

# Chapter 2

## Setting the Context

### I An Overview

When discussing the international legal protection of cultural property in armed conflict, the following subjects warrant immediate attention: the meaning of the term ‘cultural property’, the importance of cultural property, the impact of armed conflict on cultural property and the necessity of justice for wilful attacks directed against cultural property. With respect to the first subject, as the effectiveness of international legal instruments granting protection to cultural property is heavily dependent on a clear understanding of exactly what property they apply to and to what extent, it is essential to define unambiguously the term ‘cultural property’. However, answering the threshold question of what property qualifies as ‘cultural property’ and how wide a spectrum of such property is eligible for international legal protection, is a priority challenge for international law purportedly designed to protect cultural property.<sup>1</sup> The

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1 For discussion of the definition of cultural property see, eg, Sharon Williams, *The International and National Protection of Movable Cultural Property: A Comparative Study* (1978) 1; Karen Detling, ‘Eternal Silence: The Destruction of Cultural Property in Yugoslavia’ (1993) 17 *Maryland Journal of International Law and Trade* 41, 45-49; Stephanie Forbes, ‘Securing the Future of Our Past: Current Efforts to Protect Cultural Property’ (1996) 9 *Transnational Lawyer* 235, 238; Elissa Myerowitz, ‘Protecting Cultural Property during a Time of War: Why Russia Should Return Nazi-Looted Art’ (1997) 20 *Fordham International Law Journal* 1961, 1966; Claudia Caruthers, ‘International Cultural Property: Another Tragedy of the Commons’ (1998) 7 *Pacific Rim Law and Policy Journal* 143, 146-147; Frank Fechner, ‘The Fundamental Aims of Cultural Property Law’ (1998) 7 *International Journal of Cultural Property* 376, 377; Markus Müller, ‘Cultural Heritage Protection: Legitimacy, Property, and Functionalism’ (1998) 7 *International Journal of Cultural Property* 395, 398-402; Roger O’Keefe, ‘The Meaning of “Cultural Property” under the 1954 Hague Convention’ (1999) XLVI *Netherlands International Law Review* 26; Janet Blake, ‘On Defining the Cultural Heritage’ (2000) 49 *International and Comparative Law Quarterly* 61; Manlio Frigo, ‘Cultural Property v Cultural Heritage: A “Battle of Concepts” in International Law?’ (2004) 86 *International Review of the Red Cross* 367, 367, 375-76.

need to seek a working definition of cultural property has been one of the major pitfalls in implementing multilateral treaties covering the protection of cultural property.<sup>2</sup> For instance, the 1954 *Convention*, the principal international legal instrument on the protection of cultural property in times of armed conflict, together with the *Regulations* for its execution and the two *Protocols* that supplement it (the 1954 *Protocol* and the 1999 *Protocol*), form a true code on the subject. Yet the Convention has been an almost forgotten instrument of IHL, partly because of a ‘widespread though rarely confessed confusion over the nature and extent of the “cultural property” to which it applies’.<sup>3</sup> The confusion is amplified by the parallel existence of the imprecise and differing definitions of cultural property given in other international instruments governing the protection of cultural property.

Just as defining what is meant by the term ‘cultural property’ is fraught with difficulties, explaining why cultural property is considered important – that is, what significance is attached to it so as to distinguish it from other property and to legitimise its special international legal protection – is also a hurdle which must be overcome. Notwithstanding this, there is no disagreement about the necessity for preservation of cultural property. It is widely recognised that cultural property is property of a unique kind, the value of which transcends space and time. Because of the global and intergenerational interest in cultural property, and the various dangers to which cultural property is continuously exposed, protection of cultural property does not end at national borders but requires the concerted efforts of the entire international community. While everyone should be entitled to enjoy cultural property, each person should also have responsibility to protect it for his or her own benefit and for the benefit of future generations. This responsibility should firmly stand in peacetime and should not stop in times of armed conflict when cultural property is especially vulnerable.

As it is inherently destructive in nature, armed conflict always poses a danger to the survival of cultural property. Immovable cultural property is particularly at risk. While some of the damage is collateral, at times cultural property is targeted wilfully. Throughout history cultural property has been targeted in armed conflict for various reasons, such as the marking of victory, demoralisation of the enemy and enforcement of ethnic cleansing. Yet despite the international rules proscribing the deliberate targeting of cultural property which is not justified by military necessity, blatant attacks on cultural property go largely unpunished. They are accompanied by a centuries-long impunity at both national and international level. Save for a few exceptions, States have been perennially reluctant to prosecute war crimes involving cultural property. Cultural destruction has also been enveloped in silence at the international level. It was not until recently that the rules protecting immovable cultural property in armed conflict have been enforced by international criminal courts.

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2 See Williams, *ibid.*

3 O’Keefe, above n 1, 27.