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CULTURAL RIGHTS: THE POSSIBLE IMPACT OF  
PRIVATE MILITARY AND SECURITY COMPANIES

Ana Filipa Vrdoljak



**EUROPEAN UNIVERSITY INSTITUTE, FLORENCE**  
**ACADEMY OF EUROPEAN LAW**

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*The Possible Impact of Private Military and Security Companies*

**ANA FILIPA VRDOLJAK**

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## **Abstract**

Culture and its protection has been present in the earliest codifications of the laws of war and international humanitarian law, both in its physical manifestations as cultural heritage and its practice and enjoyment as cultural rights. However, the engagement of private military and security companies (PMSCs) in recent conflicts has again raised the vexed issue of the role of 'culture' and heritage professionals in armed conflicts and belligerent occupation. This debate has in turn exposed the limitations of existing IHL and human rights instruments.

To complement the PRIV-WAR project's current and projected work, this report is divided into four parts. First, there is an examination of the current debate amongst heritage professionals, particularly archaeologists and anthropologists, about their professional engagement with PMSCs in recent conflicts and belligerent occupation. Second, there is an overview of existing international humanitarian law (IHL) and human rights (HR) provisions covering cultural rights and cultural heritage during armed conflict and occupation. Third, the response of professional bodies and associations of heritage professionals through their codes of ethics and public pronouncements to these emerging challenges is detailed. Finally, in the light of this, the existing lacunae in international law are exposed and challenges for the protection of cultural rights and cultural heritage specifically are outlined.



# *Cultural Rights: The Possible Impact of Private Military and Security Companies*

ANA FILIPA VRDOLJAK\*

## **1. Introduction**

Culture and its protection has been present in the earliest codifications of the laws of war and international humanitarian law, both in its physical manifestations as cultural heritage and its practice and enjoyment as cultural rights. However, the engagement of PMSCs in recent conflicts has again raised the vexed issue of the role of ‘culture’ and heritage professionals in armed conflicts and belligerent occupation. This debate has in turn exposed the limitations of existing international humanitarian law and human rights instruments.

To complement the PRIV-WAR project’s current and projected work, this paper is divided into four parts. First, there is an examination of the current debate amongst heritage professionals, particularly archaeologists and anthropologists, about their professional engagement with PMSCs in recent conflicts and belligerent occupation. Second, there is an overview of existing international humanitarian law (international humanitarian law) and human rights (HR) provisions covering cultural rights and cultural heritage during armed conflict and occupation. Third, the response of professional bodies and associations of heritage professionals through their codes of ethics and public pronouncements to these emerging challenges is detailed. Finally, in the light of this, the existing lacunae in international law are exposed and challenges for the protection of cultural rights and cultural heritage specifically are outlined.

This paper provides but an overview of the main issues and legal concerns raised by the impact of the privatisation of war on cultural rights and cultural heritage during military engagements. It has been prepared on the basis that it must be read and understood in the context of the other contributions of the PRIV-WAR project,<sup>1</sup> in particular, the more detailed, general treatments of human rights and international humanitarian law, individual criminal responsibility and liability, state responsibility (and attribution), multinational corporations (MNCs), and remedies.

## **2. Heritage Professionals, PMSCs and the ‘Cultural Turn’**

The recent armed conflicts, occupation and ongoing foreign military presence in Iraq and Afghanistan, and anticipated military engagement in Iran in 2008, has fuelled an at times heated debate within disciplines like archaeology, anthropology, sociology, and museum studies, from which heritage professionals are often drawn. These deliberations concerning legal obligations and professional ethics during armed conflict and occupation are heightened at time when Departments of Defence (DoDs), militaries and private military and security contractors (PMSCs) have actively recruited from their ranks.<sup>2</sup> In this section, I will focus on the invasion and occupation of Iraq as this case study

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\* Associate Professor, Faculty of Law, University of Western Australia, Perth and Visiting Professor, Legal Studies Department, Central European University, Budapest. Email: ana.vrdoljak@uwa.edu.au.

<sup>1</sup> PRIV-WAR (Privatization of War) collaborative research project coordinated by the European University Institute in cooperation with LUISS “Guido Carli” (Rome), Justus Liebig Universität Giessen; Riga Graduate School of Law; Université Panthéon-Assas (Paris II), Centre Thucydide; University of Sheffield and Utrecht University, funded by the European Union’s FP7 Research Programme, at <<http://priv-war.eu/>>.

<sup>2</sup> See for example the sample list of recruitment advertisements summarised in R. J. González, ‘Towards mercenary anthropology? The new US Army counterinsurgency manual *FM 3-24* and the military-anthropology complex’, 23(3) *Anthropology Today* (2007) 14, at 18.

underscores much of the disquiet arising from the engagement of heritage professionals by the military and PMSCs today.

This ‘awakening’ to the importance of the cultural, be it cultural heritage or cultural (and religious) practices of the combatants and civilian populations in belligerent and occupied territories is a recent phenomenon in these current conflicts. Indeed, the destruction and loss of cultural heritage in Iraq evidenced by the looting of the Baghdad’s National Museum and other museums and libraries, damage to religious monuments and sites, and theft from archaeological sites during the initial invasion of Iraq and height of the insurgency during the occupation pointed to the diminished priority afforded it by the belligerents and occupying powers.<sup>3</sup> Likewise, lack of knowledge of the local languages, cultural and religious customs and practices necessarily exacerbated the tensions which come with armed conflict and belligerent occupation and amplified the likelihood and seriousness of violations of international humanitarian law and human rights by the invading and occupying forces (including PMSCs).

It was not always so. In fact, the critical consciousness which engulfed elements of anthropology, archaeology, art history and theory, museum studies and related disciplines in the 1960s and 70s primarily through Marxist thought and the 1980s and 90s with successive postmodernist philosophies, served to expose the centrality of culture and heritage in the arsenal of military campaigns and foreign occupations stretching back centuries. From the Napoleonic expeditions in Egypt headed by Denon (the founder of the Louvre), to the cultural immersion and monument surveys of British colonial overseers in the Asia, to the Monuments, Fine Arts and Archives program of the Allied forces following the Second World War, to the deployment of anthropological theories by the CIA during the Cold War, culture, its manifestations and the people from which it was drawn, were collected, studied, analysed, reinterpreted and deployed in part to further the interests of the belligerent and occupying power.

Parallels between these past practices and the recent enthusiasm of DoDs, militaries and PMSCs to recruit persons qualified in these disciplines to promote this so-called ‘cultural turn’,<sup>4</sup> has led to charges of neo-imperialism and the coining of phrases like the ‘military-archaeological complex’,<sup>5</sup> or the ‘“weaponisation” of anthropology’.<sup>6</sup>

Whilst the engagement of heritage professionals by foreign militaries and PMSCs attached to them can prove problematic in respect of existing international law in various ways, I shall highlight but two examples to expose particular concerns relating to cultural rights and cultural heritage protection.

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<sup>3</sup> See generally L. Rothfield (ed.), *Antiquities under Siege: Cultural Heritage Protection after the Iraq War*, (Lanham: Altamira Press, 2008); P. Stone and J. Farchakh Bajjaljy (eds), *The Destruction of Cultural Heritage in Iraq* (Woodridge: The Boydell Press, 2008); Global Policy Forum, ‘War and Occupation in Iraq’ (June 2007), at <<http://www.globalpolicy.org/security/issues/iraq/occupation/report/full.pdf>> (viewed 6/04/09), at 13-22; and A. Al-Hussainy and R. Matthews, ‘The Archaeological Heritage of Iraq in Historical Perspective’, 7(2) *Public Archaeology* 91.

<sup>4</sup> D. Gregory, ‘The Rush to the Intimate: Counterinsurgency and the Cultural Turn’, 150 *Radical Philosophy* (2008) 8. For example see US Department of Defense’s Minerva Research Initiative, at <<http://www.arl.army.mil/www/DownloadedInternetPages/CurrentPages/DoingBusinesswithARL/research/08-R-0007.pdf>> (viewed 9/04/09), and T. Asher, ‘Making Sense of the Minerva Controversy and NSCC’, at <<http://www.ssrc.org/essays/minerva/wp-content/uploads/2008/10/asher.pdf>> (viewed 9/04/09); and for scholarly responses the dedicated webpage of The Social Sciences Research Council, ‘The Minerva Controversy’, at <<http://www.ssrc.org/essays/minerva/>> (viewed 9/04/09); C. Lutz, ‘Selling Ourselves? The Perils of Pentagon funding for anthropology’, 24(5) *Anthropology Today* 1-3; and T. G. Mahnken, ‘Partnership for mutual benefit: The Pentagon’s perspective’, 24(5) *Anthropology Today* 3.

<sup>5</sup> Y. Hamilakis, ‘The “War on Terror” and the Military-Archaeological Complex: Iraq, Ethics, and Neo-Colonialism’, 5(1) *Archaeologies: Journal of the World Archaeological Congress* (2009) 39.

<sup>6</sup> R. J. González, ‘Human Terrain: Past, Present and Future Applications’, 24(1) *Anthropology Today* 1.



First, and perhaps most obviously, the recruitment of archaeologists, conservators, and museum practitioners from the 'territorial' or 'contracting' states to identify, preserve and protect cultural heritage in the 'host' state. As explained below, international humanitarian law stipulates that primacy be given to national authorities of the 'host' state in such matters and existing domestic laws including those covering the protection of cultural heritage be respected. During the invasion and subsequent occupation of Iraq these twin obligations came under threat. Foreign heritage professionals were 'embedded' with the incoming militaries and PMSCs to take the place of local heritage professionals and scholars removed as part of the process of de-Ba'athification, not dissimilar to the de-Nazification which occurred following the end of the Second World War. Scholarly critiques observed that this phenomenon of blurring the military and scholarly served to legitimise the military effort for the audience of the 'home' and 'host' states and de-legitimise the important role that these disciplines could play in facilitating the preservation of cultural heritage.<sup>7</sup> Much of this discourse is coloured by the position of authors to the legality or otherwise of the invasion of Iraq in 2003, with critics arguing any collaboration by these disciplines with the military and PMSCs facilitates the destruction of very cultural heritage which they are seeking to preserve. Furthermore, as cultural heritage can only be viewed in context, they argue such collaboration cannot be divorced from the significant loss of civilian lives resulting from these military and security operations.<sup>8</sup>

These difficulties were exacerbated with the push by the American Council for Cultural Property, a lobby group which included art and antiquities dealers and collectors, for the relaxation of the existing US domestic legislation regulating the illicit trade in cultural property, and the replacement by the Coalition Provisional Authority of existing Iraqi laws with more permissive legislation enabling the export of cultural objects from the country and onto the international market.<sup>9</sup>

Finally, although less frequent a practice today is the removal of cultural objects from the 'host' state to the 'home' state for safekeeping and placing them on exhibition for audiences in the 'home' state. An example is the *Babylon: Myth and Reality* held at the British Museum from November 2008 to March 2009 (preceded by exhibitions in Paris and Berlin). There no indication that the British Museum show contains objects removed during the current conflict. Indeed, the institution has positioned itself at the fore of ongoing efforts to curb the full impact of the conflict and occupation on Iraq's cultural heritage.<sup>10</sup> This does not detract from the fact that the museum continues to hold in its collections objects removed from Samarra for 'safekeeping' during Britain's earlier colonial occupation of Iraq in the early twentieth century.<sup>11</sup>

Second, the recruitment drive by the military and PMSCs of anthropologists, sociologists and those in related disciplines is more closely aligned to the cultural rights of local populations and enemy combatants.<sup>12</sup> As explained below, international humanitarian law and human rights law require states engaged in armed conflict and belligerent occupation to respect the cultural rights (and religious practices) of civilians especially children, and prisoners of war. The line between engaging persons from these disciplines to ensure that one's military properly observes such obligations and their

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<sup>7</sup> Hamilakis, *supra* note 4, at 48-55.

<sup>8</sup> *Ibid.*

<sup>9</sup> A. Lawler, 'Impending War Strokes Battles Over Iraqi Antiquities' *Science* (31 January 2003); D. Darcy, 'Legal Group to Fight 'Retentionist' Policies' *Art Newspaper* (24 October 2002); and L. Rothfield, 'Preserving Iraq's Heritage from Looting: What went wrong (within the United States)', in Rothfield (ed.), *supra* note 3 at 5.

<sup>10</sup> See British Museum, The Iraq Project, at <<http://www.britishmuseum.org/iraq>>, (viewed 9/03/09); and P. Stone, 'The Identification and Protection of Cultural Heritage During the Iraq Conflict: A Peculiarly English Tale', 79 *Antiquity* (2005) 1.

<sup>11</sup> M. T. Bernardsson, 'The Spoils of History: The Return of Cultural Property and the Samarra Collection Episode', *Hofstra Horizons* (Fall 2001) 17.

<sup>12</sup> See AAA Commission on the Engagement of Anthropology with the US Security and Intelligence Services, Final Report, 4 November 2007 (CEAUSSIC Final Report), at <[http://www.aaanet.org/pdf/Final\\_Report.pdf](http://www.aaanet.org/pdf/Final_Report.pdf)> and appendices, <<http://www.aaanet.org/issues/CEAUSSIC-Final-Report.cfm>> (10/04/09).

retention for the purpose of maximising the chances of military success is often blurred, and transgressed, in Iraq.<sup>13</sup> Examples include the updating of the US Army's counterinsurgency manual *FM 3-24* (the first time in 20 years) with input from anthropologists customising source materials from the early twentieth century;<sup>14</sup> and US Army's Human Terrain System which involves the employment of anthropologists to 'study' local populations in Iraq and Afghanistan 'in response to identified gaps in commanders' and staffs' understanding of the local population and culture, and its impact on operational decisions; and poor transfer of specific socio-cultural knowledge to follow-on units'.<sup>15</sup>

However, counterinsurgency consulting by social scientists is increasingly viewed as 'just another weapon on the battlefield'.<sup>16</sup> Anthropology has been co-opted in the design and execution of culturally specific extreme interrogation tactics which include torture.<sup>17</sup> The discipline is revisiting concerns raised in the 1960s when counterinsurgency strategies for the US Army's Project Camelot program drew on anthropological fieldwork to defeat belligerents.<sup>18</sup> Whilst culturally specific knowledge has been deployed 'maximal degradation within a particular cultural context'; such knowledge is also vitally important for those treating torture survivors and prosecuting perpetrators.<sup>19</sup>

Finally, the work of physical anthropologists and forensic archaeologists has been essential for the prosecution of gross violations of human rights under international criminal law before international criminal tribunals, hybridised criminal tribunals and domestic courts; and facilitating reconciliation processes and the right to know of victims in respect of the fate and whereabouts of deceased persons before truth and reconciliation commissions. However, practitioners must negotiate complex legal and ethical issues in highly politicised and cultural sensitive environments such as the work of the Iraqi Special Tribunal.<sup>20</sup>

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<sup>13</sup> Major General Robert Scales (ret.) testified before the US House of Representatives Armed Services Committee on 15 July 2004, at <<http://armedservices.house.gov/comdocs/openingstatementsandpressreleases/108thcongress/04-07-15Scaes.pdf>> (viewed 9/03/09): [D]uring the present "cultural" phase of the war where intimate knowledge of the enemy's motivations, intent, will, tactical method and cultural environment has proven to be far more important for success than the deployment of smart bombs, unmanned aircraft and expansive bandwidth. See also Y. Bhattacharejee, 'Cross-cultural research: Pentagon asks academics for help in understanding its enemies', *Science* (27 April 2007), 534; and González, *supra* note 2, at 17. Parallels can also be drawn with the engagement of social scientists like anthropologists and archaeologists by multinational corporations to liaise with local populations (particularly when it involves indigenous peoples) for development projects. See UN work on MNCs and human rights generally and the World Bank's Operational Manual OP 4-10 Indigenous Peoples (July 2005) and OP-4.11 Physical Cultural Resources (July 2006), at <<http://go.worldbank.org/DZDZ9038D0>> (viewed 10/03/09).

<sup>14</sup> US Army, *Counterinsurgency*, FM 3-24, June 2006 (Final Draft), at <<http://www.fas.org/irp/doddir/army/fm3-24fd.pdf>>, (viewed 9/03/09); and González, *supra* note 2, 14-17.

<sup>15</sup> See US Army Training and Doctrine Command's Human Terrain System, at <<http://humanterrainsystem.army.mil/>> (viewed 9/03/09); and Col. A. Jewett et al, *Human Terrain Team preliminary assessment: Executive summary* (July-August 2007). See R. J. González, 'Human Terrain: Past, Present and Future Applications', 24(1) *Anthropology Today* (2008), 14. Cf. M. McFate and Col. S. Fondacaro, 'Comment: Cultural Knowledge and Common Sense, A Response to González in this issue', *ibid.*, at 27.

<sup>16</sup> González, *supra* note 1 at 18-19.

<sup>17</sup> See D. H. Price, 'Buying a piece of anthropology, Part Two: The CIA and our tortured past', 23(5) *Anthropology Today* (2005) 17, at 22; US Office of the Inspector General Department of Defense, 'Review of DoD-directed investigations of detainee abuse (U)' (25 August 2006), at <<http://www.fas.org/irp/agency/dod/abuse.pdf>> (viewed 9/03/09); A. W. McCoy, *A Question of Torture: CIA Interrogation from the Cold War to the War on Terror* (2006); and T. Lagouranis and A. Mikaelian, *Fear Up Harsh*, (2007).

<sup>18</sup> G. D. Berreman, 'Is Anthropology Alive? Social Responsibility in Social Anthropology', 9(5) *Current Anthropology* (1968) 391.

<sup>19</sup> R. F. Mollica, 'Surviving Torture', 351(1) *The New England Journal of Medicine* (2004) 5.

<sup>20</sup> C. Steele, 'Archaeology and the Forensic Investigation of Recent Mass Graves: Ethical Issues for a New Practice of Archaeology', 4(3) *Archaeologies: Journal of the World Archaeological Congress* (2008) 414.

### **3. Cultural Rights and Cultural Heritage in International Humanitarian Law and HR Law**

The following overview provides an abbreviated version of existing international humanitarian law and HR protections for cultural rights and cultural heritage during armed conflict and belligerent occupation. These provisions have been interpreted broadly thereby affording mutually reinforcing protection for cultural rights *and* cultural heritage.

#### **A. *International Humanitarian Law and Cultural Rights***

In international humanitarian law, cultural rights are protected by a number of disparate provisions covering civilian populations and prisoners of war. Article 46 of the Convention (IV) respecting the Laws and Customs of War on Land, and Regulations (1907 Hague Regulations) provides that during belligerent occupation: ‘Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.’<sup>21</sup> International Military Tribunal at Nuremberg found that by 1939, the Hague Regulations were customary international law binding on non-state parties,<sup>22</sup> and this has been reaffirmed by the International Court of Justice,<sup>23</sup> and the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>24</sup>

Article 27 of Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV) confirms that protected persons’ honour, family rights, religious convictions and practices, and manners and customs shall be respected.<sup>25</sup> It is reaffirmed in the two Additional Protocols to Geneva Conventions finalised in 1977 with the deliberately broader wording: ‘convictions and religious practices’ used to encompass ‘all philosophical and ethical practices.’<sup>26</sup> The ICRC commentary states that this respect of the person includes their physical and intellectual integrity.<sup>27</sup> Intellectual integrity is defined as ‘all the moral values which form part of man’s heritage, and appl[y] to the whole complex structure of convictions, conceptions and aspirations peculiar to each individual.’<sup>28</sup> The phrase ‘respect for religious practices and convictions’ covers ‘religious

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<sup>21</sup> 18 October 1907, in force 26 January 1910, 208 *Parry’s CTS* (1907) 77, 2(supp.) *AJIL* (1908) 90.

<sup>22</sup> Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946, (1947), vol.I, at 253-254; and 41 *AJIL* (1947) 172, at 248-249.

<sup>23</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports (1996) 226, at 256; and Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports (2004) 136, at 172.

<sup>24</sup> Prosecutor v. Dario Kordić and Mario Čerkez, Trial Judgment, No.IT-95-14/2-T, 26 February 2001, paras.359-62; and Prosecutor v. Miodrag Jokić, Trial Judgment, Case No.IT-01-42/1-S, 18 March 2004, para.48.

<sup>25</sup> 12 August 1949, in force 21 October 1950, 75 UNTS 287. See J. Pictet, Geneva Convention relative to the Protection of Civilian Persons in Time of War, Commentary, (1958), at 200.

<sup>26</sup> Art.75 of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 8 June 1977, in force 7 December 1978, 1125 UNTS 3; and Art.4(1) of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), 8 June 1977, in force 7 December 1978, 1125 UNTS 609. See Y. Sandoz *et la* (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, (1987), at 1370, ¶5422: that this slight drafting modification was deliberate: see *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflict, (O.R.)* (1974-1977), vol.X, at 186-187, CDDH/405/Rev.1, paras.35 and 36; *O.R.* vol.XV, p.461, CDDH/407/Rev.1, para.43. The word “religious” only qualifies “practices”; so that convictions including philosophical and political convictions, as well as religious one, are also protected.

<sup>27</sup> Pictet, *supra* note 25, at 201.

<sup>28</sup> *Ibid.*

observances, services and rites.<sup>29</sup> This protection is augmented by Article 38(3) (hostile territory) and Article 58 (occupation) of Geneva Convention IV concerning access to religious ministers, and books and other materials to aid the protected communities in their religious observances and practices.<sup>30</sup>

Obligations in respect religious practices are extended prisoners of war under Article 18 of the Hague Regulations and reiterated by Geneva Law (and extended to cover internees).<sup>31</sup> The ICRC commentary stating that it covers: ‘those [practices] of a physical character, methods of preparing food, periods of fast or prayer, or the wearing of ritual adornment.’<sup>32</sup> In addition, Article 130 of Geneva Convention IV provides that internees when they die shall be ‘honourably buried, if possible according to the rites of the religion to which they belonged...’.<sup>33</sup>

Article 27 of Geneva Convention IV also refers to respect for the ‘manners and customs’ of protected persons which covers both individual and communal elements.<sup>34</sup> By way of explanation, the ICRC commentary notes: ‘Everybody remembers the measures adopted in certain cases during the Second World War, which could with justice be described as “cultural genocide”. The clause under discussion is intended to prevent a reversion to such practices.’<sup>35</sup>

The protection afforded children during armed conflict and belligerent occupation under international law encompasses cultural rights. During armed conflict, parties must take necessary measures to ensure that children under fifteen years that are orphaned or separated from their families, whether they are nationals or not, can exercise their religion and their education in ‘a similar cultural tradition’, where possible.<sup>36</sup> According to the ICRC, this provision is ‘intended to exclude any religious or political propaganda designed to wean children from their natural milieu; for that would cause additional suffering to human beings already grievously stricken by the loss of their parents.’<sup>37</sup> The same obligations apply to neutral countries to which the children may be transferred.<sup>38</sup> During belligerent occupation, where local institutions are unable to do so, the occupying power must organise that persons of the same nationality, language and religion as the child maintain and educate them, where the child is orphaned, separated from their parents or cannot be adequately cared for by next of kin or friends (Article 50). In respect of the equivalent provision in Additional Protocol II, it was noted that continuity of education is crucial to ensuring that children ‘retain their cultural identity and a link with their roots’ and it sought to prohibit practices where they were deliberately schooled in the cultural, religious or moral practices of the occupying power.<sup>39</sup>

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<sup>29</sup> *Ibid.*, at 203.

<sup>30</sup> See Arts 15(5) concerning protection of civilian religious personnel and 69(1) of Additional Protocol I which refers to ‘other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship.’ The ICRC Commentary notes this is more broadly defined than Art.58 of Geneva Convention IV and the objects are not described because the civilian population itself determines what is of importance for their religious practices: Sandoz *et al*, *supra* note 26 at 812, ¶2781.

<sup>31</sup> See Art.16 of the Geneva Convention relative to the Treatment of Prisoners of War, 27 July 1929, in force 19 June 1931, 118 LNTS 343; Arts 34-37 of Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949, in force 21 October 1950, 75 UNTS 135. In respect of internees see Art.93, Geneva Convention IV; and Art.5(1)(d), Additional Protocol II.

<sup>32</sup> Pictet, *supra* note 25 at 406.

<sup>33</sup> *Ibid.*, at 506. See also Art.76(3), 1929 Geneva Convention.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*, at 204.

<sup>36</sup> Art.24, 1949 Geneva Convention IV, *supra* note 26. See Pictet, *supra* note 25 at 186.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*, at 188.

<sup>39</sup> Art.4(3) Additional Protocol II, *supra* note 26, and Sandoz *et al*, *supra* note 26 at 1378, ¶4552. See O.R. vol.XV, at 79, CDDH/III/SR.46, para.11.

## **B. International Humanitarian Law and Cultural Heritage**

Cultural heritage is afforded protection under general international humanitarian law and a specialist framework under the auspices of UNESCO.

Under the 1907 Hague Regulations, during hostilities ‘all necessary steps should be taken to spare as far as possible edifices devoted to religion, art, science, and charity, hospitals, and places where the sick and wounded are collected’ as long as they are not used for military purposes, marked with the distinctive sign, and notified to the enemy (Article 27). This provision covers immovable heritage, with movables only protected if housed within such buildings. Pillage is prohibited during hostilities and belligerent occupation (Articles 28 and 47). During occupation, ‘property of the communes, that of religious, charitable, and educational institutions, and those of arts and science’ even if public property is accorded protection as private property, with no proviso made for military necessity. Destruction, intentional damage or seizure perpetrated against these institutions, historical monuments, works of art or science, is forbidden with violations to be prosecuted (Article 56).

Under so-called Geneva Law, Geneva Convention IV is silent in respect of cultural property. However, protection afforded to civilian property necessarily covers cultural heritage. Article 53 prohibits ‘destruction’ of civilian real or personal property subject to the proviso of military necessity. It is important to note that it only relates to destruction, thereby reaffirming that the occupying power may requisition or confiscate property for military purposes. However, pillaging is prohibited (Article 33). Additional Protocol I covering international armed conflicts defines general protection afforded civilian objects in Article 52. While there is a presumption of civilian use in respect of places of worship, schools, houses and other dwellings, the ICRC commentary suggests that it is confined to physical objects and not intangible elements of civilian life.<sup>40</sup> However, during the 1940s, the UN War Crimes Commission interpreted the equivalent provision contained in the Hague Regulations to cover intangible aspects of cultural heritage related to the use of such objects and sites.

Additional Protocol I provides specific protection for cultural heritage. Article 53 is *lex specialis* in respect of historic monuments, works of art and places of worship which ‘constitute the cultural or spiritual heritage of peoples.’ The same phrase is used in Article 16 of Additional Protocol II concerning non-international armed conflicts. There is some conjecture concerning *ratione materiae*. The provision relates to movable and immovable heritage, even if renovated or restored.<sup>41</sup> While Article 53 operates without prejudice to the obligations contained in 1954 Hague Convention and other relevant international treaties including the Hague Regulations,<sup>42</sup> it appears that the definition of cultural heritage covered by it is distinguishable from that covered by the 1954 Hague Convention. The ICRC commentary intimates that this phrase: ‘the cultural *or* spiritual heritage of *peoples*’, is deliberately distinguishable and broader than the *ratione materiae* of the phrase: ‘of great importance to the cultural heritage of every people’, contained in the preamble of the 1954 Hague Convention.<sup>43</sup> The ICRC study on customary international humanitarian law,<sup>44</sup> the ICTY Appeals Chamber,<sup>45</sup> and Eritrea-Ethiopia Claims Commission reaffirm this interpretation.<sup>46</sup>

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<sup>40</sup> See Sandoz, *supra* note 26, at 633-34; and J. Toman, *The Protection of Cultural Property in the Event of Armed Conflict: Commentary on the Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocol, signed on 14 May 1954 in The Hague, and on other instruments of international law concerning such protection*, (1996), at 384.

<sup>41</sup> *O.R.* vol.XV, at 277-278, CDDH/215/Rev.1, paras.68-70.

<sup>42</sup> Resolution 20 adopted by the Diplomatic Conference at the same time as the Protocols urged states who had not yet done so to become party to the 1954 Hague Convention. Consequently, this was interpreted as intending not to alter the existing legal framework for the protection of cultural property during armed conflict: Sandoz *et al*, *supra* note 26 at 641, ¶2046.

<sup>43</sup> Sandoz *et al*, *supra* note 26 at 646-647 and 1469-70, ¶¶2063-2068 and 4844 (emphasis added).

<sup>44</sup> J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, (3 vols., 2005), vol.1, at 130 and 132.

Additional Protocol I provides immunity for cultural property without the military necessity proviso.<sup>47</sup> However, violation of the obligation not to use such objects and sites 'in support of the military effort' (Article 53(b)) may render it a military objective as defined under Article 52, to which the principle of proportionality is applicable.<sup>48</sup> Nonetheless, as under the 1954 Hague Convention, they cannot be the object of reprisals (Article 53(c)).

Article 16 of Additional Protocol II provides a summarised form of the protection afforded in Article 53 of Additional Protocol I. However, it is only made without prejudice to the operation of the 1954 Hague Convention, the only multilateral treaty in force (with the exception of the regional 1935 Washington Treaty), which would have overlapping jurisdiction in respect of non-international armed conflicts.<sup>49</sup> Like Additional Protocol I, the immunity afforded makes no proviso for military necessity but this is removed when the object or site is 'used ... in support of the military effort'. Therefore, like Article 53 of Additional Protocol I, Article 16 prohibits the targeting of such cultural property and its use as a military objective.<sup>50</sup> Unlike its sister provision, Article 16 does not prohibit reprisals. But Additional Protocol II does prohibit pillage (Article 4(2)(g)).

The present day specialist international humanitarian law framework for the protection of cultural heritage during armed conflict and belligerent occupation includes the 1954 Hague Convention, the 1954 Hague Protocol,<sup>51</sup> and the 1999 Second Protocol.<sup>52</sup> The 1954 Hague Convention together with its regulations elaborate obligations for the safeguarding and respect of cultural property by the High Contracting Parties which takes effect during peacetime, armed conflict and belligerent occupation. The Hague framework contains significant concessions made to encourage its uptake and ensure a minimum standard of conduct during hostilities and occupation.<sup>53</sup> The most significant compromise is the proviso of military necessity, which was retained in the 1999 Second Protocol negotiated two decades after the Additional Protocols to the 1949 Geneva Conventions. Like the 1949 Geneva Conventions, the 1954 Hague Convention applies to international and non-international armed conflicts.<sup>54</sup> In respect of internal armed conflict each of the parties to the conflict is bound to the convention's obligations 'as a minimum' (Article 19(1)). The application of the Convention to non-international armed conflict is recognised as forming part of customary international law.<sup>55</sup>

(Contd.) \_\_\_\_\_

<sup>45</sup> Prosecutor v. Dario Kordić and Mario Čerkez, Appeal Judgment, Case No.IT-95-14/2, Appeals Chamber, ICTY (17 December 2004), at para.91.

<sup>46</sup> Partial Award: Central Front. Eritrea's Claims 2, 4, 6, 7, 8 and 22, 43 ILM (2004), at 1249, para.113.

<sup>47</sup> Cf. Art.27 Hague IV Convention, *supra* note 21 referring to 'as far as possible'. If state is party to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, in force 7 August 1956, 249 UNTS 240 (1954 Hague Convention) and the Additional Protocol, *supra* note 26, derogation under the specialist framework applies. However, if party to the Additional Protocols but not 1954 Hague Convention then no derogation permitted: Sandoz *et al*, *supra* note 26 at 647, ¶¶2071-73.

<sup>48</sup> Sandoz *et al*, *supra* note 26 at 648, ¶2079; and Henckaerts and Doswald-Beck, *supra* note 44 at vol.II, 779-790, §§282-354.

<sup>49</sup> Sandoz *et al*, *supra* note 26 at 1468, ¶4837.

<sup>50</sup> See Sandoz *et al*, *supra* note 26 at 1470, ¶4845.

<sup>51</sup> Protocol for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, in force 7 August 1956, 249 UNTS 358.

<sup>52</sup> Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, in force 9 March 2004, 38 ILM (1999), at 769.

<sup>53</sup> Committee of Governmental Experts Convened in Paris from 21 July to 14 August 1952 to draw up the Final Draft of an International Convention for the Protection of Cultural Property in the Event of Armed Conflict, Report of the Rapporteur, UNESCO Doc.7C/PRG/7, Annex I, at 6.

<sup>54</sup> Article 19, 1954 Hague Convention, *supra* note 47; and Art.22, 1999 Second Hague Protocol, *supra* note 52.

<sup>55</sup> Prosecutor v. Duško Tadić, Interlocutory Appeal Judgment, No.IT-94-1-A (2 October 1995), paras.98 and 127.

The definition of cultural property covered by the 1954 Hague Convention moves beyond the nature and purpose approach of the earlier instruments. It covers publicly or privately owned, movable and immovable property ‘of great importance to the cultural heritage of every people’ including monuments, archaeological sites, groups of buildings, works of art, books, scientific collections, archives, buildings for their preservation including museums, libraries, archival depositories and refuges, and centres containing a large repository of cultural heritage (Article 1).<sup>56</sup> Read consistently with the preamble, ‘importance’ of the cultural site or object should not be determined exclusively by the state where it is located. Rather it extends to ‘people’. This definition is applicable for the two optional protocols also.<sup>57</sup>

Two elements of the protections afforded under the Hague framework should be underscored in the light of the engagement of PMSCs generally and foreign heritage professionals specifically in respect of recent belligerent occupations. First, under Article 5 of the 1954 Hague Convention, a High Contracting Party which is an occupying power must cooperate with and support the competent national authorities for the protection of cultural heritage. If it is necessary to take measures to preserve the cultural heritage damaged by hostilities, and the competent authorities are unable to undertake the work, then the occupying power shall take ‘the most necessary measures of preservation’ with their cooperation, where possible. The provision extends to informing insurgent groups of their obligation to respect cultural property. The obligation is clarified further by Article 9 of the Second Protocol.<sup>58</sup> It provides that the High Contracting Party must prevent and prohibit any illicit export, other removal or transfer of ownership of cultural property;<sup>59</sup> archaeological excavations except when ‘strictly required to safeguard, record or preserve’ cultural property; and changes to the cultural property intended to hide or destroy ‘cultural, historical or scientific evidence’.

Second, protection afforded cultural heritage during occupation is augmented by the First Protocol concerning the removal and return of movable heritage. It requires High Contracting Parties to prevent the export of cultural objects from territory under their control (para.1). High Contracting Parties (even those not party to the conflict) must take into their custody cultural property from occupied territory which enters their territory immediately or upon request of the occupied territory’s authorities (para.2). The property on their territory removed on contravention of Article 1 shall be returned to the competent authorities of the territory immediately upon cessation of the occupation (para.3). Cultural property must never be kept as war reparations (para.3).<sup>60</sup> There is no time limit for lodging a claim for the return of such cultural objects.<sup>61</sup> The High Contracting Party obligated to prevent the exportation in the first place shall pay an indemnity to the holder in good faith which is subsequently returned (para.4). In circumstances where cultural property is deposited by a High Contracting Party in the custody of another for safekeeping against hostilities shall be returned at the cessation to the competent authorities of the territory (para.5). The gist of the obligations contained in the 1954

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<sup>56</sup> See Toman, *supra* note 40 at 45-56; and R. O’Keefe, *The Protection of Cultural Property in Armed Conflict* (2006), at 101-111.

<sup>57</sup> Art.1, First Protocol; and Art.1(b), 1999 Second Protocol.

<sup>58</sup> See also Art.32, Part VI of the 1956 UNESCO Recommendation on International Principles Applicable to Archaeological Excavations in *Records of the General Conference, Ninth Session, New Delhi 1956: Resolutions*, at 40.

<sup>59</sup> Arts 11 and 12 of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, in force 24 April 1972, 823 UNTS 231; and reports of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation: for example, GA Res.61/52 of 11 September 2006, UN Doc.A/RES/61/52.

<sup>60</sup> For discussion of contrary Russian state practice: Henckaerts and Doswald-Beck, *supra* note 44, vol.I, at 137-138 in which it notes that these acts of removal occurred prior to the operation of the First Protocol.

<sup>61</sup> See UNESCO Doc.CL/717, Annex IV, 47; Nahlik, ‘La protection internationale des biens culturels en case de conflit armé’, 120 RCADI (1967-II) 61, at 147; and Prott, ‘The Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention) 1954’, in M. Briat and J. A. Freedberg (eds), *Legal Aspects of International Trade in Art*, (1996), at 167.

Protocol were replicated in Security Council resolutions concerning Iraq during the first Gulf War in 1990 and the invasion in 2003 which provided for the taking into safekeeping and restitution of cultural heritage removed from that country.<sup>62</sup> They bound all UN Member States and not only states parties to the First Protocol.

### C. *HR Law, Cultural Rights and Cultural Heritage*

There are several provisions contained within general human rights instruments which afford protection for the cultural rights of civilian populations and cultural heritage during armed conflict and belligerent occupation. While some human rights treaties provide for derogation during 'states of emergency'.<sup>63</sup> The UN General Assembly and the International Court of Justice have confirmed the continuing operation of non-derogable human rights norms during armed conflict.<sup>64</sup> In addition, in 2007 the Human Rights Council recognised the mutually reinforcing protection afforded cultural rights and cultural heritage by international humanitarian law and human rights.<sup>65</sup>

The equivalent human rights provisions to the international humanitarian law protections outlined above include:

- Right to privacy and family life covered in Article 12 of the Universal Declaration of Human Rights (UDHR),<sup>66</sup> Article 17 of the International Covenant of Civil and Political Rights covering concerning,<sup>67</sup> and the European equivalent, Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR);<sup>68</sup>
- Right to freedom of expression including receiving and imparting information and ideas contained in Article 19 UDHR, Article 19(2) ICCPR, and Art.5 ECHR;
- Right to education and full development of human personality protected by Article 26(2) UDHR, Article 13(1) ICESCR, and Article 2 ECHR.

In addition, Article 18(2) ICCPR of the right to freedom of thought, conscience and religion has been defined as a non-derogable right by the Human Rights Committee.<sup>69</sup> Its General Comment No.22, the Committee states that the right broadly includes:

[R]itual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the

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<sup>62</sup> SC Res.661, 6 August 1990, and SC Res.1483 of 22 May 2003, para.7.

<sup>63</sup> Art.4 ICCPR; Art.27 of American Convention on Human Rights, 21 November 1969, in force 18 July 1978, OASTS No.36, 1144 UNTS 123; Art.15 of Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), 4 November 1950, in force 3 September 1953, ETS 5; 213 UNTS 221. No derogation permitted under the African Charter on Human and Peoples' Rights, 27 June 1981, in force 21 October 1986, OAU Doc.CAB/LEG/67/3 rev. 5, 1520 UNTS 217, but see Art.27(2) which has been strictly interpreted by the African Commission on Human and Peoples' Rights.

<sup>64</sup> GA Res.2675 (XXV), 9 December 1970; and Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, 226, at 240; and Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports (2004) 136, at 173. See also Human Rights Committee, General Comment No.29, Article 4 ICCPR States of emergency, 31 August 2001, UN Doc. CCPR/C/21/Rev.1/Add.11, at para.3.

<sup>65</sup> HRC Res.6/1, 27 September 2007, Protection of cultural rights and property in situations of armed conflict, UN Doc. A/HRC/RES/6/1.

<sup>66</sup> GA. Res.217A(III), 10 December 1948.

<sup>67</sup> International Covenant on Civil and Political Rights, 16 December 1966, in force 23 March 1976, GA Res. 2200A (XXI), 21 UN GAOR Supp. (No.16) at 52, UN Doc.A/6316 (1966), 999 UNTS 171.

<sup>68</sup> 14 November 1950, in force 3 September 1953, ETS No.5, 213 UNTS 221.

<sup>69</sup> General Comment No.22, UN Doc.CCPR/C/21/Rev.1/Add.4 (1993), para. 1.



display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or headcoverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.<sup>70</sup>

Regional human rights instruments have equivalent provisions, including Article 9 ECHR.

Cultural rights more specifically are protected by Article 15 of the International Covenant on Economic, Social and Cultural Rights (and Article 27 UDHR) concerning the right to participate in cultural life of the community.<sup>71</sup> The UN Committee on Economic, Social and Cultural Rights (CESCR), Human Rights Council and the International Court of Justice have interpreted the application of the treaty to extend to ‘both territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction’.<sup>72</sup> In respect of this obligation, the CESCR in its recently revised reporting guidelines, amended in response to the Human Rights Council’s harmonized guidelines on reporting under the international human rights treaties, requires states parties to advise of:

[T]he measures taken to protect cultural diversity, promote awareness of the cultural heritage of ethnic, religious or linguistic minorities and of indigenous communities, and create favourable conditions for them to preserve, develop, express and disseminate their identity, history, culture, language, traditions and customs.<sup>73</sup>

And:

To ensure the protection of the moral and material interests of indigenous peoples relating to their cultural heritage and traditional knowledge.<sup>74</sup>

The latter reporting requirement reflects the protections contained in the UN Declaration on the Rights of Indigenous Peoples,<sup>75</sup> in particular Articles 11(culture), 12(religion) and 13(language). However,

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<sup>70</sup> *Ibid.* para.4.

<sup>71</sup> 16 December 1966, in force 3 January 1976, GA Res.2200A (XXI), 21 UN GAOR Supp.(No.16) at 49, UN Doc.A/6316 (1966); 993 UNTS 3.

<sup>72</sup> *Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports (2004) 136, at 180; UN Doc.E/C.12/1/Add.90.; and HRC Res.6/19, 28 September 2007, Religious and cultural rights in the Occupied Palestinian Territory, including East Jerusalem, UN Doc.A/HRC/RES/6/19.

<sup>73</sup> Guidelines on Treaty-Specific Documents to be Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, 13 January 2009, UN Doc.E/C.12/2008/2 at 14, para.68. See also amended reporting guidelines in respect of the International Convention on the Elimination of Racial Discrimination, Guidelines for CERD-Specific Document to be submitted by States Parties, 13 June 2008, UN Doc.CERD/C/2007/1, at 11-12 concerning right to equal participation in cultural activities:

States parties should, for example, report (a) on measures taken to enhance the right of all persons without discrimination to participate in cultural life, while at the same time respecting and protecting cultural diversity; (b) on measures taken to encourage creative activities by persons belonging to groups protected under the Convention, and to enable them to preserve and develop their culture; (c) on measures taken to encourage and facilitate their access to the media, including newspapers, television and radio programmes, and the establishment of their own media...; and (e) on the status of minority, indigenous and other languages in domestic law and in the media.

See also Article 4(f) of the 1976 UNESCO Recommendation on the Right on Participation in Cultural Life, Adopted on 26 November 1976 by the General Conference of UNESCO at its 19<sup>th</sup> session held in Nairobi.

<sup>74</sup> *Ibid.*, at para.71(c).

<sup>75</sup> GA Res.61/295, 13 September 2007.

explicit extension of Geneva Law to indigenous peoples contained in Article 11 of the 1993 draft Convention was deleted from the final text of this instrument.

Article 27 ICCPR covers cultural, religious and language rights of minorities (of which there is no equivalent in the ECHR). The Human Rights Committee's General Comment No.23 states that this provision imposes positive obligations on States parties.<sup>76</sup> UN Special Rapporteur Capotorti also suggested that 'culture' must be interpreted broadly to include customs, morals, traditions, rituals, types of housing, eating habits, as well as the arts, music, cultural organisations, literature and education.<sup>77</sup> The Committee has similarly endorsed a wide concept of culture including, for example, a particular way of life associated with the use of land resources, especially in relation to indigenous peoples.<sup>78</sup>

Furthermore, under Article 4(2) of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UN Declaration on Minorities),<sup>79</sup> states must create favourable conditions to enable members of a minority to 'express their characteristics' and 'develop their culture, language, religion, traditions and customs' where they do not violate national or international law. The Declaration privileges individual rather than collective rights by referring to the rights of 'persons belonging to minorities' (Article 2). Yet, it is clear that while the rights granted are to individuals, 'the duties of States are in part formulated as duties towards minorities as groups.'<sup>80</sup>

Within the European context, the Framework Convention for the Protection of National Minorities is the first binding multilateral instrument dealing exclusively with minority protection.<sup>81</sup> Its explanatory report elaborates that this provision does not imply 'that all ethnic, cultural, linguistic or religious differences necessarily lead to the creation of national minorities.'<sup>82</sup> Furthermore, each person has the right to choose to be a member of the minority (Article 3(1)); and 'individual's subjective choice is inseparably linked to objective criteria relevant to the person's identity'.<sup>83</sup> Nonetheless, the instrument affirms the application of the human rights protections outlined above to members of minorities. In particular, Article 5 prohibits assimilation policies and requires states parties to 'undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage.'<sup>84</sup> This provision resembles Article 4(2) of the UN Declaration but it refers to 'persons belonging to national minorities' rather than 'minorities' *simpliciter*.

#### **D. International Criminal Law, Cultural Rights and Cultural Heritage**

One avenue of implementation of these international humanitarian law and HR obligations in respect of cultural rights are prosecutions of violations of international criminal law. There are three heads of

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<sup>76</sup> General Comment No.23, UN Doc.HRI/GEN/1/Rev.1, 38 (1994).paras.6.1, 6.2 and 9.

<sup>77</sup> UN Doc.E/CN.4/Sub.2/384/Rev.1 at 99-100.

<sup>78</sup> General Comment No.23, para.7, *supra* note 76.

<sup>79</sup> GA Res.47/135, 18 December 1992, UN Doc.A/Res/47/135, and. 32 *ILM* (1993) 911.

<sup>80</sup> Art.1, Declaration on Minorities, *supra* note 79; UN Doc.E/CN.4/Sub.2/AC.5/2001/2, (2001), at 4, para.14; and Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Indigenous Persons belonging to National or Ethnic, Religious and Linguistic Minorities, UN Doc.E/CN.4/Sub.2/AC.5/2005/2 (2005), para.33.

<sup>81</sup> 1 February 1995, in force 1 February 1998, ETS No.157.

<sup>82</sup> Explanatory report on the Framework Convention for the Protection of National Minorities, para.43 (1995) 20-2 *NJCM-Bulletin*; [1995] HRLJ 101, and at <<http://conventions.coe.int/Treaty/en/Reports/Html/157.htm>> (viewed 9/03/09).

<sup>83</sup> *Ibid.*, para.35.

<sup>84</sup> Art.5(1), Framework Convention; and Explanatory Report, *supra*, note 81 para.42.

particular relevance: grave breaches of the laws and customs of war (war crimes); crimes against humanity; and genocide.

The obligation to prosecute violations of the international humanitarian law protections is outlined above as grave breaches of the laws and customs of war prohibitions against ‘inhumane treatment’ and ‘wilfully causing great suffering’ to ‘protected’ persons and prisoners of war (Article 147 Geneva Convention IV; and Article 130 Geneva Convention III). The ICRC commentary states that measures ‘might cut the civilian internees off completely from the outside world and in particular from their families, or which caused grave injury to their human dignity’ could constitute grave breaches.<sup>85</sup> In respect of the latter phrase, the ICRC notes that: ‘[T]he Conventions do not specify that only physical suffering is meant, it can quite legitimately be held to cover moral suffering also.’<sup>86</sup> Article 8(2)(b)(xxi) of the Rome Statute of the International Criminal Court (Rome Statute) defines war crimes to include ‘committing outrages against personal dignity, in particular humiliating and degrading treatment.’<sup>87</sup> Jurisdiction in respect of these war crimes also covers non-international conflicts (Article 8(2)(c)(ii)).

Grave breaches include attacking and causing extensive damage to ‘clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization’ which were not being used in support of military effort nor located in the immediate proximity of military objective (Article 85(4)(d) of Additional Protocol II).<sup>88</sup> Special protection means not only that afforded under the 1954 Hague Convention, (and enhanced protection under the 1999 Second Protocol) but includes the lists established under the 1972 World Heritage and 2003 Intangible Heritage Conventions.<sup>89</sup> The chapeau of the Article 85 requires that the breach be committed wilfully and in violation of the Protocol or Conventions. If the object or site is marked or on a list that is adequately circulated this would satisfy the *mens rea* requirement.<sup>90</sup> Article 85(3)(f) includes among grave breaches and war crimes the perfidious use of emblem recognised by the Conventions or Additional Protocol I.

The Second Protocol to the 1954 Hague Convention elaborates upon the duty to prosecute violations. High Contracting Parties to the Second Protocol must introduce domestic penal legislation (establishing jurisdiction and appropriate penalties) concerning serious violations occurring within

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<sup>85</sup> Pictet, *supra* note 25 at 598.

<sup>86</sup> *Ibid.*

<sup>87</sup> 17 July 1998, in force 1 July 2002, UN Doc.A/CONF. 183/9, 2187 UNTS 90. See also Art.2(c) Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, GA Res.827 of 25 May 1993, amended by GA Res.1166 (1998), 1329 (2000), 1411 (2002), 1431 (2002) 1481 (2003), 1597 (2005) and 1660 (2006) (ICTY Statute); Art.4(e), Statute of the International Criminal Tribunal for Rwanda, SC Res.955 of 8 November 1994 as adopted and amended to SC Res.1717 of 13 October 2006; Art.3(e), Statute of the Special Court for Sierra Leone, in Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, SC Res.1315 of 14 August 2000, 2178 UNTS 138; Art.9 (jurisdiction includes grave breaches of the 1949 Geneva Conventions), Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, GA Res.57/228B of 22 May 2003, UN Doc.A/RES/57/228B (2003) Annex; Art.6, Law on the Establishment of Extraordinary Chambers in the Court of Cambodia for the Prosecution of Crimes committed during the period of Democratic Kampuchea, with the inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006). Under this later law, provision is made for prosecution of perpetrators of religious persecution during the Khmer Rouge period in violation of the domestic penal code: Art.3.

<sup>88</sup> Art.3(d) ICTY Statute; Arts.8(2)(b)(international conflicts), and 8(2)(e)(iv)(not international armed conflicts), Rome Statute; Art.3, Statute of the Special Court for Sierra Leone; Art.7 of Law on the Establishment of Extraordinary Chambers in the Court of Cambodia provides specific jurisdiction for the prosecution of persons violating obligations under the 1954 Hague Convention during the Khmer Rouge regime.

<sup>89</sup> Sandoz *et al.*, *supra* note 26 at 1002-1003, ¶3517, footnote 37; and Toman, *supra* note 40 at 392.

<sup>90</sup> *Ibid.*

their territory or perpetrated by nationals.<sup>91</sup> Serious violations are defined as acts committed intentionally and in violation of the Convention or Second Protocol, namely, attacks on property under enhanced protection,<sup>92</sup> using such property or its immediate surroundings in support of military action, extensive destruction or appropriation of cultural property covered by general protection, making such property the object of attack, and theft, pillage or misappropriation of property under general protection.<sup>93</sup> Universal jurisdiction must be established for the first three of these serious violations.<sup>94</sup>

Unlike war crimes, crimes against humanity (of persecution) and genocide enable prosecution of gross violations of cultural rights perpetrated during armed conflict and belligerent occupation *and* peacetime. Recent jurisprudence in this area highlights the significant overlap between the protection these prohibitions afford cultural rights and cultural heritage.

The crime against humanity of persecution against political, racial or religious grounds was first articulated in Article 6(c) of the Charter of the International Military Tribunal, Nuremberg.<sup>95</sup> The Rome Statute extended it to include ‘any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender’ (Art.7(1)(h)) and defines persecution as the ‘intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity’ (Article 2(g)).<sup>96</sup> The ICTY Trial Chamber in *Kordić and Čerkez* found:

This act, when perpetrated with the requisite discriminatory intent, amounts to an attack on the very religious identity of a people. As such, it manifests a nearly pure expression of the notion of ‘crimes against humanity’, for all humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects.<sup>97</sup>

The ICTY has held that the attacks must be directed against a civilian population, be widespread or systematic, and perpetrated on discriminatory grounds for damage inflicted to cultural property to qualify as persecution.<sup>98</sup> This requirement is intended to ensure that it is crimes of a collective nature that are penalised because, a person is ‘victimised not because of his individual attributes but rather because of his membership of a targeted civilian population.’<sup>99</sup> Similarly, cultural property is protected not for its own sake, but because it represents a particular group.

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<sup>91</sup> Arts 15(2) and 16(1), Second Protocol.

<sup>92</sup> To attract enhanced protection cultural property must be (a) cultural heritage of the ‘greatest importance to humanity’; (b) protected adequately by a national legal and administrative measures recognising its ‘exceptional cultural and historic value and ensuring the highest level of protection’; and (c) not be used for military purposes or as a shield of military sites and the Party controlling the property must declare that it will not be used as such. The guarding of sites by armed custodians or police responsible for public order is deemed not to be a military purpose: Art.10, Second Hague Protocol

<sup>93</sup> Art.15(1), Second Protocol. The Summary Report of the Diplomatic Conference records drafters intended this provision to be consistent with Art.85, Additional Protocol I and the Rome Statute. However, serious concerns were raised about the initial draft particularly by the ICRC which questioned the omission of intentional attacks and pillage as war crimes, in: Diplomatic Conference on the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, *Summary Report*, (June 1999), at 6, para.26 and 27.

<sup>94</sup> Art.16(1)(c), Second Protocol.

<sup>95</sup> Annexed to the Agreement by United Kingdom, United States, France and USSR for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 82 UNTS 279.

<sup>96</sup> Art.5(h), ICTY Statute; Art.3(h), ICTR Statute; Art.2(h), Statute of the Special Court for Sierra Leone; Art.9, Statute of the Special Court for Cambodia; Art.3 (Religious Persecution) and Art.5, Law on the Establishment of Cambodian Extraordinary Chambers.

<sup>97</sup> *Kordić and Čerkez*, Trial Judgment, *supra* note 24, at paras.206 and 207.

<sup>98</sup> *Prosecutor v. Zoran Kupreškić et al*, Trial Judgment, Case No.IT-95-16-T, (14 January 2000), para.544; and *Prosecutor v. Tihomir Blašić*, Trial Judgment, Case No.IT-95-14-T, (30 March 2000), at para.207.

<sup>99</sup> *Prosecutor v. Duško Tadić*, Trial Judgment, No.IT-94-1-T (7 May 1997), at para.644.

Persecution requires a specific additional *mens rea* element over and above that needed for other crimes against humanity, namely a discriminatory intent ‘on political, racial or religious’ grounds’ (not necessarily cultural).<sup>100</sup> The ICTY has pointed out that persecution may be ‘acts rendered serious not by their apparent cruelty but by the discrimination they seek to instil within humankind.’<sup>101</sup>

The ICTY has found that the material element encompasses crimes against persons and crimes against property as long as it is accompanied by the requisite intent.<sup>102</sup> Under this provision, the tribunal has dealt with crimes against property in general and those specifically directed at cultural property. It has held that comprehensive destruction of homes and property may cause forced transfer or deportation and, if done discriminatorily, constitutes ‘the destruction of the livelihood of a certain population’ and therefore, persecution.<sup>103</sup> In *Blaškić*, the Trial Chamber convicted the defendant of the persecution which took ‘the form of confiscation or destruction’ by Bosnian Croat forces of ‘symbolic buildings ... belonging to the Muslim population of Bosnia-Herzegovina.’<sup>104</sup> The ICTY Trial Chamber has found that an act must reach the same level of gravity as the other crimes against humanity enumerated in Article 5 (Crimes against humanity) of the ICTY Statute, ‘but also include the denial of other fundamental human rights, provided they are of equal gravity or severity.’<sup>105</sup> The Appeals Chamber in *Blaškić* found that committing an act with the requisite intent is not sufficient, the act itself must ‘constitute the denial or infringement upon a fundamental right laid down in customary international law.’<sup>106</sup>

Several indictments brought before the ICTY for the wanton destruction or damage of cultural property related to religious or ethnic groups included charges of persecution and genocide. However, while such acts have been used to establish the *mens rea* of a defendant, that is, the discriminatory intent required for proving genocide and persecution. The targeting of cultural property may amount to *actus reus* in respect of the crime of persecution, but as explained below, the tribunal has not include such acts within the definition of genocide under Article 4 of the ICTY Statute and this interpretation has been confirmed by the International Court of Justice.

Article 4 the ICTY Statute contains the same definition of genocide as Article II of the Genocide Convention.<sup>107</sup> The acts must have been perpetrated with a specific intent or *dolus specialis*, that is, with the intent ‘to destroy, in whole or in part, a national, ethnic, racial or religious group as such...’<sup>108</sup> The ICTY has found that the *travaux préparatoires* of the Genocide Convention highlight that the list of groups contained in Article II ‘was designed more to describe a single phenomenon, roughly corresponding to what was recognised, before the Second World War, as “national minorities”, rather than to refer to several distinct prototypes of human groups.’<sup>109</sup> Furthermore, the Trial Chamber emphasised that it was not individual members of the group that were to be targeted but the group itself.<sup>110</sup>

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<sup>100</sup> Blaškić, Trial Judgment, *supra* note 98 at para.283; Prosecutor v. Radislav Krstić, Trial Judgment, Case No.IT-98-33, (2 August 2001), para.480; and Kordić and Čerkez, Trial Judgment, *supra* note 45, at paras.211 and 212.

<sup>101</sup> Blaškić, Trial Judgment, *supra* note 98 at para.227.

<sup>102</sup> *Ibid.*, para.233.

<sup>103</sup> Kupreškić *et al*, Trial Judgment, *supra* note 98, at para.631 (involving the massacre and destruction of homes in Ahmići).

<sup>104</sup> Blaškić, Trial Judgment, *supra* note 98, at paras.227-228.

<sup>105</sup> Krstić, Trial Judgment, *supra* note 100, at para.535.

<sup>106</sup> Prosecutor v. Tihomir Blaškić, Appeals Judgment, Case No.IT-95-14-A, Appeals Chamber, ICTY, (29 July 2004), at para.139.

<sup>107</sup> Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, in force 12 January 1951, UNGA Res.260A(III), 78 UNTS 277.

<sup>108</sup> Krstić, Trial Judgment, *supra* note 100, at para.480.

<sup>109</sup> *Ibid.*, at para.556. Cf. Crimes against humanity of persecution also includes political groups.

<sup>110</sup> *Ibid.*, at paras.551-553.

In *Krstić*, the defendant was charged with atrocities related to the fall of Srebrenica in mid-1995, and the ICTY Trial Chamber took the opportunity to re-examine the question of whether acts directed at the cultural aspects of a group constituted genocide as a crime in international law. It noted that:

The physical destruction of a group is the most obvious method, but one may also conceive of destroying a group through purposeful eradication of its culture and identity resulting in the eventual extinction of the group as an entity distinct from the remainder of the community.<sup>111</sup>

The tribunal observed that, unlike genocide, persecution was not limited to the physical or biological destruction of a group but extended to include ‘all acts designed to destroy the social and/or cultural bases of a group.’<sup>112</sup> However, the Trial Chamber found that the drafters of the Genocide Convention expressly considered and rejected the inclusion of the cultural elements in the list of acts constituting genocide, and the international community has consistently reaffirmed this position.<sup>113</sup> The Appeals Chamber in *Krstić* confirmed that the Genocide Convention and customary international law limited genocide to the physical or biological destruction of the group.<sup>114</sup> Nonetheless, the Trial Chamber in the *Krstić* used evidence of the destruction of mosques and the houses of Bosnian Muslims to prove the *mens rea* or the specific intent element of genocide.<sup>115</sup> This interpretation was referred to with approval by the International Court of Justice in 2007.<sup>116</sup>

International criminal tribunals from the IMT to the ICTY and ICTR have examined the issue of whether education or specialist knowledge is an aggravating factor in respect of accused persons like medical practitioners or scientists found guilty of torture or inhuman treatment, when determining sentence.<sup>117</sup> The International Criminal Tribunal for Rwanda found that: ‘It [was] particularly egregious that, as a medical doctor, [the defendant] took lives instead of saving them. He was accordingly found to have abused the trust placed in him in committing the crimes [of genocide and crimes against] of which he was found guilty.’<sup>118</sup> It may be argued that this conception of aggravating factor could extend to social scientists like anthropologists who engage in devising culturally specific counterintelligence measures which are found to constitute war crimes or crimes against humanity. To this end, codes of ethics of the relevant professional bodies provide guidance not only in respect of ethical standards but also the requirement of prior informed consent.

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<sup>111</sup> *Ibid.*, at para.574.

<sup>112</sup> *Ibid.*, at para.575.

<sup>113</sup> *Ibid.*, at paras.576ff. See Art.2, ICTR Statute; Art.6, Rome Statute; Art.9, Statute of the Special Court for Cambodia; and Art.4, Law on the Establishment of Cambodian Extraordinary Chambers.

<sup>114</sup> Prosecutor v. Radislav Krstić, Appeals Judgment, Case No.IT-98-33-A, (19 April 2004), para.25.

<sup>115</sup> Krstić, Trial Judgment, *supra* note 100, at para.580. See also Krstić, Appeals Judgment, *ibid.*, dissenting judgment of Judge Mohamed Shahabuddeen, at para.50.

<sup>116</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 26 February 2007, paras. 191-201, especially para.194, at < <http://www.icj-cij.org/docket/files/91/13685.pdf> > (viewed 9/03/09). In its submission during the Merits phase, the applicant, Bosnia and Herzegovina presented only two witnesses to the Court. One of which was the expert testimony of Andrés J. Riedlmayer in respect of the destruction of cultural, religious and architectural heritage of Bosnia and Herzegovina.<sup>116</sup> He had previously given evidence in the Milošević case before the ICTY.<sup>116</sup> His evidence used to prove the specific intent element of genocide and which distinguishes it from other international crimes.

<sup>117</sup> Trial of Karl Brandt et al (Medical case), Case I, US Military Tribunal No.1, in UNWCC, *Law Reports of the Trial of War Criminals*, (1997), vol.IV, at 91-93; and vol.VII, at 49-53; Cf. Prosecutor v. Blagoje Simić *et al*, Appeals Judgment, Case No.IT-95-9-A, ICTY, (28 November 2006), paras.270-274; Prosecutor v. Milomir Stakić, Appeals Judgment, Case No.IT-97-24-A, ICTY, (22 March 2006), paras.414-416.

<sup>118</sup> Prosecutor v. Gerard Ntakirutimana, Trial Judgment, Case No.ICTR-96-10, (21 February 2003), para.910.

#### **4. Codes of Ethics and the Response of Professional Bodies**

Major international and national professional organisations in the cultural field usually have a voluntary code of ethics to which members are required to adhere.<sup>119</sup> Over the years, these codes have been amended to cover a range of issues pertinent to the concerns raised by this paper including illicit trade in cultural goods, human rights including the issue of prior informed consent and so forth. These bodies are also responding to the challenges raised by their disciplines' engagement in theatres of war and occupation by establishing taskforces and adopting resolutions. All of these initiatives are relevant, not only for the reasons raised in the preceding section concerning defining the accepted ethical standards within a discipline. Rather, these professional bodies have had a lengthy pedigree of providing input and actively shaping the legal protection of human rights (including cultural rights) and cultural heritage in the international and domestic spheres. So their codes and concerns point the way to potential future changes in the law.

It is well documented that armed conflict and occupation have a devastating impact on the material culture of the effected territory, in particular, elevated volumes of illicitly removed cultural goods coming onto the international market.<sup>120</sup> The codes of ethics of professional bodies in the museums most extensively address the issue of illicit trade in cultural goods and obligations arising in respect of armed conflict. The International Council of Museums (ICOM) *Code of Ethics for Museums* lists and links the relevant UNESCO cultural heritage instruments, including the 1954 Hague Conventions and two protocols, and states that they must be 'taken as standards in interpreting' the code.<sup>121</sup> The museum and archaeological bodies of countries which host the large art centres have similar provisions in their codes.<sup>122</sup>

The codes of ethics of professional organisations in the field of anthropology, archaeology and museum sector address the requirement to liaise with the communities from which the cultural heritage is derived.<sup>123</sup> These concerns tie directly into protection and enjoyment of the human rights

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<sup>119</sup> For details and links to these codes of ethics see <[http://icom.museum/other-codes\\_eng.html](http://icom.museum/other-codes_eng.html)> (viewed 10/04/09).

<sup>120</sup> For example, in respect of Iraqi archaeological materials see N. Brodie, 'The Western Market in Iraqi Antiquities', in Rothfield (ed.), *supra* note 2 at 63.

<sup>121</sup> ICOM Code of Ethics for Museums (2006) (ICOM Code), para.7.2, at <<http://icom.museum/ethics.html#intro>> (viewed 10/04/09). See also ICOMOS, 'Charter for the Protection and Management of Archaeological Heritage' (1990), at <[http://www.international.icomos.org/charters/arch\\_e.htm](http://www.international.icomos.org/charters/arch_e.htm)> (viewed 10/04/09); and its 'International Charter for the Conservation and Restoration of Monuments and Sites' (1964) (Venice Charter), at <[http://www.international.icomos.org/charters/venice\\_e.htm](http://www.international.icomos.org/charters/venice_e.htm)> (viewed 10/04/09).

<sup>122</sup> See for example, Museums Association, 'Code of Ethics for Museums: Ethical Principles for all who work for or govern museums in the UK', (2007), at 14-16 (MA Code), at <[http://www.museumsassociation.org/asset\\_arena/text/07/codeofethics\\_2007.pdf](http://www.museumsassociation.org/asset_arena/text/07/codeofethics_2007.pdf)> (viewed 10/04/09); European Association of Archaeologists, 'Code of Practice' (2000), at <[http://www.e-a-a.org/EAA\\_Codes\\_of\\_Practice.pdf](http://www.e-a-a.org/EAA_Codes_of_Practice.pdf)> (viewed 10/04/09); American Association of Museums, 'Standards regarding Archaeological Material and Ancient Art', (July 2008) (AAM Code), at <<http://www.aam-us.org/museumresources/ethics/upload/Standards%20Regarding%20Archaeological%20Material%20and%20Ancient%20Art.pdf>> (viewed 10/04/09); and Archaeological Institute of America, Code of Ethics, adopted 1990 and amended 1997 (AIA Code), at <[http://www.archaeological.org/pdfs/AIA\\_Code\\_of\\_EthicsA5S.pdf](http://www.archaeological.org/pdfs/AIA_Code_of_EthicsA5S.pdf)> (viewed 10/04/09). See also Statement of Archaeological Institute of America *et al* before the US Senate Foreign Relations Committee, in support of Ratification of 1954 Hague Convention, 15 April 2008, at <<http://www.culturalheritagelaw.org/advocacy/1954%20Hague%20Testimony.doc>> (viewed 10/04/09).

<sup>123</sup> ICOM Code, Section 6; MA Code, Section 7; World Archaeological Congress, First Code of Ethics, (1990) (WAC-2 Code), at <[http://www.worldarchaeologicalcongress.org/site/about\\_ethi.php](http://www.worldarchaeologicalcongress.org/site/about_ethi.php)>, (viewed 10/03/09); AIA, 'Code of Professional Standards', adopted 1994 and amended 1997 and 2008 (AIA Professional Code), Part II, at <[http://www.archaeological.org/pdfs/AIA\\_Code\\_of\\_Professional\\_StandardsA5S.pdf](http://www.archaeological.org/pdfs/AIA_Code_of_Professional_StandardsA5S.pdf)>, (viewed 10/04/09); American Anthropological Association, 'Code of Ethics' (2009) (AAA Code 2009) <<http://www.aaanet.org/issues/policy-advocacy/upload/AAA-Ethics-Code-2009.pdf>> (viewed 10/4/09); and Society for American Archaeology, 'Principles of Archaeological Ethics', (1996) (SAA Code), Principle 4, at <<http://www.saa.org/AbouttheSociety/PrinciplesofArchaeologicalEthics/tabid/203/Default.aspx>> (viewed 10/04/09).

especially cultural rights of these communities and their members. In the context of the issues raised by this paper the question of informed consent is of importance for heritage professionals engaging in fieldwork. To date, the American Anthropological Association's Code of Professional Standards originally adopted in 1971 and amended again in 2009 most fully addresses this question in the field of anthropology in respect of consent and privacy/anonymity of the informant.<sup>124</sup> Its treatment of consent should be compared with the Nuremberg Code arising from the prosecuting of Nazi doctors before the US Military Tribunal at the end of the Second World War,<sup>125</sup> and obligations contained in Article 7 ICCPR ('no one shall be subjected without his free consent to medical or scientific experimentation'). More broadly, it should be placed in the context of ongoing work within the United Nations and its agencies on 'free prior informed consent' (FPIC) particularly in respect of indigenous peoples and development.

The engagement of forensic archaeologists and physical anthropologists in recovering human remains and evidence from mass graves following recent atrocities precipitated the UN Guidelines for the Conduct of UN Inquiries in Allegations of Mass Graves (Minnesota Protocols).<sup>126</sup> More generally, the World Archaeological Congress has adopted in 1986 the Vermillion Accord on Human Remains which requires that 'respect for the mortal remains of the dead shall be accorded to all, irrespective of origin, race, religion, nationality, custom and tradition' and that the wishes of the deceased where known, or the local community and relatives be respected when 'possible, reasonable and lawful'.<sup>127</sup> These efforts should be understood in relation to broader human rights developments in this area. The UN Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity provide that human remains must be returned to the family as soon as they are identified.<sup>128</sup> Beyond this right to know, the Inter-American Court of Human Rights has held that for indigenous communities and other groups, the burial and care of ancestral remains is a core component of their cultural and religious observance.<sup>129</sup> When ordering the repatriation of human remains in the *Moiwana Community Case*, it noted relevant customary law in assessing the impact of the inability of the community to bury the victims of a massacre according to their proscribed practices.<sup>130</sup>

Finally, some professional organisations have recently addressed the engagement of their disciplines by national militaries and PMSCs. The World Archaeological Congress established a dedicated Archaeologists and War Taskforce in 2003 to investigate the ethical, social and political issues arising from the engagement of archaeologists in armed conflicts which is currently drafting its first report,

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<sup>124</sup> Compare AAA Code 2009 and 'Statement on Ethics: Principles of Professional Responsibility', adopted 1971 and amended 1986, at <<http://www.aaanet.org/stmts/ethstmnt.htm>> (viewed 10/04/09). See also American Sociological Association, Code of Ethics, (1999), (ASA Code), Part 11: Confidentiality, para.11.04 (c) concerning consent; and Part 12: Informed Consent, at <<http://www.asanet.org/galleries/default-file/Code%20of%20Ethics.pdf>> (viewed 10/04/09).

<sup>125</sup> Reproduced in E. Shuster, 'Fifty Years Later: The Significance of the Nuremberg Code', 337(20) *The New England Journal of Medicine* (1997) 1436.

<sup>126</sup> Sales No.E.DPI/1710 (1995), at <<http://www.icrc.org/themissi.nsf/b5a5eed1a93ca649c12569dd00505aca/ee82c7e78d0175d3c1256b02002984df!OpenDocument>> (viewed 10/04/09).

<sup>127</sup> WAC, 'The Vermillion Accord on Human Remains', (1989), paras.1-3, at <[http://www.worldarchaeologicalcongress.org/site/about\\_ethi.php#code2](http://www.worldarchaeologicalcongress.org/site/about_ethi.php#code2)> (viewed 10/04/09).

<sup>128</sup> UN Doc.E/CN.4/2005/102/Add.1, Principle 4. See Art.24(3) of the International Convention for the Protection of All Persons from Enforced Disappearance, GA Res.61/177, 20 December 2006, UN Doc.A/RES/61/177; Report of the independent expert to update the Set of Principles to Combat Impunity, Diane Orentlicher, UN Doc.E/CN.4/2005/102 (2005), para.63; Study of the Right to Truth: Report of the Office of the United Nations Commissioner for Human Rights, UN Doc.E/CN.4/2006/91 (2006), para.59; *Bámaca Velasquez v. Guatemala (Reparations)* (2002) 91 I./A. Ct. H.R. (ser.c), para.81, 82 and 96; and *Staselovich v. Belarus*, communication No.887/1999, para.11 (2003).

<sup>129</sup> *Moiwana Community v Suriname (Judgment)* (2005) 124 I./A. Ct. H.R. (ser.C), Separate Opinion of Judge Cançado Trindade, paras.47ff.

<sup>130</sup> *Ibid.*



and the organisation's next congress will be dedicated to this theme.<sup>131</sup> The American Anthropological Association has engaged these issues since the 1960s with its 'Statement on Problems of Anthropological Research and Ethics' which stated in part: 'Except in the event of a declaration of war by the Congress, academic institutions should not undertake activities or accept contracts in anthropology that are not related to their normal functions of teaching, research, and public service. They should not lend themselves to clandestine activities.'<sup>132</sup> The AAA commissioned a report on the engagement of anthropology by military and security agencies in 2007,<sup>133</sup> and has amended its Code of Ethics in 2009 to include: 'Anthropologists should not work clandestinely or misrepresent the nature, purpose, intended outcome, distribution or sponsorship of their research.'<sup>134</sup> It has issued advocacy statement in respect of the US Army's Human Terrain System, stating that it 'places anthropologists, as contractors with the US military, in settings of war, for the purpose of collecting cultural and social data for use by the US military' and which concludes that it raises serious ethical concerns for anthropologists and the Executive Board expressed its disapproval of the program.<sup>135</sup> The AAA has also issued a statement on torture in 2007 addressed to the US Congress and President advising that it: '[U]nequivocally condemns the use of anthropological knowledge as an element of physical and psychological torture; condemns the use of physical and psychological torture by U.S. Military and Intelligence personnel, subcontractors, and proxies'.<sup>136</sup>

## 5. Some Questions and Observations

This paper by its nature, and like the PRIV-WAR project as a whole, raises more questions than can be answered by existing international law. Yet, I have sought to highlight also that as in the past, international law has proved versatile, flexible and organic in its ability to adapt to new challenges. However, the impact of private military and security contractors on cultural rights and cultural heritage and the recruitment of heritage professionals by the military and PMSCs in recent conflicts

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<sup>131</sup> Email communication with Yannis Hamilakis, Chair, WAC Taskforce on Archaeologists and War, (7 April 2009). See also at <[http://www.worldarchaeologicalcongress.org/site/active\\_war.php](http://www.worldarchaeologicalcongress.org/site/active_war.php)> (viewed 10/04/09).

<sup>132</sup> Reproduced at <<http://www.aaanet.org/stmts/ethstmnt.htm>> (viewed 10/04/09). See also CEAUSSIC Final Report, *supra* note 12, at 4-7.

<sup>133</sup> CEAUSSIC Final Report, *ibid*.

<sup>134</sup> The amendments also include the following provision: 'There are circumstances where disclosure restrictions are appropriate and ethical, particularly where those restrictions serve to protect the safety, dignity or privacy of participants, protect cultural heritage or tangible and intangible cultural or intellectual property'. The AAA has set up a taskforce (2008-2010) to overhaul its entire code, at <<http://www.aaanet.org/issues/policy-advocacy/Task-Force-Members-Named-for-Comprehensive-Ethics-Review.cfm>> (viewed 10/04/09).

<sup>135</sup> AAA Executive Board Statement on the Human Terrain System Project, (31 October 2007), at <<http://www.aaanet.org/issues/policy-advocacy/Statement-on-HTS.cfm>> (viewed 10/04/09), the conclusion in full states:

In light of these points, the Executive Board of the American Anthropological Association concludes (i) that the HTS program creates conditions which are likely to place anthropologists in positions in which their work will be in violation of the AAA Code of Ethics and (ii) that its use of anthropologists poses a danger to both other anthropologists and persons other anthropologists study. Thus the Executive Board expresses its disapproval of the HTS program. In the context of a war that is widely recognized as a denial of human rights and based on faulty intelligence and undemocratic principles, the Executive Board sees the HTS project as a problematic application of anthropological expertise, most specifically on ethical grounds. We have grave concerns about the involvement of anthropological knowledge and skill in the HTS project. The Executive Board views the HTS project as an unacceptable application of anthropological expertise. The Executive Board affirms that anthropology can and in fact is obliged to help improve U.S. government policies through the widest possible circulation of anthropological understanding in the public sphere, so as to contribute to a transparent and informed development and implementation of U.S. policy by robustly democratic processes of fact-finding, debate, dialogue, and deliberation. It is in this way, the Executive Board affirms, that anthropology can legitimately and effectively help guide U.S. policy to serve the humane causes of global peace and social justice.

<sup>136</sup> AAA Business Resolution No.2, 'Torture' (2006), at <[http://dev.aaanet.org/press/AAA\\_Bus\\_Res\\_2.htm](http://dev.aaanet.org/press/AAA_Bus_Res_2.htm)> (viewed 10/04/09).

and ongoing occupations expose a number of gaps in existing international humanitarian law and HR Law which merit further consideration.

First, the emphasis in existing international humanitarian law on weapons as ‘hardware’, with limited or no regulation of measures deployed to against combatants and civilian populations which is intangible such as counterintelligence strategies designed using knowledge derived from anthropological and sociological fieldwork.

Second, and related to the above point, reconsideration of the definition of torture in international humanitarian law, HR and international criminal law in the light of techniques deliberately designed to be culturally specific.

Third, whether the aggravating factor of profession considered during the sentencing phase for war crimes, crimes against humanity and genocide should be extended to include social scientists such anthropologists, archaeologists and sociologists. In addition, whether the prior informed consent requirement in respect of experimentation should also cover fieldwork carried out by such scientists.

Fourthly, the Montreaux Document on the good practice of states when dealing with PMSCs to ensure personnel are sufficiently trained prior deployed and on an ongoing basis on ‘religious ... cultural issues, and respect for the local population’.<sup>137</sup> To this end, the obligation contained in Article 7(1) of the 1954 Hague Convention ‘to introduce in time of peace into their military regulations or instructions such provisions as may ensure observance of the present Convention, and to foster in the members of their armed forces a spirit of respect for the culture and cultural property of all peoples’ should be extended to PMSCs.<sup>138</sup> States engaging PMSCs should ensure that the relevant contracts reflect this obligation. However, this does not mean that states can contracted out of or onwards their responsibilities (and liabilities) in this field.

Finally, reinforcement of the positive role that heritage professionals and social scientists can have during armed conflict and belligerent occupation by ensuring that the cultural rights (and all human rights) and protection of cultural heritage afforded under current international humanitarian law and HR Law are observed for the benefit of the right-holders, interests of the international community and maximising the success of post-conflict reconciliation and reconstruction. To this end, the distinction between engaging persons from these disciplines to ensure that its military properly observes such obligations and their retention for the purpose of maximising the chances of military success *per se* needs to be more clearly demarcated.<sup>139</sup>

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<sup>137</sup> Montreaux Document on pertinent international legal obligations and good practices for States related to private military and security companies in armed conflict, 17 September 2008, UN Doc.S/2008/636, at 14, 20 and 25.

<sup>138</sup> For a survey of military manuals: see Henckaerts and Doswald-Beck, *supra* note 44 at vol.II, Part 2, 782-786 and 793-796; and US Army Graphic Training Aid 41-01-002, Civil Affairs Arts, Monuments and Archives Guide, (2005), <[http://www.au.af.mil/au/awc/awcgate/army/gta41-01-002\\_arts\\_monuments\\_and\\_archives.pdf](http://www.au.af.mil/au/awc/awcgate/army/gta41-01-002_arts_monuments_and_archives.pdf)> (viewed 10/04/09) (which lists as applicable law the 1907 Hague IV Convention, 1919 Treaty of Versailles in respect of return and restitution, 1935 Washington Treaty covering protection in war and peace time, the 1954 Hague Convention and First Protocol. Significantly, the US Senate only approved ratification of the 1954 Hague Convention in September 2008).

<sup>139</sup> The position is further confused with the lack of uniformity in government departments in respect of funding for such arrangements: see J. D. Kila, ‘The Role of NATO and Civil Military Affairs’, in Rothfield (ed.), *supra* note 2 at 175.