Cultural Heritage, Human Rights and the Privatisation of War

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Introduction

Hugo Grotius in *De jure belli ac pacis* (1625) observed that under the law of nations an enemy’s property even if it was ‘sacred, that is, things dedicated to God or to the gods’ could be destroyed and pillaged during war.\(^1\) He quotes the words of Cicero in support: ‘Victory has made profane the sacred things …’. One rationale being that it would demoralise the enemy into surrender sooner. This sentiment was reiterated by Emmerich de Vattel in his *Le droit des gens ou principes de la loi naturelle* (1758) but with an important proviso. He wrote: ‘For whatever cause a country be devastated, those buildings should be spared which are an honour to the human race and which do not add to the strength of the enemy …’.\(^2\) This changing outlook was crystallised in nineteenth century efforts to humanise the laws of war through codification. By the Nuremberg trials in the mid-twentieth century, the prohibition against the destruction and pillaging of cultural (and religious) property during armed conflict and belligerent occupation was found to be customary international law, binding on all States. These developments in turn informed subsequent specialist treaties on the protection of cultural heritage and human rights. However, the early twenty-first century has brought changes to how war and occupation is conducted; changes which have exposed the limitations of existing human rights and humanitarian law norms.

The increased use of private military and security companies (PMSCs) by states and intergovernmental organisations, not only in respect of armed conflicts and occupations, but a range of activities previously deemed within the preserve of states and their organs have highlighted the shortcomings of existing human rights law and international humanitarian law, their implementation and enforcement frameworks, and the ability of international


organisations to adequately respond to rapidly changing circumstances. Reminiscent of the rationale espoused in earlier times, these same contemporary armed conflicts have also raised the vexed issue of the role of ‘culture’ and allied professionals (including archaeologists, anthropologists, museum officials, sociologists) in the furtherance of the objectives of combatants and occupying forces. These developments have been amplified with the engagement of these professions by national militaries and PMSCs.

Both the push towards the privatisation of war and the ‘cultural’ turn have potentially significant and detrimental impacts on the protection of cultural heritage and the enjoyment of human rights, particularly cultural rights. This chapter focuses on the legal issues raised by the impact of the privatisation of war on cultural rights and cultural heritage during military engagements. It is divided into four parts. First, there is an examination of the current debate amongst heritage practitioners, 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 and human rights provisions covering cultural rights and cultural heritage during armed conflict and occupation. Third, the response of professional bodies and associations of heritage practitioners through their codes of ethics and public pronouncements to these emerging challenges is detailed. Finally, there is a brief explanation of international initiatives to regulate the activities of PMSCs. It is clear that the rapidly changing face of war has not only revealed the limitations of existing international law; but the efforts of professional bodies and industry to ‘regulate’ these activities through codes of ethics and good practice guidelines cannot fully address the shortcomings.

Heritage practitioners, PMSCs and the ‘cultural turn’

The recent armed conflicts, occupations and ongoing foreign military presences in Iraq, Afghanistan and Syria fuelled debate within disciplines like archaeology, anthropology.

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sociology, and museum studies, from which heritage practitioners are often drawn. These deliberations concerning legal obligations and professional ethics during armed conflict and occupation were heightened as Departments of Defence (DoDs) and PMSCs actively recruited from their ranks. This section focusses on the Second Iraq War of 2003 and subsequent occupation as case study. Over a decade afterwards, this conflict and its aftermath exposed the unease and ambivalence created by these professionals’ engagement with the military and PMSCs. While they serve a vital role in ensuring the protection of cultural rights and heritage during armed conflict and occupation; experience has shown that they can also facilitate the abuse of human rights and destruction of heritage.

The ‘awakening’ to the importance of culture, be it cultural heritage or cultural (and religious) practices of the combatants and civilian populations in belligerent and occupied territories was a belated phenomenon in contemporary 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 to it by the belligerents and occupying powers. Likewise, the 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 combatants and occupying forces, including PMSCs.

It was not always so. The critical consciousness which engulfed elements of anthropology, archaeology, art history and theory, museum studies and related disciplines in the 1960s and

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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 combatant and occupying power.\footnote{See L. H. Nicholas, \textit{The Rape of Europa}, (London: Papermac, 1994), pp.20-444; F. Stonor Saunders, \textit{Who Paid the Piper? The CIA and the Cultural Cold War} (London: Granta, 1999); D. Price, Lessons from Second World War Anthropology: Peripheral, Persuasive and Ignored Contributions', \textit{Anthropology Today} (2002) vol.18(3), pp.14-20; J. van Bremen et al, ‘Comments on D. Price AT (18(3))’, \textit{Anthropology Today} (2002), vol.18(4), pp.22-22; D. Price, ‘Buying a Piece of Anthropology Part 1: Ecology and Unwitting Anthropological Research for the CIA’, \textit{Anthropology Today} (2007), vol.23(3), pp.8-13; D. Price, ‘Buying a Piece of Anthropology Part Two: The CIA and Our Tortured Past’, \textit{Anthropology Today} (2007), vol.23(5), pp.17-22;}


While the engagement of heritage practitioners by foreign militaries and PMSCs attached to them can prove problematic in respect of existing international law in various ways, two examples expose particular concerns relating to cultural rights and cultural heritage protection.
First, and perhaps most obviously, the recruitment of archaeologists, conservators, and museum practitioners from (using the terminology of international instruments regulating PMSCs) the ‘home’ or ‘contracting’ states to identify, preserve and protect cultural heritage in the ‘territorial’ state. As explained below, international humanitarian law stipulates that primacy be given to national authorities of the ‘territorial’ 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 practitioners were ‘embedded’ with the incoming militaries and PMSCs to take the place of local heritage practitioners 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 academic served to legitimise the military effort for the audience of the ‘home’ and ‘territorial’ states and de-legitimise the important role that these disciplines could play in facilitating the preservation of cultural heritage.\(^{11}\) Much of this discourse is coloured by the position of authors to the legality or otherwise of the Second Iraq War in 2003, with critics arguing any collaboration by these disciplines with the military and PMSCs facilitated the destruction of cultural heritage they sought to preserve. Furthermore, as cultural heritage can only be viewed in context, they argued such collaboration could not be divorced from the significant loss of civilian lives resulting from these military and security operations.\(^{12}\)

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 U.S. 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.\(^{13}\) Although a less frequent practice today, the removal of


cultural objects from the ‘territorial’ state to the ‘home’ state for safekeeping and placing them on exhibition for audiences in the ‘home’ state remains problematic. An example is the Babylon: Myth and Reality exhibition held at the British Museum from November 2008 to March 2009 (proceeded by exhibitions in Paris and Berlin). There was no indication that the British Museum show contained objects removed during the recent conflict. Indeed, the institution had positioned itself at the fore of ongoing efforts to curb the full impact of the conflict and occupation on Iraq’s cultural heritage. However, the Museum continues to hold in its collections removed from Samarra for ‘safekeeping’ during Britain’s earlier colonial occupation of Iraq in the early twentieth century.

Second, the recruitment drive by the military and PMSCs of anthropologists, sociologists and psychologists can impact on the cultural human rights of local populations and enemy combatants. 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 and prisoners of war. The line between engaging persons from these disciplines to ensure that one’s military properly observes such obligations and their retention for the purpose of maximising the chances of military success was, often blurred, and transgressed, in Iraq. In 2004, Major General Scales (ret.) testified before a U.S. Congressional committee that:

[D]uring the present “cultural” phase of the war ... 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.\textsuperscript{18}

This mindset drove the revision of U.S. Army’s counterinsurgency manual \textit{FM 3-24} (the first time in 20 years) with input from anthropologists customising source materials from the early twentieth century;\textsuperscript{19} and the U.S. Army’s Human Terrain System (HTS) engagement 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 inadequate transmission of socio-cultural information within units.\textsuperscript{20}

Counterinsurgency consulting by social scientists was increasingly viewed as ‘just another weapon on the battlefield.’\textsuperscript{21} Anthropology and psychology was co-opted in the design and execution of culturally specific extreme interrogation tactics which included torture.\textsuperscript{22} These disciplines revisited concerns raised in the 1960s when counterinsurgency strategies for the

\textsuperscript{21} See González, note 17, pp.18-19; and P. K. Davis and C. Kim (eds), \textit{Social Science for Counterterrorism: Putting the Pieces Together} (Arlington VA: RAND Corporation and National Defense Research Institute, 2009).
U.S. Army’s Project Camelot program drew on anthropological fieldwork to defeat the opposing forces.\textsuperscript{23}

While culturally specific knowledge has been deployed for ‘maximal degradation within a particular cultural context’,\textsuperscript{24} such knowledge is also vitally important for those treating torture survivors and prosecuting perpetrators. The work of physical anthropologists and forensic archaeologists has also 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. Practitioners must negotiate complex legal and ethical issues in highly politicised and cultural sensitive environments such as the work of the Iraqi Special Tribunal.\textsuperscript{25}

**Legal obligations concerning human rights and cultural heritage**

Current initiatives designed to regulate PMSCs and recently revised codes of ethics of archaeologists, anthropologists, sociologists and heritage professionals invariably affirm the requirement to adhere to international human rights and humanitarian law. These international legal frameworks provide protection for cultural rights and cultural heritage during armed conflict and belligerent occupation.\textsuperscript{26} International criminal tribunals and human rights bodies have interpreted these legal obligations and their interconnectedness, broadly.


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.’ The International Military Tribunal at Nuremberg found that by 1939, the Hague Regulations were customary international law binding on all states; and this was reiterated by the International Court of Justice, and the International Criminal Tribunal for the former Yugoslavia (ICTY).

Article 27 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (GCIV) confirms that protected persons’ honour, family rights, religious convictions and practices, and manners and customs shall be respected. It refers to respect for the ‘manners and customs’ of protected persons which covers both individual and communal elements. 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’. This obligation is reaffirmed by Additional Protocols I and II to the Geneva Conventions which deliberately uses the broader wording: ‘convictions and religious practices’ to encompass ‘all philosophical and ethical practices.

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27 18 October 1907, in force 26 January 1910, American Journal of International Law (supp.) (1908) vol.2 (supp.), p.90.
states that respect of the person includes their physical and intellectual integrity. Intellectual integrity is defined as ‘all the moral values which form part of man’s heritage, and apply to the whole complex structure of convictions, conceptions and aspirations peculiar to each individual.’\textsuperscript{34} The phrase ‘respect for religious practices and convictions’ covers ‘religious observances, services and rites.’\textsuperscript{35} This protection is augmented by Article 38(3) (hostile territory) and Article 58 (occupation) GCIV concerning access to religious ministers, and books and other materials to aid the protected communities in their religious observances and practices.\textsuperscript{36}

Obligations in respect religious practices cover prisoners of war under Article 18 of the Hague Regulations and reiterated by Geneva Law (and extended to cover internees).\textsuperscript{37} The ICRC commentary states that it covers: ‘those [practices] of a physical character, methods of preparing food, periods of fast or prayer, or the wearing of ritual adornment.’\textsuperscript{38} In addition, Article 130 GCIV provides that internees when they die shall be ‘honourably buried, if possible according to the rites of the religion to which they belonged…’.

The protection afforded children during armed conflict and belligerent occupation under international law also 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.\textsuperscript{39} The same obligations apply to

\textsuperscript{34} Pictet, note 31, p.201.
\textsuperscript{35} Pictet, note 31, p.203.
\textsuperscript{36} See Arts 15(5) concerning protection of civilian religious personnel and 69(1) API 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 GCIV and the objects are not described because the civilian population itself determines what is of importance for their religious practices: Sandoz et al, note 33, p.812.
\textsuperscript{37} Arts 34-37, Convention (III) relative to the Treatment of Prisoners of War (GCIII), 12 August 1949, in force 21 October 1950, 75 UNTS 135; Art.93 GCIV; and Art.5(1)(d) API.
\textsuperscript{38} Pictet, note 31, p.406.
\textsuperscript{39} Art.2 GCIV; and Pictet, note 31, p.186. See also Arts 38 and 39, Convention on the Rights of the Child, 20 November 1989, in force 2 September 1990, 1577 UNTS 3.
neutral countries to which the children may be transferred.\textsuperscript{40} 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 (Article 4(3)), 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.\textsuperscript{41}

There are several provisions contained within general human rights instruments that 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’;\textsuperscript{42} the UN General Assembly and the International Court of Justice have confirmed the continuing operation of non-derogable human rights norms during armed conflict.\textsuperscript{43} 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 during armed conflict.\textsuperscript{44}

The equivalent human rights provisions to the international humanitarian law protections outlined above include the right to privacy and family life,\textsuperscript{45} the right to freedom of

\begin{footnotes}
\item[40] Pictet, note 31, p.188.
\item[41] Sandoz et al, note 33, p.1378; and O.R., note 33 , vol.XV, p.79.
\item[44] 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.
\item[45] Art.12, Universal Declaration of Human Rights (UDHR), GA Res.217A(III), 10 December 1948; Art.17, ICCPR; Art.8, ECHR; Art.11, ACHR; and Art.18, ACHPR.
\end{footnotes}
expression including receiving and imparting information and ideas, and the right to education and full development of human personality. In addition, Article 18(2) of the International Covenant on Civil and Political Rights covering the right to freedom of thought, conscience and religion has been defined as a non-derogable right by the Human Rights Committee. In its General Comment No.22, the Committee states that the right broadly includes:

[...]tual 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 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.

Regional human rights instruments have equivalent provisions.

Cultural rights more explicitly are protected by Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and Article 27 UDHR, concerning the right to participate in cultural life of the community. 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

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46 Art.19, UDHR; Art.19(2), ICCPR; Art.5, ECHR; Art.13, ACHR; and Art.9, ACHPR.
47 Art.26(2), UDHR; Art.13(1), International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 December 1966, in force 3 January 1976, GA Res.2200A(XXI), 21 UN GAOR Supp.(No.16), 49, and 993 UNTS 3; Art.2 ECHR; Art.1, ACHR; and Art.17, ACHPR.
48 General Comment No.22, Article 18 ICCPR, 30 July 1993, UN Doc.CCPR/C/21/Rev.1/Add.4, p.1.
49 Ibid.
50 Art.18, UDHR; Art.9, ECHR; Art.12, ACHR; Art.8, ACHPR.
has sovereignty and to those over which that State exercises territorial jurisdiction.\textsuperscript{51} In respect of this obligation, the CESCR in its revised reporting guidelines, requires States Parties to advise of:

\begin{quote}
\textit{The 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.}\textsuperscript{52}
\end{quote}

And:

\begin{quote}
\textit{To ensure the protection of the moral and material interests of indigenous peoples relating to their cultural heritage and traditional knowledge.}\textsuperscript{53}
\end{quote}

The latter reporting requirement reflects the protections contained in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in particular Articles 11(culture), 12(religious) and 13(language).\textsuperscript{54} However, 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 on the territory or within the jurisdiction of a state, and is not restricted to citizens. The Human Rights Committee’s General Comment No.23 states that this provision ‘is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.’\textsuperscript{55} The Committee has endorsed a broad interpretation of culture including, for example, a particular way of life associated with the use of land resources, especially in relation to indigenous peoples (UN

\textsuperscript{51} \textit{Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports}, 2004, p.136, at p.180; Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, 23 May 2003, UN Doc.E/C.12/1 Add.90; and HRC Res.6/19, 28 September 2007, Religious and cultural rights in Occupied Palestinian Territory, including East Jerusalem, UN Doc.A/HRC/RES/6/19.


\textsuperscript{53} UN Doc.E/C.12/2008/2, p.15.

\textsuperscript{54} GA Res.61/295, 13 September 2007.

\textsuperscript{55} General Comment No.23: The Rights of Minorities (Art.27), April 8, 1994, CCPR/C/21/Rev.1/Add.5, para.9.
1994). Under Article 4(2) of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UN Minorities Declaration) 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.\textsuperscript{56}

Human rights bodies have repeatedly emphasised the link between effective protection of cultural heritage and enjoyment of human rights and fundamental freedoms particularly by vulnerable groups as a means of ensuring peace. General Comment No.21 on Article 15 ICESCR calls on states to ‘respect and protect cultural heritage in all its forms, in times of war and peace, and natural disasters.’\textsuperscript{57} The Human Rights Council in its resolution 6/11 of 2007 reiterated the importance of the protection of cultural heritage to the promotion and protection of cultural rights and noted that cultural diversity was ‘indispensable for peace and security at the local, national and international levels’. This position was reaffirmed by the UN Special Rapporteur in the field of cultural rights in her 2011 report on access to cultural heritage when she observed that states’ obligation to protect ‘requires [them] to refrain from interfering, directly or indirectly, with the right to access and to enjoy cultural heritage, while their obligation to protect requires that they prevent third parties from interfering with that right.’\textsuperscript{58}

\textit{Cultural heritage}

Cultural heritage is afforded protection under general international humanitarian law and a specialist framework under the auspices of United Nations Educational, Scientific and Cultural Organisation (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

\textsuperscript{56} GA Res.47/135, 18 December 1992.

\textsuperscript{57} UN Doc.E/C.12/GC/21, para.50.

buildings. Pillage is prohibited during hostilities and belligerent occupation (Articles 28 and 47). During occupation, the ‘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 qualification concerning 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 Geneva Law, GCIV 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). API 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.\(^59\) 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.\(^60\)

API provides specific protection for cultural heritage. Article 53 is \textit{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 phase is used in Article 16 APII concerning non-international armed conflicts. There is some conjecture concerning \textit{ratione materiae}. The provision relates to movable and immovable heritage, even if renovated or restored.\(^61\) While Article 53 operates without prejudice to the obligations contained in 1954 Hague Convention


\(^{60}\) Criminality of Attempts to Denationalise the Inhabitants of Occupied Territory, 4 October 1945, C.149, para.6, box 6, reel 34, PAG-3/1.1.0, United Nations War Crimes Commission 1943-1949, Predecessor Archives Group, United Nations Archives, New York.

and other relevant international treaties including the Hague Regulations, 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. The ICRC study on customary international humanitarian law, the ICTY Appeals Chamber, and Eritrea-Ethiopia Claims Commission reaffirm this interpretation.

API provides immunity for cultural property without the military necessity proviso. 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 by Article 52, to which the principle of proportionality is applicable. Nonetheless, as under the 1954 Hague Convention, they cannot be the object of reprisals (Article 53(c)).

Article 16 *APII* provides a summarised form of protection afforded under Article 53 API. It is made without prejudice to the operation of the 1954 Hague Convention, the only multilateral treaty in force, which would have overlapping jurisdiction in respect of non-international armed conflicts. Like API, 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’.

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62 Sandoz et al, note 33, p.641.
64 Sandoz et al, note 33, pp.646-647, 1469-70, 4844.
66 Prosecutor v. Dario Kordić and Mario Čerkez, Judgment, Case No.IT-95-14/2, Appeals Chamber, ICTY (17 December 2004), para.91.
68 Cf. Art.27 Hague IV, referring to ‘as far as possible’. If state is party to the 1954 Hague Convention and API, derogation under the specialist framework applies. However, if party to the API but not 1954 Hague Convention then no derogation permitted: Sandoz et al, note 33, p.647.
69 Sandoz et al, note 33, p.648; and Henckaerts and Doswald-Beck, note 64, vol.2, pp.779-790.
70 Sandoz et al, note 33, p.1468.
Therefore, like Article 53 API, it prohibits the targeting of such cultural property and its use as a military objective.\footnote{Sandoz et al, note 33, p.1470.} APII prohibits 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, its First Protocol (HPI),\footnote{14 May 1954, in force 7 August 1956, 249 UNTS 358.} and Second Protocol (HPII).\footnote{26 March 1999, in force 9 March 2004, 2253 UNTS 212.} 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.\footnote{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 (1952), Annex I, p.6.} The most significant compromise is the proviso of military necessity that is retained in the HPII, negotiated two decades after the Additional Protocols to the 1949 Geneva Conventions. The 1954 Hague Convention applies to international and non-international armed conflicts.\footnote{Art.19, 1954 Hague Convention; and Art.22, HPII.} In respect of international armed conflict each of the parties to the conflict is bound by 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.\footnote{Prosecutor v. Duško Tadić, Interlocutory Appeal Judgment, No.IT-94-1-A, Appeals Chamber, ICTY (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 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).\footnote{See O’Keefe, note 226, pp.101-111; and Toman, note 58, pp.45-46.} 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.\textsuperscript{78}

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 practitioners 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 by Article 9 HPII which provides that the High Contracting Party must prevent and prohibit any illicit export, other removal or transfer of ownership of cultural property;\textsuperscript{79} 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’. Archaeological excavations or changes to cultural property in occupied territory shall only (unless circumstances do not permit) be carried out in close cooperation with the competent authorities of the occupied territory. Resolutions reiterating the prohibition against ‘the pillaging of archaeological and cultural property’ have been adopted in various United Nations fora.\textsuperscript{80}

Second, protection afforded cultural heritage during occupation is augmented by the HPI 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 that enters their territory immediately or upon request of the

\textsuperscript{78} Art.1, HPI; and Art.1(b), HPII.


\textsuperscript{80} For example, GA Res. 46/47, 9 December 1991, Part A, paras.8(h), and 25-26; UN Commission on Human Rights Resolution 2005/7 on Israeli practices affecting the human rights of Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, 14 April 2005.
occupied territory’s authorities (para.2). Such cultural property shall be returned to the competent authorities of the territory immediately upon cessation of the occupation (para.3). Similarly, when cultural property is deposited by a High Contracting Party in the custody of another for safekeeping during hostilities, it shall be returned at the cessation to the competent authorities of the territory (para.5). These core obligations to ‘facilitate the safe return’ and prohibit trade were extended to all UN Member States in respect of in cultural heritage illicitly removed from Iraq and Syria in a series of Security Council Resolutions.

International criminal courts from the International Military Tribunal, in Nuremberg following the Second World War to the present-day permanent International Criminal Court, in The Hague and ad hoc tribunals like those for the former Yugoslavia (ICTY) and the Extraordinary Chamber of the Courts of Cambodia (ECCC) have found that deliberate destruction and pillage of cultural property by combatants and civilians can constitute war crimes and crimes against humanity (persecution). The Nuremberg Tribunal, ICTY and International Court of Justice have also held that such acts assist in proving the mens rea for genocide. The jurisprudence in respect of crimes against humanity and genocide serves to further reinforce the link between international legal protection of cultural human rights and cultural heritage.

Individual criminal responsibility

International criminal law jurisprudence raises two other points of significance for the present discussion. Civilians working for a private company can be found individually criminally

81 See Arts 18 and 19, 1954 Hague Convention concerning transfer of property with special protection and in occupied territory for safekeeping.


responsible, including for war crimes. In *Klein and Others (Hadamar Sanatorium)*, the U.S. Military Commission at Weisbaden in 1947 found a doctor (a psychiatrist) and two nurses and administrators, although personnel of a civilian institution and not members of the armed forces were guilty of war crimes. They were unsuccessful in their defence of superior orders. In *Tesch and Others (Zyklon B. Case)*, the British Military Court found that two of the accused, civilians whose firm was involved in commercial activities, the manufacture and delivery of gas for the systematic extermination of civilians in concentration camp, guilty of war crimes including the violation of Article 46 Hague IV.

International criminal tribunals have consider whether education or specialist knowledge is an aggravating factor when determining sentence in respect of accused persons like medical practitioners or scientists found guilty of torture or inhuman treatment. In the *Trial of Karl Brandt and Others (Medical Case)* German doctors and scientists carrying out medical experiments which caused inhuman suffering, torture or death at concentration camps, were found by the U.S. Military Commission to be ‘actually and personally “implicated in the commission of war crimes and crimes against humanity”’. The ICTR 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.’ Arguably, this interpretation 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, crimes against humanity or torture. 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.

85 LTRWC, note 83, vol.1, p.46 at p.53.
86 LTRWC, note 83, vol.1, p.93 at p.103.
Codes of ethics and the response of professional bodies

Major international and national professional associations in the cultural field usually have a voluntary code of ethics. The period since the Second Iraq War of 2003 and current conflicts in the Middle East and North Africa have led a number of these associations to reinforce their members’ commitment to uphold international human rights law and international humanitarian law and confront the ethical and legal implications of working with PMSCs in such environments. In addition to explicitly reaffirming their commitment to human rights norms, some professional organisations have also addressed the engagement of their disciplines with national militaries and PMSCs in their revised codes of ethics.

Cultural heritage

The revised codes of ethics or statements by professional associations of archaeologists and museum professionals while largely focussed on the protection of cultural heritage have reaffirmed legal norms covering cultural rights. 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. In 2014 it adopted the Dead Sea Accord of 2014, which recognises that the ‘expression and preservation of culture, both tangible and intangible, are basic human rights’ (Preamble). It calls on states and non-state actors involved in armed conflicts to observe the Hague Regulations, safeguard and respect their own cultural heritage and that of others, and refrain


from deliberately or negligently destroying or damaging it. It notes that failure to do so could constitute a violation of international humanitarian law. The Accord counsels ‘all scholars and heritage professionals, in particular its members and other educators to become familiar with the instruments of international law that protect cultural heritage’ and promote them ‘within their own communities, with other stakeholders, and with the governmental authorities in their home countries, and to use and refer to them responsibly.’

States and non-state actors are asked to ‘respect the pluralistic religious and cultural heritage of any territory under their control’ and to refrain from archaeological excavations in occupied territory (Article 9 HPI), and the removal of cultural objects from such territory (HPI; Article 11 1970 UNESCO Convention). The codes of ethics of professional bodies in the museum field extensively address the issue of illicit trade in cultural goods and obligations arising in respect of armed conflict and belligerent occupation. The International Council of Museums (ICOM) Code of Ethics for Museums references the relevant UNESCO cultural heritage instruments, including the 1954 Hague Convention and its Protocols, which are to be ‘taken as standards in interpreting’ the code.

Specifically, in respect of PMSCs and contractors, the WAC Dead Sea Accord provides that states must take responsibility for ensuring that these companies and individuals observe the principles of international law generally, including those covering cultural heritage. It calls on the United Nations, international regional organisation and all countries who deploy multilateral, national or private forces (including peacekeeping) to ensure that international legal norms for the protection of cultural heritage be incorporated into the mandate covering the deployment, rules of engagement, and planning prior, during and post-conflict, on-going training of officers and forces, and ‘to create and maintain’ expert liaison officers.

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93 Ibid., para.12.
94 Ibid., paras.6, 7 and 8.
96 WAC, note 92, paras 4 and 5.
Compared to other professional statements in this field, the WAC document is more limited in defining the legal and ethical obligations of its own members.

**Cultural rights**

The codes of ethics in the social sciences were propelled and informed by the so-called Nuremberg Code enunciated by the U.S. Military Commission in the *Trial of Brandt and Others* in 1947. However, most codes were first formally articulated in response to their disciplines engagement with governments and military during the 1960s and 70s.

In response to members’ engagement with national armed forces and PMSCs during conflicts and occupations in the twenty-first century, professional organisations in the field of anthropology, archaeology, sociology and psychology had revisited and often revised their codes of ethics in respect of ‘do no harm’, informed consent of research participants, and transparency of research results. For example, the American Anthropological Association (AAA)’s Code of Professional Standards originally adopted in 1971 and amended again in 2009 addresses these issues in the field of anthropology with references to the UDHR, UNDRIP, the UN Convention on the Rights of the Child and Convention on the Elimination of All Forms of Discrimination Against Women. It also references the Archaeological

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Institute of America’s Code of Professional Standards which requires ‘archaeologists … respect the cultural norms and dignity of local inhabitants in areas where the archaeological research is carried out’ and consult, invite participation and inform them of results. Its treatment of consent should be compared with the Nuremberg Code, Article 7 ICCPR (‘no one shall be subjected without his free consent to medical or scientific experimentation’); and ongoing work within the United Nations and its agencies on ‘free prior informed consent’ (FPIC) particularly the UNDRIP.

The AAA has engaged these issues since the 1960s. Its Statement on Problems of Anthropological Research and Ethics provided that: ‘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 … They should not lend themselves to clandestine activities.’ After delivering a draft report in 2007, the AAA’s Commission on the Engagement of Anthropology with the U.S. Security and Intelligence Communities (CEAUSSIC) in its final report two years later found that the Human Terrain System ‘fundamentally transgressed’ the Association’s Code of Ethics. In the intervening two year period, the HTS was condemned as a failure by scientists and the military alike. Further, the AAA amended its Code of Ethics in 2009 to include: ‘Anthropologists should not work clandestinely or misrepresent the nature, purpose, intended outcome, distribution or


AIA, note 96.


sponsorship of their research. Further, it has issued an advocacy statement in respect of the HTS, stating that it ‘places anthropologists, as contractors with the U.S. military, in settings of war, for the purpose of collecting cultural and social data for use by the U.S. military’ and concluded that it raises serious ethical concerns for anthropologists and the Executive Board expressed its disapproval of the program. Franz Boas had warned in 1919:

A soldier whose business is murder as a fine art, ... such may be excused if they set patriotic devotion above common everyday decency and perform services as spies. ... Not so the scientist. The very essence of his life is the service of truth. ... A person, however, who uses science as a cover for political spying, who demeans himself to pose before a foreign government as an investigator ... prostitutes science in an unpardonable way and forfeits the right to be classed as scientist.

The AAA shortly thereafter censured its former president for these views. This censure was rescinded and entirely repudiated by the Association in mid-2005.

However, more problematically for anthropologists, psychologists and, indeed, international lawyers, their discipline has been complicitous in the torture of detainees during the Iraq conflict and more recently, the so-called ‘War on Terror’. The AAA issued a statement on torture in 2007 addressed to the U.S. 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.

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106 The amendments also include a proviso for limiting disclosure ‘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, <http://www.aaanet.org/issues/policy-advocacy/Task-Force-Members-Named-for-Comprehensive-Ethics-Review.cfm> (accessed 10 April 2009).

107 American Anthropological Association (AAA), Executive Board Statement on the Human Terrain System Project, adopted 31 October 2007. http://www.aaanet.org/about/Policies/statements/Human-Terrain-System-Statement.cfm (accessed 21 December 2010). See also Fluehr-Lobban, note 90; and the Resolution of the Executive Board of the Society for Applied Anthropology in 2008 which states: The Board of SfAA expresses grave concern about the potentially harmful use of social science knowledge and skills in the HTS project. SfAA believes that social scientists can be helpful to the military by offering training, analysis and evaluation so long as these activities are compatible with this organization’s code of ethics.


Military and Intelligence personnel, subcontractors, and proxies. Nonetheless, the AAA has reaffirmed that anthropologists and other social scientists ‘legitimately and effectively’ facilitate governmental policies in the pursuit of ‘human causes of global peace and social justice’. Recent independent reports released in respect of the American Psychologists Association’s review and implementation of its ethical guidelines during the same period which addressed the issue of ‘enhanced interrogation’ made reference to their members’ engagement as contractors with the military and the question of ‘cultural differences’ in such acts. It found that APA officials were appointed to key positions with the CIA, Department of Defense and contractors; ‘colluded with important DoD officials to have APA issue loose, high-level ethical guidelines that did not constrain DoD in any greater fashion than existing DoD interrogation techniques’; engaged in ‘a pattern of secret collaboration with DoD officials to defeat efforts by the APA Council of Representatives to introduce and pass resolutions that would have definitely prohibited psychologists from participating in interrogations’; and handled ‘ethics complaints against prominent national security psychologists … in an improper fashion, in an attempt to protect them from censure’ ‘above the protection of the public’. In response to this report, the APA’s President wrote to members advising that the association was working to ‘returning the APA to an ethical, values-based, scientific, and professional organization committed to human rights’.

Despite concerns voiced by social scientists and in the armed forces with the design and implementation of programmes like HTS and engagements of social scientists and their research generally by the intelligence and security communities, governments has indicated their intentions to expand their reach within their own states and beyond. A significant

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issue raised about the HTS was that it was contracted out to PMSCs. However, the status of HTS personnel is currently being changed from private contractors to government employees.\footnote{AAA, note 4, p.12.}

**International regulation of PMSCs**

The rise of PMSCs has exposed gaps in existing international humanitarian law and human rights law.\footnote{Open-ended Intergovernmental Working Group (OIGWG) to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies. *Summary of the first session*, 2011, UN Doc.A/HRC/WG.10/1/CRP.2, p.1.} The International Code of Conduct developed by and for the industry notes that they engage in ‘protecting state and non-state clients engaged in relief, recovery, and reconstruction efforts, commercial business operations, diplomacy and military activity’ and have ‘potentially positive and negative consequences’ for ‘the local population in the area of operation’ and ‘the enjoyment of human rights.’\footnote{Swiss Confederation, International Code of Conduct for Private Security Providers, 9 November 2010, at <http://www.icoc-psp.org/uploads/INTERNATIONAL_CODE_OF_CONDUCT_Final_without_Company_Names.pdf> (accessed 23 September 2015), p.3} International regulatory initiatives have been designed to reinforce the application of international human rights and international humanitarian law norms to PMSCs and their personnel and formulate good practice guidelines. These include a multilateral treaty, the UN’s draft Convention on Private Military and Security Companies (draft UN Convention);\footnote{Working Group on the Use of Mercenaries as a means of violating human rights and impeding the exercise of the rights of peoples to self-determination (WGM), Draft of a possible Convention on Private Military and Security Companies (PMSCs) for consideration and action by the Human Rights Council, 5 July 2010, UN Doc.A/HRC/15/25, Annex.} and multi-stakeholder, self-regulatory instrument, the Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict (Montreux Document). To a limited extent both instruments refer broadly to international legal obligations concerning cultural heritage and cultural rights.

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Draft UN Convention on PMSCs

Within the United Nations, the regulation of PMSCs is primarily been driven by the Working Group on the Use of Mercenaries which expressed a clear intention to pursue a legally binding instrument for states rather than companies. By 2008, the Working Group proposed a definition of PMSCs that recognises the extensive range of activities these companies undertook during armed conflict and post-conflict situations. Its draft Convention released in 2010, reaffirmed states’ obligations concerning international human rights law and requires that they establish measures of ensuring transparency, accountability, and responsibility of PMSCs and their personnel. The UN Human Rights Council has established an Open-ended Intergovernmental Committee consider the adoption of such a binding instruments.

In its preamble, the 2010 draft Convention refers to the international commitment to ‘prevent impunity for war crimes, crimes against humanity, genocide and grave breaches of the Geneva Conventions’ and the Rome Statute of the International Criminal Court (PP 5). It explicitly refers to the 1954 Hague Convention and its Protocols and the UNESCO Convention on the Protection and Promotion of Diversity of Cultural Expressions (PP 8). The draft Convention reaffirms the obligation of states to prevent, investigate, prosecute and punish violations of international humanitarian and human rights law and that violations of these norms can be imputed to states, intergovernmental organisations, and non-state actors including PMSCs. However, only the legal responsibility of States Parties, and intergovernmental organisations ‘within the limits of their competence’ is elaborated.

There is silence on the direct responsibility of PMSCs.

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122 HRC Res.15/26(2010) Open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies, 7 October 2010, Doc.A/HRC/RES/15/26, para.5.
123 PMSCs are defined as ‘corporate entit[ies] which provide on a compensatory basis military and/or security services by physical persons and/or legal entities’: Art.2(a), draft UN Convention.
124 UN Doc.A/HRC/15/25, paras.43-45.
The draft UN Convention enunciates differing obligations for Contracting States (who directly contract the services of PMSCs), States of operation (on whose territory PMSCs operate) and Home States (where the PMSC is incorporated, registered or has its principal place of management) (Art.2). It outlines the basic international law obligations owed by states in respect of international humanitarian law, human rights law, and use of force (Part II). They are required to ensure that all PMSCs registered or operating on their territory are ‘professionally trained to respect relevant international human rights law and international humanitarian law’; ‘adhere to’ these norms; promptly investigate, prosecute and punish violations; and that they ‘take all necessary measures to avoid harm to citizens … and to objects of historical and cultural importance’ (Article 17). This effectively extends 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’, to PMSCs.

The draft UN Convention seeks to fill the current regulatory gap by affirming the application of international human rights and humanitarian law to PMSCs, that they and their personnel must be held responsible for violations, and proposes a clear mode of implementation and enforcement missing from the current international and national initiatives. Under the proposed instrument, this gap will primarily be closed through the establishment of effective national legal frameworks by States Parties that cover regulation and oversight through licensing, registration, training and vetting in respect of human rights and humanitarian law norms, and regulation of the use of force (Part III). The proposed Convention would also require the establishment of an international committee made up of ‘experts of high moral standing, impartiality and recognised competence in the field’ elected and nominated by the states parties, who will oversee and monitor its implementation (Art.29).

It should be noted that the Working Group has stated that intergovernmental organisations and states can be party to the convention.\footnote{Statement of the Chair, Fourth Session of the Open-ended Intergovernmental Working Group, 1 May 2015, at <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGMilitary/Session4/Statement_of_Chair_of_WG_mercenaries.pdf> (viewed on 21 September 2015).} While the United Nations has stressed that it engages armed private security services as a ‘last resort’; because of the ‘increasingly dangerous environments’ in which their staff work it has utilised these services for
peacekeeping and security operations. The United Nations has repeatedly reaffirmed its 1999 commitment to ensuring that peacekeepers under its command and control respect international humanitarian law including that, civilians will be ‘accorded full respect for their person, honour and religious and other convictions’ and protections afford to cultural heritage. Under current UN policy, the organisation can only retain armed private security companies if they are licenced pursuant to the Montreux Document and prior to commencing services train their personnel in respect of a range of issues including ‘cultural sensitivity training’ and ‘human rights law and its application.’

**Montreux Declaration and Good Practice**

The draft UN Convention borrows heavily from the Montreux Document and Good Practices. Co-sponsored by the International Committee for the Red Cross (ICRC) and the Swiss Confederation, the Montreux is a multi-stakeholder initiative that received broad support from the United Nations, states, and the industry. Part I of the Document summarises existing obligations of states, PMSCs and their personnel under international law; while Part II outlines ‘good practices’ to facilitate states’ adherence to these obligations.

The Montreux Document should be considered in tandem with the UN Guiding Principles on Business and Human Rights. They both work on the premise that there has been a fundamental shift from the public to the private spheres and this is having adverse implications for human rights and vulnerable groups. They do not create new international law obligations but provide a framework of existing standards and practices to facilitate future developments. While it addresses the obligations of states in international law, the Montreux Document makes clear its good practice recommendations would be of benefit to international organisations, NGOs, and companies, including PMSCs (Preface, para.8). It

132 Ibid., p.5.
covers the activities of PMSCs during armed conflict. However, the principles and good practice guidelines were prepared on the understanding that they may also be useful in non-conflict situations (Preface, para.5).

The Montreux Document affirms that states are the primary duty bearers in respect of human rights and international humanitarian law and places the primary obligation for monitoring and enforcement of these international norms on the state. It reaffirms that under international humanitarian law and human rights law certain activities cannot be contracted out by a state and that it retains its obligations under international law even if it contracts out activities to third parties (Part I.A, para.2, Montreux Document; UN Guiding Principle 5). Furthermore, states must prevent, investigate, and punish violators of international human rights law and provide effective remedies to victims of PMSCs and their personnel (Part I, paras.4-8, 10, 15, 20). It confirms that PMSCs and their personnel are bound by applicable national laws including those imposing international humanitarian law and human rights law standards upon them (Part I, para.22).

Part II of the Montreux Document covering ‘good’ practice for states interacting with PMSCs and their personnel. It reflects the operationalization of legal obligations of states in the UN Guiding Principles that is dominated by contractually-based mechanisms. These are neither legally binding nor exhaustive, and are inappropriate when they clash with a state’s international legal obligations. They are primarily directed to the Contracting State, which is encouraged to select PMSCs whose personnel are ‘sufficiently trained, both prior to any deployment and on an ongoing basis, to respect relevant national law, international humanitarian law and human rights law’ (Part II, para.10, Montreux Document). It also states preparation of personnel could include training that is specific to the environment and covers international humanitarian law, human rights law, and ‘religious, gender and cultural issues and respect of the local population’ (para.10). These same criteria are also enumerated in respect of obligations of Territorial States and Home States (paras 35 and 63). Given the use of research in anthropology, sociology and psychology, outlined above, it is vital that ‘cultural’ awareness training be tied with training and adherence to human rights and international humanitarian law. Enforcement procedures are contractually based and include

133 The operationalisation of the UN ‘Protect, Respect, Remedy’ Framework was intended to provide ‘concrete and practical recommendations for its implementation’ which have become the UN Guiding Principles: ibid., p.4.
termination of licenses for the PMSC and employment contracts for its personnel, financial sanctions. In respect of monitoring and compliance, it should provide for criminal jurisdiction under its national law including establishing corporate criminal responsibility and extraterritorial application covering acts committed abroad (Part II, para.19).

**Concluding observations**

The trials of medical practitioners, and indeed judges and lawyers, in the subsequent Nuremberg trials after the Second World War served to reinforce the intrinsic role of these professionals, working in a civilian capacity, sometimes while in the employ of private companies, in acts found by the military courts to constitute war crimes, crimes against humanity and genocide. Information now coming to light about the policies and practices instigated in response to the Second Iraq War and so-called ‘War on Terror’ show that anthropologists, sociologists, psychologists (and lawyers) have worked to justify and facilitate acts which violate human rights law and international humanitarian law, and constitute crimes in international law, including torture.

The involvement of social scientists and their research in the privatisation of military, intelligence and security services has heightened awareness of limitations not only of existing professional codes of ethics but international law, which must be addressed. These gaps include: 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 point, there needs to be a reconsideration of the definition of torture in international humanitarian law, human rights 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.

134 See Declaration by the British Psychological Society concerning Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, agreed by the Board of Trustees, 11 February 2005 and by the Representative Council, 12 February 2015, <http://www.bps.org.uk/system/files/Public%20files/declaration_on_torture_2005.pdf> (23 September 2015) where the definition of torture includes ‘use of threats, insults, sexual, religious or cultural degradation or degrading treatment of any kind.’
International law has long recognised that it cannot vacate the field in respect of armed conflicts and belligerent occupation. International humanitarian law codifies minimum standards to which combatants and occupiers must adhere to reduce the impact upon civilian populations and prisoners of war. Heritage practitioners and social scientists have a positive and vital role during armed conflict and belligerent occupation in facilitating the protection of cultural rights (and all human rights) and cultural heritage afforded under current international humanitarian law and human rights law for the benefit of the right-holders, the 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 armed forces 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 and regulated by international law.\textsuperscript{135}

\textsuperscript{135} The position is further confused with the lack of uniformity in government departments in respect of funding for such arrangements: J. D. Kila, ‘The Role of NATO and Civil Military Affairs’, in Rothfield (ed), note 6, p.75 at p.175.