

Reserapport efter deltagende i ILA:s 81 tvåårskonferens 25–28 juni 2024 i Athen.

In June 2023 ILA had instituted a new Committee: Safeguarding Cultural Heritage in Armed Conflict, on foundations laid by two previous committees in the sphere of cultural heritage). The Committee is chaired by Dr Kristin Hausler, London, with Prof. Andrzej Jakobowski, Warsaw, as rapporteur. I am a member of the Committee, and have written on the main international instrument: the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, with two additional Protocols, in JUNO Karnov/Lexino. I was grateful to ILA's Swedish Branch for awarding me a travel grant to participate in the Committee's first official meeting at the biannual ILA Conference in Athens, where it held a closed and an open meeting.

The Committee departed from a questionnaire sent out by the chair/rapporteur. The focus was on the question: *What are the key legal gaps in the current safeguarding of cultural heritage in armed conflicts?* Responses were grouped into 'legal' and 'non-legal' gaps.

Legal gaps

1. System of register protected sites is unfeasible (only few countries have registered properties on the enhanced list)
2. Nexus with an armed conflict and question regarding the application of IHL, such as in the case of deliberate destruction of cultural heritage in the context of an armed conflict, but away from the battlefield
3. Cross-border effects of cultural destruction
4. Gaps within the First Protocol to the 1954 Hague Convention (which applies in occupation)
5. New weaponry has put in jeopardy many cultural sites, not envisaged by the current international legislation; this may be tied with questions of hybrid warfare / heritage use in propaganda, rise of social media and information warfare / 'new generation warfare' in Russia.
6. "Collateral damage"

Relationships / overlaps with other bodies of law:

1. Overlap with other bodies of law / links of the regime with human rights law, links with other UNESCO conventions (incl 1970) and their working methods / difficulty in identifying a single universal international legal regime applicable to all situations and to what extent rules are part of customary intl law.
2. Atrocity crimes & lack of recognition of 'cultural genocide'
3. Linking 'cultural genocide' to ecocide; Gaps in international humanitarian law concerning destruction
4. of environment as threats to World Heritage cultural landscapes and other elements of World Heritage sites.

What heritage?

1. Issue with terminology and use of 'cultural heritage'

2. ICH: are the existing instruments enough? The need to identify how safeguards can be applied to ICH and which types of ICH are at greatest risk. What extra steps may be necessary to safeguard the ICH of Indigenous peoples. Issue with maintenance of sites impacted by conflict as 'living heritage' / uncertain status ICH under the existing legal framework for the protection of cultural heritage in armed conflicts. The fragility and vulnerability of ICH, stemming from the fact that we are talking about less visible manifestations of culture, might lead to the denial of protection or support. [Note that UNESCO adopted guidelines for safeguarding of ICH in emergencies but they do not link with the Hague system]
3. Failure to protect 'sites of knowledge' as key evidentiary examples of assaults on cultural heritage constituting a form of epistemicide (killing, silencing, annihilation, or devaluing of a knowledge system).
4. religious heritage impacted by conflict merits specific attention

Non-legal gaps

Regulating the actors:

1. Non-state actors: how to regulate non-state actors / ability of non-state actors to engage existing international law (both public and private) in order to recover artefacts impacted by conflict.
2. Communities / Indigenous peoples: need to consider the impact of destruction of cultural heritage on communities (and role of communities in safeguarding heritage). How armed conflicts affect the cultures of Indigenous peoples: is there a gap between International Law of Armed Conflict (including cultural heritage aspects), and Indigenous rights Law, which asks generally for a more "anthropological" approach? What about the Indigenous visions on "war".
3. An underexplored issue in this field: cultural boycott, and right of artists in AC.

Phases of conflict / post-conflict:

1. Legal framework does not sufficiently address the post-conflict phase, which may lead to further conflicts precisely because the lack of proper regulation [Note the Warsaw recommendations on recovery and reconstruction but that these are focused on WH]
2. Heritage of displaced population: there is loss of cultural heritage when civilian are displaced? How to protect this endangered heritage?
3. Procedure of restitution needs to be strengthened and further developed.

Other issues: ratification, implementation, compliance, recognition (awareness-raising / education)

1. No legal gaps, especially if we take into account general rules of IHL, as well as international human rights law and international criminal law.
2. Issue is with ratification of all three instruments, and their implementation, monitoring and effective enforcement of the legal framework (national and international) / issue also with cooperative enforcement, taking anticipatory

action to prevent harm, and peacetime preparations; Missing Reporting and Monitoring in conjunction with sanctions

3. Domestic implementation: what are national laws concerning safeguarding cultural heritage / More information is needed on State practice concerning these legal frameworks and State practices on restitution of cultural objects
4. Issue with compliance and risks of impunity command responsibility is not properly imposed and prosecution lies behind. And there is a need for more education of military personnel
5. Cultural heritage appears to not have the necessary international legal recognition as is still seen as a contested area (such as in the field of IP).

Within responses received, a few pointed to possible ways forward:

1. The work of the ILA should be rooted in a **survey of practice** by both State and non-State actors in this area.
 - Respond to questionnaire: subject (NSAs, organisations / digital giants), object (digital heritage, ICH), substance, procedure (cooperation at domestic level). Add intro for consideration of all stages of conflict (including post conflict / transitional justice).
2. Specific rules on the safeguarding of intangible cultural heritage in armed conflict may not be necessary, feasible or politically realistic.

Summary of the Discussion

The members of the Committee were then invited to react to the summary of responses. They identified a number of issues related to the mandate and the planned research agenda. They noticed that the Committee cannot assume that the law has failed since deliberate destruction continues to happen. The law cannot provide clarity in every situation but it should be the Committee's task to endeavour to clarify and explore the 'grey zones' in order to encourage states and other actors to work together for more effective safeguarding of cultural heritage.

General themes and comments are summarised below:

1) Typology of heritage and deliberate destruction:

Several members addressed the issue of the complexity of cultural heritage endangered by armed conflicts. Hence much more emphasis must be placed on various elements of heritage (archives, educational institutions, movable property (including archaeological objects) etc. In this regard, the issue of deliberate destruction was raised as the deliberate destruction is not new but fits within new generation warfare (lawfare) which plays on this lack of clarity.

2) Cultural genocide:

There was a disagreement between the members on the relevance of the notion of 'cultural genocide' for the Committee's mandate. Some suggested that this should be revisited and debated; others pointed out that it has no practical relevance as this is

the concept outside the contemporary system of international law, as confirmed by international courts on several occasions.

3) Prolonged warfare and occupation:

Several members pointed to the problems of prolonged occupation (a grey zone between close of hostilities and peacetime (prolonged warfare)), as a legal condition that hinders the application of international law. In this regard, some members emphasised the need for a more systemic approach to the destruction of cultural heritage as the violation of human rights, including cultural rights.

4) Accountability:

Since accountability is the key element of safeguarding cultural heritage in all stages of an armed conflict, it should be emphasised in the work of the Committee (as highlighted at UNESCO's conference in The Hague in May 2024). In addition to closing the impunity gap the members also pointed to the need for adequate reparations programmes (the practice of regional human rights tribunals is key here). The role of national judges is crucial as they apply international law in their jurisprudence, but often they are not fully aware of the international law framework. Hence the practical aspect of the Committee's work may have an input. A good example has been offered by the ILA Sea Level Rise Committee which has produced a lot of work (what is practice of Pacific Small Island Developing States (SIDS).

5) Duties of non-parties to the conflict:

Several members reflected on the obligations of non-participating parties (including non-state actors).

They noticed that R2P had been dealt by UNESCO, as well as safe zones, so this Committee's work should build on this. Here, the issues of safe havens for cultural property under threat need to be reconsidered in the light of the past and current practice.

6) Diversity and inclusiveness of approaches:

The Committee's work should take into account various research and methodological perspectives. First of all, there is a pressing need to (re)consider **Third World Approaches to International Law (TWAIL)**ⁱ approaches to the safeguarding cultural heritage and armed conflict. Secondly, gender perspective would require careful examination (see patrimoine / matrimoine approach to heritage).

Work Plan

The Committee Rapporteur explained that a hybrid intersessional meeting would be planned in 2025 most likely in Korea (other offers were noted including London, Warsaw, and Salzburg). In addition, an online meeting is planned for October/November 2024 in order to discuss the work to be completed prior to the intersessional meeting, which will count towards the Interim Report to be presented at the ILA 82nd Biennial Conference in Vienna in 2026.

By mid-September 2024, the report on the Committee's closed session in Athens will be sent to the members, with suggestions for ways forward to be discussed during the envisaged online meeting. In this regard, the ways forward could include considerations of the following sections: 1) terminological issues, including the object of safeguarding; 2) duty-bearers: their identification and core responsibilities in various stages of an armed conflict, especially considering the cases of prolonged occupation; 3) procedural aspects of safeguarding cultural heritage in armed conflicts; 4) accountability; and 5) education /training.

Closing Issues

The Chair concluded that from the response to the questionnaire and the debate during the Committee's closed session an emerging theme appeared to be 'grey zones': what law to apply to specific situation and how does existing law apply and then propose some ways forward. The Interim Report could be a more general scoping / explanatory exercise, with the second part of mandate focusing on more specific (transitional / post-conflict) issues, in accordance with the mandate.

Varje ILA konferens har kulturinslag. Här i Athen var det ett besök på det nya Akropolis-museet. För mig – som tagit del av argumenten både för och mot ett återlämnande av Parthenon-frisen och även skrivit om detta – var det särskilt intressant att se hur den exponerades av museet. Två observationer: Som delarna av frisen nu är monterade reproduceras den ursprungliga placeringen (fast förstås på annan plats). För mig överraskande många originaldelar har kunnat monteras i museet.

Konferensen avslutades med en utfärd till Delfi, där vi besökte översteprästinan i Apollotemplet, Pythia. Hennes förutsägelser som lär gå tillbaka till åtminstone 800-talet f.Kr. var nog inte alltid att lita på. Men man ska inte glömma hennes grundläggande insatser för de mänskliga rättigheterna. År 501 f.Kr fick hon en riklig sold av dem i Athen som ville störta tyrannen Hippias. Därmed initierade hon spartanerna att gå till angrepp mot Athen vilket ledde till Hippias fall och början på den athenska stadsdemokratin. – Vid vårt besök var den enda sold som förekom entrebiljetten och inga orakelord uttalades.

Stjärnhov den 8 januari 2025

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ⁱ Mutua, Makau, and Antony Anghie. "What Is TWAIL?" *Proceedings of the Annual Meeting (American Society of International Law)*, vol. 94, 2000, pp. 31–40. *JSTOR*, <http://www.jstor.org/stable/25659346>. Accessed 6 Jan. 2025.: The regime of international law is illegitimate. It is a predatory system that legitimizes, reproduces and sustains the plunder and subordination of the Third World by the West. Neither universality nor its promise of global order and stability make international law a just, equitable, and legitimate code of global governance for the Third World. The construction and

universalization of international law were essential to the imperial expansion that subordinated non-European peoples and societies to European conquest and domination. Historically, the Third World has generally viewed international law as a regime and discourse of domination and subordination, not resistance and liberation. This broad dialectic of opposition to international law is defined and referred to here as Third World Approaches to International Law