<sup>349</sup> ICTY, *Strugar*, Judgment, para. 298.

property within the meaning of Article 3(d) of the Statute'.<sup>350</sup> Several earlier Judgments of the ICTY interpreted the provision as stated in Article 3(d). In the *Blaškić* Case, the Trial Chamber stated: "*The damage or destruction must have been committed intentionally to institutions which may clearly be identified as dedicated to religion or education and which were not being used for military purposes at the time of the acts. In addition, the institutions must not have been in the immediate vicinity of military objectives.*"<sup>351</sup>

The *Naletilić* Case rejected the interpretation that, for the protection of the institutions, the latter 'must not have been in the immediate vicinity of military objectives'.<sup>352</sup> Instead, in the *Naletilić* Case the Tribunal decided that in order to comply with Article 3(d), 'the general requirements of Article 3 of the Statute should be fulfilled (i); the destruction regarded an institution dedicated to religion (ii); the property was not used for military purposes (iii) and the perpetrator acted with the intent to destroy the property (iv)'.<sup>353</sup>

The Court decided in the *Strugar* Case on this difference of opinion and stated that instead of the location of the cultural property, it is the use of this property that determines whether the protection of the cultural property would be no longer held.<sup>354</sup> It also confirmed Article 3(d) as customary international law.<sup>355</sup>

In order to determine the elements under the offence of Article 3(d) of the Statute the Court referred to the sources of this Article 'in international customary law and treaty law' and mentions Article 27 of the 1907 Hague Regulations and the 1954 Hague Convention.<sup>356</sup> The Court made further reference to Article 4 of the 1954 Hague Convention and stated that "*The Hague Convention of 1954 provides for an obligation to respect cultural property.*"<sup>357</sup> Earlier, in the *Tadić* Case the Court had already confirmed the customary status of Article 19 of the 1954 Hague Convention.<sup>358</sup> Regrettably the Court did not elaborate on whether it believed that the entirety of the Hague Convention is customary international law.

The Court on 31 January 2005, found the Accused guilty pursuant to Article 7(3) of the ICTY Statute of the crimes of attacks on civilians (Count 3) and the destruction and wilful

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<sup>350</sup> ICTY, *Strugar*, Judgment, para. 327.

<sup>351</sup> ICTY, *Prosecutor v. Blaškić*, Trial Chamber Judgment, Case No. IT-95-14-T (3 March 2000), para. 185.

<sup>352</sup> ICTY, *Prosecutor v. Naletilić and Martinović*, Trial Chamber Judgment, Case No. IT-98-34-T (31 March 2003), para. 604.

<sup>353</sup> ICTY, *Prosecutor v. Naletilić and Martinović*, Trial Chamber Judgment, Case No. IT-98-34-T (31 March 2003), para. 605.

<sup>354</sup> ICTY, *Strugar*, Judgment, para. 310.

<sup>355</sup> ICTY, *Strugar*, Judgment, para. 230.

<sup>356</sup> ICTY, *Strugar*, Judgment, para. 303.

<sup>357</sup> ICTY, *Strugar*, Judgment, para. 309.

<sup>358</sup> ICTY, *Strugar*, Judgment, para. 229.

damage of cultural property (Count 6).<sup>359</sup> For these reasons Strugar was sentenced to 8 years of imprisonment.<sup>360</sup>

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<sup>359</sup> ICTY, *Strugar*, Judgment, para. 461, 478.

<sup>360</sup> ICTY, *Strugar*, Judgment, para. 481.



#### 4. State Practice: The Case of The Bamiyan Buddhas (2001)

The deliberate destruction by the Taliban regime<sup>361</sup> of the two standing rock statues of Buddha in the Bamiyan Valley in Afghanistan, originating from the local pre-Islamic religious and artistic culture in the third and fifth centuries AD, is one of the most recent and offensive examples of iconoclasm.<sup>362;363</sup>

The case however differed from war damage to cultural heritage in several ways. Whereas in the sphere of war damage, cultural heritage of the enemy, another nation, is targeted, the Bamiyan Buddhas concerned the destruction of ancient national cultural heritage belonging to the Afghan Nation. Another difference referred to the modality of execution of the destruction which was, unlike traditional war damage, carefully planned in the case of the Bamiyan Buddhas and advertised in worldwide media (see Annex, fig. 5).<sup>364</sup> In this chapter we will elaborate on this striking example of state practice which regrettably shows the inefficiency of the protective mechanism of cultural heritage.

Already in 1997 the World Heritage Committee<sup>365</sup> of UNESCO expressed its concern over threats by the Taliban regarding the Bamiyan Buddha statues. A paragraph of the Report of the Naples meeting reads: *"The World Heritage Committee (...) 2. 'Calls' [emphasis originally provided] upon the International Community to provide all the possible assistance needed to protect and conserve the cultural and natural heritage of Afghanistan under threat; 3. 'Invites' [emphasis originally provided] the authorities in Afghanistan to take appropriate measures in order to safeguard the cultural and natural heritage of the country."*<sup>366</sup>

Despite the advocacy of the World Heritage Committee for protection and conservation of the Bamiyan cultural heritage, the Taliban regime announced in 2001 its intention to demolish the cultural heritage representing a culture different from Islam.<sup>367</sup> Scholars refer to the context of that time in which sanctions were adopted by the United Nations

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<sup>361</sup> X., "Who are the Taliban?", *BBC News* 1 November 2013, [www.bbc.com/news/world-south-asia-11451718](http://www.bbc.com/news/world-south-asia-11451718), (accessed 10 July 2015).

<sup>362</sup> F. FRANCIANI and F. LENZERINI, "The Obligation to Prevent and Avoid Destruction of Cultural Heritage: From Bamiyan to Irak" in B.T. HOFFMAN (ed.), *Art and Cultural Heritage: Law, Policy, and Practice*, Cambridge, University Press, 2006, 28; F. FRANCIANI and F. LENZERINI, "The Destruction of the Buddhas of Bamiyan and International Law", *EJIL* 2003, 619-620.

<sup>363</sup> UNESCO WORLD HERITAGE CENTRE, "Cultural Landscape and Archaeological Remains of the Bamiyan Valley", s.d., <http://whc.unesco.org/en/list/208> (accessed 10 July 2015).

<sup>364</sup> F. FRANCIANI and F. LENZERINI, "The Obligation to Prevent and Avoid Destruction of Cultural Heritage: From Bamiyan to Irak", B.T. HOFFMAN (ed.), *Art and Cultural Heritage: Law, Policy, and Practice*, Cambridge, University Press, 2006, 28.

<sup>365</sup> THE WORLD HERITAGE COMMITTEE, <http://whc.unesco.org/en/committee/> (accessed 10 July 2015).

<sup>366</sup> UNESCO WORLD HERITAGE COMMITTEE, Report of the XXI Session of the World Heritage Committee, Naples, Italy, 1-6 December 1997, *UN Doc. WHC-97/CONF.208/17* of 27 February 1998, para. VII.58, <http://whc.unesco.org/archive/repcom97.pdf>; F. FRANCIANI and F. LENZERINI, "The Destruction of the Buddhas of Bamiyan and International Law", *EJIL* 2003, 625.

<sup>367</sup> F. FRANCIANI and F. LENZERINI, "The Destruction of the Buddhas of Bamiyan and International Law", *EJIL* 2003, 625.

Security Council<sup>368</sup> towards the Taliban because of their continuing support and training of terrorists. The destruction of the Buddhas is therefore called 'an act of defiance towards the United Nations and the international community.'<sup>369</sup>

The edict of the Taliban leader Mullah Omar to destroy the Buddhas displayed the motives of the destruction of the cultural heritage: because these statues or idols had been 'gods of the infidels' and 'they were still respected and might turned into gods again.' For these reasons, these 'false gods should be removed.'<sup>370</sup>

Additionally, UNESCO Director-General Irina Bokova at the tenth anniversary of the destruction of the Buddhas (in 2011) put forward one of the motives of the Taliban regime for the destruction as 'to undermine the power of culture as a cohesive force for the Afghan people'.<sup>371</sup> This motive is commonly shared among scholars.<sup>372</sup>

The destructive and provocative events against cultural heritage in the Bamiyan Valley left the international community disappointed and shocked.<sup>373</sup> This case not only showed the fallible character of the diplomatic pressure of UNESCO and the UN Secretary General Kofi Annan<sup>374</sup>, but also the international condemnation of destruction of cultural heritage as a sanction proved to be a totally ineffective.<sup>375</sup>

Regardless of the shock that went through the international community in consequence of these events<sup>376</sup>, the case of the Bamiyan Buddhas had not been the subject of a case before a supranational court. In order to do so, Article 34(1) of the Statute of the International Court of Justice (ICJ) states that "*only States can be parties in cases before the Court*".<sup>377</sup> Since the destruction of the Buddhas was located only on the territory of

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<sup>368</sup> UN Security Council Resolution 1267 (1999) of 15 October 1999; UN Security Council Resolution 1333 (2000), adopted on 19 December 2000; UN Security Council Resolution 1363 (2001) of 30 July 2001.

<sup>369</sup> F. FRANCONI and F. LENZERINI, "The Obligation to Prevent and Avoid Destruction of Cultural Heritage: From Bamiyan to Irak" in B.T. HOFFMAN (ed.), *Art and Cultural Heritage: Law, Policy, and Practice*, Cambridge, University Press, 2006, 28.

<sup>370</sup> F. FRANCONI and F. LENZERINI, "The Destruction of the Buddhas of Bamiyan and International Law", *EJIL* 2003, 626.

<sup>371</sup> UNESCO WORLD HERITAGE CENTRE, "Ten years on – remembering the tragic destruction of the giant Buddha statues of Bamiyan (Afghanistan)", 3 March 2011, <http://whc.unesco.org/en/news/718/>, (accessed 10 July 2015).

<sup>372</sup> F. FRANCONI and F. LENZERINI, "The Destruction of the Buddhas of Bamiyan and International Law", *EJIL* 2003, 625-627; J. KILA and R. VRANCKX, "Interview: Cultural Heritage under fire", organized by *M-Museum*, Leuven (Belgium), at M-Museum, 24 April 2014.

<sup>373</sup> F. FRANCONI and F. LENZERINI, "The Destruction of the Buddhas of Bamiyan and International Law", *EJIL* 2003, 621; X., "Bamiyan Statues: World reaction", *BBC News* 5 March 2001, [http://news.bbc.co.uk/2/hi/world/monitoring/media\\_reports/1202432.stm](http://news.bbc.co.uk/2/hi/world/monitoring/media_reports/1202432.stm) (accessed 10 July 2015).

<sup>374</sup> An overview of the actions by the international community to prevent the destruction of the Buddhas of Bamiyan, can be found in the Report of the Bureau of the World Heritage Committee, 25th Session, 25–30 June 2001, *UN doc. WHO-2001/CONF.205/10*, <http://whc.unesco.org/archive/repbur01.htm> (accessed July 2015).

<sup>375</sup> C. FORREST, *International Law and the Protection of Cultural Heritage*, London, Routledge, 2010, 402.

<sup>376</sup> X., "Bamiyan Statues: World reaction", *BBC News* 5 March 2001, [http://news.bbc.co.uk/2/hi/world/monitoring/media\\_reports/1202432.stm](http://news.bbc.co.uk/2/hi/world/monitoring/media_reports/1202432.stm) (accessed 10 July 2015).

<sup>377</sup> Article 34(1) Statute of the International Court of Justice, San Francisco, 26 June 1945, 15 *UNCIO* 355. [Hereinafter: 'ICJ Statute'].

one state, Afghanistan, it lacked international character to enable an application of one state against another to the ICJ.

#### **4.1. The destruction of the Bamiyan Buddhas as an Internationally Wrongful Act**

We could wonder whether the deliberate destruction of the Buddhas could have been understood as an internationally wrongful act<sup>378</sup>, upon which legal countermeasures could have followed.<sup>379</sup> In order to investigate the acts of destruction as an international wrongful act, several conditions have to be met (Article 2 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts [hereinafter 'ARSIWA']).

##### **4.1.1. Attribution of the Conduct**

Because the Taliban regime advertised their intentions to destroy the Bamiyan Buddhas worldwide, and instructed thus the demolition, this conduct is firstly attributable to the Taliban regime.<sup>380</sup> Secondly, the question whether this then unofficial, *de facto* regime in Afghanistan could be assumed to be in control of the State and thus being the subject of international sanctions, could receive a confirmation since the Taliban possessed the effective territorial sovereignty over 90 to 95 % of the Afghan territory, including the capital Kabul.<sup>381</sup> The Taliban regime also possessed governmental control over this territory and the people living there.<sup>382</sup>

Previous scholars did not discuss Article 9 or Article 10 ARSIWA.<sup>383</sup> In our opinion article 9 ARSIWA could be applicable because of the effective sovereignty and governmental control that the Taliban possessed over 90 to 95 % of the Afghan Territory.<sup>384</sup> A display of this governmental power is, for example, the publishing on their own initiative of the

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<sup>378</sup> Article 2 ILC, Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of Its 53rd Session (31 May 2001) *UN Doc. A/56/10* [also referred to as 'ARSIWA'].

<sup>379</sup> F. FRANCONI and F. LENZERINI, "The Destruction of the Buddhas of Bamiyan and International Law", *EJIL* 2003, 628 etc.

<sup>380</sup> Article 2(1) ARSIWA.

<sup>381</sup> According to Francioni and Lenzerini, the only necessary requirement to impose international sanctions on a government is the presence of effective territorial sovereignty of this government. This was set in the case of Southern Rhodesia in which the UN Security Council imposed sanctions on the white South Rhodesian government, based on the effective character of the territorial sovereignty of this regime: UN Security Council [hereafter UN SC] Resolution 216 (1965), UN SC Resolution 217 (1965), UN SC Resolution 221 (9 April 1965), S/RES/221 (1966), UN SC Resolution 232 (16 December 1966), S/RES/232 (1966), UN SC Res 253 (1968), [www.refworld.org/docid/3b00f205c.html](http://www.refworld.org/docid/3b00f205c.html) (accessed 10 July 2015); UN, "Afghanistan & the United Nations", s.d., [www.un.org/News/dh/latest/afghan/un-afghan-history.shtml](http://www.un.org/News/dh/latest/afghan/un-afghan-history.shtml) (accessed 10 July 2015).; X., "Mapping Militant Organizations, The Taliban", *Stanford University* 2 July 2013, <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/367>(accessed on 4 August 2015); X., "Who are the Taliban?", *BBC News* 1 November 2013, [www.bbc.com/news/world-south-asia-11451718](http://www.bbc.com/news/world-south-asia-11451718), (accessed 10 July 2015).

<sup>382</sup> UN, "Afghanistan & the United Nations", s.d., [www.un.org/News/dh/latest/afghan/un-afghan-history.shtml](http://www.un.org/News/dh/latest/afghan/un-afghan-history.shtml) (accessed 12 July 2015); X., "Mapping Militant Organizations, The Taliban", *Stanford University* 2 July 2013, <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/367>(accessed on 4 August 2015).

<sup>383</sup> ILC, "Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries", 31 May 2001, 49, [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf).

<sup>384</sup> Article 9 ARSIWA.

edict to destroy the Buddhas (see above).<sup>385</sup> Contrary to this hypothesis is the fact that the delegation of the Islamic State of Afghanistan, the overthrown, 'official government of Afghanistan'<sup>386</sup> still held the Afghan UN seat and controlled the foreign embassies of the country.<sup>387</sup> Additionally, the exceptional nature of the envisaged circumstances in Article 9<sup>388</sup> does not advocate the application of this Article either. However in these specific events, namely the suppressing of the legitimate government by the Taliban Article 9 ARSIWA could indeed be applied.<sup>389</sup>

In subsidiary order the first provision of Article 10 ARSIWA could also be relevant in the present case: conducts of the Taliban - assumed an insurrectional movement<sup>390</sup> - who became *de facto* the new government of Afghanistan (see above) will be considered acts of the State under International Law (Article 10(1) ARSIWA).

#### 4.1.2. Breach of an International Obligation

As illustrated above, the destruction of the Bamiyan Buddhas is a conduct, attributable to the Taliban Regime, possessing the territorial and governmental sovereignty over the largest part of Afghanistan (article 2(1) ARSIWA). Next, the destruction has to be proven a breach of an international obligation of the State, in order to be an internationally wrongful act (article 2(2) ARSIWA).

Francioni and Lenzerini put forward that the destruction of the Bamiyan Buddhas concerned a breach of two rules of customary international law. Firstly there is a breach of the *erga omnes obligation*<sup>391</sup> to respect cultural heritage<sup>392</sup> (see above). According to

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<sup>385</sup> ILC, "Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries", 31 May 2001, 49, [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf); UN, "Afghanistan & the United Nations", s.d., [www.un.org/News/dh/latest/afghan/un-afghan-history.shtml](http://www.un.org/News/dh/latest/afghan/un-afghan-history.shtml) (accessed July 2015).

<sup>386</sup> The Islamic State of Afghanistan, is still recognized by the majority of the international community as the legitimate government of Afghanistan. During their regime (1996-2001) only a minority recognized the Taliban as the legitimate government: Pakistan, Saudi Arabia and the United Arab Emirates. Today the Taliban can only count on the support of Pakistan. (X., "Mapping Militant Organizations, The Taliban", *Stanford University* 2 July 2013, <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/367> (accessed on 4 August 2015).)

<sup>387</sup> F. FRANCIONI and F. LENZERINI, "The Destruction of the Buddhas of Bamiyan and International Law", *EJIL* 2003, 622; HUMAN RIGHTS WATCH, "Fueling Afghanistan's War", *HRW World Report: Asia Overview 2001*, [www.hrw.org/legacy/background/asia/afghanistan/afghbk.htm](http://www.hrw.org/legacy/background/asia/afghanistan/afghbk.htm) (accessed 11 July 2015); UN, "Afghanistan & the United Nations", s.d., [www.un.org/News/dh/latest/afghan/un-afghan-history.shtml](http://www.un.org/News/dh/latest/afghan/un-afghan-history.shtml) (accessed 10 July 2015); X., "Who are the Taliban?", *BBC News* 1 November 2013, [www.bbc.com/news/world-south-asia-11451718](http://www.bbc.com/news/world-south-asia-11451718), (accessed 10 July 2015).

<sup>388</sup> These are expressed by the phrase "in circumstances such as to call for". (Article 9 ARSIWA) (ILC, "Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries", 31 May 2001, 49, [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf)).

<sup>389</sup> ILC, "Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries", 31 May 2001, 49, [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf).

<sup>390</sup> According to Parry and Grant, an insurrectional movement refers to "some sort of rising or rebellion within an State and the rebellious party thereto (...) [they have] no precise meaning in the sense that any distinction can be drawn between a mere revolt or rising and an insurrection." (C. PARRY, J.P. GRANT & J.C. BARKER, *Encyclopaedic dictionary of International Law*, Oxford, University Press, 2009).

<sup>391</sup> According to Parry and Grant, an 'erga omnes-obligation' is "opposable to, valid against all the world, i.e. all other legal persons, irrespective of consent on the part of those thus effected" (C. PARRY, J.P. GRANT & J.C. BARKER, *Encyclopaedic dictionary of International Law*, Oxford, University Press, 3th edition, 2009); F. FRANCIONI, "A Dynamic Evolution of Concept and Scope: From Cultural Property to Cultural Heritage", in A.A. YUSUF, *Standard Setting at UNESCO*, Leiden, Martinus Nijhoff Publishers, 2007, 221 etc.

Francioni and Lenzerini cultural heritage constitutes part of the 'general interest of the international community as a whole' and therefore deliberate destruction is prohibited.<sup>393</sup> This prohibition can be found in Article 4 of the 1954 Hague Convention, which by other scholars is also assumed to reflect customary international law.<sup>394</sup> Afghanistan never became a party to the 1954 Hague Convention<sup>395</sup>, therefore we cannot state that by destroying the Bamiyan Buddhas, the State as a contracting Party evaded its treaty obligations.

The second rule of customary international law that was violated in the case of the Bamiyan Buddhas concerns the prohibition of acts of violence against cultural heritage in the event of armed conflict.<sup>396</sup> In 2001, the civil war in Afghanistan had not come to an end<sup>397</sup>, therefore the situation can be assumed as 'an event, although internal, of armed conflict'. The prohibition of acts of violence against cultural heritage is for example laid out in the preamble and the Articles 2, 3 and 4 of the 1954 Hague Convention.<sup>398</sup>

With the deliberate destruction of the Bamiyan Buddhas, the Regime of the Taliban breached the *erga omnes obligation* to respect cultural heritage on the one hand, and committed a violation of the customary international law principle, namely the prohibition of acts of violence against cultural heritage in the event of armed conflict, on the other hand. Because these acts of violence against the cultural heritage are attributable to the Taliban, this conduct can be qualified as an internationally wrongful act.<sup>399</sup>

Since 2003 the Bamiyan Buddhas are inscribed on the list of the World Heritage Committee.<sup>400</sup> Afghanistan has been a State Party to the World Heritage Convention since 1979.<sup>401</sup> Therefore, not only did the Taliban Regime commit an internationally wrongful act, but as *de-facto-regime*, but also breached obligations of Afghanistan under the World Heritage convention by deliberately destroying the Buddhas.

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<sup>392</sup> The ICJ confirmed the existence of norms that are binding upon all states in the *Barcelona Traction case*. (ICJ, *Barcelona Traction, Light and Power Company Ltd* (Belgium v. Spain), Judgment, *ICJ Reports* 1970, 3, at 33-34).

<sup>393</sup> F. FRANCIONI and F. LENZERINI, "The Destruction of the Buddhas of Bamiyan and International Law", *EJIL* 2003, 633-634.

<sup>394</sup> C. EHLERT, 55; J.M. HENCKAERTS and L. DOSWALD-BECK, *Customary International Humanitarian Law*, Cambridge, Cambridge University Press, 2005, 127-132.

<sup>395</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954, 249 *UNTS* 240; UNESCO, "The State Parties", s.d., [www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/the-states-parties/#P1](http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/the-states-parties/#P1) (accessed on 13 July 2015).

<sup>396</sup> F. FRANCIONI and F. LENZERINI, "The Destruction of the Buddhas of Bamiyan and International Law", *EJIL* 2003, 635.

<sup>397</sup> UN, "Afghanistan & the United Nations", s.d., [www.un.org/News/dh/latest/afghan/un-afghan-history.shtml](http://www.un.org/News/dh/latest/afghan/un-afghan-history.shtml) (accessed 12 July 2015).

<sup>398</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954, 249 *UNTS* 240.

<sup>399</sup> F. FRANCIONI and F. LENZERINI, "The Destruction of the Buddhas of Bamiyan and International Law", *EJIL* 2003, 633-634.

<sup>400</sup> UNESCO WORLD HERITAGE CENTRE, "Cultural Landscape and Archaeological Remains of the Bamiyan Valley", s.d., <http://whc.unesco.org/en/list/208> (accessed 18 July 2015).

<sup>401</sup> UNESCO WORLD HERITAGE CENTRE, "States Parties: Ratification Status", s.d., <http://whc.unesco.org/en/statesparties/> (accessed 18 July 2015).

## CONCLUSION

In this research paper we tried to formulate an answer to the central question: *'Is there an effective mechanism in international law protecting the world's cultural heritage in situations of armed conflict?'*

The first chapter provided us with the necessary terminological insight to fully grasp the definitions of cultural property and cultural heritage which are put forward by respectively the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the 1972 Convention for the Protection of the World Cultural and Natural Heritage. Both definitions differ from each other although they each present a detailed list of cultural objects and buildings. Something they have in common is that not just any cultural object can be protected by international law since there has to be a certain importance attached to it: the 1954 Hague Convention decided upon 'property of great importance to the cultural heritage of every people', while the 1972 World Heritage Convention asked for cultural monuments, artwork, buildings and sites 'of outstanding universal value'.

In the second chapter we examined the protection system of cultural heritage in the situation of armed conflict through two relevant international legal conventions: the 1954 Hague Convention and the 1972 World Heritage Convention. Using the hypothesis to consider the protection provided by the general public international law as *lex generalis*, consequently the protection provided by these specific cultural conventions can be called a *lex specialis*. Because of the development of this special regime, cultural heritage contributed to the process of fragmentation of international law. Often this process led to the development of specialized dispute settlement mechanisms. However no specialized tribunal was set up to enforce the cultural heritage legal protection system. Scholars would consider the development of a specialized tribunal concerning cultural heritage conflicts an improvement for an unequivocal interpretation and application of cultural heritage law and solid enforcement of the cultural heritage protection regime.

The scope of the 1954 Hague Convention is the specific situation of an armed conflict. The 1972 WHC protection system on the contrary applies to both situations of armed conflict and peacetimes. Both Conventions are non-self-executing Conventions, therefore they demand adequate domestic rulings in the domestic law of the States Parties.

The protection of cultural property in the cultural heritage conventions is generally two-pronged: one aspect concerns the physical protection of the cultural property and the preventive measures against harm and destruction of the property, the other one concerns the penal measures that provide punishment and criminal responsibility for the

destruction of cultural property. The latter was only discussed in relation to the 1954 Hague Convention since only this Convention developed penal measures.

In both Conventions the protection of cultural heritage is divided into a 'general' and a 'special' protection system. The general system contains among other measures the application of the Blue Shield-Emblem on the protected cultural properties according to the 1954 Hague Convention. The WHC developed similarly the World Heritage Emblem to mark properties which are listed on the World Heritage List. Both Conventions also contain measures regarding risk preparedness, which means that the States Parties have to take measures in peace time in order to be prepared for situations of armed conflict.

The core obligation in the 1954 Hague Convention is the duty to respect cultural property (Article 4). According to some scholars this obligation reflects customary international law. Other authors go even further by suggesting that this obligation is an *erga omnes* obligation. Article 4 also contains the waiver of military necessity, which could cancel the protection system provided for cultural heritage. Due to the absence of a detailed regulation regarding the use of this waiver, it was often misinterpreted and abused with consequently the loss of cultural heritage. The Second Protocol to the 1954 Hague Convention (1999) filled this gap.

The penal provisions provided by the 1954 Hague Convention turned out to be a missed opportunity to include a detailed penalization of the destruction of cultural property in the international convention. Regrettably there was no unequivocal *animo* amongst the Drafters to include such a detailed provision at the International Conference in 1954. The Second Protocol to the 1954 Hague Convention (1999) made up for this inefficient provision of the 1954 Hague Convention by providing strict sanctions for serious violations against cultural property, the individual criminal responsibility for the crimes against cultural property and the conditions for prosecution. We can therefore state that the Second Protocol firmly enhanced 'the second leg' the sanctioning aspect of the protection system of the 1954 Hague Convention by elaborating the penal measures that provide punishment of the cultural property crimes.

The general protection system of the WHC on the one hand contains the duty of the sovereign national State Party to protect its national heritage (Article 4). On the other hand, because this national heritage constitutes a world heritage, there exists the duty of the international community to cooperate in the protection of this (cultural and natural) heritage (Article 6(1)). These duties exist in peacetime and continue to exist in situations of armed conflict. The special protection system of the WHC consists of the inscription of cultural (or natural) heritage on the *World Heritage List* or the *List of the World Heritage in Danger*. Regrettably, inclusion on these lists does not translate into a higher form of

physical protection as the case of the destruction of the Old Town of Dubrovnik showed (See ICTY *Strugar* Case).

The third chapter investigated how the destruction of cultural heritage is prosecuted by supranational courts and on which legal foundations the charges are built. We firstly discussed the ICJ Case concerning the *Temple of Preah Vihear* (Cambodia v. Thailand) (1962). In this case, the occupation of the cultural heritage site of Preah Vihear on Cambodian territory by Thai military forces implied a violation of the territorial integrity of Cambodia. Based on general international law, it became the first case in which the ICJ clearly obliged one State, *in casu* Thailand, upon restoring the cultural heritage of another state, Cambodia. Because Thailand did not comply with the Judgment of 1962, Cambodia requested a new interpretation from the ICJ in 2011. Meanwhile, the World Heritage Convention was established in 1972 and both Countries accepted this Convention. In this recent Judgment (2013) the ICJ confirmed indeed for the first time the obligations as stated in the WHC. This expression of *opinio juris*, combined with unequivocal state practice, reflects the obligation to protect cultural heritage as a rule of international customary law.

Secondly we elaborated on the ICTY *Judgment of Prosecutor v. Pavle Strugar* (2005). This case concerned the unlawful attacks against the World Heritage listed 'Old Town of Dubrovnik', on 6 December 1991 by the Yugoslav People's Army (JNA), of whom General Pavle Strugar was the military commander. The Court concluded that the JNA-attack was 'an attack directed against cultural property within the meaning of Article 3(d) of the ICTY Statute' and that there was no military necessity for the attack. In order to determine the elements under the offence of Article 3(d) of the Statute, the Court referred to Article 4 of the 1954 Hague Convention. It did not elaborate on the customary status of the latter Article. Strugar was sentenced to 8 years of imprisonment for the crimes of attacks on civilians and the destruction and wilful damage of cultural property.

In this chapter, we thus conclude by noting that in the first Judgment (1962) concerning the case of Preah Vihear, the crimes against cultural heritage were prosecuted on the basis of general public international law, the *lex generalis*. At the time, Thailand had accepted the 1954 Hague Convention, but there was no reference made in the Judgment of 1962 to Thailand's obligations under this Convention. In the most recent ICJ Judgment (2013) concerning this case, there was indeed reference made to the obligations of the World Heritage Convention, the *lex specialis*. Thus we notice an evolution in the prosecution of crimes against cultural heritage. Additionally, because of the development of the obligation to protect cultural heritage as a rule of customary international law, we can state that indeed the creation of a unequivocal protection of the world's cultural heritage has improved.



The fourth and final chapter deals with the deliberate destruction by the Taliban regime of the two standing rock statues of Buddha in the Bamiyan Valley in Afghanistan (2001). Unfortunately this case is one of the most recent and offensive examples of iconoclasm. The case however differed from war damage to cultural heritage, as came forward in the *Strugar Case*, in several ways. Whereas in the sphere of war damage, cultural heritage of the enemy, another nation, is targeted, the Bamiyan Buddhas concerned the destruction of ancient national cultural heritage belonging to the Afghan Nation. Not only did this case show the fallible character of the diplomatic pressure of UNESCO and the UN Secretary General Kofi Annan, but also the international condemnation of destruction of cultural heritage as a sanction proved to be ineffective since the destruction of these irreplaceable monuments could not be prevented.

In this research paper we tried to formulate an answer to the question: 'Is there an effective mechanism in international law protecting the world's cultural heritage in situations of armed conflict?' We can assert that several sources of international law provide protective rules for cultural heritage. Firstly there are the cultural heritage Conventions: the 1954 Hague Convention and additional Protocols and the 1972 World Heritage Convention, which provide for an elaborate *lex specialis* mechanism. Only the 1954 Hague Convention provided sanctioning provisions. The effectiveness of the 1954 Hague Convention is enhanced with the adaptation of the Second Protocol (1999). Secondly the obligation to protect international law reflects customary international law and therefore has to be respected at all times, by all parties.

Since there is no specialized tribunal established for the enforcement of a cultural heritage protective system, we elaborated on two recent cases of supra-national courts. In these recent Judgments of the ICJ and the ICTY reference was made to the obligations as defined by these two cultural Conventions. We consider this a leap forward in the enhancement of the protection system of cultural heritage.

However, the case of the Bamiyan Buddhas and recent state practice in for example Iraq, Syria and Yemen still show the shortcomings in the protective system of cultural heritage in international law.

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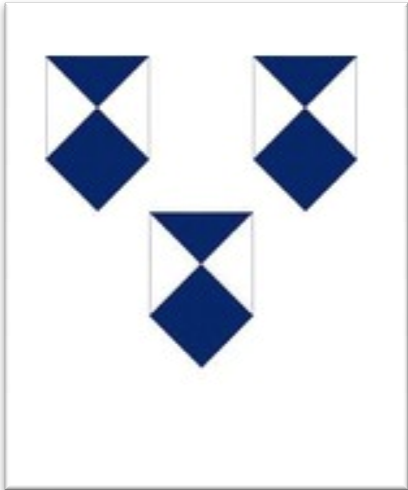
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**ANNEX - Figures**



*Fig.1 The Blue Shield Emblem*

Source: US COMMITTEE OF THE BLUE SHIELD, "The Blue Shield Emblem", 2015, <http://uscbs.org/blue-shield-emblem.html> (accessed on 8 August 2015).



*Fig.2 Triple Blue Shield Emblem*

Source: US COMMITTEE OF THE BLUE SHIELD, "The Blue Shield Emblem", 2015, <http://uscbs.org/blue-shield-emblem.html> (accessed on 8 August 2015).



Fig.3 *The World Heritage Emblem*

Source: UNESCO WORLD HERITAGE CENTRE, "World Heritage Emblem", s.d., <http://whc.unesco.org/en/emblem/> (accessed 8 August 2015).



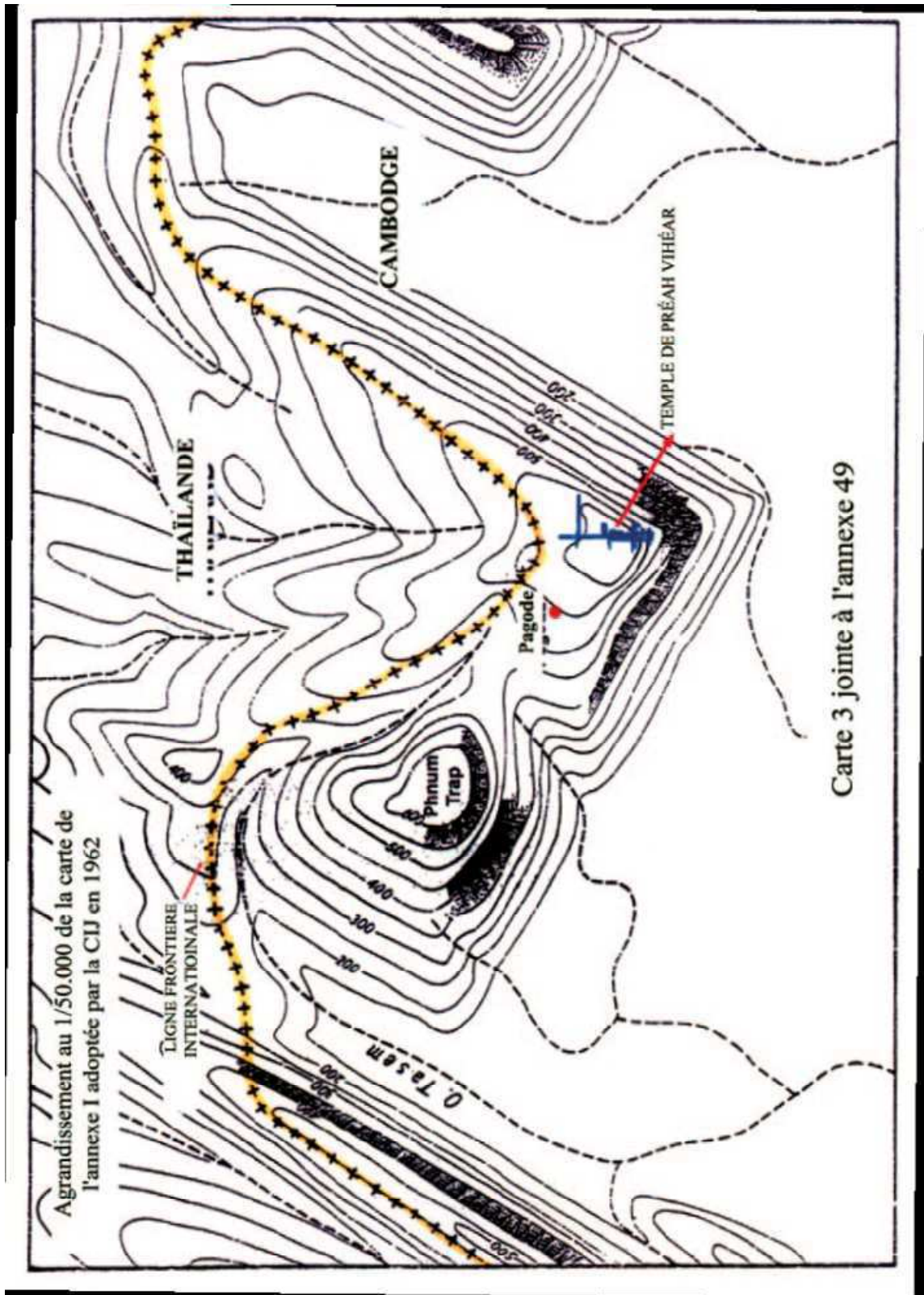


Fig. 4 Map of Preah Vihear area

Source: ICJ, Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand), Application of 28 April 2011, 186, [www.icj-cij.org](http://www.icj-cij.org). (accessed on 10 August 2015).



Fig. 5 *The Taller Bamiyan Buddha in 1963 (left) and after destruction, in 2008 (right).*

Source: X., "Taller Buddha of Bamiyan before and after destruction", s.d., Licensed under CC BY-SA 3.0 via Wikimedia Commons - [https://commons.wikimedia.org/wiki/File:Taller\\_Buddha\\_of\\_Bamiyan\\_before\\_and\\_after\\_destruction.jpg#/media/File:Taller\\_Buddha\\_of\\_Bamiyan\\_before\\_and\\_after\\_destruction.jpg](https://commons.wikimedia.org/wiki/File:Taller_Buddha_of_Bamiyan_before_and_after_destruction.jpg#/media/File:Taller_Buddha_of_Bamiyan_before_and_after_destruction.jpg) (accessed 10 August 2015).