

CULTURAL HERITAGE PROTECTION AS A SECURITY ISSUE IN THE 21ST CENTURY: RECENT DEVELOPMENTS

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Abstract

Throughout history, cultural property has permanently been at risk in armed conflict as belligerents always aimed at razing to the ground or plundering the enemy's cultural heritage. Cultural property is a war victim time and again, either by armed attack or by collateral damage. This background opens the way for new insights into research on cultural heritage protection as a security issue in the 21st century. In order to fight the root causes of heritage destruction and extremism, UNESCO is advocating strongly a comprehensive approach, using also its "soft power" across the Organization's mandate. Thus, despite its limited resources, UNESCO is an important actor in promoting a culture of peace, justice and tolerance on a worldwide scale.

Keywords: *cultural heritage, armed conflict, UNESCO*

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I. INTRODUCTION

Throughout history, cultural property has permanently been at risk in armed conflict. As Roger O'Keefe put it, belligerents always aimed at razing to the ground or plundering the enemy's cultural heritage.¹ Cultural property is a war victim time and again, either by armed attack or by collateral damage.

Still, the vulnerability of cultural heritage in the 21st century has increased. Since the year 2001 when the Taliban shocked the world community by turning the Buddha statues in the Valley of Bamiyan into rubble² while at the same time the country was stripped of its cultural

¹ Roger O'Keefe, "Protection of Cultural Property" in Andrew Clapham and Paola Gaeta, eds., *The Oxford Handbook of International Law in Armed Conflict*, Oxford University Press, 2014, pp. 492-520, p. 492.

² For detail see Francesco Francioni and Federico Lenzerini, "The Destruction of the Buddhas of Bamiyan in International Law", *European Journal of International Law*, vol. 14, 2003, pp. 619-652.

heritage by a booming antiquities trade,³ attacks against cultural heritage have become a continuous phenomenon in international relations and consequently also a topic for the United Nations system, especially for the UN Security Council and the UN specialized agency UNESCO.

Due to the political vacuum and the humanitarian crises created by the war in Afghanistan, but also subsequently in Iraq, Libya, Mali and Syria, non-state actors and terrorist groups started to exploit cultural heritage as a fundraising mechanism for financing their activities and a war tactic.⁴ Intentional destructions of cultural heritage have become “a ‘corollary’ of broader actions, normally carried out in the context of armed conflicts or systematic terrorist campaigns”⁵.

Not only innocent people and communities are targeted, but in many cases also their tangible and intangible cultural heritage, amounting to what has been described as a “deliberate targeting trend”⁶. Symbolic cultural heritage – not least because of its iconic posture – is a target for destruction, “but with a modern, post 9/11 terrorist framework iconic cultural heritage is at greater risk than in the past”⁷.

This background opens the way for new insights into research on

³ Massoud Ansari, “Plundering Afghanistan: A Booming Antiquities Trade Strips the Country of its Cultural Heritage”. *Archaeology*, vol. 55, no. 1, 2002, pp. 18-20, p. 20: “Archaeologists, meanwhile, fear that if the present rate of smuggling continues, Afghanistan’s children will have to go overseas to learn of their country’s cultural heritage.”

⁴ Thomas G. Weiss and Nina Connelly, “Cultural Cleansing and Mass Atrocities. Protecting Cultural Heritage in Armed Conflict Zones”, *J. Paul Getty Trust Occasional Papers in Cultural Heritage Policy*, no. 1, 2017, p. 20.

⁵ Federico Lenzerini, “Terrorism, Conflicts and Responsibility to Protect Cultural Heritage”, *The International Spectator*, vol. 51, no. 2, 2016, pp. 70-85, p. 76.

⁶ Marina Lostal, Kristin Hausler and Pascal Bongard, “Armed Non-State Actors and Cultural Heritage in Armed Conflict”, *International Journal of Cultural Property*, vol. 24, no. 4, 2017, pp. 407-427, p. 411; concerning the notion of “deliberate”, see Marina Lostal, *International Cultural Heritage Law in Armed Conflict*, Cambridge University Press, 2017, p. 112 ff. who argues that a “threefold test” is necessary when World Cultural Heritage is affected.

⁷ Claire Smith, Heather Burke, Cherrie de Leiuen and Gary Jackson, “The Islamic State’s Symbolic War: Da’esh’s socially mediated terrorism as a threat to cultural heritage”, *Journal of Social Archaeology*, vol. 16, no. 2, 2016, pp. 164-188, p. 181.

cultural heritage protection⁸ as a security issue in the 21st century.

II. CHARACTERISTICS OF CULTURAL HERITAGE DESTRUCTION IN THE 21ST CENTURY

Since the adoption of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict after World War II,⁹ the nature of conflicts has changed largely.

A. EXTENSIVE INTERNAL ARMED CONFLICTS AND TERRORIST ATTACKS

One of the key differences between past and present-day armed conflict is that nowadays, most armed conflicts are non-international in character, with the result that these conflicts that take place involve armed non-state actors (e.g. liberation movements, rebel groups, freedom fighters, insurgents, terrorists) who are present in the territories of the conflicting zones.¹⁰ A non-international armed conflict exists when a “protracted armed confrontation occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State” takes place, provided that the confrontation reaches “a minimum level of intensity and the parties involved in the conflict must show a minimum of organisation”.¹¹

Thus, an internal armed conflict is the typical situation that involves non-state armed groups and terrorist groups alike, resulting in the

⁸ As Roger O’Keefe suggested, “protection” means “protection from damage and destruction and from, all forms of misappropriation”, O’Keefe see note 1, p. 492.

⁹ 249 U.N.T.S. 240, entry into force: 7 August 1956.

¹⁰ Lostal, Hausler, Bongard see note 6, p. 409.

¹¹ ICRC, “How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law”, International Committee of the Red Cross (ICRC), Opinion Paper March 2008, p. 5. See also Art. 1 (1) Protocol Additional II 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 U.N.T.S. 609, entry into force: 7 December 1978; for detail cf. Eric David, “Internal (Non-International) Armed Conflict” in Andrew Clapham and Paola Gaeta, eds., *The Oxford Handbook of International Law in Armed Conflict*, Oxford University Press, 2014, pp. 353-362, p. 356. See also ICTY, *Prosecutor v Dusko Tadic a/k/a “Dule”*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

doctrinal problem that there is just a fine line between organized armed groups and terrorist groups.¹² While the former incur obligations under international humanitarian law, including the protection of cultural heritage (e.g. Art. 19 and 4 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) and its Second Protocol (1999); Art. 16 Additional Protocol II to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-international Armed Conflicts”) the latter are generally regarded as “hostis humani generis”¹³ or as “an enemy of mankind”.¹⁴

But what are the characteristics of a “terrorist group”? Despite intensive international effort and debate,¹⁵ there is no binding, universally agreed definition of “terrorism” applicable to all fields of international law. The fact that a binding definition of “terrorism” is still missing may explain, according to Federico Lenzerini, that “any legal elaboration, concerning the possible consequences of an act of destruction of cultural heritage perpetrated within the context of a wider terrorist campaign, is contaminated ex ante by the impossibility of defining what ‘terrorism’ actually means”¹⁶.

¹² Sabine von Schorlemer, “Liberation Movements” in Rüdiger Wolfrum, ed., *United Nations: Law, Policies and Practice*, München, 1995, vol. 2, pp. 854-864.

¹³ Cf. Douglas R. Burgess Jr., “Hostis Humani Generi: Piracy, Terrorism and a New International Law”, *University of Miami International & Comparative Law Review*, vol. 13, 2006, pp. 293-342, p. 341: “That is the task of terrorism law: to affect a bulwark against the anarchy inherent in a conflict without territorial boundaries, obvious contestants, or legal parameters. It is a task that can only be met by giving terrorists their correct legal status as hostis humani generi under the law”.

¹⁴ Elimma C. Ezeani, “The 21st Century Terrorist: Hostis Humani Generis?”, *Beijing Law Review*, vol. 3, no. 4, 2012, pp. 158-169, p. 168: “For the international community, the perception of the terrorist regardless of his modus operandi, as an enemy of mankind, is vital to any international effort at punishing and deterring the violence of terrorism”.

¹⁵ Alex P. Schmid, *Political Terrorism: A Research Guide*, Brunswick, NJ, Transaction Books, 1984; Anthony Richards, “Conceptualizing Terrorism”, *Studies in Conflict & Terrorism*, vol. 37, no. 3, 2014, pp. 213-236; see Sami Zeidan, “Desperately seeking definition: The International Community’s Quest for Identifying the Specter of Terrorism”, *Cornell International Law Journal*, vol. 36, no. 3, 2004, pp. 491-496; Dominik Steiger, “Das Ringen um eine rechtliche Definition des Begriffs ‘Terrorismus’ auf internationaler Ebene” in Kerstin Odendahl, ed., *Die Bekämpfung des Terrorismus mit Mitteln des Völker- und Europarechts*, Duncker & Humblot, 2017, pp. 45-86, p. 7.

¹⁶ Lenzerini see note 5, p. 77.

For that reason, the effort to establish a universal comprehensive definition of terrorism in the UN General Assembly's "Draft Comprehensive Convention on International Terrorism" is important.¹⁷ In contrast to the International Convention on the Suppression of the Financing of Terrorism¹⁸ the draft definition in Art. 2 (1) of the Comprehensive Convention does include cultural property, mentioning "serious damage to public or private property, including a place of public use". As Christian Walter rightly emphasizes, this indicates "a tendency in international law to extend the notion of terrorism to destructive violence against objects, a development which corresponds with recent trends in national law."¹⁹ However, having started in 1996, the negotiations regarding the Comprehensive Convention on International Terrorism are deadlocked because of the controversy regarding the definition of terrorism and related to that, the scope of application of the future treaty.

Obviously, the existing "fine line" between organised non-state armed groups and terrorist groups is about to be blurred further by

¹⁷ Ad Hoc Committee established in General Assembly Resolution 51/210, A/RES/51/210, 16 January 1997, <http://legal.un.org/docs/?symbol=A/RES/51/210>, para. 9; see also General Assembly Resolution 53/106 (para. 11), Resolution 54/110 (para. 12), 55/158 (para. 13), 56/88 (para. 16), 57/27 (para. 16) and 58/81 (para. 14). As to the Draft see Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, 6th session (28 January-1 February 2002) by United Nations General Assembly [UN Doc A/57/37], Annex I.-VI. For more detail cf. Mahmoud Hmoud, "Negotiating the Draft Comprehensive Convention on International Terrorism. Major Bones of Contention", *Journal of International Criminal Justice*, vol. 4, no. 5, 2006, pp. 1031–1043.

¹⁸ The International Convention for the Suppression of the Financing of Terrorism (adopted by the General Assembly of the United Nations in resolution 54/109 of 9 December 1999) in its Art. 2 1) b) presents a universal definition, including any "act intended to cause death or serious bodily injury to a civilian (...), when the purpose of such act, by its nature or its context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act".

¹⁹ Christian Walter, "Terrorism", *The Max Planck Encyclopedia of Public International Law*, 2011, para. 9. Critical, however, Steiger, see note 15, p. 78 who objects including "violence against objects" in a definition of terrorism.

recent Security Council resolutions.²⁰ For example, in 2014 the Security Council reaffirmed “that all parties, including ISIL, associated armed groups, and other militias, must respect the human rights of the Iraqi people and abide by all applicable obligations under international humanitarian law (...)”²¹. One year later, in Resolution 2233 (2015), as of 29 July 2015, the Council took up the same wording, reaffirming “that all parties, including ISIL, associated armed groups, and militias, must respect human rights and abide by all applicable obligations under international humanitarian law, including those protecting the civilian population, by which both official Iraqi forces and member states that assist them must also abide”²².

Still, it is doubted whether a wholesale embracement of rights and obligations of terrorist groups is the right way to go. Terrorists operate in the shadow of an existing rather amorph entity; terrorist organisations, as for example Al-Qaida, nowadays have “fewer imperatives for a centralized structure or vertical (hierarchical) organisation and a greater propensity for horizontal networks which span time zones and territory and in which influence and power are multidirectional”.²³ In addition to that, generally terrorists see themselves not bound by the rules of international humanitarian law/human rights: “Most importantly, they are not under any illusions that they are bound by any law, domestic or international”.²⁴

In order to come under the umbrella of international humanitarian

²⁰ Christian Tomuschat, “The Applicability of Human Rights Law to Insurgent Movements” in Horst Fischer, Ulrike Froissart, Wolff Heintschel von Heinegg, Christian Raap, eds., *Krisensicherung und Humanitärer Schutz – Crisis Management and Humanitarian Protection, Festschrift für Dieter Fleck*, Berliner Wissenschaftsverlag, 2004, pp. 573-591, p. 586; Andrew Clapham, “Focusing on Armed Non-State Actors” in Andrew Clapham and Paola Gaeta, eds., *The Oxford Handbook of International Law in Armed Conflict*, Oxford University Press, 2014, pp. 776-810, p. 770.

²¹ UN Security Council, UN Doc. S/PRST/2014/20, 19 September 2014, preamble para. 6.

²² UN Security Council, UN Doc. S/Res/2233 (2015), 29 July 2015, preamble para. 15 (emphasis added by the author).

²³ Smith, Burke, de Leiu, Jackson see note 7, p. 168 quoting Ersun N. Kurtulus, “The ‘New Terrorism’ and its Critics”, *Studies in Conflict & Terrorism*, vol. 34, no. 6, 2011, pp. 476-500, p. 483, 489, 490.

²⁴ Ezeani see note 14, p. 164.

law, an armed group must be able and willing to follow the rules of humanitarian law and in order to do so, it has to be organised to a sufficient degree by an internal hierarchical structure and a certain extent of territorial control. Whether this is the case is a complex issue, depending also on the circumstances of the hostilities.

If we take, for example, the violent acts in Afghanistan in the early 21st century, we have to distinguish different settings: In a first period, when the Taliban destroyed the Buddha statues in 2001, there was an internal armed conflict in some parts of the country. However, this internal armed conflict reportedly was not taking place precisely in the region of the Bamiyan Valley, where most of the monumental Buddha statues were located.²⁵ The destruction was not directly connected to that conflict and as a result, the rules protecting cultural heritage in situations of armed conflict were not applicable to that situation. Consequently, those who destroyed the cultural objects were not to be prosecuted for a war crime.

In contrast to that, in a second period from 2002 onwards, international humanitarian law, including obligations concerning cultural property, was applicable: After ousting the Taliban government in Afghanistan (2001-02), the newly installed Afghan government and coalition forces were fighting against various armed groups, among them the Taliban: “This amounted to a non-international armed conflict”.²⁶ Because the violent acts reached the required degree of intensity (“protracted”) and the Taliban who engaged in such acts were sufficiently organized, that situation amounted to a non-international armed conflict with ensuing binding rules for organized armed non-state actors.

B. INCREASE IN SYSTEMATIC AND DELIBERATE ACTS

Another special feature related to armed conflicts in recent times

²⁵ Stephen Tanner, *Afghanistan: A Military History from Alexander the Great to the War against the Taliban*, Da Capo Press, 2009, p. 219; Kristin Hausler, “Culture under Attack: The Destruction of Cultural Heritage by Non-State Armed Groups”, *Santander Art & Cultural Law Review*, vol. 2, no. 1, 2015, pp. 117-146, p. 130; Lostal see note 6, p. 35.

²⁶ Jan K. Kleffner, “Scope of Application of International Humanitarian Law” in Dieter Fleck, ed., *The Handbook of International Humanitarian Law*, Oxford University Press, 2013, pp. 43-78, p. 51.

concerns the increase of heritage attacks. Deliberate and systematic acts against cultural heritage have spread to a considerable extent since the wanton demolition of the Buddha statues in Afghanistan in March 2001. In addition to the inherent risks for cultural monuments and archaeological sites by fighting in combat zones, instability in conflict-ridden host countries is conducive for looting and illegal trafficking of movable cultural objects.

The reasons for the increase in systematic and deliberate acts of annihilation of cultural heritage are complex, related, among others, to poverty, ideology, demonstration of power, terrorist propaganda and fragmentation of societies.²⁷ Financial reasons may play a role as well: Due to the high commercial value of movable antiquities in international markets, the way how they are exploited by non-state actors has changed. Plundering and illegal trafficking of antiquities take place in an organized and thoroughly-planned manner. In Iraq and Syria, ISIL even had put in place a systematic looting plan through its Antiquities division, thus raising funds through the issuing of licenses for digging of archaeological objects and collecting taxes for trafficking.²⁸

Organised trade in looted artefacts from conflict zones is flourishing in many parts of the world, supported not only by unscrupulous diggers but also by illegal traders and/or art collectors who are willing to buy valuable objects, e.g. from the Middle East, with unclear illegal provenance. Also, the possibility of new advanced sales channels like the Dark Web and the use of almost untraceable payment methods like Bitcoin seem to be drivers for illegal activities and smuggling.²⁹ Moreover, in some cases, cultural artefacts are used as a “currency in weapons transactions”.³⁰

²⁷ With further references Sabine von Schorlemer, *Kulturgutzerstörung. Die Auslöschung von Kulturerbe in Krisenländern als Herausforderung für die Vereinten Nationen*, Nomos, 2016, pp. 123-151.

²⁸ Schorlemer see note 27, p. 271.

²⁹ Gabriel Weimann, “Going Dark: Terrorism on the Dark Web.”, *Studies in Conflict & Terrorism*, vol. 39, no. 3, 2016, pp. 195-206, p. 196; see also Katie A. Paul, *Ancient Artifacts v. Digital Artifacts: New Tools for Unmasking the Sale of Illicit Antiquities on the Dark Web*, 13 February 2018, <https://www.mdpi.com/2076-0752/7/2/12/html>.

³⁰ Erik Nemeth, “Cultural Security: The Evolving Role of Art in International Security”, *Terrorism and Political Violence*, vol. 19, no.1, 2007, pp. 19-42, p. 32.

C. CULTURAL CLEANSING AND MASS ATROCITIES

Cultural cleansing³¹ seems to be evolving into a new atrocity crime in the 21st century. The denial of cultural identity and desecration of historic monuments, combined with the intentional and systematic destruction of cultural heritage, defined as cultural cleansing,³² has become a typical feature of recent heritage attacks by non-state actors.

As the 2017 UNESCO Strategy for the Reinforcement of UNESCO's Action for the Protection of Culture and the Promotion of Cultural Pluralism in the Event of Armed Conflict observed, recent attacks are characterized by the "deliberate targeting of individuals and groups on the basis of their cultural, ethnic or religious affiliations"³³. Cultural cleansing, the UNESCO Strategy explains, "aims to eradicate cultural diversity from a geographical area and replace it with a single, homogeneous cultural and religious perspective."³⁴

The J. Paul Getty Trust Paper Cultural Cleansing and Mass Atrocities, by Thomas Weiss and Nina Connelly, described cultural cleansing and ethnic cleansing as "evocative": "both capture dramatic crimes that shock the human conscience".³⁵ That means, going hand in hand with a quantitative change by increasing hostile acts against cultural heritage, we face a qualitative change as well: Cruelty³⁶ and the

³¹ Irina Bokova, "Fighting Cultural Cleansing: Harnessing the Law to Preserve Cultural Heritage", *Harvard International Review*, vol. 36, no. 4, 2015, pp. 40-45, pp. 40 f.

³² 38 C/Resolution 48; revised on 24 October 2017 (UNESCO Doc. 39/C/57), 24 October 2017, para. 2.

³³ UNESCO Strategy for the Reinforcement of UNESCO's Action for the Protection of Culture and the Promotion of Cultural Pluralism in the Event of Armed Conflict (38 C/Resolution 48); revised on 24 October 2017 (UNESCO Doc. 39/C/57), 24 October 2017, para 2. However, on 19 June 2017, the UN General Assembly adopted a Resolution "Strengthening the Capability of the United Nations System to Assist Member States in implementing the United Nations Global Counter-Terrorism Strategy (A/RES/71/291), where it was reaffirmed that terrorism and violent extremism "should not be associated with any religion, nationality, civilization or ethnic group" (Preamble para. 9).

³⁴ 38 C/Resolution 48; revised on 24 October 2017 (UNESCO Doc. 39/C/57), 24 October 2017, para. 2.

³⁵ Weiss and Connelly see note 4, p. 9.

³⁶ The Head of the Antiquities in Palmyra, Khaled-al-Assad, was assassinated in 2015 after refusing to cooperate with ISIL and disclose the location of some of the site's

tendency to commit mass atrocities against civilian populations have reached new peaks: For example, in 2015, the so-called Islamic State (ISIL/Da'esh) was reported to have been burning agricultural fields to devastate the landscapes of livelihood and the sources of subsistence for Kurdish communities in parts of Syria, adjacent to the Turkish border, thus pursuing a policy of “scorched earth”, with heritage destruction as “part and parcel”.³⁷

D. THE USE OF NETWORKED MEDIA

In recent times, intentional attacks against cultural heritage became connected with the use of networked (social) media. Due to its high visual potential and impact of cultural property destruction not only on the local but also on the international audience,³⁸ cultural heritage may even be prone more than ever before to become a victim of intentional attacks.

For example, in 2001 the Taliban presented the Bamiyan statues' demolition as a premeditated, well-orchestrated act of destruction in the international media. Thus, the Bamiyan Buddhas statues in Afghanistan were viewed as one of the first examples of global communications being used to intensify the impact of cultural heritage destruction.³⁹ The “immense size and consequent value of the statues as symbols of

antiquities, UNESCO, Director-General Irina Bokova deplores the loss of two leading scholars of Syrian antiquity, 20 August 2015, <https://en.unesco.org/news/director-general-irina-bokova-deplores-loss-two-leading-scholars-syrian-antiquity>.

³⁷ Ömür Harmanşah, “ISIS, Heritage, and the Spectacles of Destruction in the Global Media”, *Near Eastern Archaeology*, vol. 78, no. 3, Special Issue: the Cultural Heritage Crisis in the Middle East (September 2015), pp. 170-177, p. 170.

³⁸ In the case of ISIL /Dae'sh maximum impact was intended at three distinct levels: “(1) locally, by providing the Islamic State with an aura of invincibility that weakens resistance as it moves into new territory; 2) regionally, by reinforcing a sense of inevitable success in incipient movements in neighbouring countries; and 3) internationally, by attracting recruits to the cause, exhorting some to join battle on the lands of the Kaliphate and others to act alone in their home countries”, see Smith, Burke, de Leiu, Jackson see note 7, p. 174.

³⁹ Smith, Burke, de Leiu, Jackson see note 7, pp. 168; see also Barry Flood Finbarr, “Between Cult and Culture: Bamiyan, Islamic Iconoclasm, and the Museum”, *The Art Bulletin*, vol. 84, no. 4, 2002, pp. 641-659; Erik Nemeth even stated that in the case of the Buddhas, the political impact of cultural terrorism by the Taliban extended to the United States, see Nemeth see note 31, p. 32.

Buddhism attracted the attention of the media internationally (...)",⁴⁰ it was observed.

Meanwhile, other non-state armed groups started using cultural property strategically, for they have grasped the high symbolic value of cultural monuments and sites. When ISIL (Da'esh) started in mid-2014 a practice of deliberate damaging prominent archaeological sites such as Nineveh, Nimrud, Hatra, Ashur and Palmyra, ISIL had choreographed the cultural heritage destructions in Syria, as "mediatic spectacles of violence aimed at objects and sites of heritage".⁴¹ By deliberately choosing, in a calculated way, ancient statues instead of smaller antiquities, ISIL's media performances in Syria, but also Iraq, operated much like a "reality show that effectively mobilizes the consumerism of visual media"⁴². Not only the local communities were shocked, but also the international community.

Radical modern, high-tech and systematical use of networked social media as YouTube, Facebook, Twitter, Instagram evolved as a central element of ISIL (Da'esh) strategies with an estimated 90,000 posted messages a day online through a variety of platforms⁴³ or at least 46,000 twitter accounts at its peak.⁴⁴ Thus, it may be said that the "Islamic State's counter-heritage campaign took place as a media performance on a global scale"⁴⁵.

III. SECURITY COUNCIL RESOLUTIONS ADDRESSING CULTURAL HERITAGE

Some important new legal developments in the field of cultural heritage protection are related to UN Security Council Resolutions that

⁴⁰ Nemeth see note 31, p. 31.

⁴¹ Harmanşah see note 38, p. 170.

⁴² Harmanşah see note 38, p. 175.

⁴³ Smith, Burke, de Leiu, Jackson see note 7, p. 172.

⁴⁴ J.M. Berger and Jonathan Morgan, "The ISIS Twitter census: Defining and describing the population of ISIS supporters in Twitter", *Analysis Paper No. 20. The Brookings Project on U.S. Relations with the Islamic World*, Washington D.C., The Brookings Institution, March 2015, p. 2; Jytte Klausen, "Tweeting the Jihad: Social media networks of Western foreign fighters in Syria and Iraq", *Studies in Conflict & Terrorism*, vol. 38, no. 1, 2015, pp. 1-22, p. 20.

⁴⁵ Harmanşah see note 38, pp. 171.

have been drafted recently, some of them in close cooperation with UNESCO. It will be shown that various Security Council resolutions paved the way for considering cultural heritage protection as a “security issue” in the United Nations.

In recent years the Council has paid attention to the fact that non-state actors and terrorist groups specifically, “have exploited destruction of cultural heritage as a fundraising mechanism and a war tactic”⁴⁶.

A. CULTURAL HERITAGE AND THE NEXUS TO PEACE AND SECURITY

Since 2013/14,⁴⁷ the protection of cultural heritage has become a rather regular “component of a ‘threat to international peace and security’, i.e. the trigger for binding UN Security decisions” under Art. 39 UN Charter.⁴⁸

To begin with, in its Resolution 2170 (2014), adopted on 15 August 2014, the Security Council reaffirmed that “terrorism in all its forms and manifestations constitutes one of the most serious threats to international peace and security”⁴⁹. At the same time, the Council reiterated its condemnation “of ISIL, ANF and all other individuals, groups, undertakings and entities associated with Al-Qaida for ongoing and multiple criminal terrorist acts”⁵⁰ while strongly condemning in particular the “destruction of cultural and religious sites”⁵¹.

In its equally binding Resolution 2199 (2015), as of 12 February

⁴⁶ Weiss and Connelly see note 4, p. 20.

⁴⁷ See however, the landmark resolution 1483 (2003), where the Security Council decided for the first in the history of the United Nations to address the protection of the heritage of a UN member state (Iraq), stating that “all member States 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 Iraqi National Museum, the National Library, and other locations in Iraq since the adoption of resolution 661 (1990)”, UN Security Council, UN Doc. S/RES/1483, 22 May 2003, para. 7; see Catherine Phuong, “The Protection of Iraqi Cultural Property”, *International & Comparative Law Quarterly*, vol. 53, no. 4, 2004, pp. 985-998, p. 995.

⁴⁸ Weiss and Connelly see note 4, p. 16.

⁴⁹ S/RES/2170 (2014), preamble, para. 4.

⁵⁰ S/RES/2170 (2014), preamble, para. 6.

⁵¹ S/RES/2170 (2014), para. 2.

2015, the Council referred to the fact that “terrorism in all its forms and manifestation constitutes one of the most serious threats to international peace and security”⁵². The Council condemned “the destruction of cultural heritage in Iraq and Syria, particularly by ISIL and ANF, whether such destruction is incidental or deliberate, including the targeted destruction of religious sites and objects”⁵³. Moreover, the Council noted with concern that income is generated by ISIL, ANF and others “from engaging directly or indirectly in the looting and smuggling of cultural heritage items from archaeological sites, museums, libraries, archives, and other sites in Iraq and Syria, which is being used to support their recruitment efforts and strengthening their operational capability to organize and carry out terrorist attacks”⁵⁴.

This position was again confirmed and strengthened in Resolution 2249 of 20 November 2015. The Council affirmed that

“by its violent extremist ideology, its terrorist acts, its continuous gross systematic and widespread attacks directed against civilians, abuses of human rights and violations of international humanitarian law, including those driven on religious and ethnic ground, its eradication of cultural heritage and trafficking of cultural property (...) the Islamic State in Iraq and the Levant (ISIL, also known as Da’esh), constitutes a global and unprecedented threat to international peace and security”.⁵⁵

In very clear words, the Council condemned “in the strongest terms” the “barbaric acts of destruction and looting of cultural heritage carried out by ISIL”⁵⁶ and called on all member states “that have the capacity to do so to take all necessary measures (...) on the territory under the control of ISIL (...) to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL (...) and other individuals, groups, undertakings, and entities associated with Al-Qaida, and other terrorist groups (...)”⁵⁷.

In contrast to the previous resolutions Resolution 2347 (2017), as of 9 June 2017, is a non-binding general thematic resolution that

⁵² S/RES/2199, preamble, para. 3.

⁵³ S/RES/2199, para. 15.

⁵⁴ S/RES/2199, para. 16.

⁵⁵ S/Res/2249 (2015), preamble, para 6.

⁵⁶ S/RES/2249 (2015), para. 3.

⁵⁷ S/RES/2249 (2015), para. 5.

was not adopted due to a certain crisis or event. For the first time ever, Resolution 2347 (2017) focused “exclusively on cultural heritage and its necessity for peace and security”, as has been stressed by former UNESCO Director-General.⁵⁸ The Council noted “with grave concern the involvement of non-state actors, notably terrorist groups, in the destruction of cultural heritage and the trafficking in cultural property and related offences, in particular at the continued threat posed to international peace and security by the Islamic State in Iraq and the Levant (ISIL, also known as Da’esh), Al-Qaida and associated individuals, groups, undertakings and entities.⁵⁹ An additional security aspect concerns the threats posed by landmines and unexploded material/ordnance,⁶⁰ not only for the living conditions of the local population but also for the restoration of cultural heritage in post-conflict-situations. In its operational paragraphs, Resolution 2347 aims at safeguarding cultural heritage against destruction and trafficking and promotes a network of safe havens in the territories of Member States.⁶¹ Moreover, the Security Council mentioned future “preventive and emergency operations” and encouraged Member States to provide financial contributions to support them.⁶²

Finally, in Resolution 2379 (2017), adopted on 21 September 2017, the Council condemned the destruction of cultural heritage, including archaeological sites, and trafficking of cultural property,⁶³ while strengthening considerably the accountability of individual members of ISIL (Da’esh) who committed war crimes, crimes against humanity or genocide.

The brief overview reflects that the Council paved the way to a more comprehensive understanding of the existing threats for cultural heritage. It may be stressed that on the basis of this clearly established nexus to peace, collectors, art trader or auction houses, whenever they

⁵⁸ Letter of Irina Bokova to Ministers responsible for Relations with UNESCO CL/4210, United Nations Security Council Resolution 2347, 09/06/2017, p. 1.

⁵⁹ S/RES/2347 (2017), preamble, para. 7.

⁶⁰ S/RES/2347 (2017), preamble, para. 9 “noting with grave concern the serious threat posed to cultural heritage by landmines and unexploded ordnance”.

⁶¹ S/RES/2347 (2017), para. 16.

⁶² S/RES/2347 (2017), para. 15.

⁶³ S/RES/2379 (2017), preamble, para. 5.

are “associated” with the terrorist group Al-Qaida may come under the scrutiny of the Security Council (e.g. the sanctions list). This clearly is a step forward in the protection of cultural heritage against misuse.

By framing cultural heritage destruction as a security issue, the Security Council reacted in an adequate manner to ongoing crimes and illegal activities of terrorist groups. However, in a realistic stocktaking, it may be argued that the Council’s approach does not reflect any commitment to protect culture/cultural heritage for its own sake or value: The Council acts not or at least not primarily because of the intrinsic historic and/or aesthetic value of cultural monuments and artefacts or because they are important artistic landmarks of mankind, but rather in order to “cut off one avenue of terrorist financing”.⁶⁴

The above analysis reflects the fact that the Council is considering, above all, the relevance cultural heritage has for the promotion of terrorism and hence, for the stability of the regions affected. In this way, the Council is accentuating an instrumental relationship between cultural heritage in its own right and broader security aspects, taking into consideration also the fact that sales from trafficking illegally excavated or stolen objects may be used for operational activities or for recruiting new groups of militants.

B. HERITAGE PROTECTION BY UN PEACE MISSIONS AND INDIVIDUAL CRIMINAL ACCOUNTABILITY

Generally, the Security Council is the competent body to authorize multilateral enforcement measures also on the ground. The Council may do so at any time, provided a threat to peace and international security exists (Art. 39, 42 UN Charter).

After terrorist groups as Ansar Dine and Al-Qaeda in the Islamic Maghreb (AQIM), had attacked Timbuktu’s mosques and damaged

⁶⁴ Edward C. Luck, “Cultural Genocide and the Protection of Cultural Heritage”, *J. Paul Getty Trust Occasional Papers in Cultural Heritage Policy*. No. 2. 2018.

severely 14 of its mausoleums,⁶⁵ the Council in its Resolution 2100 (2013) mandated a UN Mission with the specific task of protecting Malian cultural heritage. Acting under Chapter VII of the UN Charter, the Council created the Multidimensional Integrated Stabilization Mission in Mali (MINUSMA). Its mandate included, inter alia, the stabilization of key population centres and support for the re-establishment of State authority throughout the country.⁶⁶ In addition to that, the Council adopted a specific cultural heritage clause for MINUSMA “to assist the transitional authorities of Mali as necessary and feasible, in protecting from attack the cultural and historical sites in Mali, in collaboration with UNESCO”⁶⁷.

This robust mandate for cultural heritage protection in Mali as part of a binding UN Security Council resolution is another important recent development for cultural heritage protection: For the first time in UN history, the Council mandated explicit support for cultural preservation, advancing also a “paradigm for sharing the protection of objectives identified by the Security Council, UN and UNESCO”, as the Italian Centre for Higher Defence Studies put it in an informal paper.⁶⁸

It may be criticized, however, that MINUSMA was dispatched rather late, i.e. a couple of months after the main destructions of the Malian mausoleums had already taken place.⁶⁹ Still, when the Council authorized the mission with its mandate for cultural heritage, the Council might have wished to protect Malian cultural heritage (e.g. mausoleums, manuscripts, holy shrines) against future terrorist attacks. Besides, MINUSMA actively took part in cultural heritage protection at a practical level: Together with UNESCO, MINUSMA supported the

⁶⁵ Concerning cultural heritage destruction in Mali see Lostal see note 6, p. 127 ff; Sabine von Schorlemer, “Military Intervention, the UN Security Council and the Role of UNESCO: The Case of Mali.” in Anne-Marie Carstens and Elisabeth Varner, eds., *Intersections in International Cultural Heritage Law*, Oxford University Press, 2019 (forthcoming).

⁶⁶ S/RES/2100 (2013), para. 16 (a).

⁶⁷ S/RES/2100 (2013), para. 16 f.

⁶⁸ Italian Centre for Higher Defence Studies, “The Legal Obligations to Protect Cultural Properties and Identities during armed Conflict”, submitted to the Committee on Participation in Global Cultural Heritage Governance at the 78th biennial ILA Conference in Sydney August 2018 (on stock with the author).

⁶⁹ For detail see Schorlemer see note 65.

restoration of mausoleums, e.g. by protecting the experts and sites.⁷⁰

Therefore, despite some serious security problems MINUSMA is facing on the ground,⁷¹ the adoption of MINUSMA's mandate by the Security Council is an important signal to terrorist groups, warning them that the international community is ready to act when cultural heritage is destroyed wantonly.

Not least, MINUSMA also supported early investigations of the International Criminal Court's (ICC) Office of the Prosecutor in the case of Al Mahdi who was charged with intentionally directing attacks against ten sites of a religious and historic character, committed in Timbuktu between 30 June 2012 and 11 July 2012. Al Mahdi was successfully convicted on 27 September 2016 to nine years of imprisonment.⁷² The Chamber unanimously found Al Mahdi guilty within the meaning of Article 25 (3) (co-perpetration), of the crime of attacking the protected sites⁷³ as a war crime under Article 8 (2) (e) (iv) of the Statute of Rome.⁷⁴ In its Judgement, the Trial Chamber VIII considered Al Mahdi to have been fully implicated in the destruction, e.g. by having supervised the execution of the operations by using his men from the Hesbah morality brigade and by personally participating in the attacks.⁷⁵ In its Reparation Order, the Court further awarded Mali a fine of 2.7 million Euros, and the international community, represented by UNESCO, a symbolic reparation of one Euro.⁷⁶

⁷⁰ *Ibid.*

⁷¹ As of September 2018, 173 peacekeepers have been killed by attacks on MINUSMA personnel, see UN peacekeeping, 'Fatalities by Mission, Year and Incident Type', <https://peacekeeping.un.org/en/fatalities>.

⁷² International Criminal Court, *The Prosecutor v. Al Mahdi*, Judgement and Sentence, ICC-01/12-01/2015, 27 September 2016.

⁷³ All buildings with the exception of the Sheikh Mohamed Mahmoud Al Arawani Mausoleum had the status of protected UNESCO World Heritage sites under the 1972 Convention; they were not military objectives, International Criminal Court, *The Prosecutor v. Al Mahdi*, Judgement and Sentence, ICC-01/12-01/2015, 27 September 2016. see para. 39.

⁷⁴ Rome Statute, 2187 U.N.T.S., entry into force 1 July 2002.

⁷⁵ Summary of the Judgment and Sentence in the case of *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, 27 September 2016, <https://www.icc-cpi.int/itemsDocuments/160926Al-MahdiSummary.pdf>.

⁷⁶ International Criminal Court, *The Prosecutor v. Al Mahdi*, Reparations Order, ICC-01/12-01/15, 17 August 2017; for detail see Ana Filipa Vrdoljak in this volume.

Given the general importance of Resolution 2100 (2013), UNESCO in its 2017 Strategy for the Reinforcement of UNESCO's Action for the Protection of Culture and the Promotion of Cultural Pluralism in the Event of Armed Conflict, pledged that it will build on the positive experience of the implementation of UN Security Council Resolution 2100 (2013) concerning MUNUSMA and propose "the integration of a module on the protection of cultural heritage and diversity within the standard training of peace-keeping forces"⁷⁷. This is an important element in the follow-up process of Security Council resolution 2100 (2013).

C. A "RESPONSIBILITY TO INTERVENE" (R2P)

A well-known problem in UN politics is related to the fact that the adoption of a Security Council resolution may be delayed or even hampered by a veto of the P-5. The question therefore is whether there is a responsibility to intervene in certain cases.

As has been stated by the Heads of State and Government in September 2005 in the UN World Summit Outcome Document,⁷⁸ specified by the UN Secretary-General,⁷⁹ each state has the responsibility to protect its populations from "genocide, war crimes, ethnic cleansing and crimes against humanity" (so-called atrocity crimes). When national authorities manifestly fail to fulfil their own responsibility to protect their population from atrocity crimes mentioned above, the international community has the responsibility to take action through peaceful diplomatic and humanitarian means and, if that fails, through other more forceful means, including the use of military force. In this context, Heads of State and Government declared:

"we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organisations, as appropriate should peaceful means

⁷⁷ UNESCO Strategy para. 31.

⁷⁸ UN General Assembly, 2005 World Summit Outcome, Res. 60/1, UN Doc. A/RES/60/1, 24.10.2005, para. 138-139.

⁷⁹ UN, Report of the Secretary-General on Implementing the Responsibility to Protect, UN Doc. A/63/677, New York, NY, 12 January 2009, para. 61.

be inadequate (...).”⁸⁰

Hence, the question is whether R2P, developed by the International Commission on Intervention and State Sovereignty (ICISS)⁸¹ and accepted by all United Nations member states,⁸² may be value-added for the future international protection of cultural heritage?

The differentiated levels of the R2P may also be relevant for cultural heritage protection against terrorist attacks.⁸³ As the ICC’s Prosecutor Fatou Bensouda stated, “we all have a duty to protect cultural heritage”⁸⁴. And military experts stress that previously, the existing obligations during the conduct of operational activities were “avoiding damage to cultural assets in the combat zone”, while now it appears necessary “to adopt caution in order to protect the monumental sites submitted to forces under UN mandate”⁸⁵.

In that context, a UNESCO Concept Paper for the Application of Responsibility to Protect to the Protection of Cultural Property in preparation of an Expert Meeting on ‘Responsibility to Protect’ as Applied to the Protection of Cultural Heritage in Armed Conflict,

⁸⁰ UN General Assembly, 2005 World Summit Outcome, Res. 60/1, UN Doc. A/RES/60/1, 24.10.2005, para. 139.

⁸¹ See December 2001 Report of the International Commission on Intervention and State Sovereignty (ICISS), co-chaired by Gareth Evans and Mohamed Sahnoun.

⁸² As far as the general obligation of states are concerned, the UN-Secretary-General in his 2009 Report on Implementing the Responsibility to Protect stated that “the provisions of paragraphs 138 and 139 of the Summit Outcome are firmly anchored in well-established principles of international law. Under conventional and customary international law, States have obligations to prevent and punish genocide, war crimes and crimes against humanity”, see UN, Report of the Secretary-General on Implementing the Responsibility to Protect, UN Doc. A/63/677, New York, NY, 12 January 2009, para. 3.

⁸³ UNESCO, Expert meeting on the ‘Responsibility to Protect’ and the protection of cultural heritage, Recommendations, Paris, 26-27 November 2015, UNESCO Doc. 38 C/49.

⁸⁴ International Criminal Court and UNESCO Strengthen Cooperation on the Protection of Cultural Heritage, 6 November 2017, <https://en.unesco.org/news/international-criminal-court-and-unesco-strengthen-cooperation-protection-cultural-heritage>.

⁸⁵ Italian Centre for Higher Defence Studies see note 70, p. 1.

hosted by the UNESCO Secretariat in Paris, 26-27 November 2015,⁸⁶ formulated the hypothesis that an “expansion of the doctrine of R2P to include the protection of cultural property will strengthen safeguarding measures of such cultural heritage under threat”⁸⁷.

The Responsibility to Protect Cultural Heritage was described as an “innovative way to deal with new threats of international extinction of cultural heritage in combination with massive human rights violations”⁸⁸. Still, the scope of application of R2P regarding cultural heritage is controversial.

While some authors squarely object to apply R2P, also fearing mission creep as, for example, in the Libyan Resolution 1973 (2011),⁸⁹ others advocate a rather broad scope of application and suggest to apply R2P whenever attacks against cultural heritage amount either to war crimes, crimes against humanity, ethnic cleansing or genocide. As Federico Lenzerini stated: “(...) since intentional destruction of cultural heritage amounts to a war crime and a crime against humanity, it falls directly within the scope of R2P which (...) applies as a minimum to genocide, war crimes, ethnic cleansing and crimes against humanity (...)”⁹⁰.

⁸⁶ Paris Expert meeting on the ‘Responsibility to Protect’ and the protection of cultural heritage, Recommendations, Paris, 26-27 November 2015; Sabine von Schorlemer, “The Usefulness of the ‘Responsibility to Protect’ as Applied to the Protection of Cultural Heritage in Armed Conflict” in Marc-André Renolds and Alessandro Chechi, eds., *Cultural Heritage Law and Ethics: Mapping the Recent Developments*, Geneva, Art-Law Centre, 2017, pp. 71-93.

⁸⁷ UNESCO, “Concept Paper: Proposal for an Expert Group Meeting to discuss the Application of Responsibility to Protect to the Protection of Cultural Property” November 2015 (on stock with the author), p. 1.

⁸⁸ Sabine von Schorlemer, “Paper for the Expert Group Meeting to Discuss the Application of the Responsibility to Protect to the Protection of Cultural Property”, Written Notes for the UNESCO Expert Meeting “Responsibility to Protect and the Protection of Cultural Property” at UNESCO Headquarters, Paris, 26-27 November 2015 (on stock with the author), p. 2.

⁸⁹ See S/RES/1973 (2011), as of 17 March 2011; for detail of that mandate cf. Thomas H. Lee, “The Law of War and the Responsibility to Protect Civilians: A Reinterpretation”, *Harvard International Law Journal*, vol. 55, no. 4, 2014, pp. 251-321, p. 293; Oliver Stuenkel, “The BRICS and the Future of R2P. Was Syria or Libya the Exception?”, *Global Responsibility to Protect*, vol. 6, 2014, pp. 3-28, p. 3.

⁹⁰ Lenzerini see note 5, p. 80.

In contrast to that, independent UNESCO experts as Frederic Rosén took a more restrictive stance and argued that there should be no “stand-alone R2P category for war crimes against cultural property.”⁹¹ Indeed, the rationale of R2P is to prevent atrocity crimes, i.e. crimes that are generally considered be more serious than plain war crimes against cultural property. According to the International Commission on Intervention and State Sovereignty (ICISS)’s groundwork on R2P, military intervention is justified only in case of “large scale loss of life” or “large scale ‘ethnic cleansing’, actual or apprehended, whether carried out by killing, forced expulsion, acts of terrors or rape”⁹². Along these lines, the 2017 Getty Trust Research Paper on “Cultural Cleansing and Mass Atrocities” proposed to adapt the criteria for military force for cultural protection purposes to include henceforth: “Large scale loss of cultural heritage, actual or apprehended, with genocidal intent or not, which is the product of deliberated action by a state or a non-state actor, or of neglect or inability to act, or of a failed-state situation; or large-scale cultural cleansing, actual or apprehended”⁹³.

According to the author, it is rather the combined effect of particular attacks on cultural property by non-state actors and massive human rights violations which lead to the gravity required for R2P. Given the recent instances of crimes in Syria, Iraq, Yemen, Libya, Mali and other places, it seems feasible to expand R2P and include atrocity crimes as “cultural cleansing” which are directed against cultural property and people’s human rights. Cultural heritage destructions in combination with massive human rights violations (e.g. displacement, torture, murder, enslavement, persecution or even genocide as in the case of Yazidis in

⁹¹ Frederik Rosén, “Food for Thought, Paper on Cultural Heritage Destruction and R2P”, Written Notes for the UNESCO Expert Meeting “Responsibility to Protect and the Protection of Cultural Property” at UNESCO Headquarters, Paris, 26-27 November 2015 (on stock with the author), p. 1. See, however, Francesco Francioni, and Federico Lenzerini, “Responsibility to Protect Meeting”, Written Notes for the UNESCO Expert Meeting “Responsibility to Protect and the Protection of Cultural Property” at UNESCO Headquarters, Paris, 26-27 November 2015 (on stock with the author).

⁹² December 2001 Report of the International Commission on Intervention and State Sovereignty (ICISS), p. 32; Sabine von Schorlemer, “The Responsibility to Protect as an Element of Peace. Recommendations for its Operationalisation, Policy Paper 28 of the Peace and Development Foundation, Bonn 2007.

⁹³ Weiss and Connelly see note 4, p. 38.

Iraq⁹⁴) reflect the framework for which R2P has been developed. On that basis, it may be argued that R2P encompasses cultural property when States are unwilling or unable to respect their obligations, e.g. in cases of willful targeting or deliberate destruction of cultural property by terrorist actors, leading to the risk of extinction/cultural cleansing.⁹⁵

To conclude, there is leeway for an expansive interpretation of R2P to be applied on cultural property. In the view of the author, R2P is a useful tool to legitimize action by the international community and Member States to protect cultural heritage threatened also by non-state actors, whenever a State is unable or unwilling to do so. The R2P approach as applied to cultural heritage provides a stronger basis to the international community to intervene in order to save humanity's past incorporated in precious cultural treasures. Whenever a case of "cultural cleansing" reaches the threshold of a "threat to peace", the international community, represented by the United Nations, is supposed to take action to protect populations/communities from mass atrocity, when the territorial state is not able or willing to comply with its own responsibility. Under these circumstances, also third states may have recourse to armed force, provided the military action is carried out with the authorization of the SC pursuant to Chapter VII of the UN Charter.⁹⁶

Details of R2P as applied to cultural property, in particular its content and practical measures of cultural protection (e.g. safe havens, cultural protected zones, preventive deployment, robust cultural protection mandates for UN peace missions) should be explored further, for example by an international commission composed of independent experts as Weiss/Connelly suggested.⁹⁷

⁹⁴ The British Council reported that at least 20 historic Yazidi places of worship around Dohuk, Mosul and Sinjar have been destroyed between 2014-2016 with the ensuing risk that cultural identity, memories and practices will disappear (britishcouncil.org, "Preserving Yazidi Heritage and Identity").

⁹⁵ Lenzerini see note 5, p. 80.

⁹⁶ Military action must be "a last resort and the relevant decision must be taken with the utmost caution" as Peter Hilpold stresses, see Peter Hilpold, "From Humanitarian Intervention to the responsibility to protect" in Peter Hilpold, ed., *The Responsibility to protect (R2P). A new Paradigm of International Law?*, Brill/Nijhoff, 2014, pp. 1-37, p. 31.

⁹⁷ Weiss and Connelly see note 4, p. 39.

D. REFLECTION: MISSING ASPECTS IN CULTURAL SECURITY?

The UN Security Council resolutions analysed above serve a fundamental goal in the early 21st century: To defend the general interest of humanity to be protected against atrocities committed by non-state terrorist groups against people and their heritage.

Still, the Security Council seems to have turned a “blind eye” on the relevance of intangible cultural heritage. So far the Council made no mention of intangible heritage despite the fact that intangible heritage of people (e.g. oral traditions and expressions, performing arts, rituals and festivities, traditional music and dance, traditional craftsmanship)⁹⁸, is violated in manifold respects by armed attacks, whether in Iraq, in Syria, in Yemen, Libya or Mali. In many – and generally not well-documented cases – local communities are threatened with the extinction of important parts of their intangible heritage when located in conflict zones.

In that regard, the UNESCO General Conference’s 2017 Strategy for the Reinforcement of UNESCO’s Action for the Protection of Culture and the Promotion of Cultural Pluralism in the Event of Armed Conflict⁹⁹ could be an “eye-opener”: The Strategy emphasizes that “there is today growing recognition that the protection of cultural diversity and promotion of cultural pluralism, through the safeguarding of the tangible and intangible heritage of communities” is “more than a cultural emergency”: “It is a security and humanitarian imperative in conflict and transition situations and an essential element in ensuring sustainable peace and development”¹⁰⁰.

In a similar vein the Italian Centre for Higher Defence Studies¹⁰¹ emphasized that intangible heritage should come under the umbrella of military protection by UN peace missions. In an informal Paper

⁹⁸ Tullio Scovazzi, “The Definition of Intangible Cultural Heritage” in Silvia Borelli and Federico Lenzerini, eds., *Cultural Heritage, Cultural Rights, Cultural Diversity. New Developments in International Law*, Brill/Martinus Nijhoff, 2012, pp. 179-200, p. 181; Janet Blake, ed., *Safeguarding Intangible Heritage: Challenges and Approaches*, Institute of Art and Law, 2007.

⁹⁹ UNESCO Doc. 38 C/Resolution 48; revised on 24 October 2017 (UNESCO Doc. 39/C/57, 24 October 2017).

¹⁰⁰ Strategy para. 6.

¹⁰¹ Italian Centre for Higher Defence Studies see note 68.

submitted to the Committee on the Participation in Global Cultural Heritage Governance at the 78th biennial ILA Conference in Sydney in August 2018, Lieutenant General Massimiliano del Casale and Lieutenant Umberto Colonel Montuoro urged:

“When defining a UN mandate and planning a deployment of a multinational contingent, the safeguard of mobile and immobile artefacts tangible and intangible must be taken in consideration. In other words, the aim of the military operations is to protect both the populations and historical sites during ongoing armed conflicts in war zones”.¹⁰²

The authors reflected critically the fact that the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict of 1954 and its Second Protocol of 1999 merely focus on the protection of cultural tangible goods while the 2003 UNESCO Convention on the Safeguarding of Intangible Heritage does not contain any specific rules for military operations.¹⁰³ Consequently, the judgment of the military experts is harsh: “The legal void in international law concerning the protection of human rights and dignity of the person appears to be vast and anachronistic”¹⁰⁴. Against this background, the Italian Centre for Higher Defence Studies’ Paper emphasizes that “the planning of joint operations” is needed in military terms, regarding the protection of cultural sites and regarding the inhabitants.¹⁰⁵

The question may be asked, however, whether it is likely that the Security Council will include intangible heritage in its future security-related framework. Traditionally, military rules address tangible heritage only, beginning with the Convention (IV) respecting the Laws and Customs of War on Land (1907) and its annexed Regulations concerning the Laws and Customs of War on Land, the 1935 Roerich Pact, up to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), its Second Protocol (1999) and Additional Protocols I and II to the Geneva Conventions (1977). The need of a precise mandate and a realistic chance to implement it is an important operational requirement for armed forces. Overburdening

¹⁰² *Ibid.*, p. 1 f. (emphasis added by the author).

¹⁰³ *Ibid.*, p. 3.

¹⁰⁴ *Ibid.*, p. 3.

¹⁰⁵ *Ibid.*, p. 2.

military mandates by including too many objects for protection ought to be avoided therefore.

Before striving at integrating the protection of intangible heritage as an additional element in UN peace missions, it seems advisable to explore better coherence of existing obligations, e.g. by a mixed round table of military and UNESCO experts. The authors of the Italian Paper are right, therefore: Better coordination among the 2003, 2005 and 1954 conventions “is nowadays necessary and not deferrable”¹⁰⁶. In particular, synergies between the 1954 Hague Convention on the Protection of Cultural Property in Armed Conflict and the 2003 UNESCO Convention of the Safeguarding of Intangible Heritage, but also the 2005 Convention on the Diversity of Cultural Expressions in situations of armed conflict ought to be explored in more detail.¹⁰⁷

IV. CONCLUSION: THE ROLE OF UNESCO IN THE FIGHT AGAINST INTENTIONAL CULTURAL HERITAGE DESTRUCTION AND EXTREMISM

UNESCO, the UN specialized agency with a broad statutory competency not only for culture, but also education, science and communication, is rightly seen as the “most visible international institution working on protecting cultural heritage in zones of armed conflict”¹⁰⁸. More specifically, “UNESCO is leading the fight against cultural cleansing”, “bringing all its expertise to bear in strategies to prevent violent extremism”.¹⁰⁹

For example, in reaction to the extinction of the Buddha statues in Afghanistan, the 32nd UNESCO General Conference, Paris, 17 October 2003, adopted the “Declaration Concerning the Intentional Destruction

¹⁰⁶ *Ibid.*, p. 4. Drafting new tools, e.g. an authoritative interpretation concerning a broader definition of cultural heritage, including intangible heritage under Art. 1 of the Hague Convention (1954) or new UNESCO guidelines concerning protection against deliberate attacks on cultural heritage in armed conflict may be an option.

¹⁰⁷ See already Schorlemer see note 27, pp. 610.

¹⁰⁸ Weiss and Connelly see note 4, p. 22.

¹⁰⁹ Para. 24.11, Records of the General Conference, Proceedings, 38th session, Paris 2017, <http://unesdoc.unesco.org/images/0024/002479/247901m.pdf>.

of Cultural Heritage”¹¹⁰. This is the first universal manifesto in the history of the United Nations that addresses and defines intentional attacks.¹¹¹

In response to large-scale systematic destruction and looting of cultural sites in Syria, Iraq, Libya, Yemen, Mali, but also attacks on cultural diversity and cultural/religious minorities, infringing on their human rights and security in many parts of the world, UNESCO adopted the Strategy for the Reinforcement of UNESCO’s Action for the Protection of Culture and the Promotion of Cultural Pluralism in the Event of Armed Conflict.¹¹² In addition to intentional destruction, collateral damage, forced neglect and organized looting/illicit trafficking, para. 1 of the Strategy mentions “terrorism” as a threat to cultural heritage in armed conflict. The overall objective of the Strategy is to strengthen Member states’ ability to prevent, mitigate and recover the loss of cultural heritage and diversity as a result of conflict and to incorporate the protection of culture into humanitarian action, security strategies and peacebuilding processes.¹¹³

Furthermore, in order to explore practical instruments for protection in times of imminent threats for the cultural heritage of people, e.g. by creating cultural protected zones or safe havens, the UNESCO Secretariat hosted the “Expert Meeting on ‘Responsibility to Protect’ as Applied to the Protection of Cultural Heritage in Armed Conflict” in November 2015, as was already mentioned above.¹¹⁴ In November

¹¹⁰ UNESCO Declaration concerning the International Destruction of Cultural Heritage, 17 October 2003, http://portal.unesco.org/en/ev.php-URL_ID=17718&URL_DO=DO_TOPIC&URL_SECTION=201.html. See Federico Lenzerini, “The UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage: One Step Forward and Two steps Back”, *Italian Yearbook of International Law*, vol. 13, 2003, pp. 131-145.

¹¹¹ UNESCO Declaration 2003 para. II.2 defines intentional attacks as “an act intended to destroy in whole or in part cultural heritage, thus compromising its integrity, in a manner which constitutes a violation of international law or an unjustifiable offence of the principles of humanity and dictates of public conscience.”

¹¹² UNESCO Strategy for the Reinforcement of UNESCO’s Action for the Protection of Culture and the Promotion of Cultural Pluralism in the Event of Armed Conflict (38 C/Resolution 48); revised on 24 October 2017 (UNESCO Doc. 39/C/57), 24 October 2017.

¹¹³ Strategy para. 16.

¹¹⁴ Regarding R2P see above.

2017, a high-level panel discussion at UNESCO Headquarters focussed on “Responding to Cultural Cleansing, Preventing Violent Extremism”.

As far as emergency funding in times of crises is concerned, the Heritage Emergency Fund¹¹⁵ was established, followed by the new ALIPH fund, established in December 2016 in Abu Dhabi by France and the United Arab Emirates.¹¹⁶ In addition to that, UNESCO launched several campaigns related to the protection of cultural heritage in zones of armed conflict. The 2014 EU-financed “Emergency Safeguarding on the Syrian Cultural Heritage” project¹¹⁷ was followed by the social media campaign “Unite4Heritage” in 2015¹¹⁸ that raises awareness and promotes culture-sensitivity in the civil society of affected states. The Heritage Passport, developed by UNESCO in cooperation with Malian authorities, is another initiative aiming at stimulating a feeling of responsibility among the local population for “their” cultural treasures.¹¹⁹

Furthermore, UNESCO’s Global Coalition-Unite for Heritage was launched in June 2015 in order to establish a broad network of stakeholders in heritage protection.¹²⁰ As part of that network,

¹¹⁵ Website of the Heritage Emergency Fund: <http://www.unesco.org/donate/hef/>, UNESCO, 2017 Heritage Emergency Fund Annual Progress Report, https://en.unesco.org/sites/default/files/hef_2017_annual_progress_report-v2_en.pdf

¹¹⁶ UNESCO, France and the Emirates launch an International Alliance for the Protection of Heritage, 20.03.2017 http://www.unesco.org/new/en/media-services/single-view/news/unesco_france_and_the_emirates_launch_an_international_alli/ concerning ALIPH, see Weiss and Connelly see note 4 , p. 23 f.; Paolo Foradori, Serena Giusti and Alessandro Giovanni Lamonica, “Reshaping Cultural Heritage Protection Policies at a Time of Securitisation: France, Italy, and the United Kingdom”, *The International Spectator*, vol. 53, no. 3, 2018, pp. 86-101, p. 90.

¹¹⁷ Heritage in Danger: Emergency Safeguarding of the Syrian Cultural Heritage, 28.06.2017, http://www.unesco.org/new/en/brussels/about-this-office/single-view/news/heritage_in_danger_emergency_safeguarding_of_the_syrian_cul; The Emergency Safeguarding of the Syrian Cultural Heritage project, <https://en.unesco.org/syrian-observatory/emergency-safeguarding-syrian-cultural-heritage-project>.

¹¹⁸ Website #Unite4Heritage, <http://www.unite4heritage.org/>. The “UNITE4Heritage” initiative received a positive response, S. Kane, *Archaeology and Cultural Heritage in Post-Revolution Libya* in: *Near Eastern Archaeology* 78, 2015, p. 211.

¹¹⁹ <https://whc.unesco.org/en/news/981/>.

¹²⁰ Launch of global Unite for Heritage Coalition in Bonn, 29 June 2015, <https://whc.unesco.org/en/news/1303/>.

the Government of the Italian Republic signed a Memorandum of Understanding with UNESCO for initiatives in favor of countries facing emergencies that may affect the protection and safeguarding of culture and the promotion of cultural pluralism (Rome, 16 February 2016).¹²¹ The Parties agreed that in response to a request by a UNESCO member state facing crisis or natural disaster, the Italian Task Force may be able to operate as well in and after the crisis, e.g. by devising operational plans for urgent safeguarding measures or “assisting in transferring movable cultural property at risk to safe havens”¹²².

In order to better protect cultural heritage in times of crisis and armed conflict, UNESCO successfully established new partnerships with international agencies in recent years. For example, a Memorandum of Understanding (MoU) was signed with the International Committee of the Red Cross (ICRC) (Geneva, 29 February 2016).¹²³ The Memorandum constitutes the first agreement of its kind signed between the two organisations, encouraging the ICRC to play a more active operational role in the rescue of cultural property under imminent threat.

Moreover, the joint cooperation between UNESCO and the ICC that started in 2012 in the wake of the deliberate destruction of cultural heritage in Mali, is to be recalled. It consisted in providing detailed documentation on cultural heritage destructions to the ICC, thereby establishing a “strong basis for further collaboration, especially when countries have not yet ratified relevant Conventions or are not States Parties to the ICC”.¹²⁴ Meanwhile, the ICC and UNESCO further strengthened their collaboration regarding the protection of cultural heritage: On 6 November 2017 the UNESCO Director-General and the ICC’s Prosecutor, Fatou Bensouda, signed a Letter of Intent that

¹²¹ The official text of the Memorandum of Understanding is available at: http://itra.esteri.it/Ricerca_Documenti/wfrmRicerca_Documenti.aspx .

¹²² *Ibid.*

¹²³ Memorandum of Understanding between UNESCO (represented by Irina Bokova) and ICRC (represented by Peter Maurer), signed in Geneva on 29 February 2016; ICRC, Agreement between the ICRC and UNESCO on the protection of cultural property – Q&A, 8 March 2016 (<https://www.icrc.org/en/document/cultural-property-in-armed-conflict>).

¹²⁴ UNESCO Strategy, para. 25.

formalized the cooperation of both institutions.¹²⁵

In order to fight the root causes of heritage destruction and extremism, UNESCO is advocating strongly a comprehensive approach, using also its “soft power” across the Organization’s mandate. In a broader perspective, the UNESCO Executive Board expressed its concern about the worldwide challenge of recruitment and radicalization to violent extremism of youth in media, in communities and in schools.¹²⁶ The Board therefore decided to develop new educational resources in order to facilitate the prevention of violent extremism through education.¹²⁷ Efforts for training and capacity-building are made, including educators, policy-makers, parents and the youth.¹²⁸

Thus, despite its limited resources,¹²⁹ UNESCO is an important actor in promoting a culture of peace, justice and tolerance on a worldwide scale.

¹²⁵ https://www.icc-cpi.int/Pages/item.aspx?name=171106_OTP_Unesco.

¹²⁶ UNESCO Executive Board UNESCO, “UNESCO’s role in promoting education as a tool to prevent violent extremism (197 EX/46 and Corr.; 197 EX/DG.INF; 197 EX/53)”, Doc. 197 EX/SR.8, 23 November 2015, para. 2.

¹²⁷ *Ibid.*, para. 17 (c).

¹²⁸ *Ibid.*, para. 17 (g); UNESCO Youth and the Internet Fighting Radicalization and Extremism, 16-17 June 2015, <https://en.unesco.org/youth-and-internet-fighting-radicalization-and-extremism>. A Teacher’s Guide on the Prevention of Violent Extremism, 2016, <http://unesdoc.unesco.org/images/0024/002446/244676e.pdf> Preventing violent extremism through education, A guide for policy-makers, 2017, <http://unesdoc.unesco.org/images/0024/002477/247764e.pdf>. See also UNESCO global networking for education to prevent violent extremism, 23 April 2018, <https://en.unesco.org/news/unesco-global-networking-education-prevent-violent-extremism>. Youth led guide on prevention of violent extremism through education, 2017, <http://unesdoc.unesco.org/images/0026/002605/260547e.pdf>. UNESCO in Action Preventing Violent Extremism Worldwide, https://en.unesco.org/sites/default/files/unesco_in_action-pve_worldwide-en.pdf.

¹²⁹ For detail see Klaus Hüfner, *What can save UNESCO?*, Frank & Timme, 2016, pp. 61.

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