



INTERNATIONAL
CRIMINAL LAW
SERIES

PROSECUTING THE DESTRUCTION OF CULTURAL PROPERTY IN INTERNATIONAL CRIMINAL LAW

With a Case Study on the Khmer Rouge's
Destruction of Cambodia's Heritage



CAROLINE EHLERT



MARTINUS NIJHOFF PUBLISHERS

Prosecuting the Destruction of Cultural Property in International Criminal Law

With a Case Study on the Khmer Rouge's Destruction of
Cambodia's Heritage

By

Caroline Ehlert

MARTINUS

NIJHOFF

PUBLISHERS

LEIDEN • BOSTON

2014

The present book constitutes an updated version of the author's doctoral thesis, which was accepted by the Faculty of Law of the University of Zurich, Switzerland, on 14 December 2011 (*summa cum laude*).

Library of Congress Cataloging-in-Publication Data

Ehlert, Caroline.

Prosecuting the destruction of cultural property in international criminal law : with a case study on the Khmer Rouge's destruction of Cambodia's heritage / By Caroline Ehlert.

pages cm. -- (International criminal law ; 4)

Includes bibliographical references and index.

ISBN 978-90-04-25762-7 (hardback : alk. paper) -- ISBN 978-90-04-25763-4 (e-book)

1. Cultural property--Protection (International law)--Criminal provisions. 2. International criminal law. 3. Cultural property--Protection--Law and legislation--Cambodia--Criminal provisions. I. Title.

K3791.E35 2013

344:094--dc23

2013034729

This publication has been typeset in the multilingual "Brill" typeface. With over 5,100 characters covering Latin, IPA, Greek, and Cyrillic, this typeface is especially suitable for use in the humanities. For more information, please see www.brill.com/brill-typeface.

ISSN 2213-2724

ISBN 978-90-04-25762-7 (hardback)

ISBN 978-90-04-25763-4 (e-book)

Copyright 2014 by Koninklijke Brill NV, Leiden, The Netherlands.

Koninklijke Brill NV incorporates the imprints Brill, Global Oriental, Hotei Publishing, IDC Publishers and Martinus Nijhoff Publishers.

All rights reserved. No part of this publication may be reproduced, translated, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without prior written permission from the publisher.

Authorization to photocopy items for internal or personal use is granted by Koninklijke Brill NV provided that the appropriate fees are paid directly to The Copyright Clearance Center, 222 Rosewood Drive, Suite 910, Danvers, MA 01923, USA.

Fees are subject to change.

Brill has made all reasonable efforts to trace all rights holders to any copyrighted material used in this work. In cases where these efforts have not been successful the publisher welcomes communications from copyright holders, so that the appropriate acknowledgements can be made in future editions, and to settle other permission matters.

This book is printed on acid-free paper.

ACKNOWLEDGMENTS

This book was approved as a doctoral thesis by the Law Faculty of the University of Zurich. It was developed during my engagement as a research assistant to Professor Christine Kaufmann at the University of Zurich.

I would like to express my gratitude to Professor Christine Kaufmann for her support as a thesis supervisor and for giving me the opportunity to spend six months in Cambodia as a trial monitor at the Extraordinary Chambers in the Courts of Cambodia for the Asian International Justice Initiative (AIJI). I also owe special thanks to Professor David Cohen, Director of the War Crimes Studies Center at the University of Berkeley, for welcoming me as part of the trial monitoring team. In that context I would like to particularly thank the AIJI trial monitors with whom I have spent lots of long hours at the ECCC's public gallery and press room or on the bus during Phnom Penh's infamous traffic jams.

I am deeply grateful to Emiko Alexejew and Kris Baleva for their superb assistance with the manuscript editing. I am most obliged for their linguistic input and for their efficiency and kindness.

I would also like to thank my supportive colleagues and friends at the Law Faculty of the University of Zurich, among them, Sibylle Dischler, Miriam Frisenda, Natalia Graf, Dr. Eva Hostettler, Dr. Karin Lorez, Laura Marschner, Susanne Tobler and Florian Utz.

I am very grateful to Martinus Nijhoff and the Editorial Board of the International Criminal Law Series for publishing this book. A special thank you goes to Lindy Melman and Bea Timmer for their support.

Finally, I warmly thank those who have supported and encouraged me throughout this project. A very special thank you is directed to Dr. Patrick Götze. Above all, my deepest gratitude goes to my family and especially my mother, Professor Ulrike Ehlert, for her continuous support, her patience and encouragement, to whom I dedicate this book.

Caroline Ehlert

ABBREVIATIONS

AD	<i>Anno Domini</i>
AIIJ	Asian International Justice Initiative
APARIUZ	Analysen und Perspektiven von Assistierenden des Rechtswissenschaftlichen Instituts der Universität Zürich
art	article
ASEAN	Association of Southeast Asian Nations
BC	Before Christ
CCL	Control Council Law
CDDH	Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts
CHR	Commission of Human Rights (of the United Nations)
cit.	cited as
Co.	Company
CPK	Communist Party of Kampuchea
CPC	Cambodian Court of Criminal Procedure
Doc.	Document
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECOSOC	Economic and Social Council (of the United Nations)
ECOSOCOR	Economic and Social Council (of the United Nations) Official Records
ed(s).	editor(s)
edn.	edition
e.g.	<i>exempli gratia</i>
et al.	<i>et alii</i>
etc.	<i>et cetera</i>
et seq.	<i>et sequentia</i>
fn.	footnote
GA	General Assembly (of the United Nations)
GAOR	General Assembly (of the United Nations) Official Records
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee for the Red Cross
ICTR	International Criminal Tribunal for Rwanda

ICTY	International Criminal Tribunal for the Former Yugoslavia
i.e.	<i>id est</i>
ILC	International Law Commission
ILM	International Legal Materials
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
Inc.	Incorporation
ISIL	Indian Society of International Law
IUCN	International Union for Conservation of Nature
LNTS	League of Nations Treaty Series
Mtg.	Meeting
no.	number
p./pp.	page(s)
para(s).	paragraph(s)
PRK	People's Republic of Kampuchea
RAK	Revolutionary Army of (Democratic) Kampuchea
Res.	Resolution
SC	Security Council (of the United Nations)
SCOR	Security Council (of the United Nations) Official Records
SCSL	Special Court for Sierra Leone
Sess.	Session
SPSC	Special Penal for Serious Crimes of the District Court of Dili (East Timor)
SR	Systematische Sammlung des Bundesrechts (Schweiz)
Supp.	Supplement
TIAS	Treaties and Other International Acts Series (published by the United States Department of State)
UCLA	University of California, Los Angeles
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNIDROIT	International Institute for the Unification of Private Law
UNGA	United Nations General Assembly
UNTAC	United Nations Transitional Authority in Cambodia
UNTAET	United Nations Transitional Administration in East Timor
UNTS	United Nations Treaty Series
UNWCC	United Nations War Crimes Commission
US	United States
USSR	Union of Soviet Socialist Republics
v.	<i>versus</i>
Vol.	Volume

TABLE OF CONTENTS

Acknowledgments.....	xi
Abbreviations.....	xiii
Introduction.....	1
Preliminary Remarks	7
§ 1. Concept of International Criminal Law.....	7
§ 2. Sources of International Criminal Law	7
I. International Treaties.....	8
II. Customary International Law.....	11
III. General Principles of Law	11
IV. Judicial Decisions and Teachings	12
V. Others	13
Chapter 1. Prohibition of the Destruction of Cultural Property in	
International Treaty Law.....	15
§ 1. Historical Development	15
I. The Classical Law	15
II. Renaissance	16
III. The Lieber Code	19
IV. The 1874 Brussels Declaration and the 1880	
Oxford Manual.....	20
V. Developments between the two World Wars.....	23
§ 2. The 1899 and 1907 Hague Conventions	26
I. Scope of Application.....	27
II. Definition of Cultural Property	28
III. Protection of Cultural Property.....	29
IV. Violations of the Treaty.....	32
§ 3. The Genocide Convention.....	33
§ 4. The Geneva Conventions.....	37
I. Scope of Application.....	38
1. International Armed Conflict.....	38
2. Non-International Armed Conflict	39
3. Belligerent Occupation.....	40

II. Definition of Cultural Property	40
III. Protection of Cultural Property.....	41
IV. Violations of the Treaty.....	41
§ 5. The 1954 Hague Convention.....	42
I. Scope of Application	44
1. International Armed Conflict	44
2. Non-International Armed Conflict.....	45
3. Belligerent Occupation.....	47
II. Definition of Cultural Property.....	48
III. Protection of Cultural Property	50
1. General Protection.....	51
2. Special Protection	55
IV. Violations of the Treaty	59
§ 6. The 1972 Convention for the Protection of the World Cultural and Natural Heritage	60
I. Scope of Application.....	61
II. Definition of Cultural Property	61
III. Protection of Cultural Property.....	63
1. General Protection	63
2. Special Protection	64
IV. Violations of the Treaty.....	66
§ 7. The 1977 Additional Protocols to the Geneva Conventions of 1949	66
I. Scope of Application	67
1. International Armed Conflict	67
2. Non-International Armed Conflict.....	68
3. Belligerent Occupation.....	69
II. Definition of Cultural Property	70
III. Protection of Cultural Property.....	72
1. General Protection	72
2. Special Protection	74
IV. Violations of the Treaty.....	78
§ 8. The 1999 Second Hague Protocol	81
I. Scope of Application.....	82
II. Definition of Cultural Property	83
III. Protection of Cultural Property.....	84
1. General Protection	84
2. Enhanced Protection.....	88
IV. Violations of the Treaty.....	92

§ 9. The 2003 UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage.....	96
I. Scope of Application.....	98
II. Definition of Cultural Property	98
III. Protection of Cultural Property	99
IV. Violations of the Declaration	100
§ 10. Interim Conclusion	101

Chapter 2. The Prosecution of the Destruction of Cultural Property in the Practice of the International Criminal Tribunals	107
§ 1. Structures of Crimes under International Criminal Law	107
§ 2. War Crimes	108
I. Evolution and Definition	108
II. General Requirements.....	111
1. Serious Violation of International Humanitarian Law.....	111
2. Existence of an Armed Conflict or Belligerent Occupation.....	113
a. International or Internal Armed Conflict.....	114
b. Applicability, <i>ratione temporis</i> and <i>loci</i>	116
c. Belligerent Occupation.....	117
3. Nexus between the Underlying Offence and the Armed Conflict	117
4. <i>Mens Rea</i>	119
a. <i>Mens Rea</i> in General.....	119
b. <i>Mens Rea</i> for War Crimes.....	120
III. Underlying Offences with regard to Destruction of Cultural Property.....	120
1. <i>Lex Generalis</i>	120
2. <i>Lex Specialis</i>	121
3. Object of the Offence.....	125
4. Nature of the Offence	129
5. Level of Gravity of the Offence	132
6. Not justified by Military Necessity	135
7. <i>Mens Rea</i>	139
§ 3. Crimes against Humanity	141
I. Evolution and Definition	141

II. General Requirements	144
1. Part of a Widespread or Systematic Attack	144
a. Attack	144
b. Widespread or Systematic	148
2. Directed against any Civilian Population	150
3. On National, Political, Ethnical, Racial or Religious Grounds	153
4. <i>Mens Rea</i>	155
III. Underlying Offence with regard to the Destruction of Cultural Property: Persecution	156
1. Deprivation of a Fundamental Right	158
2. Nature of the Offence	159
3. Level of Gravity of the Offence	164
4. <i>Mens Rea</i>	167
a. Political, Racial, or Religious Grounds for Persecution	168
b. Other Grounds for Persecution	170
§ 4. Interim Conclusion	171
I. War Crimes	171
II. Crimes against Humanity	173
Chapter 3: Case Study Cambodia	175
§ 1. Background to the Khmer Rouge Regime	175
I. Democratic Kampuchea	175
II. 1978 Rebellions in the Eastern Zone	178
III. Armed Conflict with Vietnam	179
IV. Destruction of Cultural Property	180
1. The Monkhooood	180
2. Buddhist Places of Worship	181
3. Buddha Images and Buddhist Books	184
4. Temple Complex of Angkor	185
5. Orders concerning the Destruction	186
V. Cambodia after 1979	187
§ 2. The Extraordinary Chambers in the Courts of Cambodia (ECCC)	189
I. Establishment of the ECCC	189
II. Nature of the ECCC	191
III. Jurisdiction of the ECCC	192
IV. Structure of the ECCC	194
V. Procedural Law of the ECCC	196
VI. The Cases	197

§ 3. Direct Applicability of the 1954 Hague Convention by the Extraordinary Chambers in the Courts of Cambodia	198
I. Preliminary Observations	200
1. Principle of Legality	200
2. Serious Violation of International Humanitarian Law	202
II. Elements of the Crime	203
1. Existence of an Armed Conflict	203
a. International Armed Conflict	203
b. Non-International Armed Conflict	204
c. Belligerent Occupation	205
2. Nexus between the Destruction of Cultural Property and the Armed Conflict	206
3. Object of the Offence	206
4. Nature of the Offence	209
5. Level of Gravity of the Offence	211
6. Not justified by Military Necessity	211
7. <i>Mens Rea</i>	212
§ 4. Alternative Provisions for the Prosecution of the Destruction of Cultural Property at the Extraordinary Chambers in the Courts of Cambodia	213
I. Grave Breaches of the 1949 Geneva Convention	213
II. 1956 Penal Code	214
III. Crimes against Humanity	216
1. General Requirements	217
a. Existence of an Armed Conflict?	217
b. Part of a Widespread or Systematic Attack	220
c. On National, Political, Ethnical, Racial or Religious Grounds	222
d. Nexus between the Acts of the Accused and the Attack	223
e. <i>Mens Rea</i>	223
2. Underlying Offence with regard to Destruction of Cultural Property: Persecution	224
a. Deprivation of Fundamental Right	224
b. Nature of the Offence	225

c. Level of Gravity of the Offence.....	225
d. <i>Mens Rea</i>	226
§ 5. Interim Conclusion.....	227
Conclusion.....	229
§ 1. Prosecuting the Destruction of Cultural Property during Armed Conflicts	229
§ 2. Prosecuting the Destruction of Cultural Property during Peacetime.....	230
Bibliography	235
Index.....	247

INTRODUCTION

The wanton destruction of valuable cultural property during armed conflict is omnipresent. The alarming pictures of the shelling of the Mostar Bridge in Bosnia and Herzegovina are still in our minds as is the agitating memorial of the Kaiser Wilhelm Church in Berlin, which preserved the destroyed church as it was after World War II. Also the very recent pictures of Timbuktu are still present when Islamic rebel forces destroyed the precious mausoleums, landmarks of the region and set fire to a library containing thousands of priceless historic manuscripts.¹

The reasons to destroy cultural property during armed conflicts are manifold. Sometimes there is symbolic value behind the act as was the case when the US wanted to send Iraqis and the whole world a clear message by toppling the statue of Saddam Hussein in Paradise Square, Baghdad, on 9 April 2003.² In other cases, like in the former Yugoslavia, the perpetrators aimed at erasing whole ethnicities by destroying their cultural heritage and thereby taking their identity.³ Among others, thousands of mosques were destroyed in Bosnia and Herzegovina in order to harm the Moslem population.⁴ During the Third Reich, similar motivations prompted the Nazis to destroy synagogues and other Jewish places of worship.⁵ The destruction of cultural property by the Allies' area bombing of German cities is also a reminder of that time and the Allies' attempt to break down German resistance.⁶ Vice versa Hitler's armed forces were ordered to raid British historic civilian centres leading to massive destruction of cultural property.⁷ Those pictures stay in our minds and are clearly associated with the aftermath of armed conflicts. But there are also other examples of destruction of cultural property, which did not occur during an armed conflict. The al-Qaida attack on the World Trade Center in New York on 11 September 2001 also manifested the destruction of cultural property, as did the Taliban's

¹ UNESCO, Damage to Timbuktu's cultural heritage worse than first estimated reports UNESCO mission, Press Release of 7 June 2013. See also, KERSTEN, p. 1.

² BEVAN, p. 91.

³ BEVAN, pp. 46–47.

⁴ RIEDLMAYER, pp. 9–20.

⁵ BEVAN, pp. 29–31.

⁶ BEVAN, pp. 73–75.

⁷ BEVAN, pp. 75–76.

deliberate destruction of the Buddhas of Bamyian in Afghanistan. Also the Khmer Rouge's wanton destruction of Buddhist and Moslem places in Cambodia was an attack against the country's rich cultural heritage and will therefore be the subject of a case study in the last part of this thesis.

How can such acts of deliberate destruction be prosecuted under international law? The aim of this book is to analyse a number of issues, which emerge from this question. Beforehand, though, it is vital to define the main terminology.

Cultural property is vulnerable to many different crimes during armed conflict and during peacetime, i.e. theft, illicit transport.⁸ The subject-matter of this study, however, is the *destruction* of cultural property. According to the *Dictionary of the International Law of Armed Conflict*, destruction means "demolishing manufactured products, installations and materials, or interrupting them or putting them out of order, for offensive or defensive purposes in the course of military operations".⁹ Marginally, the following assessment also deals with the damage, seizure and any form of misappropriation of cultural property. The thesis at hand, however, does not address the question of pillage, illicit trafficking and the restitution of cultural property, which is a vast topic on its own and can therefore not be included in the following assessment. Consequently, *inter alia*, the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property¹⁰ and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects,¹¹ which are major treaties concerning the protection of cultural property from theft and illicit transfer, are not considered in the following.¹² Nor will the restitution arrangements after Waterloo, World War I and II, the first Gulf War as well as after the invasion of Iraq in 2003 be addressed in this writing.

According to *Black's Law Dictionary*, cultural property is "movable or immovable property that has cultural significance, whether in the nature of antiquities and monuments of classical age or important modern items of fine arts, decorative arts, and architecture. Some writers prefer the term cultural heritage, which more broadly includes intangible cultural things such as folklore, crafts, and skills".¹³ However, it has to be held that the

⁸ See, WYSS, pp. 84–86; see also, O'KEEFE, Protection of Cultural Property, p. 3.

⁹ VERRI, Dictionary, pp. 40–41.

¹⁰ 14 November 1970, 823 UNTS 231.

¹¹ 24 June 1995, 34 ILM 1322.

¹² For a short overview on these two treaties, see, FRANCONI, Cultural Heritage, paras. 10–11.

¹³ GARNER ET AL., p. 436.

meaning of 'cultural property', as used in the thesis at hand, depends on the context. The definition of cultural property in the international treaties dealing with the protection of cultural property as well as in the provisions concerning individual criminal responsibility for the destruction of cultural property varies broadly.¹⁴

Furthermore, as previously indicated, the expression 'cultural heritage' appears quite often in the context of cultural property. According to JIRÍ TOMAN, "cultural heritage includes movable property (artistic works) as well as immovable property (monuments, buildings, sites), works of expression (music, dance, theatre), intangible cultural property (folklore, talents, rituals, religious beliefs, intellectual traditions) and so on. It implies respect for and a resolve to protect the values that form part of that heritage".¹⁵ However, even this definition depends on the context since the definition varies broadly depending on the respective treaty. For this writing only tangible cultural heritage is relevant.

Since the issue at stake in part concerns acts perpetrated during armed conflict one of the focuses of this writing lies on international humanitarian law. With regard to the prosecution of the destruction of cultural property, furthermore, international criminal law will be highly relevant in order to make a suitable assessment of the question at hand. Although international humanitarian law shares some of the goals and methods of international criminal law, they only overlap in some parts. International humanitarian law focuses on the prescription of norms for the protection of the individual – and cultural property – during armed conflict. Those norms are usually obligations upon States either to refrain from certain conduct or to provide for legislations concerning individual criminal responsibility in the case of violations of international humanitarian law. In the latter function international humanitarian law overlaps with international criminal law.¹⁶ In the following the interface between international humanitarian law and international criminal law in terms of the destruction of cultural property and its prosecution will be analysed.

With respect to the interrelation of international humanitarian law and international criminal law a war crime is a violation of a rule of international humanitarian law that creates direct individual criminal

¹⁴ See, FRANCONI, *Cultural Heritage*, para. 1. For a detailed enumeration of all the definitions of cultural property used by the UNESCO in its conventions, see, BOYLAN, *Appendix IV*.

¹⁵ TOMAN, 1954 Hague Convention, p. 40.

¹⁶ CASSESE, *Punishment of Breaches of International Humanitarian Law*, p. 5; RATNER/ABRAMS/BISCHOFF, pp. 12–13; THÜRER, pp. 160–161.

responsibility under international law.¹⁷ Hence, the rules, which constitute individual criminal responsibility under international humanitarian law, that is rules, which deal with violations or breaches of the respective treaty will need to be analysed in the thesis at hand. The principle of individual criminal responsibility for violations of international humanitarian law arising directly under international criminal law was established in Nuremberg and Tokyo after World War II.¹⁸ It has since been endorsed by the *ad hoc* tribunals and the International Criminal Court.¹⁹

The rules of international humanitarian law also influence national criminal law insofar as certain provisions obligate the State Parties to incorporate penal norms for the respective violations of international humanitarian law in their domestic legislation.²⁰ It has to be held that international humanitarian law contains a significant number of quite technical rules, not every violation of which is criminal. Determining which violations of international humanitarian law create individual criminal responsibility is one of the principal challenges of international criminal law.²¹

This study is divided into three parts. Part I analyses the protection of cultural property as well as individual criminal responsibility for its destruction in international treaty law. The focus here lies on treaties dealing with international humanitarian law, and therefore the protection of cultural property from destruction during armed conflict. In addition, the few treaties, which protect cultural property from destruction during peacetime, will be discussed. The analysis of existing treaty law aims at evaluating the respective treaty's scope of application. Furthermore, it seeks to crystallise the definitions of cultural property provided by the different treaties. Moreover, an assessment will be made of the State Parties' obligations with respect to protection of cultural property. Most importantly, the analysis of the treaties dealing with cultural property aims at crystallising the provisions concerning violations and breaches of the respective treaty. Those provisions might be the basis for the crimes dealing with the destruction of cultural property under international criminal law and which will further be developed upon in part II. Furthermore, part II will examine the prosecution of the destruction of cultural property by the international criminal

¹⁷ WERLE, para. 929. For a more detailed definition of war crimes see, *infra*, pp. 108 *et seq.*

¹⁸ See, BASSIOUNI, Crimes against Humanity, p. 473.

¹⁹ For an in-depth analysis of the evolution of individual criminal responsibility for core international crimes, see, DAMGAARD, pp. 85–123.

²⁰ WERLE, paras. 951–955.

²¹ WERLE, para. 959.

tribunals by analysing existing case law. The focus will there lie on the destruction of cultural property as war crimes and as crimes against humanity. In part III then, the situation in Cambodia concerning the destruction of cultural property during the Khmer Rouge Regime will be assessed in form of a case study, which means that the findings gained beforehand will be applied to this concrete case. Hence, part III will give an overview on the practical application of the provisions, which entail individual criminal responsibility for the destruction of cultural property.