

# BOOK REVIEWS

Karolina Wierczyńska\*

---

## *International Cultural Heritage Law in Armed Conflict: Case-Studies of Syria, Libya, Mali, the Invasion of Iraq, and the Buddhas of Bamiyan* Marina Lostal

ISBN 978-1-107-16921-0

Cambridge University Press, Cambridge 2017, pp. xviii, 198

The book by Marina Lostal, entitled *International Cultural Heritage Law in Armed Conflict: Case-Studies of Syria, Libya, Mali, the Invasion of Iraq, and the Buddhas of Bamiyan* and published by Cambridge University Press in 2017 left me with very mixed feelings. I did not find many answers and I was left with many questions.

Let me start with a three-pronged truism: Protection of cultural heritage definitely should be enhanced during armed conflicts; such protection should be assured by multiple conventions which must be binding *erga omnes*; and all States should be compelled to protect cultural heritage wherever it is located, because it is a common good of all humanity. Having this in mind, a book such as this one is definitely needed, as Marina Lostal explores questions which are not often present and/or considered in monographs. The debate over regimes

---

\* **Karolina Wierczyńska** is Associate Professor at the Institute of Law Studies of the Polish Academy of Sciences in Warsaw. Her research interests focus on international criminal law and jurisprudence. Her habilitation dissertation (2016) explored the issue of admissibility of a case before International Criminal Court.

for protecting cultural heritage in times of mass and deliberate destruction of such heritage must find its place in the current international law discussions. The author presents case studies on the existing regimes for the protection of cultural heritage, taking as a point of reference the World Heritage Convention (WHC) as the common legal denominator for her monograph.

The book consists of only 198 pages (169 if one excludes the Bibliography and Index), hence it can be read and absorbed from cover to cover in only a few days. However, an in-depth reflection on the topic requires more pages, not because of the complex essence of the book nor the way the topic is presented, but because of the issues and contexts which are actually not considered in the book.

I start on a positive note here by addressing the content of the book. It consists of six chapters, plus an Introduction and Conclusion, as well as the above-mentioned Index and Bibliography. The first chapter, entitled “Two Wrong Ways of Thinking about the Legal Protection of Cultural Property in Armed Attacks”, refers to revisionism and idealism as the two main trends which describe the current policy of cultural heritage protection; either by proposing the application of new legal instruments (revisionism) or by drawing optimistic conclusions about the development of the presented branch, although not in a unified manner (idealism). Lostal finds that the discussion of revisionists and idealists (whoever may be included under the rubrics, as she does not define them or give a list of their characteristics, basing her approach instead on her own assumptions) fails to focus on the fundamental problem of the field, diagnosed by her as the lack of a proper legal framework. Lostal does not explain whether the revisionists and idealists apply any improper legal framework or focus their studies on non-existing legal frameworks, but her efforts in the next chapter are focused on the identification of a proper system of law, wherein she situates the WHC as the basic structure which helps to conceptualize the field, asserting that an “integrated reading of the field requires the lens of the WHC”.

Thus her second chapter, entitled “The Systemic Approach. International Cultural Heritage Law and Armed Conflict” starts by identifying the legal framework of international cultural heritage law, and she consequently identifies it as a branch of international law with its own particular subject matter, principles (with a special focus on the principles applicable during an armed conflict) and its *telos* (why not aim or goal?). Interestingly, Lostal takes into account the notions of cultural property and cultural heritage in the context of the principle of relative interest and differentiated duties, showing that cultural property is rather connected with national interest, while cultural heritage belongs to the concern of the international community, thus this latter category is connected with imposing a greater burden of responsibilities on States and other actors interested in the preservation and protection of such objects. The author does not, however, develop the question of those actors obliged to preserve the international heritage, even though a discussion on the rights and responsibilities of various actors would seem to be more than necessary.

The third chapter, entitled “The World Heritage Convention as the Field’s Common Legal Denominator” is the last abstract and theoretical chapter, and here the author gives arguments why the WHC should be perceived as the basic (universal) legislative structure for the protection of cultural property during armed conflict. Her arguments are moreover based on the universal acceptance of the Convention by States and its direct application in times of both peace and war.

The remaining chapters are focused on case studies of Syria (Chapter 4), Libya and Mali (Chapter 5), and Iraq and Afghanistan (Chapter 6). Following some preliminary remarks concerning the factual backgrounds of these cases, Lostal tends to accommodate the WHC to the described crimes against cultural heritage, leaning on its universal value. The book closes with some conclusions.

The strengths of the book are definitely the subject matter chosen, the attempt to address the issue of cultural heritage, the case studies, and systematization of the legal framework governing the described discipline. However, some weaknesses must also be mentioned, which are striking at times.

Firstly, the division into revisionists and idealists at the beginning of the monograph does not seem to be necessary, because even if it helps the reader to discover some of the flaws of the examined discipline and some elements lacking in a given field, it would be possible to present these without making such division, and it does not add anything more, being solely a conception, without practical impact on the described field, an abstract hung in a vacuum (in particular the reader is not familiarized with who is a representative of either camp). Additionally, the author makes frequent use of this division by referring to the “revisionist approach”, or observing that “revisionism and idealism fail to focus ...”, or “new revisionist voices emerged” in such a way that further obfuscates the division and does not help in understanding why such a division appeared at all.

Secondly, the whole book is focused on the analysis of WHC and other international documents, while the case studies presented mostly involve the actions of non-State actors, which are not treated as legal subjects in international law. Generally, international law is State-centred and State-oriented, and consequently it does not offer any universal or uniform rules with respect to heritage protection for subjects other than States and individual legal persons, thus excluding corporate subjects and criminal or terrorist groups. This poses one of the most essential questions in contemporary international law; i.e. whether the obligation to protect cultural heritage should or can be imposed on other entities which are not recognized as subjects of international law? However, Lostal does not pose this question, thus she obviously does not offer an answer on how to deal with non-State actors in international cultural heritage law, even though it seems to be one of the most crucial problems of the emerging discipline. Neither the lack of a proper legal framework nor her artificial division into a revisionists and idealists seem to be the problem, but rather the actual lack of measures in international law to struggle against the illegal actions of non-State actors such

as terrorist groups. If there are any expectations about enhancing the scope of international cultural heritage law they are precisely related to finding answers about how to react to the destruction of cultural heritage by subjects not recognized in international law, which demands reconstruction of the scope of international law beyond the realm of statehood.

Thirdly, I cannot understand the expectations behind the author's proposal to introduce provisions on criminal responsibility and sanctions for persons who destroyed protected objects into the basic convention(s) on the protection of cultural heritage. Firstly, such competence is usually left to a State or to the jurisdiction of international criminal tribunals. Conventions on cultural heritage are not instruments of criminal law, and usually they cannot even be directly applied in the context of criminal prosecutions of individuals. Secondly, international cultural heritage law is a completely different discipline with different aims and *telos* (sic!) than international criminal law, which is based on the principle of individual criminal responsibility in reaction to mass or grave crimes (which is why the regimes are perceived as complementary to each other, not competing or concurring jurisdictions). Lastly, the criminal jurisdiction in said conventions was left to States as the States have the primary criminal jurisdiction and it's within their competence to determine the scope of individual punishment (the above-mentioned State-centrism is also visible in this context). States are the best addressees (although it is true they are not always effective) to ensure the protection of heritage goods and to prosecute those accused of its destruction.

The International Criminal Court (ICC), which was established after the WHC and related conventions went into effect, is a court of last resort and will act only if the crimes are sufficiently grave and the State is not acting at all or its actions are not genuine. In addition, the ICC cannot be perceived as the answer for mass heritage crimes because it can only prosecute a few cases a year, thus its activity in the context of heritage crimes could only be marginal at best. In this context it should be noted that there is a huge gap in accountability, which concerns not only heritage crimes (as noted by Lostal), but all the mass crimes regulated by the ICC statute. States will always play first fiddle in prosecuting international crimes. Thus, it is not a question of a more unitarian interpretation of the WHC, as proposed by the author. The question is (and this was not addressed by the author) how to support States so that they are actually able to prosecute heritage crimes, which means offering assistance in terms of judicial, financial, or administrative resources, not the reinterpretation or systemic reading of the existing legal framework.

What might also be disputable is the author's wide reliance on the jurisdiction of International Criminal Tribunal for former Yugoslavia (ICTY). Its experience and practice are certainly worthy of broad research, but given that the mission of ICTY is already completed, the omission in Lostal's monograph of a broader analysis of the provisions of the ICC statute and its *Travaux préparatoires* seems striking. If one wishes to draw any conclusions concerning today's practice in international

## BOOK REVIEWS

Karolina Wierczyńska

---

criminal justice vis-à-vis cultural heritage crimes, the provisions of the ICC statute should be the main point of reference.

There are also some problems relating specifically to the methodology of conducting the research and method of writing. Firstly, the use of secondary sources to refer to primary sources is quite striking. Citing international documents from works by Roger O'Keefe and Jiří Toman, or citing Stanisław Nahlik from Jiří Toman, does not seem appropriate when these documents and works are readily available. In my opinion, footnote mining does not build solid arguments, but leads to faulty shortcuts. If the objective of the book is to spring UNESCO into action, it seems particularly important to use their actual words, not the way they have been selected, filtered, and narrated by others, however competent and accomplished these scholars are. It is one thing to stand on the shoulder of giants to see farther; it is quite another to do it so as not get your feet dirty in the dust of primary sources.

Additionally, it is hard to accept the author's way of making arguments by, for example, appealing to authority by simply stating that "many scholars appear to share my perception". Also, the author's way of addressing documents can confuse the reader, when for example she refers to the additional protocol, but does not specify which one, from what year, etc. Also, translating Latin phrases seems inappropriate, especially a phrase like *de lege ferenda*, the meaning of which is definitely widely known among international law scholars.

In sum, it is a short monograph that leaves many questions to be considered. While it offers a promising idea for a monograph, it requires more normative development and more thorough research into primary sources.