

# RESEARCH ARTICLES

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## State Responsibility and the International Protection of Cultural Heritage in Armed Conflicts

**Abstract:** This article deals with the international responsibility of States for their breach of cultural heritage obligations in the event of armed conflicts. The topic is both highly important and challenging. In fact, the implementation of State responsibility for the breach of a cultural heritage obligation may meet with serious practical difficulties in attributing unlawful conduct to a given State. Moreover, political circumstances often favour the prosecution of individual perpetrators, even if they acted under the direction or control of a State, rather than invoking the responsibility of that State. Viewed in such light, this article briefly discusses the sources and status of international cultural heritage in the event of armed conflict, then deals with the consequences of their violation in international practice. It also discusses the resolution *Succession of States in Matters of International Responsibility*, adopted this year by the Institute of International Law (IIL), and analyses its potential outcomes in relation to cultural heritage obligations applicable to States' conduct in armed conflicts.

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## Whose Responsibility?

Although the protection of cultural heritage is a relatively new area of international law, it has already created a complex system of international obligations.<sup>1</sup> These refer particularly to the regime for the protection of cultural heritage in the event of armed conflict and occupation. While this is still an expanding area of international law-making, a number of questions arise as to the consequences of a breach of such obligations. In fact, various entities may bear responsibility for international offences against cultural heritage committed during an armed conflict. Yet, the rules governing their responsibility are regulated under distinct, though interconnected, normative regimes of international law.

Since the judgment of the Nuremberg International Military Tribunal<sup>2</sup> certain offences committed by individuals against cultural heritage during armed conflicts may be considered as international crimes and give rise to individual criminal responsibility.<sup>3</sup> After the Second World War the regime of individual criminal responsibility for the violation of international obligations towards cultural heritage was consolidated in international humanitarian law, under the 1954 Hague Convention<sup>4</sup> and the 1977 Additional Protocols to the 1949 Geneva Conventions.<sup>5</sup> But the major developments have taken place more recently. In light of the destruction of cultural heritage in the Balkans, the Second

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<sup>1</sup> For a conceptual overview, see *inter alia* J. Blake, *International Cultural Heritage Law*, Oxford University Press, Oxford 2015; F. Francioni, *Evolving Framework for the Protection of Cultural Heritage in International Law*, in: S. Borelli, F. Lenzerini (eds.), *Cultural Heritage, Cultural Rights, Cultural Diversity. New Developments in International Law*, Brill-Nijhoff, Leiden – Boston 2012, pp. 3-28; G. Carducci, *The Growing Complexity of International Art Law: Conflicts of Law, Mandatory Rules, UNSC Resolutions and EU Regulations*, in: B.T. Hoffman (ed.), *Art and Cultural Heritage. Law, Policy and Practice*, Cambridge University Press, New York 2006, pp. 68-86.

<sup>2</sup> See J. Nowlan, *Cultural Property and the Nuremberg War Crimes Trial*, "Humanitares Volkerrecht" 1993, Vol. 4, pp. 221-223.

<sup>3</sup> *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg 14 November 1945-1 October 1946*, International Military Tribunal, Nuremberg 1948, Vol. 2, pp. 593-616.

<sup>4</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict and the First Protocol to this Convention, 14 May 1954, 249 UNTS 240, 249 UNTS 358; see Article 28 of the 1954 Hague Convention.

<sup>5</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, Article 85(4)(d); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609, Article 16.

Hague Protocol (1999)<sup>6</sup> set up the most advanced and detailed regime of individual criminal responsibility for offences against cultural heritage (committed in both international and non-international armed conflicts). Certain acts against cultural heritage were also criminalized under the Statute of the International Criminal Tribunal for ex-Yugoslavia (ICTY).<sup>7</sup> The practice of this international *ad hoc* tribunal also offers the most comprehensive case law to date in the area of individual criminal responsibility for the breach of international cultural heritage obligations. In addition, the statute of the International Criminal Court (ICC), the first permanent criminal court, also refers to cultural heritage crimes,<sup>8</sup> and the Court has just recently initiated a proceeding with respect to such offences (the proceedings against Abu Tourab).<sup>9</sup> Yet, it needs to be stressed that the extent of offences against cultural property under the statutes of these tribunals is limited as compared to the regime of the Second Hague Protocol, both from a quantitative perspective and that of differentiation on the basis of gravity.<sup>10</sup>

The current acts against cultural heritage occurring in Syria, Iraq and Mali have given rise to another pressing issue – that of the international responsibility or corporate (group) criminal responsibility of non-State actors such as Daesh (ISIS). However, to date no corporate entity (non-State group) has been prosecuted by any municipal or international court for any international cultural heritage crime. Moreover, there is no such practice in relation to any other international crimes either. Importantly, the statutes of international criminal tribunals, including the Statute of Rome, provide only for jurisdiction over natural persons – not their collectivities.<sup>11</sup> Accordingly, there are so far no “accepted rules or standards for corporate criminal responsibility under international law”.<sup>12</sup> On the other hand, it has

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<sup>6</sup> Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, 2253 UNTS 212.

<sup>7</sup> 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, UN Doc. S/RES/827 (1992); see Article 3(d).

<sup>8</sup> Statute of the International Criminal Court (Statute of Rome), 17 July 1998, 2187 UNTS 90; see Articles 8(2)(b)(ix) and 8(2)(e)(iv).

<sup>9</sup> Abu Tourab – Ahmad Al Mahdi Al Faqi, an alleged member of Ansar Dine, a Tuareg Islamic extremist militia in North Africa, suspected of war crimes allegedly committed in 2012, in Timbuktu (Mali), by intentionally directing attacks against buildings dedicated to religion and/or historical monuments; ICC, *Prosecutor v. Ahmad Al Faqi Al Mahdi*, No. ICC-01/12-01/15.

<sup>10</sup> See A. Carcano, *The Criminalization and Prosecution of Attacks against Cultural Property*, in: F. Pocar, M. Pedrazzi, M. Frulli (eds.), *War Crimes and the Conduct of Hostilities: Challenges to Adjudication and Investigation*, Edward Elgar, Cheltenham 2013, pp. 78-97.

<sup>11</sup> In fact, the above-mentioned proceedings before the ICC relating to the war crimes in Mali have been initiated against a member of a group, but not against the group itself.

<sup>12</sup> J. Crawford, *State Responsibility: The General Part*, Cambridge University Press, Cambridge 2013, p. 81.

been asserted that non-State corporate actors are bound by international law rules. In particular this relates to non-State armed groups exercising control over a given territory and population.<sup>13</sup> Thus more and more voices are postulating the establishment a coherent set of principles and mechanisms concerning the corporate responsibility of non-State groups for the breach of international law, beyond the regime of individual criminal responsibility.<sup>14</sup>

The third context, and perhaps the most important one, in which the violation of international cultural heritage obligations may be invoked is that of State responsibility. Indeed, from the traditional, horizontal perspective of international law, the violation of binding obligations under international law entails international responsibility which can be invoked and implemented against those entities which are recognized as possessing personality on the international plane, in particular States, which still the primary subjects of international law. The regime of responsibility of States for internationally wrongful acts is regulated under customary international law, comprehensively codified by the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).<sup>15</sup> Although the ARSIWA does not have the form of a treaty, many of its provisions are generally considered as reflecting customary international law.<sup>16</sup>

It is clear that most of the international obligations for the protection of cultural heritage are made by and for States. Yet the objectives of such obligations have, over the years, gone beyond the exclusive cultural, political and economic interests of States towards general interests and values shared by the entire international community, with increasing focus on the protection and promotion of human rights.<sup>17</sup> In this regard, the breach of international cultural heritage obligations by a State may give rise to secondary obligations toward, and vested in, not

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<sup>13</sup> See, for instance, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986, ICJ Reports 1986, p. 392, para. 219; for a complex analysis see Z. Howe, *Can the 1954 Hague Convention Apply to Non-State Actors?: A Study of Iraq and Libya*, "Texas International Law Journal" 2012, Vol. 47, p. 403; N. Gal-Or, C. Ryngaert, M. Noortmann (eds.), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place: Theoretical Considerations and Empirical Findings*, Brill-Nijhoff, Leiden – Boston 2015.

<sup>14</sup> See article by K. Hausler, *Culture under Attack: The Destruction of Cultural Heritage by non-State Armed Groups*, "Santander Art and Culture Law Review" 2015, current issue, pp. 129-141.

<sup>15</sup> November 2001, UN Doc. A/56/83 (2001).

<sup>16</sup> See, for instance, J. Crawford, *State Responsibility*, in: *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Heidelberg-Oxford 2006, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1093?prd=EPIL> [accessed: 11.11.2015], para. 65.

<sup>17</sup> See, in particular, A.F. Vrdoljak, *Human Rights and Cultural Heritage in International Law*, in: F. Lenzerini, A.F. Vrdoljak (eds.), *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature*, Hart, Oxford 2014, p. 139.

only a State directly injured but also in their plurality or the international community as a whole. This common denominator, that is, the protection of goods particularly cherished by the international community, establishes a link between the primary rules, protecting such basic values and interests, and the secondary rules governing the consequences of any violation of these rules. Yet the implementation of State responsibility for the breach of a cultural heritage obligation may also encounter serious practical difficulties in terms of attributing a course of conduct to a given State. Moreover, the complex and internally fragmented system of international heritage law does not provide for any comprehensive dispute settlement mechanisms.<sup>18</sup> In addition, political circumstances often favour the prosecution of individual perpetrators, even if they acted under the direction or control of a State, rather than invoking the responsibility of that State.

In such a context, this article explores the existing regime of State responsibility for internationally wrongful acts against cultural heritage which are committed in the course of an armed conflict. First, it briefly discusses the sources and status of international cultural heritage obligations in the situation of military conflict. Second, it deals with the consequences of their violation in international practice. Finally, it recalls the resolution by the Institute of International Law (IIL) – *Succession of States in Matters of International Responsibility* – adopted in Tallinn on 28 August 2015,<sup>19</sup> and analyses its provisions in light of cultural heritage obligations. This recent doctrinal development addresses a long-neglected “grey zone” of international law which has an important practical impact on cultural heritage matters, such as restitution of cultural property pillaged or displaced in the event of an armed conflict and reparations for cultural loss. Arguably, such a reconceptualization seems highly important in the light of current political and territorial reconfigurations in eastern Ukraine and possible final ruptures in Libya, Syria and Iraq.

## Sources and Status of Cultural Heritage Obligations in Armed Conflicts

In contrast to the law on international responsibility of States, cultural heritage obligations are established in the great majority of cases by multilateral treaties, and to a certain extent by bilateral treaties and agreements in the matter of protection, preservation and cooperation in matters of culture and cultural heritage. In relation to tangible cultural heritage in the event of armed conflicts, two main groups

<sup>18</sup> A. Chechi, *Evaluating the Establishment of an International Cultural Heritage Court*, “Art, Antiquity & Law” 2013, Vol. 18, p. 32.

<sup>19</sup> IIL, 14<sup>th</sup> Commission, M.G. Kohen (Rapporteur), 28 August 2015, [http://www.justitiaetpace.org/idiE/resolutionsE/2015\\_Tallinn\\_14\\_en.pdf](http://www.justitiaetpace.org/idiE/resolutionsE/2015_Tallinn_14_en.pdf) [accessed: 15.11.2015].

of obligations can be identified:<sup>20</sup> 1) the protection and respect of cultural property in the event of armed conflict and occupation; 2) restoration of material unlawfully appropriated and transferred from militarily occupied territories. Importantly, the first group refers to obligations established by substantive “primary” rules of international law regulating the conduct of hostilities and occupation in relation to cultural property, whereas the second one would primarily refer to “secondary” obligations of States flowing from their breach of such cultural heritage obligations.

The destruction and pillage of property and buildings dedicated to religion, education, art, and science have been prohibited under binding international instruments on war conduct since the Peace Conferences of 1899<sup>21</sup> and 1907.<sup>22</sup> Yet the complex set of rules governing the situation of cultural property in the event of an armed conflict was codified after the Second World War, under the 1954 Hague Convention, which today binds more than 120 State Parties.<sup>23</sup> This formalized the concept of “cultural property” as an autonomous legal category requiring international protection due to the inherent value of cultural heritage for every people. It also recognizes that such protection is of universal concern, because “each people make their own contribution to the culture of the world”.<sup>24</sup> The regime established by the 1954 Hague Convention was extended by its Second Protocol (1999) to cover non-international conflicts. Article 22 of this Protocol provides that the international regime of protection shall also “apply in the event of an armed conflict not of an international character, occurring within the territory of one of the Parties”. Moreover, the Second Hague Protocol elaborated the provisions of the 1954 Hague Convention relating to the safeguarding of and respect for cultural property

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<sup>20</sup> The third of group of obligations under the treaty law, that has been not analyzed in this article, regards the duty to prosecute and impose penal or disciplinary sanctions upon individual perpetrators responsible for the violations of the rules of the protection of cultural property in armed conflicts. As already mentioned, the 1954 Hague Convention and the 1977 Protocol I to the 1949 Geneva Conventions oblige their State parties to ensure that such adequate criminal regulations and measures are established. In addition, the Second Hague Protocol introduces the principle of universal jurisdiction over the most “serious violations” of the norms on the protection of cultural heritage, and obliges the parties to prosecute or extradite the offender regardless of his or her nationality or the location of the violation committed. The penalized offences not only comprise the destruction of cultural heritage, but also theft, pillage, or misappropriation of cultural material. Read further M. Hector, *Enhancing Individual Criminal Responsibility for Offences Involving Cultural Property – the Road to the Rome Statute and the 1999 Second Protocol*, in: N. van Woudenberg, L. Lijnzaad (eds.), *Protecting Cultural Property in Armed Conflict*, Brill-Nijhoff, Leiden – Boston 2010, pp. 69-76; R. O’Keefe, *The Protection of Cultural Property in Armed Conflict*, Cambridge University Press, New York 2006, p. 236.

<sup>21</sup> Regulations Annexed to the Convention (II) with Respect to the Laws and Customs of War on Land, 29 July 1899, 187 Parry’s CTS 429, Article 56.

<sup>22</sup> Regulations Annexed to the Convention Respecting the Laws and Customs of War on Land, 18 October 1907, 208 Parry’s CTS 77, Articles 27 and 56.

<sup>23</sup> <http://www.unesco.org/eri/la/convention.asp?KO=13637&language=E&order=alpha> [accessed: 16.11.2015].

<sup>24</sup> The 1954 Hague Convention, Preamble.

during the conduct of hostilities. In particular, it established a new category of enhanced protection for “tangible cultural heritage that is of greatest importance for humanity” (Article 10). Accordingly, under the Hague regime States are obliged to spare cultural property, provided that it does not serve for military purposes, from attacks in territories affected by an armed conflict, and abstain from the pillage and removal of cultural objects situated therein.

At the level of international treaty law, the second category of obligations refers to the restitution of cultural property unlawfully removed from an occupied territory. The duty to return cultural property appropriated and/or removed from occupied territories by the use of force and/or under duress, already universally confirmed by the Allied legislation during the Second World War, particularly the 1943 London Declaration,<sup>25</sup> was codified by the First Hague Protocol (1954), which prohibits the export of cultural property from an occupied territory and requires the return of such property to the territory of the State from which it was removed. The “export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power” was also regarded as “illicit” by the 1970 Convention (Article 11).<sup>26</sup> More recently, the obligation to restore cultural material removed from occupied territories has been fully recognized by the *ad hoc* legislation of the UN Security Council adopted on the basis of the Chapter VII of the UN Charter.<sup>27</sup> In particular, the most important provisions are to be found with respect to the cultural heritage of Iraq and Kuwait. According to Resolution 686 (1991),<sup>28</sup> the Security Council demanded that Iraq “immediately begin to return all Kuwaiti property seized by Iraq, to be completed in the shortest possible period” (paragraph 2 (d)). Resolution 1483 of 2003<sup>29</sup> went much further. In this instance, the Security Council decided that all member States of the United Nations “shall take appropriate steps to facilitate the safe return to Iraqi institutions of Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from the Iraq National Museum, the National Library, and other locations in Iraq” (paragraph 7). Thus, the resolution – as a binding international instrument – provided for an obligation *erga omnes* to ensure that cultural property illicitly transferred from occupied territories

<sup>25</sup> The Inter-Allied Declaration against Acts of Dispossession Committed in Territories under Enemy Occupation or Control, 5 January 1943, <http://www.lootedartcommission.com/inter-allied-declaration> [accessed: 15.11.2015].

<sup>26</sup> Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, 823 UNTS 231.

<sup>27</sup> Charter of the United Nations, 26 June 1945, 1 UNTS XVI, amended in 1963 (557 UNTS 143), in 1965 (638 UNTS 308), and in 1971 (892 UNTS 119).

<sup>28</sup> UN Doc. S/RES/686 (1991).

<sup>29</sup> UN Doc. S/RES/1483 (2003).

would be returned. The latest events in Syria and in Iraq have also fostered various international measures with the objective of stopping the trafficking in or pillage of cultural objects and facilitating their return. The Council Regulation (EU) No 1332/2013 of 13 December 2013<sup>30</sup> is perhaps the most significant international instrument in this regard. It recognizes the obligation of the EU Member States to “return to their legitimate owners goods constituting Syrian cultural heritage which have been illegally removed from Syria” (3<sup>rd</sup> recital), and requires measures to be adopted in order “to prohibit the import, export or transfer of such goods” (Article 11).

The recent international practice has also demonstrated that most treaty rules in relation to States’ obligations towards cultural heritage reflect customary international law. Indeed, an explicit recognition of the customary nature of these obligations can be found in the jurisprudence of international courts.<sup>31</sup> In particular, the ICTY held that the intentional destruction of cultural heritage law is criminalized under customary international law.<sup>32</sup> Similar conclusions were also reached by the Eritrea–Ethiopia Claims Commission, established by the peace accords concluded in Algiers on 12 December 2000<sup>33</sup> in order to settle the disputes between these two States arising from events which took place during the war of 1998-2000. The commission found Ethiopia responsible for the destruction of an important archaeological monument in the occupied territory of Eritrea and held that such an act “was a violation of customary international humanitarian law”<sup>34</sup> even though the 1954 Hague Convention was not applicable as neither Eritrea nor Ethiopia was a party to it.

In addition, the link between the destruction of cultural heritage, its wilful damage and grave violations of humanitarian law has been strengthened. Accordingly, the ICTY found that the destruction of cultural heritage committed with “the requisite of discriminatory intent”, may amount to persecution, that is, it may be considered as a crime against humanity.<sup>35</sup> Moreover, if such attacks are directed

<sup>30</sup> Amending Regulation (EU) No. 36/2012 concerning restrictive measures in view of the situation in Syria, OJ L 335, 14.12.2013, pp. 3-7.

<sup>31</sup> See F. Lenzerini, *The Role of International and Mixed Criminal Courts in the Enforcement of International Norms Concerning the Protection of Cultural Heritage*, in: F. Francioni, J. Gordley (eds.), *Enforcing International Cultural Heritage Law*, Oxford University Press, Oxford 2013, pp. 41-64.

<sup>32</sup> See for example *Prosecutor v. Kordić and Čerkez*, ICTY Case No. IT-95-14/2-T, Judgment of the Trial Chamber, 26 February 2001, para. 206; *Prosecutor v. Tadić*, ICTY Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 98.

<sup>33</sup> Agreement the Governments of the State of Eritrea and the Federal Democratic Republic of Ethiopia, 12 December 2000, UN Doc. A/55/686-S/2000/1183, Annex, <http://www.pca-cpa.org/upload/files/Algiers%20Agreement.pdf> [accessed: 10.11.2015].

<sup>34</sup> Claims Commission for Eritrea and Ethiopia, “Partial Award, Central Front, Eritrea’s Claims 2, 4, 6, 7, 8 & 22, 28” (2004), 43 ILM (2004) 1249, para. 113.

<sup>35</sup> *Prosecutor v. Kordić and Čerkez*, op. cit., para. 207.



against cultural or religious property of a given group, they “may legitimately be considered as evidence of an intent to physically destroy the group”,<sup>36</sup> thus providing evidence of the intent (*mens rea*) requirement for the commission of the crime of genocide under the 1948 Genocide Convention.<sup>37</sup> More recently, such an interpretation of the wilful damage to cultural heritage of a group has also been confirmed in the caselaw of the Extraordinary Chambers in the Courts of Cambodia (ECCC). Accordingly, intentional acts against cultural property have been considered as crimes against humanity, when committed with a discriminatory intent.<sup>38</sup> Importantly, the nature of international offences against cultural heritage occurred in armed conflicts was addressed in two genocide cases before the International Court of Justice (ICJ). These two judgements directly transposed the *aquis* of the ICTY relating to the cultural dimension of genocide (in particular the judgment in *Krstić*) to the realm of State responsibility. Accordingly, the ICJ held that attacks on cultural and religious property during an armed conflict constitute a violation of international law. Furthermore, such acts may be considered as evidence of a genocidal intent aimed at the extinction of a group.<sup>39</sup>

Alongside the developments of relevant international case law, the customary notion of the obligation to respect cultural heritage in armed conflicts seems to be confirmed in the practice of major international organizations. In fact, such a position was taken by the UN. Accordingly, the UN Secretary-General, Kofi A. Annan, in his 1999 Observance by United Nations Forces of International Humanitarian Law set up for the protection of cultural property during operations under the UN.<sup>40</sup> Apparently, the obligations binding the UN forces are treated here as arising from general international law. This was also confirmed and emphasized by the UNESCO’s General Conference in its 2003 Declaration Concerning the Intentional Destruction of Cultural Heritage,<sup>41</sup> adopted in response to the destruction

<sup>36</sup> *Prosecutor v. Krstić*, ICTY Case No. IT-98-33-T, Judgment of the Trial Chamber, 2 August 2001, para. 580.

<sup>37</sup> Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277.

<sup>38</sup> Case 002, Indictment, 15 September 2010, Case File No. 002/19-09-2007-ECCC-OCIJ, paras. 1420-1421, <http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D427Eng.pdf> [accessed: 10.11.2015].

<sup>39</sup> *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, ICJ Reports 2007, p. 43, para. 344; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment of 3 February 2015, <http://www.icj-cij.org/docket/files/118/18422.pdf> [accessed: 7.11.2015], para. 390.

<sup>40</sup> UN Secretary-General’s Bulletin, 6 August 1999, UN Doc. ST/SGB/1999/13, Article 6.6.

<sup>41</sup> UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage, 17 October 2003, UNESCO Doc. 32 C/Res. 33 (2003).

of the sixth-century Buddhas of Bamiyan in Afghanistan.<sup>42</sup> It reiterated that “the development of rules of customary international law has also been affirmed by the relevant case-law, related to the protection of cultural heritage in peacetime as well as in the event of armed conflict” (Preamble). Moreover, it provided, under Article VI, that “a State that intentionally destroys or intentionally fails to take appropriate measures to prohibit, prevent, stop, and punish any intentional destruction of cultural heritage of great importance for humanity, whether or not it is inscribed on a list maintained by UNESCO or another international organization, bears the responsibility for such destruction, to the extent provided for by international law.” In relation to this, it seems necessary to mention a remarkable study by the International Committee of the Red Cross.<sup>43</sup> Based on an assessment of the very rich source material analysed therein, it concluded that the obligations in this respect committed during armed conflicts, both international as well as those of an internal nature, is now a fully-established set of norms of customary law.<sup>44</sup> This also refers to the obligation to restore cultural property removed from territories under military occupation.<sup>45</sup>

The development of general international norms concerning the protection of cultural heritage has also been the subject of recent analyses in the international legal scholarship.<sup>46</sup> Their universally binding nature is interpreted in the context of protecting the common interest of all mankind, manifesting itself in the protection and promotion of cultural heritage.<sup>47</sup> Moreover, it is also argued that cultural heritage belongs to global common goods and thus requires international solidarity and protection.<sup>48</sup> This is usually analysed in relation to the concept of cultural diversity being “a source of exchange, innovation and creativity; cultural diversity is as necessary for humankind as biodiversity is for nature”.<sup>49</sup> In fact, cultural diversity has already been recognized and promoted as a global common good for a variety of reasons and purposes, including its importance

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<sup>42</sup> R. O’Keefe, *op. cit.*, pp. 356-357.

<sup>43</sup> J.-M. Henckaerts, L. Doswald-Beck (eds.), *Customary International. Humanitarian Law*, Vol. 1: Rules, Vol. 2: Practice, Cambridge University Press, New York 2005.

<sup>44</sup> *Ibidem*, Vol. 1: Rules, pp. 127-138, 523-525; Vol. 2: Practice, pp. 723-813, 3452 *passim*.

<sup>45</sup> *Ibidem*, Vol. 1: Rules, p. 137.

<sup>46</sup> For the most complex analysis, see F. Francioni, *Au-delà des traités: L’émergence d’un nouveau droit coutumier pour la protection du patrimoine culturel*, “Revue générale de droit international public” 2007, Vol. 111, pp. 19-42.

<sup>47</sup> See J. Blake, *op. cit.*, pp. 119-124.

<sup>48</sup> I. Kaul, I. Grunberg, M.A. Stern (eds.), *Global Public Goods: International Cooperation in the 21st Century*, Oxford University Press, New York – Oxford 1999, p. 453; F. Francioni, *Public and Private in the International Protection of Global Cultural Goods*, “European Journal of International Law” 2012, Vol. 23, pp. 719-730.

<sup>49</sup> UNESCO Universal Declaration on Cultural Diversity, 2 November 2001, UNESCO Doc. 31C/Res., Article 1.

to peace and stability, progress and development, and the full realization of all human rights.<sup>50</sup> Therefore a number of international obligations in relation to cultural heritage are sometimes seen as effective *erga omnes*.<sup>51</sup> These particularly concern the duty to protect cultural property in the event of armed conflict and occupation arising from the 1972 World Heritage Convention.<sup>52</sup> It is recognized that the very nature and logic of these obligations under this treaty are of “general or common interest”.<sup>53</sup> Thus a breach of obligations towards cultural property protected under the 1972 UNESCO regime and situated in the territory of one State does not necessarily have to inflict a specific injury on another State, but amounts to “an offence against all the State Parties to the Convention”.<sup>54</sup>

Since the memorable judgement of the International Court of Justice in *Barcelona Traction*,<sup>55</sup> international obligations stemming, *inter alia*, from the protection of fundamental human rights or the prohibition of serious crimes of international law can be regarded as binding on the entire international community.<sup>56</sup> According to the ICJ,<sup>57</sup> certain norms aimed at protecting the general interest of humanity, even if established by a specific group of States, may be deemed to be effective *erga omnes* provided that are accepted and recognized by the international community. Consequently, these can be invoked against other subjects of international law, even those not participating in their creation. As the World Heritage Convention has been ratified or acceded to by nearly all States of the world, the obligation to respect and protect cultural property of great importance for every people

<sup>50</sup> For further analysis see A.F. Vrdoljak, *Human Rights and Cultural Heritage*..., pp. 168-172.

<sup>51</sup> F. Francioni, *Au-delà des traités*..., pp. 19-42.

<sup>52</sup> Convention Concerning the Protection of World Natural and Cultural Heritage, 16 November 1972, 1037 UNTS 151.

<sup>53</sup> G.P. Buzzini, L. Condorelli, *Article 11: List of World Heritage in Danger and Deletion of a Property from the World Heritage List*, in: F. Francioni, F. Lenzerini (eds.), *The 1972 World Heritage Convention: A Commentary*, Oxford University Press, Oxford 2007, p. 178.

<sup>54</sup> *Ibidem*, see also C. Forrest, *International Law and the Protection of Cultural Heritage*, Routledge, London – New York 2010, pp. 50, 277-278; see also *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment of 11 November 2013, ICJ Report 2013, p. 281, para. 106.

<sup>55</sup> ICJ Rep. 1969, p. 33.

<sup>56</sup> Cfr. *inter alia* *Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, p. 136, paras. 155-157; *Armed Activities on the Territory of the Congo (DRC v. Rwanda)*, Judgment of 3 February 2006, ICJ Reports 2006, p. 3, para. 41. Read further Ch.J. Tams, *Enforcing Obligations Erga Omnes in International Law*, Cambridge University Press, New York 2005; Ch. Tomuschat, J.-M. Thouvenin (eds.), *The Fundamental Rules of The International Legal Order: Jus Cogens And Obligations Erga Omnes*, Brill-Nijhoff, Leiden – Boston 2006; M. Ragazzi, *The Concept of International Obligations Erga Omnes*, 2<sup>nd</sup> edn., Oxford University Press, Oxford 2000.

<sup>57</sup> See *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, ICJ Reports 1949, p. 174, at 185 and *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, ICJ Reports 1971, p. 16, paras. 126-127.

and/or for international humanity as a whole constitutes a general principle of international law of an *erga omnes* nature.<sup>58</sup> The postulate concerning the formation of international obligations effective *erga omnes* with respect to cultural heritage at the level of general international law – beyond the exclusive realm of a given treaty regime (obligations *erga omnes contractantes*) – is not however accepted uncritically. It is primarily argued that the system for international legal protection of cultural heritage is based on the respect for the full sovereign competence of States to determine the elements of their heritage to be preserved and protected.<sup>59</sup> Some authors therefore formulate more cautious opinions, according to which the vast majority of international obligations in relation to the protection of cultural heritage do not possess an *erga omnes* nature at the level of general international law, although their further evolution and consolidation are envisioned.<sup>60</sup>

## Internationally Wrongful Acts against Cultural Heritage and Their Consequences

Every breach of an international obligation by a State, regardless of the origin of the obligation (treaty or customary law) or its character, entails the international responsibility of that State.<sup>61</sup> As regards the violations of cultural heritage obligations in the event of an armed conflict, this may be invoked, in the vast majority of cases, by a State determined to have been injured, rather than by a third State or their plurality. Accordingly, the breach of an obligation to respect cultural property involves legal consequences, as clearly established by Part II of the ARSIWA, those being to cease that act, if it is continuing; to offer appropriate assurances and guarantees of non-repetition, if circumstances so require; and to make full reparation for the injury caused by the internationally wrongful act. In practice, reparation primarily takes the form of compensation and satisfaction. In fact, in the above-cited dispute before the Eritrea – Ethiopia Claims Commission, the perpetrator State found to be responsible for unlawful damage to cultural property was obliged to apologize the injured State and to pay monetary compensation.<sup>62</sup>

<sup>58</sup> F. Francioni, *Au-delà des traités...*, p. 41; F. Francioni, F. Lenzerini, *The Obligation to Prevent and Avoid Destruction of Cultural Heritage: From Bamiyan to Iraq*, in: B.T. Hoffman (ed.), op. cit., p. 28.

<sup>59</sup> J.P. Fishman, *Locating the International Interest in Intranational Cultural Property Disputes*, "Yale Journal of International Law" 2009, Vol. 35, pp. 359ff.; R. O'Keefe, *World Cultural Heritage: Obligations to the International Community as a Whole?*, "International & Comparative Law Quarterly" 2004, Vol. 53, p. 195.

<sup>60</sup> R. O'Keefe, *World Cultural Heritage...*, pp. 203-205; A.F. Vrdoljak, *Intentional Destruction of Cultural Heritage and International Law*, in: K. Koufa (ed.), *Multiculturalism and International Law, Thesaurus Acroasium*, Vol. XXXV, Sakkoulas Publications, Thessaloniki 2007, pp. 384-396.

<sup>61</sup> Article 1 and 12 of the ARSIWA.

<sup>62</sup> Claims Commission for Eritrea and Ethiopia, op. cit., para. 114.

In this context, it is necessary to recall the principle of restitution-in-kind, applicable when cultural property has been unlawfully damaged in the event of an armed conflict. This principle was partially implemented in the peace treaty practice following the First World War. Accordingly, under Article 247 of the 1919 Treaty of Versailles<sup>63</sup> Germany had to compensate Belgium with cultural materials “corresponding in number and value” to those destroyed in the Library of Louvain in 1914. Germany was also bound to hand over certain paintings from its State art collections to the Church of St Peter at Louvain, which was heavily damaged by German artillery fire in 1914. In fact, the question of restitution-in-kind for damage to the cultural heritage of an injured State was intensely discussed during the Paris Peace Conference. However, such a form of reparation for cultural loss was not conclusively accepted as a general rule of post-war settlements,<sup>64</sup> since similarly founded claims by France and Italy were not seriously considered and eventually rejected.<sup>65</sup>

Undoubtedly, the obligation to restore cultural property unlawfully appropriated and transferred from militarily occupied territories constitutes the fundamental consequence of a breach of the obligation to protect cultural heritage in armed conflicts. Moreover, “it can nevertheless be concluded that the obligation to return illicitly exported cultural property is customary because, in addition to support for this rule found in the practice, it is also inherent in the obligation to respect cultural property, and particularly in the prohibition on seizing and pillaging cultural property”.<sup>66</sup> In addition, the primacy of restitution of cultural property has also been reiterated in relation to the removal of such materials during the course of genocidal practices and other “circumstances deemed offensive to the principles of humanity and dictates of public conscience”.<sup>67</sup> Once again the much more problematic question refers to the restitution-in-kind (or compensatory restitution) principle with regard to pillaged and lost cultural material. The peace treaty practice after the First World War addressed it in several contexts. For instance, under Article 192 of the 1919 Treaty of Saint-Germain<sup>68</sup> and Article 176 of

<sup>63</sup> Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles), on 28 June 1919, 225 Parry’s CTS 188.

<sup>64</sup> A.F. Vrdoljak, *Enforcement of Restitution of Cultural Heritage through Peace Agreements*, in: F. Francioni, J. Gordley (eds.), op. cit., p. 30, see also W. Kowalski, *Restitution of Works of Art Pursuant to Private and Public International Law*, “Collected Courses of The Hague Academy of International Law” 2001, Vol. 288, pp. 70-74, and the bibliography provided therein.

<sup>65</sup> A. Jakubowski, *State Succession in Cultural Property*, Oxford University Press, Oxford 2015, pp. 63-64.

<sup>66</sup> J.-M. Henckaerts, L. Doswald-Beck (eds.), op. cit., Vol. 1: Rules, p. 137.

<sup>67</sup> UNESCO Doc. 181/EX/53 Add, Annex I, p. 2.

<sup>68</sup> Treaty of Peace between the Allied and Associated Powers and Austria together with Protocol and Declarations (Treaty of St Germain-en-Laye), 10 September 1919, 226 Parry’s CTS 8.

the Treaty of Trianon,<sup>69</sup> Austria and Hungary respectively had to “restore objects of the same nature as those referred to in the preceding Article which may have been taken away since 1 June 1914 from the ceded territories, with the exception of objects bought from private owners”. It seems that such a form of reparation was recognized at the end of the Second World War as well. In fact, the 1945 Paris Conference on Reparation stated that “objects (including books, manuscripts and documents) of an artistic, historical, scientific (excluding equipment of an industrial character), educational or religious character which have been looted by the enemy occupying Power shall so far as possible be replaced by equivalent objects if they are not restored”.<sup>70</sup> In 1946, the Allied Control Council for Germany (Control Council) adopted a final definition of “restitution” which was applicable to the entire German territory<sup>71</sup> and which also provided that restitution-in-kind could be ordered with regard to goods of a unique character whose restoration was not possible. At the same time, this very far-reaching principle was questioned by the US administration as early as 1947, when it argued that the extensive application of cultural replacement would not be consistent with the principle of protection of the cultural property of all nations, including the German people.<sup>72</sup> On the other hand, in the Soviet occupation zone the principle of compensatory restitution was extensively applied in the form of retention of cultural property as war reparations. Such a practice has been largely criticized, since on the one hand the actual removal of cultural material from Germany constituted *de facto* war plunder contrary to the rules of occupation, and on the other hand the choice of concrete objects and collections was made unilaterally by the victorious party.<sup>73</sup> Thus, paragraph I.3. of the First Hague Protocol, concluded few years later, specifically and expressly forbade the appropriation and retention of cultural property as war reparations. However, the assessment of the measures taken in years 1944-45 in relation to German cultural property still remains a subject of much controversy in cultural relations between Russia and Germany.<sup>74</sup> Perhaps the most striking example of such a controversy can be seen the negotiations on the adoption of

<sup>69</sup> Treaty of Peace between the Allied and Associated Powers and Hungary together with Protocol and Declarations (Treaty of Trianon), 4 June 1920, 6 LNTS 187.

<sup>70</sup> Final Act and Annex of the Paris Peace Conference on Reparation, 21 December 1945, Annex 1: Resolution on the Subject of Restitution in J.B. Howard, *The Paris Agreement on Reparations from Germany*, United States Government Printing Office, Washington DC 1946, p. 19.

<sup>71</sup> I. Vásárhelyi, *Restitution in International Law*, Publishing House of the Hungarian Academy of Sciences, Budapest 1964, p. 87.

<sup>72</sup> W. Kowalski, *op. cit.*, p. 154.

<sup>73</sup> See, for example, A. Gattini, *Restitution by Russia of Works of Art Removed from German Territory at the End of the Second World War*, “European Journal of International Law” 1996, Vol. 1, pp. 67-88.

<sup>74</sup> See, for example, P. Kennedy Grimsted, *Legalizing “Compensation” and the Spoils of War: the Russian Law on the Displaced Cultural Valuables and the Manipulation of Historic Memory*, “International Journal of Cultural Property” 2010, Vol. 17, pp. 217-255.

the 2007 UNESCO Draft Declaration of Principles Relating to Cultural Objects Displaced in Connection with the Second World War.<sup>75</sup> This provided for an obligation to return cultural property to the territories from which they were taken. The final text of this document, in contrast to the initial drafts,<sup>76</sup> did not provide for the possibility of restitution-in-kind and explicitly excluded the retention of cultural objects as war reparations. Primarily for these reasons the adoption of the said instrument was opposed by both Russia<sup>77</sup> and Poland.<sup>78</sup> The latter State claimed that the exclusion of the principle of restitution-in-kind constituted an unjustified abrogation of the regime adopted in the Allied legislation after the Second World War, and therefore the Draft Declaration would be beneficial only for some States (Germany) at the expense of others. Poland also emphasized that the Draft Declaration did not “constitute a source of international law” and it would serve only as “a political act, indicating possible procedures and forms of resolving a particular issue, in this case the issue of cultural objects displaced in connection with the Second World War”.<sup>79</sup>

Irrespective of these controversies relating to the law applicable in 1945, it is clear that today reparations for the violation of rules on the protection of cultural heritage in the event of an armed conflict must not involve the retention of cultural objects of the perpetrator State by the injured State, at the expense of the population of the former. An opposite view or act would be in an obvious contrast to the regime of the First Hague Protocol. Moreover, it would also violate the cultural human rights of those who enjoy a given heritage, since States are no longer recognized as the sole and exclusive decision-makers in the realm of cultural heritage,<sup>80</sup> the protection of which is gradually becoming perceived as a matter of human rights law.<sup>81</sup> However, these arguments do not entirely preclude the application of the principle of restitution-in-kind as a form of reparation for damage to cultural heritage in the event of an armed conflict. In fact, “the international community has approved restitution-in-kind or compensation where the item cannot be returned, because it has been destroyed, lost, or it [its return] may impact negative-

<sup>75</sup> 9 March 2007, UNESCO Doc. 34C/22, Annex.

<sup>76</sup> L.V. Prott, *Principles for the Resolution of Disputes Concerning Cultural Heritage Displaced During the Second World War*, in: E. Simpson (ed.), *The Spoils of War*, Harry N. Abrams, New York 1997, p. 229.

<sup>77</sup> UNESCO Doc. 34C/22, Annex II, pp. 4-5.

<sup>78</sup> *Ibidem*, pp. 2-4.

<sup>79</sup> *Ibidem*, p. 3.

<sup>80</sup> For further analysis see, for example the studies in the volume edited by E. Waterton, S. Watson, *Heritage and Community Engagement: Collaboration Or Contestation?*, Routledge, London - New York 2010.

<sup>81</sup> See A.F. Vrdoljak, *Human Rights and Cultural Heritage...*, pp. 139-174; eadem, *Liberty, Equality, Diversity: States, Cultures and International Law*, in: eadem (ed.), *The Cultural Dimension of Human Rights*, Oxford University Press, New York 2013, pp. 26-70; J. Blake, *Taking a Human Rights Approach to Cultural Heritage Protection*, “Heritage & Society” 2011, Vol. 4, pp. 199-238.

ly on the cultural or religious heritage of the group against whom the restitution order is made”.<sup>82</sup> For instance, the Human Rights Chamber for Bosnia and Herzegovina (HRCBiH), a mixed national-international and *sui generis* court which sat from March 1996 to September 2003,<sup>83</sup> applied this principle in a case involving an Orthodox Church built in Bosnia-Herzegovina in the place of a mosque destroyed during the war in 1993. Clearly, the application of restitution as a preferred remedy was not feasible. The HRCBiH declined to order the removal of the church, and it instead ordered restitution-in-kind by requiring Republika Srpska to provide a parcel of land available to the Islamic Community and allow for the (re)construction of a new mosque on this alternative site.<sup>84</sup>

As already highlighted, certain international cultural heritage obligations relating to States' conduct in the event of armed conflicts can be effective *erga omnes*. Arguably such a status is enjoyed by the obligation to respect, during armed conflict, cultural heritage that is particularly important to all humankind, such as those recognized as World Heritage Sites. In this regard, the question emerges: which State is entitled to invoke international responsibility against the State determined to have carried out an internationally wrongful act against such universally protected cultural heritage? Undoubtedly in the first instance the State(s) which are directly affected are eligible to so, in accordance with the definition adopted in Article 42 of the ARSIWA. One may ask, however, whether the obligations to protect cultural heritage in the event of armed conflict, in particular those relating to goods of special importance for the entire international community, may give rise to the international responsibility of a State in relation to a larger group of States or the international community as whole?<sup>85</sup> Thus the question arises as to the legitimacy of *actio popularis* lodged by any State in the interest of the entire international community. According to the provisions of Article 48.1 of the ARSIWA, any State other than the injured one is entitled to invoke the responsibility of another State provided that: “(a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole”.

<sup>82</sup> A.F. Vrdoljak, *Genocide and Restitution: Ensuring Each Group's Contribution to Humanity*, “European Journal of International Law” 2011, Vol. 22, p. 45.

<sup>83</sup> General Framework Agreement for Peace in Bosnia and Herzegovina, 14 December 1995, 35 ILM (1996) 89, Annex 6: Agreement on Human Rights.

<sup>84</sup> *Islamic Community in Bosnia Herzegovina v. Republika Srpska (Zvornik Mosques)*, CH/98/1062, Decision on Admissibility and Merits, 12 October 2001, 194, Human Rights Chamber for Bosnia and Herzegovina, *Digest, Decisions on Admissibility and Merits 1996-2002* (2003), p. 177; see further A.F. Vrdoljak, *Genocide and Restitution...*, p. 45.

<sup>85</sup> In the latter instance, such a violation may amount to a serious breach of an obligations under peremptory norms of general international law, as defined by Article 40 of the ARSIWA.



Although international practice as well as the codified regime of the ARSIWA are not conclusive in this regard, it should be noted that the ICJ in its recent judgment in a case *aut dedere, aut iudicare* (*Belgium v. Senegal*) held that that with respect to obligations effective *erga omnes*, every State has “a legal interest” in their observance.<sup>86</sup> Thus, any State can claim that it has *locus standi* before international courts to assert a claim to cease the alleged infringement by another State of an *erga omnes* obligation. Such a construction of international responsibility for the breach of cultural heritage obligations *erga omnes* would potentially strengthen the existing mechanisms for the protection of heritage of great value to all humankind in the event of armed conflicts. However, as already explained, the existence of a well-established set of such obligations has not been widely and unanimously accepted by the international community.

## Cultural Heritage and State Succession to International Responsibility

### Continuity and Negative Succession Rule

Another problematic issue regards the consequences of an internationally wrongful act against cultural heritage and the law on State succession. Here it is necessary to consider situations which involve the continuity of international personality, as well as those which distinguish the identity of pre-succession States from that of new States. Accordingly, a continuing State retains its pre-existing rights and obligations arising from internationally wrongful acts, irrespective of the fact of State succession. However, the situation of a successor State is much more obscure.<sup>87</sup> In this regard, international delicts have long been considered as being of a “personal” nature and thus they could only be attributed to the State responsible for committing them, and not to its successor.<sup>88</sup> Consequently, the under the negative succession rule, the passing of international responsibility from the predecessor to the successor State has long been excluded.<sup>89</sup> Thus, the obligations arising from the commission of such an act were claimed as being non-transmissible and non-enforceable. However, the developments of the post-Cold War international practice<sup>90</sup> and the new doctrinal approaches postulated in international legal

<sup>86</sup> *Questions Relating to the Obligation to Prosecute or Extradite* (*Belgium v. Senegal*), ICJ Reports 2012, p. 422, para. 68; see Th. Weatherall, *Jus Cogens: International Law and Social Contract*, Cambridge University Press, Cambridge 2015, pp. 374, 382.

<sup>87</sup> See UN Doc. A/56/10, ch. IV.E.2, p. 119, para. 3.

<sup>88</sup> J. Crawford, *State Responsibility: The General...*, p. 441.

<sup>89</sup> *Ibidem*, pp. 437 ff.

<sup>90</sup> See in particular, *Case Concerning the Gabčíkovo-Nagymaros Project* (*Hungary v. Slovakia*), Judgement of 25 September 1997, ICJ Reports 1997, p. 3.

scholarship have led to widespread criticism of the negative succession rule. These new developments and approaches clearly favour a more equitable approach to State succession and international responsibility, based on analysing the factual and legal contexts of a given case in light of the principles of international justice as well as the stability and security of international legal relations.<sup>91</sup> These developments have also affected succession to the rights and obligations stemming from a violation of rules of conduct with respect to cultural heritage applicable in armed conflicts.

In reference to State practice with respect to the international responsibility of States for violations of cultural heritage obligations, this unsurprisingly refers to past pillages of cultural material and its intentional destruction, which has occurred mainly in cases of an armed conflict. Apart from the specific cases of Russia and the Federal Republic of Germany, which continued their obligations and rights arising from acts against cultural heritage committed during the Second World War,<sup>92</sup> the most significant cases in practice have involved the dissolution of the Socialist Federal Republic of Yugoslavia. In particular, Serbia assumed responsibility for violations of the rules governing war conduct (First Hague Protocol) in relation to cultural heritage committed by the Federal Republic of Yugoslavia (FRY) during the war with Croatia. In fact, on 23 March 2012 Serbia and Croatia signed a protocol on the restitution of Croatian cultural assets from Serbia to Croatia. According to its provisions more than 1000 works of art taken during the 1990s would be returned from Serbia to Croatia.<sup>93</sup> In fact, some restitution has already taken place.<sup>94</sup> Yet in principle the actual arrangements adopted by successor States in matters of responsibility for the breach of cultural heritage obligations have been usually based on non-succession *ex gratia* arrangements negotiated between the States concerned, rather than by the application of concrete rules or principles of the law on State succession.<sup>95</sup>

<sup>91</sup> Cf *inter alia* J. Crawford, *State Responsibility: The General...*, pp. 435-455; Tai-Heng Cheng, *Why New States Accept Old Obligations?*, "University of Illinois Law Review" 2011, Vol. 1, pp. 1-52; V. Mikulka, *State Succession and Responsibility*, in: J. Crawford, A. Pellet, S. Olleson (eds.), *The Law of International Responsibility*, Oxford University Press, Oxford 2010, pp. 291-296; B. Stern, *Responsabilité internationale et succession d'États*, in: L. Boisson de Chazournes, V. Gowlland-Debbas (eds.), *The International Legal System in Quest of Equity and Universality/L'ordre juridique international, un système en quête d'équité et d'universalité*, Brill-Nijhoff, Leiden - Boston 2001, pp. 327-356; P. Dumberry, *The Controversial Issue of State Succession to International Responsibility in Light of Recent State Practice*, "German Yearbook of International Law" 2006, Vol. 49, pp. 413-448; M.J. Volkovitch, *Righting Wrongs: Toward a New Theory of State Succession to Responsibility for International Delicts*, "Columbia Law Review" 1992, Vol. 92, pp. 2162-2214; W. Czapliński, *State Succession and State Responsibility*, "Canadian Yearbook of International Law" 1990, Vol. 28, pp. 339-359.

<sup>92</sup> See A. Jakubowski, *op. cit.*, pp. 193-196.

<sup>93</sup> *Protocol on Restitution of Cultural Assets from Serbia to Croatia Signed*, 23 March 2012, <http://www.culturenet.hr/default.aspx?id=44206> [accessed: 13.11.2015].

<sup>94</sup> <http://www.min-kulture.hr/default.aspx?id=9899> [accessed: 12.11.2015].

<sup>95</sup> A. Jakubowski, *op. cit.*, pp. 193-198.

## Equity and Justice

As already mentioned, the obscure legal regime governing State succession and international responsibility became the topic of more extensive scholarly investigation in the early 1990s. Comprehensive research in the field was initiated a few years ago at the Institute of Graduate Studies in Geneva, Switzerland. The research work of Patrick Dumberry and Marcelo G. Kohen is of particular relevance in this regard. An extensive analysis undertaken by Dumberry<sup>96</sup> revealed certain common patterns in assuming or rejecting succession to State responsibility, depending on the types of succession of States and the “specific situations and circumstances”.<sup>97</sup> He advocated that these practices could amount to the emergence of new rules of customary international law,<sup>98</sup> while at the same time acknowledging that the existence of already well-established rules of international law in this area is still debatable.<sup>99</sup> This research was continued within the framework of the 14th IIL Commission, with Marcelo G. Kohen as Rapporteur. The IIL initiative was commenced in 2009, and four years later the Rapporteur submitted his Provisional Report, including a draft Resolution.<sup>100</sup> On 28 August 2015 the final text of the resolution *Succession of States in Matters of International Responsibility* was adopted (hereinafter: the 2015 IIL Resolution).

This doctrinal instrument provides a catalogue of operational guiding principles on succession and the consequences of internationally wrongful acts applicable to distinct categories of State succession. Importantly, it is founded on the argument that “situations involving succession of States should not constitute a reason not to implement the consequences stemming from international wrongful acts”.<sup>101</sup> In other words, “no internationally wrongful act must remain unpunished as a result of the emergence of a case of State succession”.<sup>102</sup> Its basic premise consists of a distinction between cases of continuity and succession of States. Accordingly, the “general, though not absolute, rule proposed is that in cases in which the predecessor State continues to exist, it is this State that continues the enjoyment of rights

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<sup>96</sup> P. Dumberry, *State Succession to International Responsibility*, Brill-Nijhoff, Leiden – Boston 2007.

<sup>97</sup> *Ibidem*, pp. 420-430.

<sup>98</sup> *Ibidem*.

<sup>99</sup> Cfr J. Crawford, *State Responsibility: The General...*, p. 455.

<sup>100</sup> M.G. Kohen, Rapporteur, *State Succession in Matters of State Responsibility. Provisional Report and State Succession in Matters of State Responsibility. Draft Resolution*, 9 August 2013, IIL, 14<sup>th</sup> Commission, Tokyo Session, 2013, [http://www.idi-iil.org/idiE/annuaireE/2013/IIL\\_14\\_Kohen.pdf](http://www.idi-iil.org/idiE/annuaireE/2013/IIL_14_Kohen.pdf) [accessed: 5.11.2015]; for the commentary see A. Jakubowski, *op. cit.*, pp. 265-270.

<sup>101</sup> 2015 IIL Resolution, preamble, third recital.

<sup>102</sup> M.G. Kohen, Rapporteur, *State Succession in Matters of State Responsibility. Final Report*, 30 June 2015, IIL, 14<sup>th</sup> Commission, Tallinn Session, 2015, [http://www.justitiaetpace.org/idiE/annuaireE/2015/IIL\\_14\\_2015-06-30.pdf](http://www.justitiaetpace.org/idiE/annuaireE/2015/IIL_14_2015-06-30.pdf) [accessed: 14.11.2015], (hereinafter: Kohen's Final Report), para. 26.

and the assumption of obligations arising from the internationally wrongful acts in which it was involved before the date of State succession".<sup>103</sup> This is founded on the observation that "the same subject that has been the victim or the author of an international wrongful act holds the rights or obligations arising from this act, no matter whether its territory and population have diminished".<sup>104</sup> Therefore a general negative succession rule has been proposed in relation to all cases of State succession in which the predecessor State continues to exist, that is, territorial cession, secession, and the creation of a newly independent State.<sup>105</sup> However, certain exemptions from this general rule are put forth, which include: an "intrinsically direct link of the consequences of the wrongful act with the territory or the population concerned";<sup>106</sup> a "wrongful act committed by an entity of the predecessor State that later becomes the successor State";<sup>107</sup> or "acceptance by the successor State of fulfilling the obligations".<sup>108</sup>

Indeed, one of the most important elements of the 2015 IIL Resolution consists of the equitable approach to the territorial factor in resolving issues of State succession to international responsibility.<sup>109</sup> Accordingly, the principle of an "intrinsically direct link of the consequences of the wrongful act with the territory or the population concerned" is consistently applied in the provisions concerning specific categories of successor States, except those regarding the merger of States or incorporation of one State into another existing State. This principle is corrective in nature, since alongside territorial considerations it invokes a human link that may exist between the wrongful act and the population concerned. In fact, "this is particularly relevant in cases of violations of human or minority rights", that is, when the wrongful act "has a specific population as a direct victim".<sup>110</sup> Accordingly, the continuity of obligations and rights arising from such a serious breach of international law will be maintained, irrespective of any non-succession or discontinuity claims of the States concerned.

The human dimension and equitable nature of the 2015 IIL Resolution also characterizes the solutions proposed with regard to rights stemming from internationally wrongful acts committed against the predecessor State or the population concerned. These may be of great relevance for State succession to international

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<sup>103</sup> Ibidem, para. 56.

<sup>104</sup> Ibidem.

<sup>105</sup> 2015 IIL Resolution, Articles 11, 12 and 16.

<sup>106</sup> Kohen's Final Report, paras. 57-62.

<sup>107</sup> Ibidem, paras. 63-65.

<sup>108</sup> Ibidem, paras. 66-69.

<sup>109</sup> "The question of where the wrongful act took place is not [...] necessarily decisive", ibidem, para. 57; see also P. Dumberry, *State Succession...*, pp. 285-288 and the literature cited therein.

<sup>110</sup> Kohen's Final Report, para. 62.

responsibility for the breach of cultural heritage obligations. Importantly, the right to redress internationally wrongful acts against cultural heritage may be treated in parallel to that of arising from violations of human and minority rights, and thus it shall continue to be enforceable irrespective of the transformations experienced by States. This may be especially crucial for peoples who did not constitute independent States when wrongful acts were committed. Importantly, Article 16.4 of the 2015 IIL Resolution provides that “the rights arising from an internationally wrongful act committed before the date of the succession of States by the predecessor State or any other State against a people entitled to self-determination shall pass after that date to the newly independent State created by that people”. As the IIL Provisional Report of 2013 explains, this principle has already been recognized by both State practice and international jurisprudence.<sup>111</sup> Arguably, it may provide a newly independent State which has emerged in violent circumstances with a strong legal argument against its predecessor and/or another State to which a wrongful act can be attributed and give it the right to claim reparation for the violation of cultural heritage obligations, in particular those established by humanitarian rules for the protection of cultural property.<sup>112</sup> On the other hand, the newly independent State shall be held responsible for the conduct, prior to the date of State succession, of a national liberation movement which succeeded in establishing such a newly independent State. Thus, the responsibility for internationally wrongful acts against cultural heritage committed by such a national liberation movement shall, in principle, pass to the successor State.<sup>113</sup> It is important to note that the regime provided for by the 2015 IIL Resolution in relation to newly independent States may well be tested against international facts very soon. It may be applicable to the ongoing transformations in eastern Ukraine and possible final dissolutions of Libya, Syria and Iraq. All these situations have already involved breaches of international obligations to protect cultural heritage in armed conflicts, accompanied by grave violations of other norms of humanitarian law. In fact, the question may arise as to the status and transferability of rights and obligations stemming from current violations of international cultural heritage obligations in relation to new States that would emerge from the current political and social turmoil.

Finally, the question arises whether such specific considerations would apply to rights and obligations arising from the breach of cultural heritage obligations of

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<sup>111</sup> M.G. Kohen, Rapporteur, *State Succession in Matters of State Responsibility. Provisional Report...*, paras. 95-98.

<sup>112</sup> It might also be argued that the consolidation of the regime on the succession in secondary rights of the predecessor State arising from a wrongful act of another State (irrespective of the specific situation of newly independent States), could give to the successor State better legal foundations to protect its cultural heritage. Accordingly, a State responsible for the breach of cultural heritage obligation would still have the duty to repair, notwithstanding the replacement of an injured State by its successor.

<sup>113</sup> Article 16.3 of the 2015 IIL Resolution; see also Article 10(2) of the ARSIWA.

an *erga omnes* nature (such as the destruction of a World Heritage Site). Since such violations give rise to obligations owed to the international community as a whole, automatic succession with respect to them is strongly advocated.<sup>114</sup> However, the 2015 IIL Resolution does not provide for any special regime in this context. According to the Rapporteur, “the consequence of the distinction between *erga omnes* obligations and other kinds of obligations is a matter for the law of responsibility”,<sup>115</sup> not that of State succession, since “no distinct consequences arise” in this field: “the successor State(s) inherit(s), or not, the rights or obligations stemming from the commission of an internationally wrongful act, no matter the nature of the obligation breached”.<sup>116</sup> Arguably, this solution correctly reflects the current state of international law. In fact, there is no support, either in State practice or in relevant international case law, for the automatic transferability of obligations stemming from a grave violation of international law, comprising the breach of an obligation *erga omnes*.<sup>117</sup>

## Conclusions

The international law rules on the protection of cultural heritage in armed conflicts would not be effective without an efficient regime governing the consequences of their violation. This article has explored the regime of international responsibility of States for the breach of two main groups of cultural heritage obligations in the event of armed conflicts: to respect cultural property during military operations; and to restore cultural material unlawfully appropriated and transferred from occupied territories. It has been shown that these obligations are not only established by relevant treaty provisions, but also reflected in and confirmed under customary rules of international law. Moreover, those obligations which relate to the protection of and respect for cultural heritage of great importance to all humankind are ever more often being perceived as effective *erga omnes* under general international law. Accordingly, their violation might entail lodging *actio popularis* by any State, including States other than the one(s) directly injured, which would then have *locus standi* to invoke the responsibility of the perpetrator State in the interest of the entire international community. However, international practice has not to date provided any relevant examples of such an action.

As regards reparations for the violation of rules of States' conduct in armed conflicts in relation to protected cultural heritage, restitution and compensation are the most common forms, as confirmed by international practice and legal scholarship.

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<sup>114</sup> P. Dumberry, *State Succession...*, p. 298; B. Stern, *op. cit.*, p. 349; M.J. Volkovitch, *op. cit.*, p. 2200.

<sup>115</sup> Kohen's Final Report, para. 25.

<sup>116</sup> *Ibidem*.

<sup>117</sup> P. Dumberry, *State Succession...*, p. 298; B. Stern, *op. cit.*, p. 349.

It also appears that the regime of State responsibility has been recently consolidated with respect to State succession. This is due to a more pragmatic approach to the legal effects and consequences of transformations of States observed in international practice, and driven by the objective of maintaining the geopolitical equilibrium of the international legal order. Moreover, the main policy underlying the recent initiative by the IIL has been that no internationally wrongful act must remain unpunished due merely to the fact of State succession. The IIL initiative also reflects certain “pragmatic” approaches to the matter of State succession, postulating flexible solutions based on fairness and equity.<sup>118</sup> In fact, the equitable nature of the 2015 IIL Resolution seems to be in line with the character of cultural heritage obligations: on one hand these often involve extremely complex historical and politically sensitive aspects, while on the other hand they may be seen as parallel to those obligations stemming from the rules on the protection of human and minority rights. Thus, every internationally wrongful act against cultural heritage in the event of an armed conflict entails a duty to provide reparations, irrespective of the particular circumstances of a given case with respect to State succession, if that act has a direct link with the territory or the human community concerned.

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<sup>118</sup> See *inter alia* W. Czapliński, *Equity and Equitable Principles in the Law of State Succession*, in: M. Mrak (eds.), *Succession of States*, Brill-Nijhoff, The Hague 1999, pp. 61-73; S. Oeter, *State Succession and the Struggle over Equity: Some Observations on the Laws of State Succession with Respect to State Property and Debts in Cases of Separation and Dissolution of States*, “German Yearbook of International Law” 1995, Vol. 38, pp. 73-102.

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Andrzej Jakubowski

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