

BOOK REVIEW

Juliette van Krieken-Pieters, ed., *Art and Archaeology of Afghanistan: Its Fall and Survival*. Pp. 412, Brill, Leiden & Boston, 2006. ISBN-13: 978-90-04-15182-6, ISBN-10:90-04-15182-6.

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Cultural heritage law is growing up in a paradoxical environment of global discourse. One might think that the amazing advancements in information technology and the gradual emergence of civil society throughout the world would help ensure more effective diplomacy and international collaboration to protect cultural material. Instead, the discourse about issues of cultural heritage too often reflects the worst of international relations in today's world: Diplomacy remains polarized and the legal framework adversarial. Afghanistan's recent experience is a case in point.

Art and Archaeology of Afghanistan: Its Fall and Survival helps fill a scholarly gap with a gratifying blend of informative scientific and legal commentary. The general theme of this book involves the challenges in managing and protecting a severely threatened heritage in a time of chaos. Aably introduced and edited by Juliette van Krieken-Pieters, 18 essays together confirm the vital protective role of law and institutions, but also expose their deficiencies, as well as those of related diplomatic and scholarly communications. All too often these deficiencies have inhibited effective management of cultural resources. In the case of Afghanistan, as in many developing countries, the problems of good stewardship have also been compounded by a sketchy inventory of the resources. Happily, however, the book's publication coincides with the issuance by UNESCO of Francine Tissot's *Catalogue of the National Museum of Afghanistan*. This latter volume records and illustrates some 1600 treasures that were acquired by the Kabul Museum in just a little over a half-century (1931–85). How much of it is still left after a nightmare of armed conflict, looting, and intentional destruction during the last quarter century remains unclear, however. What is clear is the need for better processes of transnational communication and cooperation.

Legal discourse about cultural heritage, which has shaped both diplomacy and scholarship, is too often expressed in the simplistic constructs that mark any young body of jurisprudence. Far from being timeworn, as Audi suggests,¹ the legal

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vocabulary is simply immature, often generating more heat than light. In particular, a tendency to express complicated issues in terms of dichotomies invites adversarial posturing, polarizes stakeholders, and limits the options for effective management and dispute resolution. Perhaps the most troublesome of these dichotomies is a false one that pits *cultural internationalism* against *cultural nationalism*. (Cultural internationalism, it turns out, is a sort of euphemism for free trade in cultural objects rather than, as one might suppose, genuine international cooperation in the caring and sharing of them.) Fortunately, this artificial and misleading construct has remained largely academic. Other, more functional dichotomies include, for example, art-exporting versus art-importing countries (sometimes expressed as art-rich versus art-poor countries or source countries versus market countries); common heritage versus national patrimony; historic salvage versus stewardship of the underwater heritage; and cultural property interests versus cultural heritage.

A related problem in the current environment of legal discourse has been an over-reliance on adversarial processes to resolve issues related to claims for the return and restitution of cultural material to countries of origin. Unfortunately, litigation in national courts often produces conflicting and even paradoxical results. A good example may be derived from a case that Lyndel Prott discusses in her essay on the international management of Afghan and other cultural resources. She describes an action that the Autocephalous Greek Orthodox Church of Cyprus brought in a Dutch court against a certain buyer of mosaics looted from Turkish-occupied northern Cyprus. Both the Netherlands and Turkey were parties to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocol I on illegal exports. The court ruled, however, that the church could not invoke that authority because it was directed only to states, not individuals.² Therefore, individuals have neither obligations nor standing to complain directly under the convention, according to the court. Hence, it was unable to order the restitution of the mosaics to the Church (and Cyprus).

By contrast, in the famous case of the *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Arts* 9 years earlier,³ a U.S. court of appeals, upholding a lower court decision, reached the opposite result from that of the Dutch courts on similar facts. The court carefully applied principles of private international law based on a congruence of U.S. (Indiana) and Swiss law to validate a claim for restitution of mosaics to the same plaintiff as in the Dutch case. Judge Cudahy's concurring opinion made clear, *obiter dictum*, that even though the United States was not a party to the 1954 Hague convention, it "may be applicable to the case before us [and generally] to international trafficking during peacetime in cultural property unlawfully seized during an armed conflict."⁴ Presumably, international custom would have established the applicability of the convention had it been necessary for the court to rely on it.

When we compare these two cases, a paradox is apparent. On one hand, a court of the Netherlands, which was a *party* to the 1954 Hague convention, refused to

apply it so as to restore property to its rightful owner. On the other hand, the court of a *nonparty* state, the United States, was in part guided by the same treaty when it ordered the restitution of similar cultural material to the same owner. Sadly, there is no indication that the Dutch court ever consulted the published U.S. court opinions for guidance. In sum, the unreliability of judicial and other interpretations among national legal systems cautions against expecting adversarial processes to generate a coherent body of customary law.

To be sure, even crude dichotomies can be useful analytical techniques, and adversarial processes are essential backstops if all else fails. But there may be better alternatives for avoiding and resolving disputes involving cultural heritage. The harmonization and unification of rules is one such alternative. Despite the diversity of national laws, uniform rules have emerged, such as those of the European Union concerning member-state imports of cultural material and those in the UN-IDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995. Efforts to install a more comprehensive regime of protection are promising, beginning with the 1954 Hague convention to protect cultural property in time of armed conflict and the 1970 UNESCO convention against illegal trafficking in cultural property. As several essays in *Art and Archaeology in Afghanistan* reveal by negative implication, nonadversarial processes can help strengthen the emerging regime.

The book is divided into four sections: Afghanistan's Cultural Heritage Protection in General, The Situation in the Field, Legal Aspects in the Afghan Context, and A Global Impact. The first two sections, in particular, reveal that modern threats to the extraordinary heritage of Afghanistan, where Eastern and Western artistic traditions enrich each other so impressively, predate the Taliban period and the crisis of 9/11. The Taliban are often blamed in hindsight for everything that went sour in that country. They are, however, "only a small part of a long and sad story," as Warwick Ball argues in his essay on reassessing and taking stock of the Afghan heritage. That story chronicles myriad assaults to the heritage, ranging from widespread public scavenging and smuggling in diplomatic pouches during peacetime to relentless pummeling by rocket fire, grenades, and other weaponry during armed conflict.

Sadly, however, even the shelling and looting of the Kabul Museum in 1993 failed to spur any systematic recourse to intergovernmental cooperation and assistance, as Carla Grissman points out in her essay on the museum during its turbulent years. Indeed, no looted objects were ever officially registered with Interpol nor with any other international enforcement or information agencies. Nevertheless, the 1993 devastation was a wake-up call, providing a focal point for concerns about the cultural heritage and inspiring the establishment of the Society for the Preservation of Afghanistan's Cultural Heritage (SPACH), as Brendan Cassar and Ana Rosa Rodríguez García explain in their opening essay about that organization. SPACH's activities have included technical assistance in retrieving, returning, inventorying, and documenting objects; advocacy; awareness-raising; and emergency conservation.⁵

The vigilance and responsiveness of nongovernmental organizations such as SPACH have bolstered global efforts to protect, restitute, and return the Afghan heritage. By contrast, a fascinating essay by Atle Omland on the Schøyen collection of Afghan manuscripts in Norway—one of the highlights of the book—demonstrates the futility of relying too heavily on legal constructs and institutions in response to a massive, opportunistic acquisition of heritage in the throes of armed conflict. Omland notes that for several years, “most media and Norwegian officials ignored the appropriate international conventions (UNESCO 1954, UNESCO 1970; UNIDROIT 1995) and the ICOM code of museum ethics. [Afghan law] was not considered either.” Public; scholarly; and, yes, national (Afghan) accessibility to such manuscripts as those in the Schøyen collection is particularly critical because of the poverty of early written records, as van Krieken-Pieters observes in her essay on dilemmas and lessons related to the Afghan heritage. She also introduces the topic of safe havens for imperiled heritage, a concept Kurt Siehr ably explores in a separate essay on that topic. One might note that the concept is also the focus of a project undertaken by the Cultural Heritage Law Committee of the International Law Association.

Safe havens can only protect monuments *in situ*, however, if they are secured with financial support and effective law enforcement. Sadly, the Taliban’s intentional destruction in 2001 of the colossal Buddhist statues at Bamiyan underscored the fragility of the protective regime and the inadequacy of legal rules alone to facilitate the kind of constructive discourse and supportive processes that would help deter such vandalism in even the wildest precincts of the global village. After all, these were not just any old monuments. Bamiyan was Afghanistan’s most important cultural site. Ironically named “the place of shining light,” it was by far the most prominent victim of the Taliban’s “spree of iconoclasm,” in Cassar and Rodríguez García’s words.

What caused the Taliban to destroy the Bamiyan statues, given that just two years earlier the Taliban’s Mullah Omar had decreed an unqualified protection of the Afghan heritage, including a specific prohibition on destruction of the statues? The explanations for Mullah Omar’s abrupt reversal of his own decrees range from his fundamentalist revulsion toward graven images to a messianic assertion of the Taliban’s power to snub global public opinion and diplomatic pressures. Some have suggested that the destruction may have been more carefully staged than appeared at the time. The strategy was essentially one of cultural genocide against all blasphemous images. The tactics, however, were more subtle, at least before the demolition itself. For example, an exhibit at the reopened Kabul Museum in 2000 may have been designed deliberately to elicit strong objections from fundamentalists and foment a campaign of religious cleansing. Writing specifically on the Bamiyan case, Francesco Francioni and Federico Lenzerini note that “the demolition was carefully planned, painstakingly announced to the media all over the world, and cynically documented in all its phases of preparation, bombing and ultimate destruction.” They interpret the Taliban’s motivation as both an

“act of narcissistic self-assertion” and an “act of defiance”—indeed, the first one ever—toward the United Nations and the international community, coming as the demolition did in the wake of antiterrorist sanctions against the Afghan government under United Nations Security Council Resolutions in 1999 and 2000.

One thing is for sure: The Taliban’s actions do not seem to have been dictated or even strongly encouraged by other Islamic authority. Nine months after the Bamiyan obliteration, UNESCO; the Organization of the Islamic Conference; and the Arab League Educational, Scientific and Cultural Organization organized a conference in Doha, Qatar to examine Islamic views on protection of cultural heritage. Drawing on the Koran, the hadith, and traditions of Islamic jurisprudence, the assembled specialists expressed several schools of Islamic thought, concluding on a theme of cultural diversity within an Islamic religious framework.

Today the dilemma in the Bamiyan Valley is to decide what to do with the empty niches that once framed the statues. There are three basic issues:

1. The first is whether the decision to restore the statues should be made exclusively by the Afghans or, if the statues are truly deemed to be part of a global heritage, with substantial influence by the international community.
2. The second issue is whether to restore the statues. Many other cultural treasures have been restored in the public interest. Conversely, the empty niches may make a powerful statement that is more important than the healing quality of restoration. Moreover, Buddhist scruples may counsel a gentle acceptance of what has been done. Construction follows destruction follows construction in endless cycles.
3. Assuming, however, that restoration is a viable option, the third issue would be how to do it. One proposal, for example, is to employ the technique of anastylosis by which the statues would be rebuilt with both original and fabricated pieces assembled together but distinguishable from each other.

In their strong condemnation of the Taliban’s *cultural terrorism*, Francioni and Lenzerini carefully review the applicable international law. They observe correctly that attempting to characterize the armed conflict as either international or non-international is futile and unavailing. They further conclude that the Taliban’s intentional destruction of the statues violated customary norms, *erga omnes*, and that such monumental heritage is entitled to protection even if it is not on the World Heritage List. Similarly, Fabio Maniscalco, explaining his checklists of risks, types of damage, and protective strategies related to wartime threats, advocates an elevation of cultural heritage to the level of human rights as objects of protection in zones of armed conflict. In direct response to the Bamiyan destruction, UNESCO adopted a Declaration Concerning the Intentional Destruction of Cultural Heritage in 2003. The declaration affirms the global and intergenerational dimensions of intentional destruction and the extension of state responsibility to such acts

regardless of whether a target is inscribed on a UNESCO list or similarly official roster of protected heritage.

The efficacy of all this hard and soft international law is, however, another matter. The reader cannot help but be struck by the sharp contradiction between the law's ambition and its futility in circumstances such as the looting of the Kabul Museum and the demolition of the Bamiyan statues. The problem seems to be not only our inability to use the right words at the right time but also to put those words into action. For example, Francioni and Lenzerini quote from a 1997 resolution of the World Heritage Committee that gracefully confirmed the cultural significance of the Afghan heritage and invited Afghan authorities to cooperate with UNESCO and the committee to help ensure protection of the country's cultural and natural heritage. Unfortunately, however, the resolution failed to set in motion any enduring process to achieve the desired cooperation. In this regard, the book leaves unanswered some key questions: Were the Taliban encouraged to participate actively in meetings of the World Heritage Committee, especially the one that adopted the resolution? Did the Committee or any other international institution attempt to assure the Taliban that they respected the sincerity of the Taliban's religious aversion to graven images? Was there any concerted effort whatsoever, until it was too late, to listen to the Taliban on an on-going basis and thereby tame their fiery egos by simply paying serious attention to them? Was there any concerted effort, despite the obstacles, to engage them further in the kind of constructive dialog that might have helped decouple the heritage from a combination of their religious zeal and xenophobia before it was too late to change their minds? If so, was there any follow-up effort to nudge them into a long-term commitment to protect its cultural heritage? The Mullah Omar's temporary decrees were one thing, but even a minimum level of genuine trust was quite another.

Quite likely, there are answers to at least some of these questions, but the book does not disclose them. It is likely, of course, that the Taliban simply stonewalled efforts, or would have stonewalled efforts, to turn the Mullah Omar's initial assurances into long-term commitments that would trump politics. But who knows for sure? What we can conclude is that a premise of condemnation in the legal and scholarly discourse about the Bamiyan demolition is inadequate. The unanswered questions about the Taliban provide yet another example of the need to improve the discourse.

Once the milk is spilled, however, why cry about it? We cry, of course, for the wanton destruction of priceless heritage that merged Eastern and Western motifs along the ancient Silk Road. We also cry, more broadly, because of our inability to avoid such cultural crises whenever and wherever they occur. We cry for the lack of constructive discourse in an era of political stonewalling, for a more collaborative regime, for a vision of law as an ongoing process rather than a set of rigid rules.

The Principles for the Mutual Protection and Transfer of Cultural Material, which the International Law Association adopted in 2006, offer one promising initiative

for drying these tears by improving the discourse among a broad array of public and private actors, at least involving issues of restitution and return of cultural material. Resolution of these issues also require more accessible mediation facilities and training of mediators.

International institutions can also help meet the challenges, but they suffer from their own limitations, as UNESCO's involvement in the endless Afghan imbroglio demonstrates. When the insecurity of the Afghan cultural heritage became apparent in the years before the destruction at Bamiyan, UNESCO, working with SPACH and other organizations, sought to safeguard it. Lyndel Prott's succinct essay on UNESCO's efforts demonstrates, however, the weakness of the institutional framework. On one hand, it raised expectations of protection and even rescue of material but, on the other hand, abided by national export controls that inhibited efforts to remove heritage from harm's way. As Prott reminds the reader, however, UNESCO is an *intergovernmental* organization. It must therefore respect national laws. It has no mandate to provide criminal detection or custody of materials, not to mention to impose sanctions directly against delinquent national authority. At best, UNESCO can only mediate between states and enlist its own corps of professional expertise in the interest of protecting heritage in times of crisis. Fortunately, skillful negotiations and discreet arrangements eventually made the best out of an institutional predicament. Prott, who was on the front lines of UNESCO's efforts, concedes, however, that its structure and status as an intergovernmental organization limits its powers of persuasion. Those powers are apt to be secondary to initiatives by such nongovernmental organizations as SPACH.

As Afghanistan rebuilds itself, there must be means to reconcile its developmental needs with the exigencies of protecting the heritage. Otherwise, economic development may threaten the heritage. For example, the \$6 billion Diamir-Bhasha dam project in neighboring Pakistan threatens to obliterate thousands of rock carvings that span the ages, from the dawn of civilization until the early modern period. In his panoramic review of looting, theft, and smuggling, Jos van Beurden cites two examples from China of "Development versus Protection": the Three Gorges Dam project on the Yangtze River and the construction of facilities for the 2008 Olympic Games in Beijing. As van Krieken-Pieters observes, Afghanistan, at the crossroads of civilizations, "deserves to be discovered not by bulldozers but by professional archaeologists."

Ultimately, the experience in Afghanistan may teach us the rather unexciting but important lesson that the effectiveness of cultural heritage law requires the education and informed engagement of local communities. Indeed, for Francioni and Lenzerini, there is no better way to prevent the wanton destruction of heritage than to rely on local communities. That is, of course, problematic if a consensus of a community favors such destruction or is otherwise unprepared physically or politically to prevent it. Educational initiatives therefore are essential in trying to improve all levels of discourse and action. Such initiatives take plenty

of hard work and money. We can be hopeful, however, that high-quality scholarship such as the essays in this volume will help light the way.

ENDNOTES

1. Audi, "A Semiotics of Cultural Property Argument" carefully organizes and deconstructs clichés and legal arguments about cultural heritage, using the long-standing Elgin (Parthenon) Marbles dispute between Greece and the United Kingdom as a case in point.

2. Autocephalous Greek Orthodox Church in *Cyprus v. Lans*, *Court of Rotterdam (Civil)*, Case No. 44053, Roll no. HaZa 95-2403 (Feb. 4, 1999). For a summary of the case, see Matyk, "The Restitution of Cultural Objects."

3. 917 F.2d 278 (7th Cir. 1990).

4. ———. At 294, 296.

5. To inject a personal note, I am still haunted by my receipt of a beautiful calendar published by SPACH that depicted some of Afghanistan's cultural heritage. I received it (and promptly displayed it in my office) on September 10, 2001, just 1 day before the infamous acts of 9/11.

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