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Guarding our Heritage – an International Law Perspective

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Abstract

The targeting of historical and cultural sites in the Old Town of Dubrovnik and the destruction of the Old Bridge of Mostar in the wars in the former Yugoslavia in the early 1990s; the dynamiting of the giant Buddha statues of Bamiyan in Afghanistan and the collapse of the Twin Towers in New York in 2001, are examples from recent history of acts of intentional destruction of cultural heritage in times of conflict.

Cultural property is priceless and irreplaceable and is of vital importance to the whole of humanity. *Cultural heritage is an important component of the cultural identity of communities, groups and individuals, and of social cohesion, so that its intentional destruction has adverse consequences on human dignity and human rights.*

In this paper I consider the questions:

How does international law seek to protect cultural property and heritage?

Can the destruction of historic monuments in times of armed conflict constitute a war crime?

What sanctions, if any, do perpetrators face?

Safeguarding cultural heritage

As a result of the death and destruction wrought by the Second World War, the global community took stock, and, in what was a seminal moment for International Law, asserted that

*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*¹

The Universal Declaration of Human Rights was proclaimed *as a common standard of achievement for all peoples and all nations* and it was recognised that *the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.*²

¹ *Universal Declaration of Human Rights* art 1, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/RES/217A (III) (1948).

² *Ibid* Preamble.

Along with these profound sentiments which recognise the innate personal rights each human being has simply by virtue of being human, the world also recognised the importance of protecting cultural property. Cultural heritage is seen as *an important component of the cultural identity of communities, groups and individuals, and of social cohesion, so that its intentional destruction may have adverse consequences on human dignity and human rights.*³

In Australia cultural heritage is recognised as *both tangible and intangible. It embodies the collective memories and beliefs which underlie social systems and cohesion. A nation's cultural heritage is a fundamental part of its way of life, history, traditions, civilisation and identity and provides links between the past, and the present and (potentially) the future. Cultural heritage contributes significantly to community sustainability, through preservation, reflection and transmission of identity. Cultural heritage also contributes to economic sustainability, through tourism and research potential.*⁴

Military operations throughout history have often resulted in the destruction of irreplaceable cultural property, a loss not only to the country of origin, but also to the cultural heritage of all people. We know the deliberate targeting of cultural property has been used as a tool of war specifically to demoralise and humiliate the enemy. Cultural property can be used to shield military objectives from attack. Equally, the looting and theft of precious objects has long been seen as part of the legitimate spoils of war for the victorious.

The Hague Convention 1954

The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (the Convention) is the paramount international instrument for the protection of cultural property during armed conflicts. The Convention was initiated, and is overseen by the United Nations Educational Scientific and Cultural Organisation (UNESCO).

The Convention recognises *that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world.*⁵

Under the Convention cultural property includes:

- monuments of architecture, art or history, whether religious or secular;
- archaeological sites;
- groups of buildings of historical or artistic interest;
- works of art;
- manuscripts and books;
- scientific collections;

³ *Declaration concerning the Intentional Destruction of Cultural Heritage*, UNESCO, 32nd sess, 21st plen mtg, UNESCO 32 C/Res. 33 (2003).

⁴ Blue Shield Australia, Submission to the National Cultural Policy Consultation (1 February 2010).

⁵ *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* Preamble, opened for signature May 14 1954, 249 UNTS 240 (entered into force 7 August 1956) ('*Hague Convention*').

- museums, libraries, and archives.

Parties to the Convention undertake to make preparations for the safeguarding of their own cultural property against the foreseeable effects of armed conflict; respect the cultural property of others; and not direct acts of hostility against such property.

Theft, pillage, misappropriation of, or acts of vandalism against, cultural property is prohibited. Occupying states are obliged to support the competent national authorities of the occupied country in safeguarding and preserving its cultural property. Parties undertake to ensure observance of the Convention by their armed forces.

The Convention provides for the use of a distinctive emblem in the form of a blue shield to identify items of cultural property.

A Protocol was adopted alongside the Convention in 1954 relating to the export of moveable items of cultural property during occupation and prohibiting the appropriation of cultural property as war reparation.

A Second Protocol, adopted in 1999 specifies the sanctions to be imposed for serious violations of the Convention and the conditions in which individual criminal responsibility applies. The impetus for this treaty came, in part from the example of the failure of the Convention to protect cultural property of great significance such as Dubrovnik and the bridge at Mostar during the conflicts in the former Yugoslavia.

Subsequent related international conventions include:

- the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970),
- the Convention Concerning the Protection of the World Cultural and Natural Heritage (1972), and
- the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995).

Some 123 States, including Australia in 1984 and the United States of America in 2009, have now ratified or acceded to the Convention.

Regardless of the extent of formal recognition however, it can certainly be argued that the principles enunciated in the Convention and its Protocols have become part of customary international law.⁶

The International Criminal Tribunal for the Former Yugoslavia

The resolution of the UN Security Council to establish the International Criminal Tribunal for the former Yugoslavia (ICTY) on 25 May 1993 was the first time the global community had decided to prosecute those accused of war crimes since the establishment of the International Military Tribunals in Nuremberg and Tokyo. There was particular emphasis on the destruction of cultural and religious property as a war

⁶ Customary international law derives from principles and rules which, as a general practice, are accepted as law and exist independent of treaty law.

crime. The Security Council so acted when it determined that the situation in the former Yugoslavia *constituted a threat to international peace and security*.⁷

The ICTY has the power to prosecute those engaging in, or ordering, grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide and crimes against humanity, in the territory of the former Yugoslavia since 1991. These offences include the wanton destruction of cities, towns or villages, or devastation not justified by military necessity; the attack or bombardment of undefended towns, villages, dwellings, or buildings; and the seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.⁸ Persons who commit, or order others to commit serious violations of international humanitarian law are held to be individually responsible for them.

Over 160 people have been indicted by the Tribunal and the records of the ICTY show that a number of those have been convicted of offences relating to the destruction of, or damage to, items of cultural property.

For example, Miodrag Jokić, a commander in the Yugoslav navy which took part in the encircling of Dubrovnik for three months from October 1991, pleaded guilty on 27 August 2003 to various violations of the laws or customs of war. These offences included devastation not justified by military necessity, unlawful attacks on civilian objects and the destruction or wilful damage of institutions dedicated to religion, charity, education, the arts and sciences, historic monuments and works of art and science. In late 1991 soldiers under Jokić's command shelled the Old Town of Dubrovnik, listed as a UNESCO World Cultural Heritage site, just as the opposing forces were about to reach a comprehensive ceasefire. Jokić was the negotiator on the Yugoslav side. As a result of the unlawful shelling, two civilians were killed, six buildings were destroyed in their entirety and many more suffered damage. As a commander, it was alleged Jokić failed to take the necessary measures to prevent or stop the shelling or subsequently punish or discipline those responsible. On 18 March 2004, Jokić was sentenced to 7 years imprisonment.

Pavle Strugar, the superior commander of the forces who perpetrated the unlawful shelling of Dubrovnik, pleaded not guilty to similar charges. On 31 January 2005 he was found guilty of destruction or wilful damage done to cultural property and attacking civilians. He was sentenced to 8 years imprisonment. On appeal he was found guilty of further charges of devastation not justified by military necessity and unlawful attacks on civilian objects, however his sentence was reduced to seven and a half years because of his deteriorating health.

Amongst the many horrendous crimes for which Slobodan Milošević was indicted were allegations that he destroyed cultural monuments and religious sites of Kosovo Albanians in Kosovo; deliberately destroyed cultural institutions, historic monuments and sacred sites of the Croat and other non-Serb population in Dubrovnik and elsewhere; and that he engaged in the intentional and wanton destruction of cultural and religious institutions, historic monuments and other sacred sites belonging to

⁷ *Tribunal (Former Yugoslavia)* SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/Res/827 (1993).

⁸ *Statute of the International Criminal Tribunal for the former Yugoslavia* arts 2 and 3.

Bosnian Muslims and Croats in Bosnia and Herzegovina. Milošević of course, died on 11 March 2006 before the proceedings against him could be finalised.

Radoslav Brdanin was sentenced by the ICTY in 2004 to 32 years' imprisonment for a number of crimes committed in Bosnia-Herzegovina in 1992 when he was in various positions of authority in the Autonomous Region of Krajina. Brdanin was convicted of destruction or wilful damage to institutions dedicated to religion as well as of other crimes against humanity.

The Blue Shield

The International Committee of the Blue Shield (ICBS) was founded in 1996 to work to protect the world's cultural heritage threatened by wars and natural and man-made disasters.

The ICBS is made up of representatives from five international cultural property non-government organisations:

- the International Federation of Library Associations and Institutions,
- the International Council on Archives,
- the International Committee of Museums,
- the International Committee on Monuments and Sites and
- the Co-ordinating Council of Audiovisual Archives Associations.

The Blue Shield emblem is the cultural property equivalent of the Red Cross icon. It is the protective emblem specified in the Convention for marking cultural sites to give them protection from attack in the event of armed conflict.



Australia has a national Blue Shield committee, Blue Shield Australia.⁹ The vision of Blue Shield Australia is to influence disaster preparedness and emergency management response in Australia in respect of natural disasters and armed conflict in order to ensure the preservation of cultural heritage in Australia's areas of responsibility and influence.

The International Criminal Court

The most significant recent advance in this area of international law was made with the adoption of the Rome Statute of the International Criminal Court (the Rome Statute) by the UN in 1998. The State Parties to the Rome Statute are: *Conscious that*

⁹ See <http://www.blueshieldaustralia.org.au>.

*all people are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time.*¹⁰

The International Criminal Court has jurisdiction to try *individuals* (not States or corporations) with respect to

- the crime of genocide;
- crimes against humanity;
- war crimes;
- the crime of aggression.¹¹

The targeting, damaging or destruction of objects of cultural heritage (provided they are not legitimate military objectives) during both international armed conflict and, in some cases, internal armed conflict, comes within the definition of *war crimes* under the Rome Statute.¹²

To date 120 countries have become parties to the Rome Statute, including Australia¹³ and the UK, but not the US. The ICC is subject to the principle of complementarity which holds that it will only intervene if national legal systems are unwilling or unable to investigate and prosecute perpetrators for the relevant crimes.

Fourteen cases arising out of seven areas of conflict (all within the African continent) have been brought before the ICC. Three trials are in progress. Charges include allegations of the commission of war crimes including pillaging and the destruction of property, but no charges have yet been brought against individuals for war crimes which involve cultural property. Jurisprudence in this new jurisdiction is, however, only in its infancy. The ICC handed down its first verdict on 14 March this year in which it found Thomas Lubanga Dyilo, the founder of an armed group operating in the Democratic Republic of Congo between 1991 and 2003 guilty of recruiting and using child soldiers.¹⁴ Lubanga Dyilo is yet to be sentenced.

The limitations of international law in protecting cultural property

It can be argued that the provisions of international law which seek to protect cultural heritage are at best weak, and at worst miserably ineffective, even counter-productive. As with International Human Rights Law and International Humanitarian Law generally, the provisions can appear to be honoured more in the breach than in the observance. There may be gaps in the treaty law which result in a reliance on customary international law, an uncertain although dynamic source of law.

¹⁰ *Rome Statute of the International Criminal Court* Preamble, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute*').

¹¹ Jurisdiction for the *crime of aggression* requires amendment to the Rome Statute, as yet not achieved.

¹² *Rome Statute* arts 8(2)(b)(ix) and (e)(iv).

¹³ Australia signed the Rome Statute on 9 December 1998 and ratified it on 1 July 2002

¹⁴ *Prosecutor v Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, International Criminal Court (ICC), Trial Judgment (14 March 2012).

There are ongoing debates about the meaning of such terms as “military necessity”, “necessities of war”, and “military objectives” which offer exceptions to the application of the law.¹⁵

The criminal sanctions of the Rome Statute are extended to apply to situations of “international armed conflict” or “armed conflicts not of an international character” (i.e. internal armed conflict) but internal disturbances and tensions not of the nature of armed conflict are unlikely, as the law currently stands, to be covered.

The law is not necessarily retrospective: the ICC only has jurisdiction over crimes committed after 1 July 2002 (the date the Rome Statute came into force) and only over State parties after they become parties to the Statute. Jurisdiction is enlivened if a State party refers the commission of a crime to the Prosecutor; or the Security Council does so; or the Prosecutor initiates an investigation with the authorisation of the Pre-Trial Chamber.

Some key States are not parties to relevant treaties. Famously (or perhaps, notoriously) the United States is not a party¹⁶ to the Rome Statute and it was only during the early days of the Obama administration that it became a party to the Convention (ratified on 13 March 2009). Sadly, the UK is yet to ratify the Convention and is now the most significant power not to have done so. This is concerning given the UK’s major role in current armed conflicts, including those in Iraq and Afghanistan.

Often those sought or indicted by the *ad hoc* tribunals¹⁷ and the ICC find sanctuary in countries which are not signatories to the Rome Statute or which do not recognise the relevant international law. These States often refuse to cooperate with the rendition of suspects. A much publicised recent example has been the ability of Joseph Kony, leader of the Lord’s Resistance Army, (which wreaked humanitarian havoc in northern Uganda for many years) and his henchmen to avoid a warrant issued by the ICC¹⁸ by obtaining refuge (and continuing with his illegal activity) in the neighbouring Democratic Republic of Congo, the Central African Republic or South Sudan.

Even when the system of “protection” is adhered to, the system itself can be counter-productive. Allegations have been made in Croatia that when, in compliance with the Convention, prior to the outbreak of hostilities, a list of sites regarded as being of particular cultural heritage value was sent to UNESCO, every one of the sites on the list were subsequently specifically targeted by opposition forces.¹⁹

In post-conflict situations the challenges of restoring security and public services, the human drama of the return of refugees and the urgency of providing basic necessities

¹⁵ *Hague Convention* arts 4 and 11; *Rome Statute* art 8(2).

¹⁶ In fact the US signed the Rome Statute in the last days of the Clinton administration, but it was “unsigned” by the new President Bush.

¹⁷ For example, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone.

¹⁸ The warrant was issued in 2005 alleging “crimes against humanity and war crimes”.

¹⁹ Peter Stone and Joanne Bajjaly (eds), *The Destruction of Cultural Heritage in Iraq (Heritage Matters: Contemporary issues in Archaeology)* (The Boydell Press, 2008), Introduction.

can overshadow concern as to the fate of cultural heritage and the bringing to account of those responsible for its destruction.

The ICBS is seriously underfunded and unrecognised, and not many states have set up their own national committees.²⁰ Given that the Blue Shield is concerned with the protection of cultural property in times of *natural and man-made disasters* as well as during *armed conflict*, it has been just as concerned, in recent times, about the impact of the Japanese tsunami and the Christchurch earthquakes and the danger to cultural property posed by civil unrest in Egypt and Syria, as with the threats posed by international military operations in Iraq and Afghanistan.

Despite the requirement under the Convention that armed forces observe its provisions, troops around the world have varying degrees of understanding of their responsibilities and duties in regard to the protection of an adversary's cultural property.

The destruction continues

Even since this jurisprudence began to develop, the world has witnessed heartbreaking examples of the destruction, or theft of precious items of cultural heritage.

Following the Turkish invasion of Cyprus in 1974,²¹ as well as extensive destruction of churches and monasteries, widespread theft and looting occurred. Many artefacts found their way onto the black market. A lawsuit filed by the Orthodox Church of Cyprus in the Federal District Court of Indiana against an art dealer²² resulted in a judgment in 1989 whereby rare sixth century mosaics which had been removed and illegally sold abroad, were returned to the Church. The Cypriot government allowed the mosaics to be displayed at the Indianapolis Museum of Art before they were returned to Cyprus in 1991.

In 2011, the British singer Boy George returned an 18th century icon of Christ to the Church of Cyprus which he had bought ignorant of its origins. The icon had been looted from the church of St Charalambos in the village of New Chorio, near Kythrea, in 1974.²³

The various conflicts in the former Yugoslavia in the 1990s resulted in the extensive destruction of, or significant damage to cultural heritage. Often this was a result of the deliberate targeting of the opponent's places of worship and of religious significance. For example a survey of the destruction of cultural heritage in Bosnia-Herzegovina between 1992 and 1996²⁴ found that 92% of mosques surveyed had been heavily

²⁰ According to the Association of National Committees of the Blue Shield ('ANCBS') (<http://www.ancbs.org>) 19 countries have functioning national committees, although another 19 are under construction.

²¹ Known in Turkey as the *Cyprus Peace Operation*.

²² *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc*, 717 F. Supp. 1374 (S.D. Ind. 1989)

²³ Sean Michaels, *Boy George returns lost icon to Cyprus church* (2011) *The Guardian* <<http://www.guardian.co.uk/music/2011/jan/20/boy-george-icon-cyprus-church>> at 22 June 2012.

²⁴ András J. Riedlmayer, *Destruction of Cultural Heritage in Bosnia-Herzegovina, 1992-1996: A Post-war Survey of Selected Municipalities* (Cambridge, 2002).

damaged or destroyed. A similar fate had befallen other types of Islamic religious monuments of cultural or historical importance. It was clear that the damage was the result of deliberately directed attacks rather than as incidental to the fighting, and it was at times accompanied by the commission of atrocities such as the burning alive of worshippers in a mosque. Of the Catholic churches documented in the same survey, none was found to be undamaged and Catholic churches of historic and cultural importance appeared to have been disproportionately targeted.

On 17 May 1992, during the siege of Sarajevo the Institute for Oriental Studies was bombarded with incendiary munitions from Serb positions and burnt with the loss of all of its collections. The contents of the Institute included official records from the Ottoman era and the country's richest collection of Islamic manuscripts in Arabic, Ottoman Turkish, Persian and Bosnian. Three months later Bosnia's National Library was bombarded and an estimated 1.5 million volumes destroyed.

Despite in 1999, issuing a decree to protect the two enormous statues of Buddha at Bamiyan, the Taleban leadership in Afghanistan went to extraordinary lengths to destroy them in March 2001. All that now remains of the statues which date back 1500 years are the niches where they once stood.

Unlike the bridge at Mostar in Bosnia, or Dubrovnik itself, UNESCO has no plans to rebuild the statues. In fact, there is an interesting philosophical debate currently taking place on the world stage as to the appropriateness or otherwise of decisions to rebuild or restore items of cultural heritage which fall victim to conflict. Not to mention who should foot the (invariably massive) bill. UNESCO has however, led a three-phase project to preserve the Buddha niches in Bamiyan and their wall paintings. Japan has provided most of the funding for the project, which has also allowed for the safeguarding of the statues' fragments.

In Iraq in the wake of the US/UK led Coalition invasion in 2003, and the subsequent occupation, a wholesale and systematic course of destruction and looting took place. Libraries and galleries were deliberately set fire to, museums and archaeological sites were shamelessly looted and damaged. The perpetrators of these crimes were not only local Iraqis, but also coalition military personnel, and significantly, unscrupulous wealthy private art collectors from around the world who quickly seized upon the chaos as an opportunity to obtain rare and priceless treasures. Legally though, the Convention was not applicable during the Iraqi conflict to the extent that two of the principal protagonists (the UK and the USA) were not then State parties to it. This is not to say that international customary law regarding the protection of cultural property did not apply.

In 2006 the golden domed Askariya mosque in Samarra in Iraq was destroyed by bombs in a calculated insult to Shia Muslims by opposing forces.

The Armenians have long been persecuted. Between 1915 and 1923, hundreds of thousands of Armenians were systematically killed in the Ottoman Empire. Along with the killings, the premeditated destruction of objects of Armenian cultural, religious, historical and communal heritage occurred, including monasteries and churches. Examples of such destruction continue today. From the sixth century Christian Armenians buried their dead in the cemetery at Djulfa, now in the Republic

of Azerbaijan. The graves were marked by thousands of elaborately carved and decorated stone *khachkars* (cross-stones). Azerbaijan is a Muslim state and Azeri authorities destroyed much of the cemetery between 1998 and 2002, but in December 2005 the last graves and crosses were crushed by Azerbaijani servicemen using sledgehammers and a crane. The broken stones were dumped in the River Araxes with the result that a medieval cemetery, regarded as one of the wonders of the Caucasus was erased from the earth. Azeri officials now state that Armenians have never lived in the region. Official history is rewritten by the convenient removal of the evidence of the past.

In the civil unrest experienced in Egypt in 2011 the Institut d'Égypte caught fire during clashes between protesters and soldiers near Tahrir Square resulting in thousands of precious historic works being damaged or destroyed by fire.

The present horrible conflict in Syria has led to the ICBS issuing statements noting that Syria's cultural heritage is endangered on several levels. Some of the country's most significant archaeological sites have been caught in the crossfire in battles between regime forces and rebels. Others have been turned into military bases. The ancient ruins of Palmyra, recognised as a World Heritage Site by UNESCO in 1980, was under siege by government forces in February/March this year with troops camped in the Arab citadel firing with machine guns into the 2000 year old ruins below. Looting of museums in Daraa, Hama, Homs and Idlib has been alleged²⁵ and there are reports of looters removing mosaics in ancient buildings with drills. In addition to the direct effect of military action, historic sites are reportedly being damaged by troops digging trenches, tanks rolling over fragile areas, and snipers building positions atop historic homes.

By contrast, when NATO undertook air strikes in Libya in the months leading up to the overthrow of Gaddafi in 2011, it compiled, with the help of archaeological experts, a "No Strike List" of sites to be preserved in the conduct of air operations. This apparently avoided any serious damage being done to Libya's ancient heritage sites.²⁶ It did not prevent looting however. In one of the worst cases of looting during the conflict, nearly eight thousand ancient gold, silver and bronze coins were stolen from a Benghazi bank vault. As at November last year only eight coins had been recovered.²⁷

The value of international law in protecting cultural property

The *ad hoc* tribunals which have been established in recent decades to deal with gross breaches of international law have all included in their briefs the crime of destruction of cultural heritage.

Nations continue to sign up to the international treaties and, although weak, at least the ICBS does exist as an international organisation committed to the preservation of the world's cultural heritage.

²⁵ International Committee of the Blue Shield, Second Statement on Syria (16 April 2012).

²⁶ *Protecting Libya's heritage* (2012) North Atlantic Treaty Organisation
<www.nato.int/cps/en/natolive/news_82441.htm> at 17 June 2012.

²⁷ ANCBS and the International Military Cultural Resources Working Group ('IMCuRWG'), 'The 2nd Libyan Heritage Mission' (Media Release, 22 November 2011).

The flavour of the times is reflected in the development of international human rights and humanitarian law and the jurisprudence surrounding their application, with the decline of an unquestioned respect for sovereignty and the rise of a recognised need to act across borders in order to preserve and maintain world peace. Such sentiments have achieved a very high degree of international consensus at least by way of lip-service.

The relevant treaty law has its clearest and strongest application to international armed conflicts, but it is the case that most armed conflicts today are non-international. The legal framework governing internal armed conflicts is more to be found under customary international law rather than under treaty law.²⁸ Customary international humanitarian law is the basic standard of conduct in armed conflict accepted by the world community, and although its applicability is primarily towards the protection of human beings, the extension of the principles to the protection of cultural property is not unreasonable. So even where there are gaps left by treaty law, customary international law may still provide remedies and sanctions and strengthen protection of cultural property in internal armed conflicts.

Examples of customary rules of international law that can be utilised to mandate the protection of cultural property in both international and non-international armed conflict include:

- The requirement that all parties to the conflict distinguish between civilian objects and military objectives (the ‘Principle of Distinction’).
- The prohibition on indiscriminate attacks.
- The prohibition on launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated.
- The requirement to take all feasible precautions to avoid or at least minimise incidental damage to civilian objects.
- The requirement that each party to the conflict must respect cultural property.²⁹

In 2005 the UN recognised a new international humanitarian law norm: the Responsibility to Protect. Under this principle States have a primary responsibility to protect their populations from genocide, war crimes, crimes against humanity, and ethnic cleansing and to prevent these offences from occurring. When a State “manifestly fails” in its protection responsibilities and peaceful means are inadequate, the international community is obliged to take stronger measures.³⁰ In February 2008 the UN Secretary-General appointed a Special Advisor with a focus on the Responsibility to Protect and the Security Council has made reference to the principle

²⁸ Jean-Marie Henckaerts, ‘Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict’ (2005) 87(857) *International Review of the Red Cross* 197.

²⁹ Ibid Annexure: List of Customary Rules of International Humanitarian Law.

³⁰ *World Summit Outcome Resolution* [138] – [139], GA Res 60/1, UN GAOR, 60th sess, 8th plen mtg, UN Doc A/Res/60/1 (2005).

in certain of its resolutions.³¹ When a State fails to protect cultural property within its borders therefore, customary international law dictates that the international community has a responsibility to take measures to do so.

A small but practical example of an attempt to have combatants (and the general population) comply with the law and protect cultural heritage was made by UNESCO during the conflict in Kosovo. A leaflet was prepared for the population of Kosovo of both Albanian and Serb ethnic origin which gave the basic rules on protection of cultural heritage. The text was in Albanian, Serb and English and the leaflet was distributed through the United Nations peace-keeping mission in Kosovo and other channels. It read:

Cultural Property – Basic Rules

1. Do not damage or steal cultural property.
2. If you find a cultural object, do not sell it or barter it; bring it to the local administration.
3. Do not abuse cultural objects belonging to other ethnic groups. Do not destroy them; remember that this may inspire them to do the same to cultural objects dear to you.
4. Do not make your house in a church, a monument or museum.
5. Do not sell cultural objects to black market dealers; your country needs those objects.
6. Remember that cultural objects are not only for you but also for your children and grandchildren and for all humanity.
7. Do not damage the cemeteries of other ethnic groups; remember that this may inspire them to do the same to your own cemeteries.

Cultural property is protected by international treaty.

UNESCO expressed the hope that the distribution of the leaflet would raise awareness of the need to protect cultural heritage, regardless of the ethnic origin of its creators, *thus helping to re-establish the fragile civil society in Kosovo and to heal the post-conflict wounds.*³²

The power of international shaming to influence nations and other parties to conflicts should not be underestimated. Modern media and means of communication (e.g. mobile phones, YouTube,³³ Facebook, Twitter etc) mean that little can be hidden from the world in this digital age. Tyrants and aggressors are increasingly being made aware that the world is not only watching, but also cares about the protection of human rights, including the preservation of cultural heritage.

Australia's Position

³¹ For example, Resolution 1706 authorised the deployment of UN peace-keeping troops in Darfur (*The situation in Sudan*, UN SCOR, 5519th mtg, UN Doc SC/Res/1706 (2006)).

³² International Committee of the Red Cross, *Protection of cultural property in armed conflict* (2001) ICRC Resource Centre < <http://www.icrc.org/eng/resources/documents/misc/57jren.htm> > at 27 May 2012.

³³ For example, the video produced and shown on YouTube by the American organisation Invisible Children, *Kony 2012*, has, despite its shortcomings, led to serious attempts by the world community to bring Joseph Kony and other leaders of the Lord's Resistance Army to justice.

The Commonwealth Criminal Code Act was amended in 2002 to provide for war crimes. Division 268 of the Criminal Code creates the crimes of genocide, crimes against humanity, war crimes and crimes against the administration of the justice of the International Criminal Court and reflects the offences created in the Rome Statute.

The extensive and wanton destruction of protected property; the attacking of buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, or hospitals or places where the sick and wounded are collected; and the attacking of clearly recognised historic monuments, works of art and places of worship (where the monuments, works of art and places of worship constitute the cultural or spiritual heritage of peoples and have been given special protection); all constitute war crimes provided they occur in the context of an armed conflict and there is no military objective or necessity for the action.

Prosecutions under these provisions can only be commenced with the consent of the Attorney-General and the jurisdiction of the International Criminal Court is declared to be complementary to the jurisdiction of Australia with respect to those categories of offences which are also crimes within the jurisdiction of that Court.

Australia's defence force is governed by the Manual on the Law of Armed Conflict (LOAC Manual)³⁴. It states that it is the duty of Australian Defence Force (ADF) commanders to do "everything feasible to verify that objects being attacked are military objects"³⁵ and it requires commanders to remove "civilians and civilian objects from the vicinity of military objectives".

§5.45 of the LOAC Manual states: "Buildings devoted to religion, the arts, or charitable purposes; historic monuments; and other religious, cultural, or charitable facilities should not be attacked, provided they are not used for military purposes. It is the responsibility of the local population to ensure that such buildings are clearly marked with the distinctive emblem." Similar provisions apply to movable and immovable objects of great importance to the cultural heritage of people, whether their state is involved in the conflict or not, such as historical monuments, archaeological sites, books, manuscripts or scientific papers and the buildings or other places in which such objects are housed.

Regarding the sometimes vexed question of what is meant by "military necessity", the LOAC Manual states that the principle of military necessity "permits the destruction of property if that destruction is imperatively demanded by the necessities of war. Destruction of property as an end in itself is a violation of international law. There must be a reasonable connection between the destruction of property and the overcoming of enemy forces. The principle cannot be used to justify actions prohibited by law, as the means to achieve victory are not unlimited".³⁶

Civilian objects are not legitimate objects of attack³⁷ and there is a fundamental rule that parties to a conflict must direct their operations only against military objectives.³⁸

³⁴ Australian Defence Force, *The Manual of the Law of Armed Conflict*, Doctrine Publication 06.4, (Australian Defence Headquarters, 2006).

³⁵ *Ibid* § 5.61.

³⁶ *Ibid* § 2.6.

³⁷ *Ibid* § 2.11.

Pillage, “the violent acquisition of property for private purposes” is prohibited, as is looting. In fact “a military person is not allowed to become a thief or a bandit merely because of involvement in a war”.³⁹

The LOAC Manual prohibits the “deliberate misuse of ... protective symbols and emblems ... including ... the protective emblem of cultural property”.⁴⁰

The ADF obligation to comply with the Law of Armed Conflict is not conditional upon an enemy’s compliance; unilateral compliance is required. A member of the ADF who is in breach of the Law of Armed Conflict could be charged under the Criminal Code and also under the Defence Force Discipline Act 1982 for corresponding service offences. The International Military Tribunal at Nuremberg rejected the assertion that the Law of Armed Conflict applies only to nations and the principle of individual responsibility for war crimes is now well established.

The Administrative Appeals Tribunal and the Federal Court, mainly in cases involving claims for asylum or refugee status, have, in a number of cases, recognised the principle of individual responsibility for war crimes and crimes against humanity even when committed within the context of a regime or government which encouraged and supported the commission of such crimes.⁴¹

Blue Shield Australia has worked with the ADF in order to ensure the protection of cultural heritage. For example, Blue Shield Australia provided input to the ADF while conducting operations in East Timor in 2006, where there was a real risk of critical legal records being stolen or destroyed in Dili.⁴²

Application to particular examples of destruction

To address the examples I give in the Abstract of recent acts of intentional destruction of cultural heritage. The law has dealt with the destruction of cultural heritage in the former Yugoslavia. Significant perpetrators have been indicted, a number convicted, and most of those sentenced to significant periods of imprisonment.

Those responsible for the dynamiting of the Bamiyan Buddhas and the destruction of the Twin Towers in New York however have not faced sanctions for specific crimes relating to cultural heritage. The situations in which those horrific examples of destruction occurred could not be said to be situations of “armed conflict” and they would appear to be beyond the reach of international law as it presently stands. However, as I hope I have demonstrated, this area of international law has advanced monumentally since the end of the Second World War. The international community

³⁸ Ibid § 5.35.

³⁹ Ibid § 12.47.

⁴⁰ Ibid § 7.5.

⁴¹ See “*SRNN*” and *Department of Immigration and Multicultural Affairs* [2000] AATA 983; “*AXOIB*” and *Minister for Immigration and Multicultural Affairs* [2002] AATA 365; *SAL and Minister for Immigration and Multicultural and Indigenous Affairs* [2002] AATA 1164; *SRYYY v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 42; *SHCB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 308.

⁴² Blue Shield Australia, Submission to the Australian Defence Force White Paper Community Consultation (1 October 2008).

has displayed concern and willingness to act in some (albeit limited) circumstances, and it is not too fanciful to hope that emerging international cultural protection law will, one day, be effective in proving that perpetrators cannot act with impunity.