

# EDITORIAL

*Dear Reader,*

We are pleased to present the 20th anniversary edition of the biannual “Santander Art and Culture Law Review” (SAACLR) (2024). The year of publication coincides with a number of significant anniversaries for the international cultural heritage protection system. Indeed, this year marks the 70th anniversary of the adoption by the General Conference of UNESCO of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention)<sup>1</sup> and its First Protocol.<sup>2</sup> Furthermore, the Second Protocol<sup>3</sup> to this convention was adopted 25 years ago. It is therefore unsurprising that this issue, being the fruit of cooperation between Frederik F. Rosén, Director of the Nordic Centre for Cultural Heritage and Armed Conflict in Copenhagen; Marta Szuniewicz-Stępień, Associate Professor of International Humanitarian Law at the Polish Naval Academy; and SAACLR editors (Andrzej Jakubowski and Alicja Jagielska-Burduk), is primarily focused on heritage protection in armed conflicts, including preparatory measures and post-conflict recovery.

Indeed, the safeguarding of cultural heritage during armed conflict has become an increasingly critical issue, especially given the increasing frequency of such conflicts and the deliberate targeting of cultural sites, cultural practices, and cultural rights. The destruction of cultural heritage has a profound impact on the identity and continuity of communities, as it not only erases the physical manifestations of a society’s history but also destroys the very fabric and foundations of their collective memory. Furthermore, cultural heritage is frequently

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<sup>1</sup> 14 May 1954, 249 UNTS 240.

<sup>2</sup> 14 May 1954, 249 UNTS 358.

<sup>3</sup> 26 March 1999, 2253 UNTS 172.

cited as a factor contributing to societal resilience in periods of armed conflict. Consequently, the safeguarding of cultural heritage has become an integral aspect of the educational process and the operational preparation (particularly during military exercises) of personnel in the armed forces, particularly in NATO member countries.

A variety of international legal frameworks have been established with the objective of providing a foundation for the protection of cultural heritage during periods of turbulence. In this regard, the 1954 Hague Convention occupies a pivotal position within the international legal order. Although there are currently only 136 States Parties to the Convention, a significant number of its provisions are considered binding under international customary law. Together with the system of the Geneva Conventions and their Additional Protocols, the 1954 Hague Convention and its Protocols establish a comprehensive legal framework for the protection of cultural property in international and non-international armed conflicts. They delineate the obligations of states in both peacetime and wartime. These obligations not only apply to the conduct of all parties to armed conflicts, but they also concern the duties of non-participants, and provide for their accountability in the event of breaches of the rules on the protection of cultural property. However, the effectiveness of these frameworks is often challenged by the realities of modern warfare and the actions of non-state actors.

The 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage<sup>4</sup> underscores the significance of preserving and celebrating intangible cultural heritage, which is indispensable to the cultural identity of communities. The obligations set forth in this treaty remain in effect even in the context of an armed conflict or belligerent occupation. Nevertheless, it is frequently asserted that international humanitarian law (IHL) is primarily concerned with the safeguarding of tangible cultural heritage, with the intangible aspects of cultural heritage often receiving inadequate attention during armed conflicts. This oversight can result in considerable cultural loss, as the destruction of intangible cultural heritage can be as detrimental as the loss of physical monuments.

The ongoing conflict in Ukraine provides a salient illustration of the perils confronting cultural heritage in the context of armed conflict. The deliberate destruction of Ukrainian cultural property by Russian forces has brought into sharp focus the urgent need for the implementation of effective protective measures and a re-evaluation of existing legal frameworks. This situation highlights the necessity for states to adopt comprehensive cultural policies that address both the immediate threats posed by armed conflict and the long-term resilience of cultural heritage, through community engagement and international cooperation. Furthermore, the role of armed non-state actors (ANSAs) in the protection of cultural heritage is a multifaceted one. While some ANSAs may engage in a positive manner

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<sup>4</sup> 17 October 2003, 2368 UNTS 3.

with cultural heritage, others may actively destroy it as a means of asserting power or spreading an ideology. This duality requires a nuanced approach to cultural heritage protection; one that encompasses dialogue and engagement with these groups, as well as promotes the formulation of targeted strategies to mitigate the risks posed by their actions. In addition to the traditional forms of cultural heritage, the advent of digital cultural property has introduced novel challenges, as well as opportunities, for the protection of cultural assets during armed conflict. As cultural expressions increasingly migrate to digital platforms, it is imperative that the legal frameworks governing cultural heritage evolve in such a manner that they adequately address these new forms and challenges. This entails acknowledging digital heritage as a valid form of cultural property, entitled to protection under international law. Further considerations pertain to the safeguarding of archaeological cultural heritage, including underwater heritage, and the interconnection and mutual reinforcement of the legal frameworks that apply in armed conflicts.

Therefore, the protection of cultural heritage in conflict situations necessitates a comprehensive approach that incorporates international legal frameworks, state policies, community engagement, and innovative strategies in order to address the evolving nature of cultural property. The genuine capacity to safeguard cultural heritage in the event of an armed conflict is frequently contingent upon measures that ought to be implemented in peacetime. These include the formulation of comprehensive plans for the protection of cultural assets and the professional training of military personnel and those entrusted with the security of historic buildings, sites, and collections of cultural objects. Hence, in order to develop effective protective measures that can withstand the challenges posed by contemporary conflicts, it is essential to consider the interplay between tangible and intangible heritage, the role of ANSAs, and the emergence of digital heritage.

The objective of this edition of the SAACLR is to facilitate a synthesis of diverse perspectives on the present and future efficacy of the 1954 Hague Convention. As with previous issues, this one is divided into the following sections: interviews; general articles; debuts; varia; short legal commentaries; and notes on recently published books on cultural heritage law and events. However, this edition commences with a memorial to Professor Francesco Francioni, a pioneering and perspicacious scholar and legal counsel in the domain of cultural and environmental heritage, who regrettably passed away on 2 February 2024. In this collective memorial, numerous former supervisees from the European University Institute reflect on Professor Francioni's contributions as a scholar, supervisor, and humanist. Each of these vignettes is authored by a different individual and focuses on a distinct aspect of Professor Francioni's oeuvre and influence on the international law of culture.

The discussion on the most pressing matters with respect to cultural heritage protection in the context of armed conflict commences with two interviews. In the initial interview Roger O'Keefe, a prominent figure in the fields of IHL and interna-

tional criminal law, provides invaluable insights and perspectives on the practical implementation of the 1954 Hague Convention and its Second Protocol. The theme of the practice of safeguarding activities and procedures is then addressed in an interview with Elke Selter, Director of Programmes at the International Alliance for the Protection of Heritage in Conflict Areas (ALIPH). ALIPH is a particularly active foundation in its role as a technical donor, providing assistance in crisis and emergency situations that not only involve armed conflict but also natural disasters.

This edition of SAACLR also addresses the core theme in its “General Articles” and “Debuts” sections, which feature a selection of papers presented in response to an open call for submissions.<sup>5</sup> In the opening article “Values Beyond Ownership: Rethinking Cultural and Civilian Uses of Heritage within International Humanitarian Law” Diogo Machado addresses the challenges arising from the differing priorities of various international legal regimes that provide for the safeguarding of cultural heritage during armed conflicts. He argues that in broadening the international legal framework for the protection of cultural heritage in armed conflicts, the integration of international humanitarian law and heritage law should result in legal responses with respect to the management of cultural heritage in wartime that account for both the civilian-use and cultural value of heritage.

The following article in this section takes a historical approach to the leading theme of the issue. Giuditta Giardini explains – based on the extensive reconstruction of archival records – the role of Italy and UNIDROIT in the drafting of the First Protocol of the 1954 Hague Convention. She reveals the extensive yet underappreciated efforts of the Italian delegation, led by the President and Secretary General of UNIDROIT, in shaping this international instrument. The discussion offered in this article extends to the aftermath of the 1954 Hague Convention, examining how unresolved issues were later addressed by the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.<sup>6</sup> In turn, Nout van Woudenberg deals with the international efforts to reduce impunity for unlawful attacks against protected cultural property in the event of an armed conflict. Alongside the analysis of the developments of the international law framework in this regard, the recent Russian destruction of cultural property in Ukraine is addressed, followed by an examination of how deterrence can be enhanced and impunity reduced.

The “General Articles” section of this edition closes with two articles. The contribution by Elena Perez-Alvaro explores the extent to which the 1954 Hague Convention regime safeguards underwater cultural heritage in armed conflicts. She explains that underwater cultural heritage has been and still is being used in military strategy as a tool of hybrid warfare. In this regard, she argues that taken together

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<sup>5</sup> <https://ejournals.eu/en/journal/saaclr/article/safeguarding-cultural-property-in-armed-conflict-revisiting-the-implementation-of-the-1954-hague-convention-on-the-occasion-of-its-70th-anniversary> [accessed: 20.11.2024].

<sup>6</sup> 24 June 1995, 2421 UNTS 457.

the 1954 Hague Convention and the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage<sup>7</sup> offer a comprehensive approach to safeguarding cultural heritage, including underwater sites and artefacts, by combining legal frameworks, preservation strategies, and international cooperation efforts mitigating the devastating impact of warfare on underwater cultural heritage.

The practical operationalization of the enhanced protection regime under the Second Protocol to the 1954 Hague Convention is addressed by Emma Cunliffe. Based on her own experience in the NATO training exercise STEADFAST JACKAL 2023, she explains that in certain circumstances enhanced protection may lead to competing obligations regarding human rights, justice, and cultural protection. Those registering sites and acting to protect them must carefully consider likely scenarios in order to establish good practices. She argues that otherwise enhanced protection could defend sites to the detriment of those who value them.

The practical aspects of the protection of cultural heritage in armed conflict are addressed by Valeria Casillo in the “Debuts” section. She discusses NFT technology in the context of cultural heritage protection in armed conflicts, addressing both the benefits and challenges that come with their use. In view of the recent example set by the Kharkiv Art Museum, she delves into both the legal and ethical aspects underlying what is known as NFTs, shedding light on their possible protection value under the existing cultural heritage framework.

In the “Varia” section, the present SAACLR issue also features other important contributions on current topics related to the intersection between law, culture, cultural diversity, and cultural heritage. Vanda Vadász and Viktória Verebélyi analyze and explain the shortcomings that still characterize the restitution of cultural property held in public collections in Hungary in light of the complex historical-legal landscape of this country. The analysis presented in this article is not concerned solely with the assessment of private law proceedings; it also encompasses an examination of the constitutional framework and the protection of human rights. The topic of restitution of cultural objects is also examined by Afolasade A. Adewumi in her article addressing the current status of the return of Benin objects to Nigeria. The author examines the perceptions of the members of the Igun community, many of whom are the descendants of the Igun guild that produced the Benin objects which were carted away from the Benin Kingdom during the 1897 Expedition. Employing both a survey questionnaire and in-depth interviews, the article examines the perceptions of the Igun community with respect to the Benin objects and the effect of the Expedition on Benin art and heritage. The article also presents a critique of the current Nigerian legislative measures concerning the Benin Bronzes.

Last but not least, Anett Pogácsás offers a critical account of the copyright status of internet folklore. This contribution aims to show that internet folklore has

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<sup>7</sup> 2 November 2001, 2562 UNTS 1.

to fit into an incredibly complex set of copyright rules, and how not only its creation but also its use for various purposes and in several different ways raises different copyright issues from one jurisdiction to another. She stresses that while intangible cultural heritage is community-based, raising awareness and emphasizing its importance is a universal task. In this context, a cultural community needs to find a place for tradition-based modern creations such as internet folklore without disregarding or disturbing their copyright status and future.

As in previous years, this issue of SAACLR also contains brief commentaries on legal matters. Szymon Zaręba considers the recent jurisprudence of the International Court of Justice on the protection of cultural heritage. In the next commentary, Mateusz M. Bieczyński delves into the ongoing issues surrounding the restitution of artwork stolen by the Nazi regime during the Second World War. He highlights the less-explored case of German dentist Hans Sachs and his extensive poster collection, shedding light on the challenges faced by heirs of Nazi-looted art and revealing the stance of German cultural institutions and courts. Finally, Jan Petr and Andrzej Jakubowski provide a short account of the European Public Prosecutor's Office's practice in prosecuting crimes in the cultural sphere, with particular focus on the investigation into the misuse of public funds in the National History Museum in Olomouc (Czechia).

The issue includes a series of notes on the most pertinent new books on cultural heritage law published in English in 2024. It also features a set of short conferences reports. It closes with a contribution by Asmaa Mehdioui, an expert in the Department of Legal Affairs and International Standards at the Islamic World Educational, Scientific and Cultural Organization (ICESCO), who provides an overview on legislative mechanisms to combat the illicit trafficking of cultural property in the Islamic world (Arab region).

We hope that you will enjoy this new issue of the “Santander Art and Culture Law Review” and find its content relevant to the current intersections between law, the arts, and cultural heritage. We encourage you to contact us (at: [saacleditors@gmail.com](mailto:saacleditors@gmail.com)) if you wish to reply to the call for papers, or just to express your opinion regarding the content of our volumes.

*Andrzej Jakubowski, Marta Szuniewicz-Stępień,  
Frederik F. Rosén, and Alicja Jagielska-Burduk*