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## **Introduction: heritage destruction, human rights and international law in times of conflict and in peace**

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# Introduction

## *Heritage Destruction, Human Rights, and International Law in Times of Conflict and in Peace*

Amy Strecker and Joseph Powderly

### 1 Background

Cultural heritage has always been targeted in times of conflict and transition for its symbolic value. However, the difference between historical acts of iconoclasm and the destruction of heritage today is that there now exists a general consensus, embodied in the corpus of international law, that intentionally destroying cultural heritage is an international wrong and, except in the case of absolute military necessity, a war crime entailing individual criminal responsibility.<sup>1</sup> This was made clear in the now infamous *Al Mahdi* case before the International Criminal Court, which concerned the deliberate attack on cultural sites in the World Heritage city of Timbuktu, Mali.<sup>2</sup> If law mirrors the general norms of society, then the increasing recognition by international law can be read as a reflection of a general public consensus that finds heritage destruction unacceptable, even if violations still occur. Yet, despite the proclamation of heritage destruction in situations of conflict as an international wrong, no such assertion can be made for its equivalent in peacetime. The most developed jurisprudence on cultural heritage destruction has been made in the context of international criminal law, yet conversely it is the area with the most limited conceptualization of cultural heritage.<sup>3</sup> While cases such as *Al Mahdi* contribute to an awareness that deliberately destroying heritage is an international wrong, there is a more widespread heritage destruction that often goes under the radar, heritage that is not in the spotlight and which may fall through the gaps of the institutional and normative framework dealing

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- 1 A Vrdoljak, 'Intentional Destruction of Cultural Heritage and International Law', in K Koufa (ed) *Multiculturalism and International Law* (Sakkoulas 2008). See also, A Vrdoljak, 'The Criminalization of the Intentional Destruction of Cultural Heritage', in E Orlando and T Bergin (eds) *Forging a Socio-Legal Approach to Environmental Harm* (Routledge 2016).
  - 2 *Al Mahdi* (ICC-01/12-01/15). See also, P Casaly, 'Al Mahdi before the ICC: Cultural Property and World Heritage in International Criminal Law' (2016) 14 JICJ.
  - 3 See, in particular, the definition of war crimes in Article 8 of the Rome Statute (ICC).

with heritage protection, especially heritage sites and cultural landscapes affected by large-scale resource extraction or infrastructural projects.<sup>4</sup>

Two aspects make heritage protection a matter for global heritage governance. The first is the notion of the 'common heritage of humanity', which has progressively developed since the Hague Convention 1954 and markedly since the adoption of the World Heritage Convention in 1972, pointing to a conceptual shift beyond the national interest of the state to which the cultural heritage belongs, to also include the general interest of humanity in conserving the cultural or natural site because of its perceived universal importance.<sup>5</sup> Accordingly, states have the obligation to protect such heritage within their borders, and a fortiori, a responsibility to refrain from any action which may damage or destroy such heritage.

The second aspect is the human rights dimension to cultural heritage, which has gained increasing momentum in the normative developments in three areas of international law in recent years: a) the development of the concept of cultural heritage within international cultural heritage law to include a more anthropological understanding of culture, thereby bringing it in closer symbiosis to identity, way of life, and cultural practice;<sup>6</sup> b) the recognition that access to cultural heritage forms an inherent part of the right to take part in cultural life within the human rights framework;<sup>7</sup> and c) through international criminal law, for its instrumental use in proving the mens rea or specific intent element of genocide and persecution.<sup>8</sup> Simultaneously in the field of heritage studies, there has been a proliferation and assertion of rights in relation to

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- 4 A Strecker, 'Heritage under Threat' (*Stadium Generale* lecture, The Hague, 1 March 2017) <https://www.leiden-delft-erasmus.nl/en/agenda/2017-03-01-stadium-generale-lecture-heritage-under-threat>, accessed 15 December 2021; and I Lilley, 'War Crimes and the Many Threats to Cultural Heritage' (*The Conversation*, 13 October 2016). <https://theconversation.com/friday-essay-war-crimes-and-the-many-threats-to-cultural-heritage-65957>, last accessed 15 December 2021. See also chapters by Chechi, Drazewska, Boer, and Strecker and Newman, in this volume.
- 5 See F Francioni and F Lenzerini, *The 1972 UNESCO World Heritage Convention: A Commentary* (OUP 2nd ed. 2023).
- 6 See for example, L Lixinski, *Intangible Cultural Heritage in international Law*, (OUP 2013); J Blake and L Lixinski (eds), *The 2003 Intangible Cultural Heritage Convention, A Commentary* (OUP 2020); A Vrdoljak and F Francioni (eds), 'Introduction' in *Oxford Handbook of International Cultural Heritage Law* (OUP 2020).
- 7 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 21*, E/C.12/GC/21, 21 December 2009, para. 6., UN Human Rights Committee, *General Comment No. 23*, CCPR/C/21/Rev.1/Add.5., Report of the Independent Expert in the Field of Cultural Rights, *The right of access to and enjoyment of cultural heritage*, A/HRC/17/38.
- 8 See *Prosecutor v Krstić* (Trial Judgment) IT-98-33-T (2 August 2001), para. 580. See also M Frulli, 'International Criminal Law and the Protection of Cultural Heritage', in F Francioni and A Vrdoljak, *The Oxford Handbook of International Cultural Heritage Law* (OUP

heritage protection.<sup>9</sup> Yet ascertaining the exact nature of those rights remains a challenge, especially in terms of accessing justice for heritage under threat beyond the framework of international criminal law. For example, what happens when heritage is under threat in peacetime, by the very state charged with its protection? Human rights are by nature limited by their focus on individual rights.<sup>10</sup> Yet heritage is a collective good, and as such, cannot be measured in terms of personal injury in the same way that the loss of property can. As a consequence, it is difficult to make a case before a human rights court for heritage destruction or heritage under threat, even though cultural heritage forms an inherent part of cultural rights.<sup>11</sup> Yet despite these obstacles, human rights based approaches to heritage are advocated for a number of reasons: for legal scholars it is an attempt to humanize heritage governance, often accused of being elitist and exclusionary, while for heritage scholars, it represents an attempt to ground their claims in the substance of legal rights.

This edited volume brings together scholars in the fields of international cultural heritage law and heritage studies to scrutinize the various branches of international law and governance dealing with heritage destruction from human rights perspectives, both in times of armed conflict as well as in peace. Importantly, it also examines cases of heritage destruction that may not be intentional, but rather the side effect or consequence of large-scale infrastructural development or resource extraction. In this way, the volume also engages with the difficult questions of intentionality, liability, and the inseparable links between the natural and cultural environment. The book comprises 15 chapters (and Afterword dealing with Ukraine), and is divided into two interrelated thematic parts: 1) heritage destruction in armed conflict and recent developments; and 2) heritage destruction in peacetime and human rights. These themes guided an international symposium on the subject of ‘Heritage Destruction, Human Rights and International Law’ hosted by the editors at Leiden University in Spring 2018, generously funded by Leiden Global Interactions and the Leiden-Delft-Erasmus Centre for Global Heritage and Development. The questions addressed at the symposium included: What

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2020) 116–117. E Novic, *The Concept of Cultural Genocide: An International Law Perspective* (OUP 2016).

- 9 See L Meskell, ‘Human Rights and Heritage Ethics’ (2010) 83 *Anthropological Quarterly*; W Logan, ‘Heritage Rights – Avoidance and Reinforcement’ (2014) 7 *Heritage & Society* 156–169; M Baird, ‘Heritage, Human Rights, and Social Justice’ (2014) 7 *Heritage & Society*.
- 10 F Francioni, ‘Cultural, Heritage and Human Rights’, in F Francioni and F Lenzerini (eds.), *Cultural Human Rights* (Martinus Nijhoff 2008).
- 11 See (n 7). For a discussion on problems of access to justice, A Strecker, *Landscape Protection in International Law* (OUP 2018) in particular Chapters 8 and 9.

is the level of state responsibility regarding heritage destruction in times of conflict and in peace? What are the corresponding rights relating to cultural heritage and what are the recent developments in the field? What is the appropriate level for balancing heritage protection imperatives with development and investment interests such as resource extraction or infrastructural projects? And does the concept of universality continue to be useful in relation to cultural heritage? The contributions in the present volume engage with these and other questions.

## 2 Overview of the Book's Structure

At the outset, Francesco Francioni lays down the normative foundations of the book by providing a thought-provoking inquiry into the readiness of international law to recognize a general obligation to prevent (and avoid) cultural heritage destruction. He shows how international law has progressed considerably in the field of cultural heritage governance and argues that a cumulative appraisal of international law points to a widespread *opinio juris* as to the illegality of heritage destruction, as well as an obligation on states to prevent such destruction. Through an analysis of multi-lateral treaties, arbitral awards, judicial decisions of international tribunals, soft law, practice of the UN organs, and Security Council decisions, Francioni puts forward a plausible legal basis for the identification of a customary norm establishing an obligation to abstain from and prevent the intentional destruction of cultural heritage in the context of armed conflict. This in turn has two corollaries: the responsibility of the state for breaches, and the international criminal responsibility of the individual perpetrator for offences relating to the destruction of cultural heritage, as seen in the case law of the ICTY and confirmed by the decision of the ICC in *Al Mahdi*.<sup>12</sup> Francioni also touches on the idea of looting as falling within the scope of destruction, something which Evelien Campfens returns to towards the end of the volume when discussing the question of returning cultural objects. Importantly, Francioni argues that the absence of a specific rule of customary international law prohibiting the destruction of cultural heritage in peacetime does not mean that no obligations arise outside conflict. Such obligations may arise, Francioni argues, directly or indirectly from the category of general principles, including self-determination and the heritage

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<sup>12</sup> *Prosecutor v Al Mahdi* (Judgment and Sentence) ICC-01/12-01/15-171 (27 September 2016).

of humanity, as well as the widespread acceptance and ratification of cultural heritage treaties.

In Chapter 2, Sophie Starrenburg takes us back to the origins of international cultural protection – which was prompted by destruction – through a genealogy of ‘universality’ of cultural heritage law. She reminds us that from the inception of the field, there has been a tension between the universal aspirations for cultural heritage protection on the one hand, and the particularity of the substance of heritage, on the other. Starrenburg notes that the construction of the concept of ‘universal’ cultural heritage cannot be achieved without reference to the particularity of that same heritage, in so far as its value derives from it being specific to a particular time, place, or people. Furthermore, she argues that while international heritage protection can have benefits for local populations, there exist many examples in which international protection has interfered with the rights of individuals and local communities, serving the interests of the international community or national elites rather than those most closely situated to the heritage in question. Starrenburg argues that at the core of these conventions is a delimitation, rather than a limitation, of State sovereignty, and that the territorial State is essentially a trustee of the cultural heritage situated within its territory, despite more recent developments emphasising the importance of human rights and local communities, a point taken up by Alessandro Chechi in Chapter 8. Starrenburg argues that the claims of individuals to heritage protection are more nuanced than the narrow scope of universality can allow, requiring a more flexible interpretation of the concept of cultural heritage within public international law. Therefore, while Francioni focused on the question of international legal responsibility for heritage destruction, Starrenburg situates her analysis in the broader framework of heritage protection and who it serves. Together these chapters lay the foundations for the rest of the volume.

Following the opening chapters, Part I of the book focuses on armed conflict and recent developments, the locus of most scholarly attention on heritage destruction. The first three chapters of Part I deal with and elaborate on various issues raised by the aforementioned *Al Mahdi* case before the International Criminal Court (ICC). In ‘Grave Crimes: Conservation, Conflict, and Criminality in Timbuktu’, Lynn Meskell advances the critique of universality discussed by Starrenburg and places the *Al Mahdi* case in the wider international context of geo-politics, coloniality, and political economy. Ahmed Al Faqi Al Mahdi was the first individual to be convicted before the ICC for the war crime of deliberately conducting attacks on cultural property, namely nine mausoleums in the World Heritage site of Timbuktu, during the armed occupation of the city in 2012. Al Mahdi had identified the sites, stipulated the order of destruction,

provided the means, and also participated in some of the demolition, which was photographed, filmed, and circulated in the global media.<sup>13</sup> Meskell argues that the case has brought many unsettling contradictions to the fore, and that rather than resorting to a presumptive universality, we should also consider the nature and extent of local injury versus international grievance. She asks “Is the harm done to the people of Timbuktu more direct and consequential than that of humanity as a whole, or some sectors of the international community?” Meskell recalls the ways in which World Heritage has been instrumentalized, whether by Ansar Dine, Islamic State (IS), or UNESCO itself, to promote divergent worldviews, and that this inevitably leads one back to the stark inequities that still exist between different states, many of which derive from colonial occupation, exploitation and who controls the narrative. She argues that UNESCO has conflated Middle Eastern conflicts in the “dystopia of destruction” and ends with a plea for closer attention to be paid to the devastation of heritage and the humanitarian crises in other places, such as Yemen, not solely at the hands of insurgents but instead from Saudi airstrikes and blockades backed by a coalition that includes America and Britain.

In Chapter 4, “Heritage Destruction as a Collective Harm: Challenges and Pitfalls of International Cultural Justice”, Andrzej Jakubowski also touches on the *Al Mahdi* case before the ICC, but from the perspective of collective harm and the way in which collective harm caused by heritage destruction has been recognized and repaired in various branches of international law and policy. First of all, Jakubowski notes that collective cultural harm has broadly been addressed in the practice of the law of state responsibility, but that this is more prevalent in relation to armed conflict than in peacetime. He points out, however, that recent doctrinal and policy approaches are focusing on moral and ethical grounds relating to the duty to repair colonial injustices and wrongs. Jakubowski argues that collective cultural harm, though rarely defined or even alluded to in international treaty law, is being gradually interpreted in the practice of international human rights bodies and he cites the practice of the Inter-American Court of Human Rights (IACtHR), which has progressively recognised the collective (communal) harm suffered by indigenous peoples (but notes that the means of repairing such harm is largely dependent on the state). Jakubowski then discusses the developments in international criminal law, in particular the collective reparations ordered by the ICC in *Al Mahdi* which explicitly address the cultural harm suffered by the community whose

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13 ICC, ‘Summary of Al Mahdi Case’ (27 September 2016) <<https://www.icc-cpi.int/itemsDocuments/160926Al-MahdiSummary.pdf>> last accessed 15 December 2021.

heritage was subject to intentional destruction.<sup>14</sup> The chapter acknowledges the various international instruments and programmes that recognize the importance of repairing cultural harm in post-conflict as well as post-natural disaster heritage governance. Jakubowski concludes by underscoring the challenge of addressing collective cultural harm in peacetime and advocates for broader participation of all stakeholders affected by cultural heritage management and governance. Cultural justice, Jakubowski reminds us, is gradually being perceived through the prism of the enhanced participation of collectivities in cultural heritage decision-making, consultation and governance.

In Chapter 5, “Intentional Destruction of Cultural Heritage: Sentencing and Reparations”, Ana Vrdoljak returns to the reparations order made in the *Al Mahdi* case as a point of departure to examine the broader international criminal justice context – from the International Military Tribunal at Nuremberg through to the ICC today – to better understand why and how international law is addressing the intentional destruction of cultural property. Vrdoljak notes that recognition of the prohibition of destruction of cultural property is part of the origin story of both modern international humanitarian law and international criminal law, and has continued to evolve in tandem with these interconnected bodies of law. The chapter explores how international criminal judgments have conceptualized, evaluated, and quantified the nature of the individual and collective harms that result from heritage destruction with a view to assessing how these harms are reflected in sentencing judgments and reparations orders. While sentencing and reparations are distinct in terms both of purpose, procedure, and often in terms of jurisdictional venue, Vrdoljak makes clear that “the link between sentencing and reparations is so entwined in current international criminal law, that it is not possible to divorce our understanding of the drivers of reparations orders without first appreciating the rationales for sentencing”. Reflecting on the rationales for sentencing as expressed in the case-law of the International Criminal Tribunal for the former Yugoslavia (ICTY), she observes that the classical rationales of retribution, deterrence and reconciliation are emphasized in the reasoning of the Tribunal. The chapter establishes that, to date, the ICC subscribes to the same set of sentencing rationales, making clear in the process that the objective of sentencing is not revenge but rather the “imposition of a proportionate sentence ... which acknowledges the harm to the victims and promotes the restoration of peace and reconciliation”. Vrdoljak then looks specifically at sentencing practices

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14 *Prosecutor v Al Mahdi* (Reparations Order) ICC-01/12-01/15 (17 August 2017) (*Al Mahdi* Reparations Order).

with respect to convictions for heritage destruction charged as a war crime and as the crime against humanity of persecution, and examines how evidence of heritage destruction has contributed to establishing guilt for the crime of genocide. The inclusion of access to reparations procedures is one of the standout innovations of the Rome Statute, since previously reparations for international crimes had only been pursuable through domestic or international human rights mechanisms. The Reparations Order in the *Al Mahdi* case thus constitutes an important departure for international criminal law in terms of its ability to address crimes against cultural heritage beyond the imposition of punishment. Vrdoljak provides a detailed assessment of the Reparations Order and critiques the decision of the Office of the Prosecutor not to charge Al Mahdi with related war crimes against civilians and civilian property, the inclusion of which would have recognized a broader range of victims impacted by Al Mahdi's crimes. While the Reparations Order acknowledges that the destruction of the mausoleums of Timbuktu inflicted harm on the local community, the state of Mali, and the international community, Vrdoljak points out the disconnect between this acknowledgment and the inability of the ICC to make findings with respect to state responsibility.

In Chapter 6, Janet Blake engages with the increasingly pertinent but difficult question of assessing damage to intangible cultural heritage occurring in armed conflict, since most of the literature to date has focused on the material dimension of cultural heritage destruction under international humanitarian law (IHL). The adoption in 2003 of the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage constituted a watershed moment in recognizing the equal value of, and interconnectedness between, tangible and intangible cultural heritage protection. Drawing on examples from a variety of conflicts, Blake illustrates the limited extent to which intangible heritage is covered by existing rules of international humanitarian law, despite the fact that the destruction of intangible cultural heritage is an all too ready occurrence in times of conflict. In addition, it is rarely straightforward to separate or demarcate the tangible from the intangible heritage, for example, particular crafts require tools, music requires instruments, and theatre and dance are often connected with sites and spaces. Intangible heritage is dependent on shared memory and in this sense resides within the person and collective social memory. Blake argues that contemporary international humanitarian law alone is ill-equipped to properly safeguard intangible cultural heritage in armed conflict. In this respect, she distinguishes "safeguarding" from "protection", positing that the notion of "safeguarding" is more redolent of a human rights-based approach, and as per the 2003 Convention, is "aimed at ensuring

the viability” of international cultural heritage law.<sup>15</sup> Given that intangible cultural heritage is predominantly located in the human person and collective social memory, Blake suggests that when considering the safeguarding of intangible cultural heritage during armed conflict, much of our focus must be placed on the protection of civilians, whether in conflict zones or as displaced persons and refugees, a fact painfully evident with the current forced migration of millions of Ukrainians from their homes. Such an approach demands careful appreciation and co-application of international humanitarian law, international human rights law, international criminal law, and of course, international cultural heritage law. In this respect, Blake also makes clear that safeguarding of intangible cultural heritage does not start and finish in the theatre of conflict, but rather extends to preservation and transmission of intangible cultural heritage amongst refugee and internally displaced populations, as well as the specific preservation of spaces and objects inherent in the practice and enactment of intangible cultural heritage.

In Chapter 7, Patty Gerstenblith raises important questions concerning the post-conflict reconstruction of cultural heritage, especially as to how the voice of local communities will be incorporated into decisions concerning reconstruction processes. The chapter reflects on the myriad stakeholders – local and international, inter-state and civil society – each promoting divergent motivations and objectives, who can exert considerable pressure and offer financial backing aimed at pushing through rapid reconstruction projects. Gerstenblith points out that “[t]he economic, political and propaganda incentives for reconstructing sites, particularly those that have received international recognition, are considerable”. However, hasty processes that fail to take into account the views and needs of affected populations can act as a means of perpetuating conflict and division rather than playing an essential role in a genuinely inclusive reconciliation process. Focusing on ISIS’s extensive and very public destruction of cultural sites and objects in Iraq and Syria as a case in point, Gerstenblith outlines the serious challenges to be overcome if the needs and consent of local communities are not to be overlooked by foreign governments and non-governmental organizations “amassed to descend on cultural sites to begin reconstruction efforts as soon as the political situation allows”. In an effort to capture the likely impact of foreign and international involvement in reconstruction projects, the chapter looks to two relevant precedents, namely the reconstruction of the Old Bridge at Mostar (Stari Most), and the reconstruction of the destroyed mausoleums of Timbuktu. Both

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15 Article 2(3) of the 2003 Convention.

efforts benefitted from international funding and engagement, but the extent to which such efforts contributed to societal reconciliation is difficult to quantify in any meaningful way.

In order to ensure that the voices of local, affected communities are central to reconstruction processes, the issue must be viewed through a human rights lens. Looking to the Warsaw Recommendation on Recovery and Reconstruction of Cultural Heritage, and the International Council on Monuments and Sites, Guidance on Post-Trauma Recovery and Reconstruction for World Heritage Cultural Properties as important but flawed precedents in this regard, Gerstenblith proposes developing a protocol or charter for carrying out cultural heritage reconstruction work in post-conflict areas, including the requirement of free, prior, and informed consent of the local community.

The lack of community consent in development projects is a recurring theme in Part II of the book, which deals with heritage destruction and human rights outside the context of armed conflict. Destruction brought about by development projects is not necessarily 'intentional' in the criminal sense of the word, but possibly negligent, or intentional but justified according to national development imperatives. The most obvious link between heritage destruction and human rights is through the right to take part in cultural life.<sup>16</sup> While the UN Special Rapporteur in the field of cultural rights has declared heritage destruction a violation of human rights, and although the negative duty not to destroy heritage forms part of the state's obligations vis-à-vis cultural rights, the lack of enforcement measures and the collective nature of heritage make both the prevention of destruction and access to justice difficult in practice.<sup>17</sup> This section includes contributions that scrutinize the peacetime framework, including the relationship between heritage destruction and development, the limits of the right to take part in cultural life, the destruction of indigenous peoples' heritage, and regional perspectives dealing with environmental principles, cultural landscapes and spatial injustice. Finally, the last chapter deals with the return of cultural objects, which although not related to destruction *stricto sensu* nevertheless forms an important part of transitional justice with a view to repairing heritage destruction and cultural loss from a *longue durée* perspective.

In Chapter 8, Alessandro Chechi appraises the normative framework relevant for cultural heritage losses in peacetime. He demonstrates that wartime attacks are not among the most recurrent threats to cultural heritage, and

16 See (n 7).

17 See in particular, the chapters by Lixinski (Chapter 10), and Strecker and Newman (Chapter 13) in this volume.

that governments often prioritize revenue-generating development projects (including those with a negative impact on cultural heritage) invoking the international law principle of sovereignty as a shield against the condemnations of specialised international bodies and the general public. Chechi provides several illustrations of such government-sanctioned heritage destruction that testify to the problem that certain economic activities bring about ipso facto the deterioration or destruction of cultural heritage, and they illustrate that intentional damage or destruction can be committed by state organs (or by private entities acting under the direction or control of the state) or by non-state entities that have obtained the required authorisations by the competent national authority. Examples provided by Chechi include the 12,000 year old town of Hasankeyf, Turkey, which was recently submerged by the Ilisu Dam,<sup>18</sup> Beijing, China's capital, where many 'hutong' – narrow alleyways and courtyard traditional houses built around the Forbidden City – have been bulldozed over in the last few decades; Mecca, Saudi Arabia, where ancient buildings and historic sites dating back to the 8th century have been replaced by modern skyscraper apartments and hotels; Mes Aynak – an outstanding 2,000-year-old Buddhist city in Afghanistan consisting of stupas, shrines, monasteries, statues and frescoes – threatened by the opening of an open-cast copper mine, and Tara, an archaeological, historical and sacred landscape in Ireland that was subject to the construction of a government-backed motorway, discussed in further detail by Strecker and Newman in Chapter 13. Chechi argues that by virtue of the principles of sovereignty and its corollary, non-interference, cultural heritage law empowers states to establish policies relating to the management of cultural heritage situated within national borders and that international law allows states to treat cultural heritage either as resources to be exploited or transformed, or as obstacles to economic development that have to be removed. Chechi highlights the important role of specialised international organisations and NGOs in strengthening the peacetime protection of heritage from the whims of development-minded governments, and advocates for a responsible sovereignty, even in the absence of specific treaty obligations to do so.

In Chapter 9, Berenika Drazewska takes up this discussion and concentrates on the justification used by the state in such development projects. She notes that the trend towards "securitization" of cultural heritage destruction can have the unwanted consequence of overlooking much of the destruction happening outside of the context of war, destruction brought about in pursuit of

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18 Discussed by Drazewska (Chapter 9), Lixinski (Chapter 10), and Strecker and Newman (Chapter 13).

industrial and tourism development or in the context of large infrastructural works, such as dams, canals, bridges, ports and roads. Drazewska argues that the term “imperatives of development” is just a disguise for economic necessity, and in contrast to Chechi, contends that international law has done a great deal to debunk the myth of necessity as involving the right of a sovereign to pursue a national interest at any cost, including breach of obligations of fundamental importance to the international community. She draws an interesting parallel between military necessity (invoked in armed conflicts) and the imperative of development used by states in peacetime to circumvent obligations arising out of international cultural heritage law or environmental law. Both, she maintains, are used to waive the obligation of respect for heritage in the face of allegedly extraordinary circumstances, whether in pursuit of a military mission or a development project. She argues, however, that unlike military necessity (which is linked to a security threat), in development contexts there are no circumstances which could challenge the general presumption of irrelevance of cultural property for development activities in a similar way. Additionally, the only reason for which cultural heritage may find itself in harm’s way in development contexts may be its location, which, she mentions, is not the criterion preferred in current international cultural heritage law. Drazewska posits that “necessity is not a right”, but rather “a de facto situation, brought about by a grave danger that threatens an important interest”. She reminds us that in the armed conflict context, rules of international humanitarian law have developed such that “it is not only forbidden to destroy cultural heritage or expose it to threat; it is also necessary to actively protect it”. This has given rise to what she terms the notion of “cultural necessity”, which could be applied by analogy to guide the idea of what is truly necessary in the pursuit of development, thereby aligning with the UN’s stated commitment to integrating cultural heritage protection in the context of sustainable development.

In Chapter 10, Lucas Lixinski focuses on the right to participate in cultural life in international human rights law, asking whether it is a panacea or part of the problem.<sup>19</sup> He argues that the answer between (arguably permissible)

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19 UNGA Res 217A(III) (10 December 1948) UN Doc A/RES/3/217A (Universal Declaration of Human Rights), Article 27 (UDHR); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR), Article 15; African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58 (1982) (Banjul Charter), Article 17; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (adopted 17 November 1988, entered into force 16 November 1999) AOS Treaty Series No 69 (1988) (Protocol of San Salvador), Article 14.

changes to heritage on the one hand, and (illegal) destruction as a result of conflict, on the other, lies in the link between heritage and the communities that live in, with, or around heritage. It is precisely because communities live near or have the closest attachments to heritage that Lixinski believes they should be in a position to decide its fate. He argues that the right to cultural life can be used to prevent heritage destruction done by people other than the community, while still allowing the community to engage with its own heritage in a way that changes or even discards it. In other words, the right to cultural life is a useful way of thinking about heritage both within and beyond the language of crisis that Lixinski also believes anchors much of the conversation about the destruction of heritage, which in turn masks broader and deeper atrocities. Focusing in particular on Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESR),<sup>20</sup> he revisits its interpretation as including both negative (abstention) and positive (action) obligations, which includes the obligation on states not to destroy. Lixinski notes that the human rights approach may not actually be able to prevent destruction of heritage (it may in fact suggest its destruction) but that nevertheless, the right to cultural life does lead to better thought-out decision-making, and adds international oversight and enforcement. Ultimately, he believes that the right to participate in cultural life does more good than harm in this space by reminding us of heritage's relational value, and how heritage is connected to a range of human needs and aspirations, and not just an end in itself.

The idea that communities are the bearers of, and should be the principal decision-makers in cultural heritage is at the core of Federico Lenzerini's reasoning in Chapter 11, on 'The Destruction of Indigenous Peoples' Heritage and International Law'. Lenzerini argues that the interconnectedness of dignity, identity, and heritage is illustrated by the all-encompassing conception of cultural heritage in indigenous traditions and practices – "cultural heritage is everything, animate or inanimate, material or immaterial". He posits that the existential, spiritual significance of heritage to indigenous peoples requires that the understanding to be given to "destruction" must be equated with that of "loss". The loss of heritage to indigenous peoples can be so profound as to "determine the cultural disappearance of the indigenous people concerned as a distinct human (cultural) community". In keeping with this section of the volume, Lenzerini points out that the greatest threats to indigenous heritage often have little or no link to armed conflict. Building on the observations of

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20 "Article 15. 1. The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; [...]".

Chechi and Drazewska in Chapters 9 and 10, Lenzerini discusses the destruction of indigenous heritage resulting from development projects. Focusing on the Canadian and US contexts, he laments the fact that on numerous occasions indigenous peoples have attempted, with little success, to use domestic legal avenues as a means of safeguarding their tangible and intangible heritage. The case-law highlights the narrowness of judicial understandings of heritage and cultural identity, an understanding based, in Lenzerini's view, "on a purely Western rationale and perception of human rights". The spiritual connection between indigenous peoples and ancestral lands often means that dispossession or relocation of indigenous peoples is the most detrimental form of destruction to indigenous cultural heritage, a fact reflected in the jurisprudence of the Inter-American Court of Human Rights, and the African Court of Human and Peoples' Rights. In addition to dispossession of ancestral lands and the forced relocation of indigenous peoples, Lenzerini offers reflections on other forms of destruction and loss all too commonly inflicted on the tangible and intangible heritage of indigenous peoples. In this regard, he discusses the prohibition under domestic laws of certain indigenous traditional practices or rituals; the deleterious impact of trivialization of indigenous intangible culture; and the profound consequences of assimilationist policies, such as those pursued in Canada through the Indian residential schools process, and their direct link with the biological and cultural genocide of indigenous peoples. While various instruments of international cultural heritage law offer a means through which to vindicate and safeguard the cultural heritage of indigenous peoples, the applicable rules and models of protection are often ill-equipped to address, or are unresponsive to, the specific needs of indigenous peoples and may in the end even contribute more to destruction than to protection. This is particularly true of the manner in which indigenous sites have been inscribed on the World Heritage List without the full, prior, and informed consent of the indigenous peoples concerned. Inscription in these circumstances can and has resulted in serious consequences for indigenous cultural heritage brought about in particular by management practices that have excluded the views and voices of affected communities. Provisions of the United Nations Declaration on the Rights of Indigenous Peoples, the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage, and ILO Convention 169 on Indigenous and Tribal Peoples speak of the need to ensure the protection and lasting agency of indigenous peoples over their cultural heritage. Looking more broadly, Lenzerini points to provisions drawn from international environmental law and international investment law instruments that either directly or indirectly offer protection or special consideration of indigenous cultural heritage. It is evident, however, that human rights law stands as the most effective

means through which the destruction and loss of indigenous cultural heritage can be addressed. Lenzerini articulates the fact that the destruction of the cultural heritage of indigenous peoples often entails the violation of a host of human rights such as the right to freedom of expression, the right to religion, the right to education, the right to be free from discrimination, and the right to cultural diversity. While safeguarding and protection can be pursued through different branches of international law, Lenzerini urges caution and recognition of the “dark side” of these various sources of law. Specifically, he cautions that the best intentions of the international community in attempting to safeguard indigenous cultural heritage, if pursued without engagement from and the consent of affected indigenous peoples, may result in acts of destruction, rather than preservation.

In Chapter 12, Ben Boer focuses on environmental principles relevant for containing natural and cultural heritage destruction in Australia: in particular Indigenous heritage. He argues that several principles of international environmental law could be useful not only in avoiding the further deterioration of heritage, but could also contribute to the promotion and revival of that heritage. These include the right to development, the right to a quality environment, the rights of nature, the principles of non-regression and progression, as well as free, prior and informed consent. Boer discusses four case studies to support this view, namely the deterioration of the Great Barrier Reef, the long-term practice of tourists climbing Uluru (erroneously named Ayers Rock), the ongoing deterioration of the ancient Aboriginal rock art of Burrup Peninsula in Western Australia, and the destruction of the Juukan Gorge rock shelters by Rio Tinto in Western Australia. These case studies illustrate the ways in which certain internationally accepted principles of environmental law could apply to limit the effects of development activity that would otherwise cause deterioration if not outright destruction of cultural, natural, and Indigenous heritage in Australia. Boer illustrates that despite political and economic pressures prevalent in decisions concerning development such as mining and tourism, principles such as access to information, the right to participate in decision-making, and access to justice will become fundamental in achieving free, prior and informed consent.

In Chapter 13, Amy Strecker and Conor Newman discuss the cultural landscape also in relation to environmental law and human rights, and take up issues discussed in previous papers such as imperatives of development, environmental impact assessment, participation in decision-making, and access to justice. Their analysis takes the cultural landscape of Tara in Ireland as a reference point to work through the various legal obstacles presented in cases where the state has made a unilateral decision to proceed with the destruction

of cultural heritage in the name of national development, even where that decision is in violation of international cultural heritage law and international (and European) environmental law. They note that human rights offer one of the only ways in which a sovereign decision can be challenged in an international court. However, human rights approaches throw up substantive and procedural obstacles due to, among other things, the individual conceptualisation of rights versus the collective nature of heritage and landscape; the lack of identifiable victims or palpable injury; and the diverging ways in which culture is interpreted between indigenous and non-indigenous communities. Perhaps most important is that cultural heritage, while increasingly couched in human rights terms, is still tied to public policy, and is traditionally considered to be one of the last bastions of sovereignty. Strecker and Newman explore the difficulties with, and avenues open to, accessing justice for cultural landscape destruction, through analyzing a concrete example of the kind of landscape destruction envisaged by the vast majority of such cases, a non-intentional form of destruction in the legal sense of the word, a calculated loss associated with development actioned in the public interest and within the sovereign authority of the state. These difficulties include the legal status of landscapes as heritage (and the traditional idea of heritage as object, monument or site); the sufficient interest of applicants who do not own land or live in the area (and the reduction of *locus standi* to proprietary interests); and the avenues open for accessing justice even where a breach of European or international law has occurred. After discussing these issues in relation to Tara, the chapter explores the relevance of international human rights law for cultural landscape destruction, and concludes by emphasizing the importance of designation, participation in the planning process, access to justice, and judicial imagination in the interpretation of sufficient interest in contexts where there is a serious threat to cultural heritage of demonstrable significance.

Amanda Byer follows closely from this in Chapter 14 on “Virtual Enclosure, Spatial Injustice and Heritage Destruction in the Caribbean: The Case of Camerhogne Park, Grenada”. Similar to Australia and Ireland, there is an important historical dimension to how heritage is protected and conceived in the (English-speaking) Caribbean, influenced as it is by British colonial law. As Byer notes, like many postcolonial countries, Grenada wrestles with development issues that are the product of an imperial legacy, and which often manifest as a balancing exercise between the need to conserve limited resources and increase their exploitation in order to accelerate economic growth. This presents a challenge where the protection and management of natural and cultural heritage is concerned. Byer argues that virtual enclosure, through the modern dissolution of parks for hotel development or privatization results in

spatial injustice because it denies communities access to heritage resources, undermining their relationships with these places and accelerating heritage loss. Byer takes the treatment of Camerhogne Park in Grenada – an important commons threatened with hotel development – as emblematic of this ongoing trend and highlights the divergence between local understanding of parks and their formal legal definition. She notes that access to land is an important matter in the small island ex-colonies of the Caribbean and that parks (originally eco-imperialist) have become modern symbolic commons important for community expression, not for exclusive use, but common spaces with a multiplicity of uses. In the Camerhogne Park example, this range of communal interests was perceived as under threat, in order to make space specifically for foreigners. For Byer “there are no barriers to the increasing privatization of public space, which marginalizes community interests, erases local custom and extinguishes landscape in the name of development, thereby recreating the conditions for the attrition and ultimate destruction of heritage”. She argues that place-protective activities in the form of community protests as seen in Camerhogne Park, which were ultimately successful, offer the only mechanism to defend park access, use and definition, and by extension secure heritage protection where the law has not been localized.

In the cases discussed by Strecker and Newman, and Byer, heritage is seen in its broader spatial context as the setting of peoples’ lives, and is intimately connected to public space and the environment. What is interesting about these cases is that, although they seem to fall under national jurisdiction and lack international case law, it is nevertheless (public) international norms that are drawn upon by local actors when contesting abuses of power by the state. International norms are also implicated in so far as they often facilitate destructive development through trade and investment norms – many development projects are financed by international consortia of investors, and result from the conclusion of bilateral investment treaties or other international agreements between the investors and host state.

Finally, the tension between public and private law is something taken up by Evelien Campfens in Chapter 15, on ‘The Notion of “Heritage Title” for Contested Cultural Objects.’ Cultural objects are often part and parcel of any conversation on transitional justice, righting historical wrongs and repair. As seen again more recently in Ukraine, heritage destruction often goes hand in hand with looting and the removal of cultural material. Campfens notes however that despite the ever-growing body of law that condemns looting, the illegality often does not stick to the objects themselves, because the legal status of such an object will generally be a matter of ownership law of the country where it ends up. Campfens discusses several cases where the tension between

cultural objects as heritage – symbolic of an identity, and cultural objects as possessions – representing economic interests and exclusive rights, clash. She provides the example of Master Zhang Gong, a mummified Buddha statue, dating back to the Song Dynasty (11th century) and revered as ‘Master Zhang Gong’ by the Chinese community from which it came, before it was stolen from their temple, acquired by a Dutch collector, and eventually became the subject of a claim by the community before the Amsterdam District Court.<sup>21</sup> Campfens shows how domestic law’s upholding of acquisitive prescription “is clearly at odds with the principles and rationale of heritage protection on the international level and the rights of indigenous peoples to their (lost) ceremonial objects”. She argues that as symbols of identity, and irrespective of the acquired rights of new possessors, original owners should still be able to rely on ‘heritage title’ if there is a continuing cultural link. Given that neither regular ownership concepts nor the treaty regime for art trade are particularly suited to solve issues with regard to contested cultural objects, Campfens proposes heritage title as a way of realizing several human rights related to cultural heritage including the right of access to one’s own culture, the right to property, freedom of religion, respect for private and family life, the rights of minorities to enjoy their own culture, the right to self-determination, and the cultural rights of indigenous peoples.

Finally, this volume was finalized just as Russia launched its full-scale invasion of Ukraine in February 2022. The conflict is having a profound impact on civilian populations and there are daily accounts of heritage in all of its diverse forms being subjected to damage and destruction. In order to capture and reflect on this important context, the editors, Amy Strecker and Joseph Powderly, have appended a substantive Afterword that discusses the centrality of heritage destruction to the Russian pretext for war, the scale of damage and destruction witnessed thus far, and the potential role of international law in safeguarding and protecting Ukrainian cultural heritage, and ultimately, whether and how, international law can deliver accountability for wanton and intentional heritage destruction. The Afterword presents a snapshot of where things stand as this volume goes to press in March 2023.

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21 *Village Communities of Yangchun and Dongpu v. Van Overveem e.a.*, Amsterdam District Court, Judgment of 12 December 2018, Case No. C/13/609408, ECLI:NL:RBAMS:2018:8919. During the procedure some key facts, such as the location of the statue, were not clarified.