

Pablo Gavira Díaz

# The Liability for Attacks against Immovable Cultural Objects in International Criminal Law

The Need for Reform of the Existing Gaps  
in Individual Criminal Liability



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*A la memoria de mis abuelos Pepe, Rosario y Antonio,  
cuyo recuerdo permanece vivo en mí*



## Foreword

In 2015, the extensive and deliberate destruction of cultural objects by ISIS in Syria and Iraq caught my attention to this very subject. Since then, my academic work has been mostly consisted in trying to seek answers to the questions of how and why cultural objects are time and again targeted, especially in the context of an armed conflict. This interest is illustrated by the publication of the present study, which is substantially based on my doctoral dissertation. With some exceptions, the core of the present study shows the product of almost five years of prolific work as a doctoral student at the University of Kiel, Germany.

It is a genuine pleasure to express my deepest appreciation and gratitude to my *Doktormutter* Prof. Dr. Kerstin von der Decken, Director of the Walther Schücking Institute for International Law (WSI), along with Prof. Dr. Andreas von Arnould and Prof. Dr. Nele Matz-Lück. Without Prof. von der Decken's guidance and constant support this study would not have been possible. Her meticulous scrutiny and scholarly advice have helped me to a great extent to accomplish this task. Especially noteworthy was also the role of Prof. von Arnould, whose combination of sensitivity and academic insight into the topic helped to improve the quality of the present study.

I would like to thank the WSI, which provides for excellent research facilities, as well as my doctoral colleagues, the student assistants, the library and the administration personnel for their help and kindness. In addition, I would like to acknowledge helpful suggestions from my colleagues at the doctoral seminars.

I wish to extend my special thanks to the Graduate Center (*Graduiertenzentrum*) and the International Center at the University of Kiel for their generous financial assistance during my doctoral studies. This work would not materialize without their support. I would like to recognize the essential roles of Dr. Sabine Milde and Jan Bensien.

A debt of gratitude is also owed to my friends in and outside the University of Kiel for their loyalty and affection. I also want to thank Benjamin Chibuye for his work as a language editor and his assistance with the last touches of my doctoral dissertation.

Last but not least, I would like to acknowledge with gratitude the support, understanding, patience and love of my family – my parents, Jesús

*Foreword*

and Concha; my brother, Javier; and my partner, Alica, with whom I share joys and sorrows, the best companion one could wish for.

Kiel, in January 2022

*Pablo Gavira Díaz*



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## List of Abbreviations

AAL	Art Antiquity and Law
ABiH	Army of Bosnia and Herzegovina
ADEE	Anuario de Derecho Eclesiástico del Estado
AEDI	Anuario Español de Derecho Internacional
AFDI	Annuaire Français de Droit International
AFL Rev	Air Force Law Review
AJIL	American Journal of International Law
AMDI	Anuario Mexicano de Derecho Internacional
Art.	Article
Arts.	Articles
Asian JIL	Asian Journal of International Law
ASIL	American Society of International Law
AQIM	Al-Qaeda in the Islamic Maghreb
ASPI	Australian Strategic Policy Institute
Boston UIntlJ	Boston University International Law Journal
Brook JIntlL	Brooklyn Journal of International Law
Brook LRev	Brooklyn Law Review
Buff JIntlL	Buffalo Journal of International Law
Cal WIntlJ	California Western International Law Journal
Cardozo Arts&EntLJ	Cardozo Arts & Entertainment Law Journal
Cardozo PubLPol&EthicsJ	Cardozo Public Law, Policy, and Ethics Journal
Case WResJIntlL	Case Western Reserve Journal of International Law
Cd.	(UK Government) Command paper (1900-1918)
CEFD	Cuadernos Electrónicos de Filosofía del Derecho
CETS	Council of Europe Treaty Series
Chap.	Chapter
Chi JIntlL	Chicago Journal of International Law
Chinese JIL	Chinese Journal of International Law
CLF	Criminal Law Forum
Cmd.	(UK Government) Command paper (1919-1956)
CoE	Council of Europe

*List of Abbreviations*

Colo JIntlEnvtlL&Pol	Colorado Journal of International Environmental Law & Policy
Colum JTransnatL	Columbia Journal of Transnational Law
Compa Legi	Comparative Legilinguistics
Cornell IntlJ	Cornell International Law Journal
DCC	Document Containing the Charges
Denv JIntlL&Pol	Denver Journal of International Law and Policy
De Paul JArtTech&IntPropL	De Paul Journal of Art, Technology & Intellectual Property Law
diss. op.	dissenting opinion
Doc.	Document
Docs.	Documents
ECCC	Extraordinary Chambers in the Court of Cambodia
ECOSOC	United Nations Economic and Social Council
Ed.	Edition
ed.	editor
eds.	editors
e.g.	exempli gratia (for example)
EJIL	European Journal of International Law
ETS	European Treaty Series
et seq.	et sequentes (and the following)
EU	European Union
fn	footnote
Ga JIntl&CompL	Georgia Journal of International and Comparative Law
Geo JIntlL	Georgetown Journal of International Law
GSP	Genocide Studies and Prevention: An International Journal
Harv HmRtsJ	Harvard Human Rights Journal
Harv IntlLJ	Harvard International Law Journal
Harv IntlRev	Harvard International Review
Harv LRev	Harvard Law Review
Hastings LJ	Hastings Law Journal
HGS	Holocaust and Genocide Studies
HumRtsQ	Human Rights Quarterly

HuV	Humanitäres Völkerrecht
HVO	Croatian Defense Council (Hrvatsko vijeće obrane)
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICCROM	International Centre for the Study of the Preservation and Restoration of Cultural Property
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICLQ	The International and Comparative Law Quarterly
ICLR	International Community Law Review
IntCrimLRev	International Criminal Law Review
ICOM	International Council of Museums
ICOMOS	International Council on Monuments and Sites
ICRC	International Committee of the Red Cross
ICSID	International Centre for Settlement of Investment Disputes
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
i.e.	id est (that is)
IEEE	Instituto Español de Estudios Estratégicos
I•CON	International Journal of Constitutional Law
IntJCultProp	International Journal of Cultural Property
IJCT	International Journal of the Classical Tradition
IJHS	International Journal of Heritage Studies
IJIL	Indonesian Journal of International Law
IJLI	International Journal of Legal Information
IntJMinority&GroupRts	International Journal on Minority and Group Rights
IJPL	Italian Journal of Public Law
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
IMT	International Military Tribunal
Int Law	The International Lawyer

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IntlLStudies	International Law Studies
IntlRevPenalL	International Review of Penal Law
IRRC	International Review of the Red Cross
ISIS	Islamic State
Isr YBHumRts	Israel Yearbook on Human Rights
It YBIL	Italian Yearbook of International Law
IUCN	International Union for Conservation of Nature and Natural Resources
JArtsMgmtL&Soc	The Journal of Arts Management, Law, and Society
JC&SL	Journal of Conflict & Security Law
JEMAHS	Journal of Eastern Mediterranean Archaeology & Heritage Studies
JICJ	Journal of International Criminal Justice
JILPAC	Journal of International Law of Peace and Armed Conflict
JMarshall LRevIntellPropL	The John Marshall Law Review of Intellectual Property Law
JNSLP	Journal of National Security Law & Policy
JPIA	Journal of Public & International Affairs
JTHM	Journal of Tourism and Hospitality Management
L&Inequality	Law & Inequality: A Journal of Theory and Practice
LDP	Letra Derecho Penal
lit.	letter
LJIL	Leiden Journal of International Law
LNTS	League of Nations Treaty Series
Max Planck UNYB	Max Planck Yearbook of United Nations Law
Md JIntlL	Maryland Journal of International Law
MESAB	Middle East Studies Association Bulletin
Mich JIntlL	Michigan Journal of International Law
MICT	International Residual Mechanism for Criminal Tribunals
MilLRev	Military Law Review
Minn JIL	Minnesota Journal of International Law
MINUSMA	The United Nations Multidimensional Integrated Stabilization Mission in Mali
MJIL	Melbourne Journal of International Law

NATO	North Atlantic Treaty Organization
NILR	Netherlands International Law Review
No.	Number
Nos.	Numbers
NQHR	Netherlands Quarterly of Human Rights
NYIL	Netherlands Yearbook of International Law
NYUJIntlL&Pol	New York University Journal of International Law and Politics
NZ YBIL	New Zealand Yearbook of International Law
OAS	Organization of American States
OJEU	Official Journal of the European Union
Osgoode Hall LJ	Osgoode Hall Law Journal
p.	page
Pace EnvntLRev	Pace Environmental Law Review
para.	paragraph
paras	paragraphs
Peace PORev	Peace Processes Online Review
Penn SILRev	Penn State International Law Review
pp.	pages
RDI	Revue de Droit International
RECIEL	Review of European Community & International Environmental Law
REEI	Revista Electrónica de Estudios Internacionales
ref.	reference
RERI	Revista Española de Relaciones Internacionales
Res.	Resolution
RGDIP	Revue Générale de Droit International Public
RHDI	Revue Hellénique de Droit International
Rn.	Randnummer
Rom JIL	Romanian Journal of International Law
Sant A&CLRev	Santander Art and Culture Law Review
San Diego ILJ	San Diego International Law Journal
Sess.	Session
SFOR	Stabilization Force in Bosnia and Herzegovina
SJILC	Syracuse Journal of International Law and Commerce

*List of Abbreviations*

Suffolk TransLJ	Suffolk Transnational Law Journal
SYBIL	Singapore Yearbook of International Law
Temple Intl&CompLJ	Temple International and Comparative Law Journal
TEU	Treaty on European Union
Tex ILJ	Texas International Law Journal
TFEU	Treaty on the Functioning of the European Union
TIAS	Treaties and Other International Acts Series
Tulsa JComp&IL	Tulsa Journal of Comparative and International Law
UCDavis JIL&Pol	U.C. Davis Journal of International Law & Policy
UKTS	United Kingdom Treaty Series
UN	United Nations
UNDU	United Nations Detention Unit
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNESCO Courier	The UNESCO Courier: A Window Open on the World
UNFCCC	United Nations Framework Convention on Climate Change
UN GA	General Assembly of the United Nations
UNRIAA	Reports of International Arbitral Awards of the United Nations
UN SC	Security Council of the United Nations
UNSW	University of New South Wales
UNTAET	United Nations Transitional Administration in East Timor
UNTS	United Nations Treaty Series
USA	United States of America
USSR	Union of Soviet Socialist Republics
Vand JTransL	Vanderbilt Journal of Transnational Law
Vic UWLRev	Victoria University of Wellington Law Review
Vol.	Volume
Wis ILJ	Wisconsin International Law Journal
WUM	World Unity Magazine
Yale HumRts&DevLJ	Yale Human Rights and Development Law Journal
Yale JIL	Yale Journal of International Law

*List of Abbreviations*

YBILC	Yearbook of the International Law Commission
YIHL	Yearbook of International Humanitarian Law





## General Introduction

The liability for attacks against cultural objects in international criminal law gained recognition principally since the establishment of the ICTY in 1993. The activities of the Tribunal included *inter alia* the conviction of several defendants for attacks against cultural and religious buildings, provided that the offence constituted a serious violation of international humanitarian law, and that it took place after 1991 in the territory of the former Yugoslavia. This approach had a great influence during the preparatory works of the Rome Statute of the ICC, which was conferred with jurisdiction over attacks against protected institutions perpetrated in the event of an international or a non-international armed conflict. As of January 2022, the Court has only convicted one individual for intentionally directing attacks against cultural and religious sites in Mali, while two additional cases dealing with the same offence are currently on trial. It is thus clear that international criminal law deems attacks against protected objects in armed conflicts as a serious offence which cannot go unpunished, as affirmed by the former Prosecutor of the ICC Fatou Bensouda.

Typically, serious offences directed towards monuments and religious buildings occur in the event of an armed conflict. It is in this context that several international instruments have been adopted with a view to governing the conduct of belligerents in respect of preserving, to the extent possible, cultural objects during hostilities. Nevertheless, the demolition of the giant Buddhas of Bamiyan in 2001 was one of the first indications that attacks against distinctive edifices are not always covered by the laws of armed conflict. This offence raised, and continue to raise, questions in so far as the same act is deemed as a war crime in an armed conflict and, under certain circumstances, could also be considered as a crime against humanity. Therefore, at the international level, there appears to be a gap when it comes to offences against protected sites outside an armed conflict. Whereas in the latter context there are several international instruments adopted with the purpose of providing safeguard and protection of heritage sites of special importance, none of them impose legally enforceable rules. Consequently, such measures as well as offences committed against cultural sites are defined by the domestic legislation of the State on which the object is located.

It is worth mentioning that, in 2017, the CoE Convention on Offences relating to Cultural Property was adopted with a view to preventing and combating, among other offences, the destruction of cultural property. This text comes into force on 1 April 2022, and it applies principally in time of peace, even though the Preamble to the Convention suggests that it does not cease to apply in the event of an armed conflict. This notwithstanding, the CoE Convention on Offences relating to Cultural Property will be accordingly analysed along with instruments providing protection to cultural objects against attacks in time of peace.

The demolition of the Buddhas did not seem to be a one-time event. The terrorist cell which attacked Barcelona in August 2017 aimed also at blowing up the Sagrada Familia, a minor basilica part of a UNESCO World Heritage Site. The failed attack raised the same question that followed the destruction of the giant Buddhas: are cultural objects duly protected against attacks in time of peace? In addition, the issue becomes more challenging if one takes into account that most of the perpetrators of the attack were raised in Spain. In this respect, the Spanish *Estrategia de Seguridad Nacional* of 2021 noted that the greatest threat in matters of terrorism and violent radicalisations comes precisely from those individuals born and raised in western society, who attack their country of residence after being radicalised.

Moreover, the question of individual criminal responsibility appears to be divorced from the matter of safeguard and protection, a fact that is certainly problematic inasmuch as there is no “crime against cultural objects” at the international level enforceable in time of peace. The present study aims to shed light on this issue as well, by identifying a number of situations which would not be covered by international criminal law, as it stands today. This lacuna leads to legal uncertainty over whether the existing normative schemes of individual criminal responsibility for attacks against protected objects are effective enough to cover offences which do not necessarily take place in the theatre of operations, as demonstrated by the destruction of the Buddhas of Bamiyan.

In light of the above, the starting point is a clear definition and scope of the relevant terms. Firstly, the present study assesses the degree of protection granted to cultural objects at the international level, both in and outside the context of an armed conflict. This implies an analysis of several instruments which refer either to cultural property or cultural heritage, or to both indistinctly. These terms do not have an identical meaning, and do not allude to the same types of objects. Relevant treaties in the field, namely the Regulations annexed to the Fourth Hague Convention of 1907

and the Additional Protocols of 1977 to the Geneva Conventions, do not even refer to any of these concepts. It is for this reason that the author of the present study is not inclined to pick any of those terms either. Each of them will be used in its own context.

Furthermore, the category of objects addressed within the present study relates to immovable tangible edifices, which because of their religious, cultural, educational, scientific or historical character, are deserving of protection at the international level. Movable tangible property lies outside the scope of this study, although several references will be made to this class of objects without going into detail. In this vein, it should be mentioned that the protection of cultural objects is usually regarded as encompassing both immovable and movable property, therefore it is sometimes difficult to extricate one of these categories from the other.

Additionally, the meaning of 'attack' for the purposes of the present study is made with reference to Article 49 of Additional Protocol I of the Geneva Convention, which confines the term to "acts of violence against the adversary, whether in offence or defence". The focus thus lies on acts directed towards immovable buildings whose degree of violence may cause damage or a complete or partial destruction of the object in question. Those attacks against protected objects occurring in the absence of an armed conflict will be deemed as events happening in time of peace. The latter is understood as a situation not connected in any way with the territory where the hostilities are taking place.

# Chapter 1: The Protection of Cultural Objects against Attacks in Time of War

## A. Sources of International Law

### I. Treaties and Protocols applicable in Time of War

#### 1. The Lieber Code, Brussels Declaration and Oxford Manual: First Codifications relating to the Protection of Cultural Objects in Armed Conflict

Cultural objects have been targeted in warfare since time immemorial,<sup>1</sup> with the 19<sup>th</sup> century a starting period in terms of its legal regulation.<sup>2</sup> In 1863, the ‘Instructions for the Government of Armies of the United States in the Field’, also known as the Lieber Code or Lieber Instructions,<sup>3</sup> were prepared by Dr. Francis Lieber,<sup>4</sup> revised by a Board of officers of

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1 For a historical overview, see *Nablik*, *Hastings LJ* 27 (1976), pp. 1070-2; *Williams*, 1978, pp. 5-6; *Verri*, *IRRC* 25 (I) (1985), pp. 67-85; *Toman*, 1996, pp. 3-7; *De Rueda Roigé*, *Locus Amoenus* 4 (1998-1999), pp. 250-2; *Poulos*, *IJLI* 28 (2000), pp. 5-13; *Bugnon*, *IRRC* 86 (2004), pp. 313-17; *Hensel*, in: *Hensel*, 2005, pp. 43-4; *O’Keefe*, 2006, pp. 5-18; *Blake*, 2015, pp. 1-4.

2 It should be noted that some international and regional instruments have used interchangeably ‘cultural property’ and ‘cultural heritage’ in the context of protected objects, although these terms do not appear to cover the same category of objects. See, for instance, *Prott/O’Keefe*, *IntJ Cult Prop* 1 (1992), pp. 307-20; *Blake*, *ICLQ* 41 (2000), pp. 61-85; *Frigo*, *IRRC* 86 (2004), pp. 367-78; *Ahmad*, *IJHS* 12 (2006), pp. 292-300; *Nafziger*, in: *Nafziger/Scovazzi*, 2008, pp. 145-7. Moreover, on the two competing narratives, namely international and national approaches, when it comes to the legal protection of cultural objects, see *Merryman*, *AJIL* 80 (1986), pp. 831-53. For a third dimension, see *Lixinski*, *Brook J IntL* 44 (2019), pp. 563-612.

3 Instructions for the Government of the Armies of the United States in the Field, prepared by Francis Lieber, LL.D., Originally issued as General Orders No. 100, Adjutant General’s Office, 24.4.1863, Washington 1898, Government Printing Office (Engl.) [Lieber Code].

4 The task of preparing the instructions was originally assigned to Major General Henry Wager Halleck in his capacity as commander of the Union Army, appointed in 1862. Due to the absorbing nature of Major General Halleck’s duties, Dr. Lieber was commissioned “to serve the government in the preparation of a compilation of rules and usages of war.” *Davis*, *AJIL* 1 (1907), pp. 14-5; *Merryman*, *AJIL* 80 (1986),

the US Army at the instance of US President Lincoln, and published to the army as General Order No. 100. This instrument was one of the first legal documents addressing the protection of cultural objects in armed conflict,<sup>5</sup> as well as the earliest attempt to shape and codify the laws of war,<sup>6</sup> however it was only binding on the armed forces of the United States.<sup>7</sup>

Section II of the Instructions, on ‘Public and private property of the enemy – Protection of persons, and especially of women; of religion, the arts and sciences – Punishment of crimes against the inhabitants of hostile countries’, refers in its Paragraph 31 to public property, including *inter alia* movable property.<sup>8</sup> For its part, Paragraph 34 directs attention to property not covered by Paragraph 31, namely “the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observatories, museums of the fine arts, or of a scientific character”. Hence, the Lieber Code distinguishes a different kind of property apart from public property, a fact that can be seen more clearly in Paragraph 35. This provision imposes an obligation (the text refers to “must”) to secure “[c]lassical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals”, which need to be protected “against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.”

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p. 833. Carnahan appears to attribute the original idea of drafting a code to Lieber, by arguing that he “proposed to the General in Chief of the Army in November 1862 that the President ‘issue a set of rules and definitions providing for the most urgent issues occurring under the Law and usages of War’.” *Carnahan*, *AJIL* 92 (1998), p. 214.

5 *Cunning*, *Tulsa JComp&IL* 11 (2003), pp. 214-5.

6 *Verr*, *IRRC* 25 (II) (1985), p. 127; *Merryman*, *AJIL* 80 (1986), p. 834; *Toman*, 1996, p. 7; *O’Keefe*, 2006, p. 18.

7 *Schindler/Toman*, 1988, p. 3.

8 In a letter dated 20 May 1863, Dr. Lieber thanked Major General Halleck for the circulation of a copy of the General Order No. 100 (the final text of the Lieber Code), and noted that the destruction of property was of particular concern for him. In the missive, he wrote that, during the American Civil War, “the wanton destruction of property by our men is alarming. It does incalculable injury. It demoralizes our troops; it annihilates wealth irrecoverably, and makes a return to a state of peace more and more difficult.” Lieber’s letter is reprinted in *Davis*, *AJIL* 1 (1907), pp 20-1.

Although the Lieber Code was adopted with a view to guiding the US forces fighting in the American Civil War, its relevance is unquestionable inasmuch as it constitutes a transitional document in the modern laws of war.<sup>9</sup> The articulation of the Lieber Code attracted the attention of many delegates at the Conference of Brussels in 1874,<sup>10</sup> which was convened after the Franco-Prussian War for the purpose of clarifying the general question of the conduct of war.<sup>11</sup> In this scenario, the Russian scholar Fyodor de Martens presented a draft code reminiscent of the Lieber Instructions in the sense that each nation would adopt and enforce an international code of land warfare that had been formulated through the negotiation and consent of individual nation states.<sup>12</sup>

The Conference adopted the ‘Project of an International Declaration concerning the Laws and Customs of War’ [hereinafter Brussels Declaration],<sup>13</sup> which bears a great similarity to the Lieber Code, since it includes *inter alia* provisions protecting institutions dedicated to religion, art, education, science, or charity as private property. In this respect, Article 8 of the text adopted by the Conference also prohibits the “saisie, destruction ou dégradation intentionnelle” of “établissements consacrés aux cultes, à la charité et à l’instruction, aux arts et aux sciences”, including “monuments historiques, [...] oeuvres d’art ou de science”, at the risk of being prosecuted “par les autorités compétentes.”<sup>14</sup> Likewise, the act of “destruction

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9 Dowdeswell, Osgoode Hall LJ 54 (2017), p. 821. See also Kornegay, MilLRev 221 (2014), p. 160.

10 Verri, IRRC 25 (II) (1985), p. 127.

11 Higgins, 1909, p. 257.

12 Dowdeswell, Osgoode Hall LJ 54 (2017), pp. 823-4.

13 *Projet d’une déclaration internationale concernant les lois et coutumes de la guerre* (Text modifié par la conférence), fait à Bruxelles, le 27 août 1874, in *Actes de la Conférence de Bruxelles de 1874 sur le Projet d’une Convention Internationale Concernant la Guerre*, Paris: Librairie des Publications Législatives, 1874, pp. 61-3 [Actes de la Conférence de Bruxelles de 1874]. For an English translation of the authentic text, see *Project of an International Declaration Concerning the Laws and Customs of War, Adopted by the Conference of Brussels, August 27, 1874*, AJIL, Vol. 1, No. 2, 1907, pp. 96-107. In addition to the Declaration, the Conference adopted a Final Protocol. See *Actes de la Conférence de Bruxelles de 1874*, pp. 62-3. For an English translation of the Final Protocol, see *Hertslet*, 1875, pp. 1974-6.

14 *Actes de la Conférence de Bruxelles de 1874*, p. 61. The author of the present study notes that the reference to ‘établissements consacrés aux cultes’ has been generally (also in subsequent instruments) translated into English as establishments or institutions dedicated or devoted ‘to religion’, when a more accurate translation of the authentic text would probably be ‘to religious worship’. The