



ADDIS ABABA UNIVERSITY

FACULTY OF LAW

SCHOOL OF GRADUATE STUDIES

**Protection of Cultural Property in the event of Armed Conflict: the Case of Syria**

Thesis Submitted in Partial Fulfillment of Master of Laws Degree

(LL.M) in Public International Law at Addis Ababa University

-By-

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March, 2018

**Declaration**

I, undersigned, declare that this thesis is my original work and has not been presented for a degree in any other university and that all sources of materials used for the thesis have been duly acknowledged.

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March, 2018.

**Conformation**

This thesis is submitted for examination with my approval as an advisor to the candidate.

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March, 2018.

This thesis is submitted to the Faculty of Law and to the School of Graduate Studies of Addis Ababa University in fulfillment of all requirements for the degree of Masters in Public International Law.

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## **Abstract**

*In a world of humans and all the perks that come with it; it's in our nature to disagree; to put it in mild term; the inevitability of conflicts are witnessed happening everywhere around the world. The international community has laid down rules in governing these armed conflicts. In the mist of this there is an issue of protecting cultural property. As part of who we are as human beings; cultural property warrants extensive protection by humanitarian law.*

*Recent developments like; the ongoing conflicts in Syria and Iraq and in the recent conflict in Mali; has made us witness one of the gravest destructions of cultural property. This destruction has displayed the challenges of international law to effectively deter these actions. Taking this into account the concept of cultural property protection and its legal frameworks will be assessed; The researcher reviews existing international law in light of these destructions and the challenges posed by the issues of non-international armed conflict, non-state actors and the military necessity exception In addition looting of this cultural property by terrorist organizations; and the establishing criminal responsibility for cultural property destruction is discussed. Furthermore based on all the assessments possible way forward allowing international law to more effectively foster the preservation of cultural heritage for future generations is put into perspective.*

## **List of Acronyms**

AP I - First Additional Protocol of the 1954 Hague Convention

CP - Cultural Property

CPP - Cultural Property Protection

IAC - International Armed Conflicts

ICC - International Criminal Court

ICJ - International Court of Justice

ICOMOS - International Council on Monuments and Sites

ICRC - International Committee of the Red Cross

ICTY - International Criminal Tribunal for the former Yugoslavia

ISIL - Islamic State of Iraq and the Levant

NIAC - Non International Armed Conflicts

PSO - Peace Support Operations

SARG - Syrian Arab Republic Government

U.S – The United States of America

UN - United Nations

UNESCO - United Nations Educational, Scientific and Cultural Organization

VCLT - Vienna Convention on the Law of Treaties

WHC - World Heritage Convention

## Table of Contents

<b>Declaration</b> .....	<b>I</b>
<b>Acknowledgment</b> .....	<b>III</b>
<b>Abstract</b> .....	<b>IV</b>
<b>List of Acronyms</b> .....	<b>V</b>
<b>CHAPTER ONE: Introduction</b>	
1.1. Background of the Study.....	1
1.2. Statement of the Problem .....	2
1.3. Objectives of the Research .....	2
1.4. Significance of the Study.....	3
1.5. Research Questions .....	3
1.6. Literature Review .....	3
1.7. Scope and Limitations of the Research .....	6
1.8. Methodology of the Research .....	7
<b>CHAPTER 2: Definition and Scope for Cultural Property Protection in the event of Armed Conflict</b>	
2.1. Introduction .....	7
2.2. What is Cultural Property? .....	8
2.3. The Scope and Rationale for Cultural Property Protection in Armed Conflicts.....	11
2.4. Historical Background of Cultural Property Protection in Armed Conflict .....	12
2.4.1. Post World War II Developments in Cultural Property Protection .....	13
<b>CHAPTER THREE: International Legal Framework for the Protection of Cultural Property</b>	
3.1. Introduction .....	15
3.2. The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) .....	16
3.3. Scope of Application of the Hague Convention .....	18
3.4. Current Rules on "Special Protection" .....	19
3.5. The Execution of the Hague Convention .....	21
3.5.1. The System of Protecting Powers .....	21

3.5.2. International Assistance .....	22
3.5.3. Dissemination .....	23
3.5.4. Reporting .....	23
3.5.5. Institutional framework .....	23
3.5.6. Criminal Prosecution .....	25
3.6. What is The Legal Framework for Applying the Hague Convention to Non-state Actors?.....	26
3.7. Cultural Heritage during the Conduct of Hostilities.....	30
3.7.1. The Principle of Military Necessity.....	30
3.7.2. The Principle of Distinction .....	31
3.7.3. The Principle of Proportionality .....	33
3.7.4. The Principle of Precaution .....	34
3.8. Customary International Law in light of Cultural Property Protection .....	35
 <b>CHAPTER FOUR: Applying International Law; the Case of Syria</b>	
4.1. Introduction .....	36
4.2. Non-State Actors and Conflicts Not of an International Character: A Syria perspective .....	37
4.3. Prosecuting Cultural Heritage Destruction in Syria and Iraq .....	38
4.3.1. Destruction by the Islamic State of Iraq and the Levant (ISIL) .....	38
4.3.2. Destruction by the Syrian Arab Republic Government (SARG) .....	49
4.3.3. Looting and Theft .....	41
4.4. Recent Developments in International Law .....	43
4.4.1. The UNESCO declaration of 2003 and the ICJ Preah Vihear Case.....	43
4.4.2. United Nations Security Council Resolution: Syria, Iraq and Mali .....	44
4.4.3. ICC Criminal Prosecution: the case of Mali and its Implications .....	46
 <b>CHAPTER FIVE: Conclusion and Recommendations</b>	
5.1. Conclusion .....	51
5.2. Recommendations .....	54
<b>Bibliography .....</b>	<b>56</b>



## **1.1. Background of the Study**

The Middle East and North Africa in recent years have encountered a dramatic rise in conflicts and terrorism which had led to the destruction of countless human lives and priceless cultural heritages. One outcome of this destruction is recognizing the shortcomings of international law to help prevent and remedy these events. However, following these events the vast amount of the governments, UNESCO and in large the international community overwhelmingly condemned the actions of destruction of cultural property.<sup>1</sup> This also coupled with slow but steady progress of international law towards the protection of cultural property, specifically in the event of armed conflict. Syria is a prime example of this situation, as the country and the region offer the international community with the opportunity to progress the understanding of protection of cultural property in the event of armed conflict.

This paper will in turn assess the development of cultural property as a concept, its protection in the event of armed conflict and how actions in Africa and Syria have impacted our understanding of this protection. Examination will be made on all aspects of the international legal regime from the Hague convention to the recent case law that seeks or helps protect cultural heritages in the case of armed conflict. Special attention will be given to the recent developments in Mali that have brought international criminal law to the forefront of cultural heritage protection and how actions in Syria have pushed the international community to progress the assessment of cultural property protection in the event of non-international armed conflicts.

It is the aim of this paper to examine the progresses of international law in the protection of cultural heritage and highlight how recent actions in Syria and Africa have helped progress the understanding of protection to a broader dynamic of establishing a relation of individuals and cultural heritage and in turn between humanitarian law and customary international law.

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<sup>1</sup> Irina Bokova, *Addressing all nations on the United Nations Security Council Resolution 2347 on peacekeeping and international security*, Director General; UN Security Council. Copies of the letter sent to Permanent Delegations to UNESCO and National Commissions for UNESCO; On June, 9, 2017.

## **1.2. Statement of the Problem**

Only a few years after the UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage and the Second Protocol to the 1954 Hague Convention, cultural heritage in various regions of the world is facing new threats. They essentially concern armed conflicts of a non-international nature and acts of terrorism affecting human communities and their cultural heritage from sub-Saharan Africa to Eastern Europe. In this past decade; there have been several examples of destructions of cultural properties. To name few instances: the destruction of Bamiyan Buddha's in Afghanistan, the looting of the Iraq museums as a result of the 2003 conflict, and more recently the destruction of cultural property in Syria and Mali.

The images of destruction and pillage of many cultural sites, including those which enjoy protected status under the World Heritage Convention, have outraged the international community. These include global initiatives by UNESCO and various UN bodies, and international criminal law jurisprudence designed to protect and preserve international cultural property at risk of destruction as a result of political instability and armed conflict. However generally international law has been slow to address this problem, hence the researcher seeks to show how recent developments in Syria and Africa impacted the international customary, humanitarian and criminal law jurisprudence in the betterment of protection of cultural property in the event armed conflicts.

## **1.3. Objectives of the Research**

- Investigate what cultural heritage protection entails in international humanitarian law.
- Discover the extent to which the international humanitarian legal regime has addressed the issue of Cultural Heritage protection in the event of armed conflicts.
- Assess applications of norms of international law such as the principles of proportionality, necessity and distinction in light of cultural heritage protection.
- Look at the existing legal frameworks and assess the gaps in light of recent cases of cultural property destructions, such as Syria and Mali.
- Shed light on the possible way forward for the international community based on recent developments and cases related to cultural property protection.

#### **1.4. Significance of the Study**

Why is the protection of cultural property so important? Cultural property is particularly threatened by armed conflict and in some cases by any resulting occupation. As cultural property reflects the life, history and identity of the community, its preservation helps to rebuild a broken community, reestablish its identity, and link its past with its present and future. In addition, the cultural property of any people contributes to the cultural heritages of human kind. Thus, the loss or damage of such property impoverishes human kind. In addition the fact that the looting of various cultural heritages being sold in black markets happening to be one of the major sources of finance for terrorist organization makes this issue of great importance.

#### **1.5. Research Questions**

- What are the international legal frameworks in place to protect cultural heritages in the event of armed conflict?
- Is there a responsibility to protect cultural heritages in the event of armed conflict?
- Who has the obligation to protect cultural heritages in the event of armed conflict?
- Are the mechanisms in place to protect cultural heritages effective in the event of armed conflict? (Seen in light of the Syrian case)
- What is the degree of applicability of the legal regime for the protection of cultural heritage? (Seen in light of practical cases: Syria and Mali)
- Does the current legal regime address cultural heritage protection in cases of non-international armed conflicts and non-state actors?
- Can Individual Criminal Prosecution be assumed in cases of cultural property destruction? (Seen in light of the Mali case)
- What are the effects of looting of cultural heritages in the event of armed conflict? (in light of financing terrorist organizations)

#### **1.6. Literature Review**

In the context of our world and all the unrest; loss of human life unaccounted for is abundant. The international community is putting all its focus in resolving the various conflicts around the world as it should be doing. However, In the mist of all this there is one of the sources of human identity that is being overlooked; protection of cultural property; various new developments have shed light on the applicability of the current legal regime that governs the issue at hand.

The main objective of this section is to bring in research findings of different international scholars, academics, and case studies to familiarize readers about relevant issues on the protection of cultural property in the event of armed conflicts and provide general outlooks into the possible effects of various new developments on the legal regime.

The most prominent legal instrument that deals with cultural property protection is the 1954 Hague Convention; however, the effectiveness of the 1954 Convention became a subject of general concern in the early nineties, during the second Gulf War and the war in the former Yugoslavia. As this paper goes to press, that effectiveness is still being tested in the continued war in Syria. A review of the objectives and operation of the Convention and Protocol with a view to identifying measures for improving its application and effectiveness and to see whether some revision of the Convention itself might be needed, perhaps by means of an Additional Protocol was initiated in 1991.<sup>2</sup> In accordance, Professor Boylan substantiated the concern in his findings. Where most applicability gaps have been assessed and many of the legal regimes gap were put to the forefront.

R. O’Keefe’; made two major points<sup>3</sup> regarding the protection of ‘cultural objects and places of worship’ in the 1977 Additional Protocols to the Four Geneva Conventions of 1949 that have reached common understanding by the international community. First, he asserted that even with the deviations between the definitions of cultural property in the 1954 Hague Convention and the 1977 Additional Protocols, the range of cultural property they covered was exactly the same; which is shared by the researcher. Secondly, he held that the Additional Protocols awarded a superior regime of protection to cultural property for not being subject to imperative military necessity. Arguments are forwarded that while both instruments tackle objects which represent each party’s national heritage, their scope of application differs; since the 1954 Hague Convention cannot cover places of worship that constitute the spiritual heritage of peoples per se. This, we will see, has resulted in its own different consequences in international practice. In addition; From a closer look at the relationship between the concepts of ‘military objectives’ and ‘imperative military

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<sup>2</sup> Patrick J. Boylan, Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, A UNESCO commissioned study, (1993).

<sup>3</sup> R. O’Keefe, ‘The Meaning of “Cultural Property” under the 1954 Hague Convention’, Netherlands International Law Review, Vol 46 (1999), p.26-56

necessity’, a separate conclusion follows: the 1954 Hague Convention offers stricter guarantees against the likelihood of acts of hostility aimed at cultural property.<sup>4</sup>

Further elaborations are discussed by Desch; as to the execution of the convention which are dependent on this six mechanisms; namely; the System of Protecting Powers, International Assistance, Dissemination, Reporting, Institutional framework, and Criminal Prosecution. And Desch elaborates that the Second Protocol decisively contributes to improving the implementation of the Convention. In particular by creating a useful and task-oriented institutional framework and by extending the criminal prosecution of persons violating the Convention or the Second Protocol, the Second Protocol helps to increase the chances that states get more closely involved in the protection of cultural property in the event of armed conflict.<sup>5</sup>

As put forth by Henckaerts; the adoption of the Second Protocol is an important step forward in the legal protection of cultural property in armed conflict. The Protocol addresses the weaknesses of the 1954 Convention and offers adequate solutions; especially in; clarifying the obligations to take precautionary measures, introducing concepts from Additional Protocol I of 1977, puts forth the concept of enhanced protection, strengthens criminal prosecution, and expands to non-international armed conflicts.<sup>6</sup>

Organizationally, the 1954 Convention counterparts the precedent proven by Common Article 3 to the 1949 Geneva Conventions and extends to rules on “respect”; as set forth in Article 4; for cultural property in non-international armed conflict. However, the language of Article 19 of the 1954 Convention (on the scope of the obligations with a material nature) is unclear and consequently legal experts disagree as to which obligations apply in non-international armed conflicts (NIAC); as described by the views of Sivakumaran.<sup>7</sup> A similar criticism of the 1999

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<sup>4</sup> Ibid.

<sup>5</sup> Thomas Desch, Head of the Sub-Division on International Law, Austrian Federal Ministry of Defence, Vienna, 2002. P.1-8. ; Seen from the compilation: Edwin R. Micewski / Gerhard Sladek.(Editors), Protection of Cultural Property in the Event of Armed Conflict – a Challenge in Peace Support Operations Series of the Austrian Society for the Protection of Cultural Property.Vienna, Austrian Military Printing Press, 2002.

<sup>6</sup> Jean-Marie Henckaerts, The Protection of Cultural Property in Non-International Armed Conflicts, in Protecting Cultural Property In Armed Conflict , Nout van Woudenberg & Liesbeth Lijnzaad (eds., 2010).

<sup>7</sup> see Sandesh Sivakumaran, The Law Of Non-International Armed Conflict (2012)

Second Protocol to the 1954 Cultural Property Convention has also been made by other experts such as Henckaerts.<sup>8</sup>

As elaborated by Gerstenblith; Examination of recent developments allows us to construct two approaches that would widen the scope of protection required for cultural heritage; one is the extent to which principles have been incorporated into customary international law and the other is the more flexible interpretation of existing provisions of treaty law. The unifying theme underlying these developments is the recognition that cultural heritage is closely connected to humanity and to human rights, as can be seen from the statements of the Prosecutor in the Al-Faqi prosecution of Mali or the devastation caused by non-state actors in the case of Syria. Seeing cultural heritage through the lens of human rights assists us in reaching a more integrated understanding of the role that cultural heritage plays in the lives of human beings; the local community that lives among the heritage, the regional and national communities, and the world community.<sup>9</sup>

This subject matter has also been discussed by the likes of Chamberlain, Bassiouni and Albro who reflect on the aforementioned ideologies in regards to cultural property protection.<sup>10</sup> Recent cases like that of Mali; that assess criminal prosecution and Syrian case that showcases the involvement of non-state actors in the destruction of cultural heritage; put together will shape the possible way forward for the legal regime. All the above mentioned authors and their various understandings coupled with the recent case laws and developments gives the researcher practical insight in assessing the applicability of the legal instruments discussed and to provide a balanced conclusion on the subject matter.

### **1.7. Scope and Limitations of the Research**

The scope of this study focuses on cultural heritage protection in the event of armed conflicts; the legal assessment is in most cases limited to acts of states and non-state actors involved in armed conflicts. Specifically, this research assesses prominent legal instruments of cultural heritage protection; most significantly; the 1954 Hague convention and its two protocols. Other

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<sup>8</sup> Henckaerts, *supra* note 6.

<sup>9</sup> Patty Gerstenblith, *The Destruction of Cultural Heritage: A Crime Against Property or a Crime Against People?* J. Marshall Review Intellectual Property Law (2016).

<sup>10</sup> See Robert Albro and Bill Ivey, *Beyond the 1954 Hague Convention, in Cultural Awareness in the Military: Developments and Implications for Future Humanitarian Cooperation*. 83, 84-87 (eds. 2014). See also Kevin Chamberlain, *War and Cultural Heritage: A Commentary on The Hague Convention 1954 And Its Two Protocols* (2d ed. 2013).

supplementary international legal frameworks and international law sources such as case laws, and general principles of law will be looked into. The researcher has chosen for discussion legal instruments and cases that are most widely used, informative and progressive in the matter of cultural heritage protection.

### **1.8. Methodology of the Research**

This study is descriptive, narrative and analytical. It describes the strength and shortcomings of the current legal regime for the protection of cultural heritages in the event of armed conflicts. It analyses how current cases of Syria, Iraq and Mali can shed light on the applicability of major legal instruments such as the 1954 Hague convention. Extensive desk research has been carried out on existing literature through published and unpublished books, journal articles, official reports, decisions, international legal instruments and scholastic resources. The primary source are mainly international legal instruments such as the 1954 Hague Convention, Additional Protocol I and II of the Convention, and the Rome Statute. While several UN resolutions, conventions, case laws, general comments and various meetings and communiqués have also been important sources. This research will follow a doctrinal based research method. The researcher has chosen this design because he has found it most suitable to achieve the specified objectives of the research. Finally, the reliability and validity of these sources will be strictly considered by the researcher.

## **CHAPTER TWO: Definition and Scope for Cultural Property Protection in Armed Conflict**

### **2.1. Introduction**

The concept of culture property is a difficult one to understand and this in turn makes understanding the cultural property protection a complex one. In this regard this chapter takes on the question of how the concept of cultural property is understood and the many facets of its definition. It further identifies the rationale behind protecting cultural properties in armed conflicts and what it might entail. The last part of this chapter looks at the historical development of cultural property protection up until the 1954 Hague convention, while also assessing other critical developments in other different international law jurisprudence which impacted how we understand the protection of cultural property protection today.

## 2.2. What is Cultural Property?

In order to understand how cultural property is protected in international law it is first paramount to understand what one means when referring to the notion of ‘cultural property’. To do this exercise, it is the practice as most scholastic writings to first dissect the meaning of the term “culture”<sup>11</sup>, and while there are multiple definition of the term let us just consider two most prominent scholastic definitions.<sup>12</sup>

Geert Hofstede defines the tem as “the collective programming of the human mind that distinguishes the members of one human group from those of another. Culture in this sense is a system of collectively held values.”

While William D. Wunderle states that culture is a “shared set of traditions, belief systems, and behaviors. Culture evolves in response to various pressures and influences and is learned through socialization; it is not inherent. In short, a culture provides a lens through which its members see and understand the world”.<sup>13</sup>

When we come to the concept of “cultural property” in the event of armed conflict Article 1 of the 1954 Hague Convention and its two Protocols<sup>14</sup>, define the term as encompassing:

*(a) movable or immovable property, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property de- fined above;*

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<sup>11</sup> Yvette Foliant, “Cultural Property Protection Makes Sense”, Civil-Military Cooperation Centre of Excellence (CCOE), (2015); See also William D. Wunderle, “Through the Lens of Culture”, Combat Studies Institute Press, (2006); See also Geert Hofstede, “Cultures consequences: Comparing Values, Behaviors, Institutions, Cultures and organizations across nations”, 2<sup>nd</sup> edition London: Sage, (2001)

<sup>12</sup> Ibid

<sup>13</sup> Ibid

<sup>14</sup> The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954. Signed May 14, 1954. Entered into force 7 August 1956, 249 U.N.T.S 240. [Hereinafter 1954 Hague convention]; See Protocol I Additional to the Geneva Conventions (1949) and Relating to the Protection of Victims of International Armed Conflicts (1977), opened for signature 12 December 1977, in force 7 December 1978, 16 ILM 1391-1441; See also Protocol II Additional to the Geneva Conventions (1949) and Relating to the Protection of Victims of Non-International Armed Conflicts (1977) opened for signature 12 December 1977, in force 7 December 1978, 16 ILM 1442-9. (Article 53 Additional Protocol I and article 16 Additional Protocol II). Convention], Article 4.



*(b) Buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property....;*

*(c) Centers containing a large amount of cultural property ... ”*

This definition of cultural property is considered by scholars<sup>15</sup> as contrast to ‘cultural heritage’ which is protected in peacetime and defined in the UNESCO world heritage convention of 1972 as:

*“[M]onuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science; groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science; sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view... ”<sup>16</sup>*

This gives the implication that the definition of ‘cultural property’ is narrower than ‘cultural heritage’ in terms of its reference to tangible property.<sup>17</sup> In this regard a baseline is established to more or less make a distinction of what are tangible (i.e. cultural property) and those that are intangible heritages (i.e. non-physical aspects of heritage).<sup>18</sup> Thus, to classify something as a tangible heritage it must be a “material artefacts of archaeology, architecture, science, or technology of a specific culture and identified as being worthy of preservation for the future”.<sup>19</sup>

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<sup>15</sup> Manlio Frigo, ‘Cultural Property v Cultural Heritage: A “Battle of Concepts” in International Law’, *International Review of the Red Cross*, Vol 86, p. 367-378, 369, (2004)

<sup>16</sup> The UNESCO World Heritage Convention [here in after WHC], 1972.

<sup>17</sup> Erika J Techera, “Protection of Cultural Heritage In Times Of Armed Conflict: The International Legal Framework Revisited”, *Macquarie University Journal of Law*, Vol 4, (2007)

<sup>18</sup> Foliant and Kila make the distinction of cultural properties as “the physical manifestations of intangible cultural heritages (or are the tangible cultural heritages)”, Foliant, *Supra* note 11; See also J.D. Kila, “Heritage under Siege: Military Implementation of Cultural Property Protection in the Event of an Armed Conflict”, (2003).

<sup>19</sup> *Id.*, p. 21

In 1972 UNESCO in its Convention Concerning the Protection of the World Cultural and Natural Heritage, stated that a UNESCO World Heritage site as a place, which may vary for example from a monument to a lake, as a place with “outstanding universal value”<sup>20</sup> in defined sets of criteria for cultural, natural, and mixed sites. It should be noted that almost all UNESCO World Heritage Sites qualify as cultural property but that cultural property is by no means limited to World Heritage Sites. While the sites remain part of the legal territory of the State, and the State continues to have responsibility for the site’s conservation. UNESCO considers it in the interest of the international community to help to preserve each site.<sup>21</sup>

In the guise of protection afforded to them, cultural properties may be identified using a blue and white shield emblem. Cultural property can be classified as having ‘general protection’ or ‘special protection’ with all cultural property being afforded the general level of protection as a minimum.<sup>22</sup> Which defined cultural heritage as “the legacy of physical artefacts and intangible attributes of a group or society that are inherited from past generations, maintained in the present and bestowed for the benefit of future generations”.<sup>23</sup>

When we consider the protection of cultural heritage in armed conflict situations, such conflict can also be categorized as being international and non-international in nature. International humanitarian law to this end introduces a typology for classification of armed conflicts.<sup>24</sup> It defines the term “armed conflicts” in two distinct ways these are namely; international armed conflicts (between two or more opposing States) and non-international armed conflicts (between governmental forces and nongovernmental armed groups, or between such groups only).<sup>25</sup>

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<sup>20</sup> Ibid

<sup>21</sup> Kila, Supra note 18, p.23.

<sup>22</sup> “Pursuant to Article 17 the shield may be used to mark property under special protection by repeating it three times in a triangle formation. It may be used alone for general protection of cultural property, identity cards and personnel engaged in the protection of cultural property. For a detailed discussion of use of the Emblem including the marking of destroyed cultural sites”; See Articles 16 and 17 Hague Convention 1954, Supra note 14; See also Jan Hladik, “Marking of Cultural Property with the Distinctive Emblem of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict” *International Review of the Red Cross*, Vol 86, p. 379-387, (2004)

<sup>23</sup> Definition accessed for UNESCO website, [www.unesco.org](http://www.unesco.org) (Last Accessed on July, 8, 2017)

<sup>24</sup> Sylvain Vite, “Typology of armed conflicts in international humanitarian law: legal concepts and actual situations”, 2004.

<sup>25</sup> International Committee of the Red Cross (ICRC), “How is the Term “Armed Conflict” Defined in International Humanitarian Law?”, *Opinion Paper* (March 2008).

Therefore, legally speaking in international humanitarian law no other type of armed conflict exists, yet one type of armed conflict can evolve to the other, depending on the facts prevailing at a certain moment.<sup>26</sup> The international law jurisprudence such as the International Criminal Tribunal for the former Yugoslavia (ICTY) has proposed a general definition of international armed conflict. In the Tadic case, the Tribunal stated that "an armed conflict exists whenever there is a resort to armed force between States".<sup>27</sup>

### **2.3. The Scope and Rationale for Cultural Property Protection in Armed Conflicts**

In order to fully realize protection of cultural property in the event of armed conflict there must be recognition and analysis of why we should protect cultural property and the scope of its protection; thus this part of the research will establish what constitutes cultural property and the reasons for protection in international law.

While in the social context the cultural property is a reflection of the evolution, current heritage and culture of a community, recent developments such as incidents of the destruction of cultural property in non-international armed conflict (in places such as Syria to Iraq, Mali and Yemen) have shown the international community why the protection of cultural property is now regarded as a matter of international concern and subject to international norms.<sup>28</sup> However, a deep analysis suggests that the very definition of cultural property varies between international instruments so the scope of protection will also vary as well.<sup>29</sup>

Specifically to armed conflicts, for example under the 1954 Hague Convention, protection is limited to "movable or immovable property of great importance to the cultural heritage of every people," while the 1907 Hague Regulations extend protection, without condition, to "buildings

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<sup>26</sup> Ibid.

<sup>27</sup> ICTY, *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para. 70

<sup>28</sup> Louise Arimatsu and Mohbuba Choudhury, "Protecting Cultural Property in Non-International Armed Conflicts: Syria and Iraq", *International Law Studies*, Vol 91, (2015).

<sup>29</sup> Id, as explained by Arimatsu and Choudhury the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, Art. 1, Nov. 14, 1970, 823 U.N.T.S. 231, defines cultural property as "property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science." The definition in the 1995 UNIDROIT Convention on the International Return of Stolen or Illegally exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322, is described as more "elastic" in that cultural objects are "those which, on religious or secular grounds, are of importance for archaeology, prehistory, literature, art or science."

dedicated to religion, art, science, or charitable purposes [and] historic monuments.”<sup>30</sup> Scholastic works on this matter are also divisive on what constitutes as both “the concept of “property” and of “culture” elude categorical or normative definition”.<sup>31</sup> Ambiguities also exist between what “Cultural Property” and “Cultural Heritage” means<sup>32</sup> stemming from the 1954 Convention stating that “damage to cultural property belonging to any people whatsoever means damage to the *cultural heritage of all mankind*, since each people makes its contribution to the culture of the world,”<sup>33</sup>

Hence, scholars such as Arimatsu suggest that, when thinking about scope and the why for protecting cultural property, “the more useful avenue of interrogation may be to ask what values are being upheld by the law through the protection of such property”.<sup>34</sup>

These scholars also state that the rationale for protection should be also viewed on what contribution these “cultural properties” entail,<sup>35</sup> with the first contribution being aesthetic value and secondly symbolic value.<sup>36</sup> It has also been previously noted by the UNESCO’s Director-General; “Culture and heritage are not about stones and buildings—they are about identities and belongings. They carry values from the past that are important for the societies today and tomorrow. . . . We must safeguard the heritage because it is what brings us together as a community; it is what binds us within a shared destiny.”<sup>37</sup>

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<sup>30</sup> See the 1954 Hague Convention, *Supra* note 14, Art 1; See also the 1907 Hague convention.

<sup>31</sup> See Roger O’Keefe, “Protection of Cultural Property”, in *The Handbook of International Humanitarian Law*, p. 425, 430, Vol 4–8 (Dieter Fleck ed., 3d ed. 2013). See also Tatiana Flessas, “Cultural Property Defined, and Redefined as Nietzschean Aphorism”, *Cardozo Law Review*, Vol 24, (2003); See also Claudia Caruthers, “International Cultural Property: Another Tragedy of the Commons”, *Pacific Rim Law & Policy Journal*, Vol 7(1), p. 143, 147 (1998).

<sup>32</sup> Janet Blake, “On Defining the Cultural Heritage”, *International and Comparative Law Quarterly*, Vol 49, (2000), p. 61; See also Manlio Frigo, “Cultural Property v Cultural Heritage: A “Battle of Concepts” in International Law?”, *International Review of The Red Cross*, Vol 86, (2004); See also Craig Forrest, “Cultural Heritage as the Common Heritage of Humankind: A Critical Re-evaluation”, *The Comparative and International Law Journal of Southern Africa*, Vol 40, (2007).

<sup>33</sup> The 1954 Hague Convention, *Supra* note 14, Preamble.

<sup>34</sup> Arimatsu and Mohbuba Choudhury, *Supra* note 28, p. 649.

<sup>35</sup> *Ibid.*

<sup>36</sup> It has also been acknowledged in the Boylan Report, *Supra* note 2 , “the very concept of culture is far from absolute but is very much a product of the culture and values of those making the various self-definitions.”; See also Benjamin Isakhan, “Targeting the Symbolic Dimension of Baathist Iraq: Cultural Destruction, Historical Memory, and National Identity”, *Middle East Journal of Culture and Communication*, Vol 4, (2011).

<sup>37</sup> Irina Bokova, Address at the International Council on Monuments and Sites (ICOMOS) Gala to commemorate the 40th Anniversary of the World Heritage Convention (Dec. 2, 2012).

## 2.4. Historical Background of Cultural Property Protection in Armed Conflict

In past History there has been a tradition dictating that “plundered from a defeated nation would be taken by the victor”.<sup>38</sup> This led to the damage and destruction of most ancient artifacts and irreplaceable cultural property throughout ancient civilizations.<sup>39</sup> While this dynamic continued of a large period of history, by the turn of the nineteenth century the U.S formulated the first codified protection of cultural sites known as the Lieber Code, which granted protection to cultural property in the time of the U.S Civil war.<sup>40</sup>

The first “international agreements came to govern the conduct of war” also came in to fruition in this period.<sup>41</sup> These international agreements recognized that protection of cultural and historical sites as a guiding principle in times of war.<sup>42</sup> When the 2<sup>nd</sup> world war commenced there were again grave destruction and pillaging especially those carried out by the German Nazi Regime of that time.<sup>43</sup> Also the victors of 2<sup>nd</sup> world war, the allied powers, were also responsible for the destruction of many cultural heritage sites especially in states like Italy.<sup>44</sup> However the U.S also played a key part in establishing the concept of “military necessity” exemplified by the General of the then U.S Army Dwight D. Eisenhower who issued orders requiring a showing of military necessity, not just military convenience, when targeting a historical site.<sup>45</sup> Hence after the aftermath of the 2<sup>nd</sup> world war the international community fully recognized the importance of protecting cultural property in times of armed conflict thus The 1954 Hague convention emerged as a major pillar for protection in international law.<sup>46</sup>

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<sup>38</sup> As discussed in Hannah G. He, “Protecting Ancient Heritage in Armed Conflict: New Rules for Targeting Cultural Property During Conflict with ISIS”, Maryland Journal of International Law, Vol 30, (2015).

<sup>39</sup> See discussions in Burrus M. Carnahan, “Lincoln, Lieber, and the Laws of War: The Origins and Limits of the Principle of Military Necessity”, American Journal of International Law, Vol 92, (1998), p. 213, 222.

<sup>40</sup> Ibid.

<sup>41</sup> See Discussions made by Hannah G., Supra note 38, p. 170; See also Convention with Respect to the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, T.S. No. 403. [Hereinafter the 1907 Hague convention]

<sup>42</sup> Ibid.

<sup>43</sup> See Robert Schwartz, “The Limits of the Law: A Call for a New Attitude Toward Artwork Stolen During World War II”, Columbia Journal of Legal & Social Problems, Vol 32, (1998), p. 1, 4–5; See also Steven H. Resnicoff, “The Jewish Perspective on the Theft of Artworks Stolen During World War II”, DePaul-Lca Journal of Articles & Environmental Law & Policy, Vol 100, (2000), p. 67.

<sup>44</sup> See John Henry Merryman, “Two Ways of Thinking about Cultural Property”, American Journal of International Law, Vol 80, (1986), p. 831, 838–39; See also Joshua E. Kastenberg, “The Legal Regime for Protecting Cultural Property During Armed Conflict”, American Legal Review, Vol 42, p. 277, 288–90 (1997).

<sup>45</sup> Id, See also Hannah G. Supra note 38, p. 171-173.

<sup>46</sup> See The 1954 Hague Convention, Supra note 14.

### 2.4.1. Post World War II Developments in Cultural Property Protection

The shocking and disappointing incidents of WWII led the international community to embark on establishing international institutions tasked with the protection of cultural heritages the most prominent of these institutions was UNESCO.<sup>47</sup> Soon after its establishment the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict followed furthering the protection of cultural heritages universally. There were also several international conventions focused on humanitarian issues like; the four Geneva Conventions of 1949, the Universal Declaration of Human Rights, and the Genocide Convention which broaden our understanding of cultural property.<sup>48</sup>

When we look at the genocide convention specifically, we find a concept of introduced ‘cultural genocide’ by the Polish lawyer, Rafael Lemkin in 1933 as “one of the eight dimensions of genocide: political, social, cultural, economic, biological, physical, religious, and moral, “each targeting a different aspect of a group’s existence.”<sup>49</sup> While this concept was not included in the convention on Genocide, the concept of cultural genocide has returned in different contexts.<sup>50</sup> For example, the International Criminal Tribunal for the former Yugoslavia (ICTY) used cultural heritage destruction during the Balkan Wars “as a method of establishing the genocidal intent of the Serbs against the Bosnian Muslims”.<sup>51</sup>

In addition to the genocide convention, The 1949 Geneva conventions do not also include the concept of cultural property, because at that time as such, was not protected under the Geneva Conventions. This is because protection of cultural property was not regarded in the same vain as other more significant war crimes showing the divide between cultural property protection and humanitarian law protection.<sup>52</sup> However, in the 1977 Protocols I and II Additional to the 1949

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<sup>47</sup> Gerstenblith, Supra note 9

<sup>48</sup> See The Convention on the Prevention and Punishment of the Crime of Genocide, U.N.T.S. 277 (1948).

<sup>49</sup> Rafael Lemkin, “Acts Constituting a General (Transnational) Danger Considered as Offences Against the Law of Nations (1933), available at <http://www.preventgenocide.org/lemkin/madrid-english.htm>. (Accessed on August,2017)

<sup>50</sup> Gerstenblith, Supra note 9

<sup>51</sup> David Nersessian, Rethinking Cultural Genocide Under International Law, Human Rights Dialogue: “Cultural Rights,” Carnegie Council for Ethics in International Affairs, (Spring 2005) ([http://www.carnegiecouncil.org/publications/archive/dialogue/2\\_12/section\\_1/.html](http://www.carnegiecouncil.org/publications/archive/dialogue/2_12/section_1/.html)) Accessed on June,2017)

<sup>52</sup> Gerstenblith; explains that Article 33 of the Fourth Geneva Convention of August 12, 1949 Relative to the Protection of Civilian Persons in Time of War forbids pillage and Article 53 prohibits the destruction of real or personal property, whether publicly or privately owned, and this can be extended to include cultural property. Supra note 9.

Geneva Conventions inclusion was made in regards to cultural property.<sup>53</sup> While these Addition protocols, in contrast to the 1949 conventions, have not achieved universal recognition they do further the jurisprudence in international humanitarian law towards cultural heritage protection.

Another significant document to consider is the Rome Statute establishing the International Criminal Court.<sup>54</sup> Article 8 of the Statute of the International Criminal Court includes, the essence of cultural property protection among its more significant violations:

*"Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes [and] historic monuments . . . provided they are not military objectives."*<sup>55</sup>

Yet this article must not be seen in a holistic manner, as it has mainly two limitations. The first of these limitations is that 'the attack must be intentional, and second is that attacks on military objectives are considered permissible'. Gerstenblith explains that 'based on these legal instruments, the term atrocity crimes refers to three categories of international crimes: genocide, crimes against humanity, and war crimes' yet in the context of the criminal court statute a designation is made on 3 forms of crimes genocide, war crimes and crimes against humanity and as such "the crime of genocide is defined by the Convention on Genocide, as well as in the Rome Statute; crimes against humanity have not been codified in a distinct treaty but their definition relies on a variety of international sources, including the Rome Statute and the Statute of the ICTY; war crimes are defined in the 1949 Geneva Conventions and Additional Protocol I, as well as the Rome Statute. According to this tripartite classification, destruction of cultural property fits only as a war crime".<sup>56</sup>

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<sup>53</sup> Article 53 of Protocol I applying to international armed conflict introduces the issue that applies in international armed and Article 16 of Protocol II applying in cases of non-international armed conflict prohibit acts of hostility directed against historic monuments, works of art, or places of worship and the use of such property for military purposes.

<sup>54</sup> The Rome Statute of the International Criminal Court, U.N. Doc. A/Conf. 183/9, 37 I.L.M. 999 (July 17, 1998).

<sup>55</sup> Id, Art. 8(2)(b)(ix) (which applies to international armed conflict) and Article 8(2)(e)(iv)(which applies to non-international armed conflict).

<sup>56</sup> Gerstenblith, Supra note 9.

## **CHAPTER THREE: International Legal Framework for the Protection of Cultural Property**

### **3.1. Introduction**

This chapter of the research looks into the International legal regime of Cultural property Protection (CPP); in assessing the legal frame work the researcher dissects the 1954 Hague convention and its two protocols in detail. The researcher starts from the provisions, examines scope of the convention, sees the rules of special protection, elaborates on the execution of the 1954 Hague Convention.

In addition the legal framework for applying the 1954 Hague Convention to non-state actors is thoroughly discussed. The applicability of the principles of military necessity, distinction, proportionality, and precaution are elaborated during the conduct of hostilities in light of cultural property protection. At last; customary international law status of the Cultural Property Protection (CPP) legal regime will also be briefly discussed.

### **3.2. The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954)**

This convention spearheaded by UNESCO was developed with the purpose of instituting an international agreement that could help ensure the past mistakes in cultural property protection were not repeated in the future. This was to be done by “supplementing and building upon the many international agreements already in place regarding cultural property protection”, with the convention being the first international instrument to contain the terminology “cultural property” as used to describe “buildings, monuments, and objects in an international agreement”.<sup>57</sup> Article 1 of the 1954 convention also goes on to state that the term “cultural property” inclusive of “movable and immovable property, buildings, and centers containing monuments.”<sup>58</sup> A detailed description of cultural property is also seen in Article 2 of the 1945 convention which states that the term “protection” the “safeguarding of and respect for such property” with parties to the convention “refraining from any use of the property and its immediate surroundings, for purposes which are

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<sup>57</sup> The 1954 Hague Convention, Supra note 14, Art 1.

<sup>58</sup> Ibid.



likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility, directed against such property.”<sup>59</sup>

Protection in accordance to this convention can be “waived” by virtue of “military necessity”.<sup>60</sup> Yet the convention left it to the parties to the convention to determine what the parameters of “military necessity” and the measures it entailed.<sup>61</sup> National measures to be carried out by parties to the 1954 convention were also stated in Article 7 dictating parties to introduce “the Convention’s core concepts into their national military” with the view of fostering “in the members of their armed forces a spirit of respect for the culture and cultural property of all peoples.”<sup>62</sup>

While the main body of the document offered a significant step in the protection of cultural property in the event of an armed conflict parties also executed a separate First Protocol.<sup>63</sup> This protocol mainly focused on the protection of “movable cultural property” in the areas of conflict or occupation and regulation of their return to the place they were taken from.<sup>64</sup> It further included the protection of any cultural property moved to another region or nation for safekeeping during a conflict or occupation must be returned to the nation from which it was removed.<sup>65</sup> This protocol to the convention also made significant strides in cultural property protection in the decades that follow, however by early 1990 the existing Hague 1954 convention could not cope with the new scenarios of conflicts such as Yugoslavia and Iraq.<sup>66</sup>

Therefore, in 1999 a Second protocol was proposed in order to supplement the Hague convention in granting “enhanced protection” for cultural property “under specific conditions”.<sup>67</sup> This second protocol was also instrumental in providing guidelines; as seen in article 6 of the Second Protocol which provided further guidelines for defining “military necessity,” and how and when “waiver to

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<sup>59</sup> Id, Art 2.

<sup>60</sup> Ibid.

<sup>61</sup> Jan Hladik, ‘The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the Notion of Military Necessity’, International Review of the Red Cross, Vol 86, (1999), p. 621- 635, 621.

<sup>62</sup> The 1954 Hague Convention, Supra note 14, Art 7.

<sup>63</sup> First Protocol for the Protection of Cultural Property Armed Conflict, May 14, 1954, 249 U.N.T.S. 358, (<https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=79B801B4D23AEA95C12563CD002D6BE3&action=openDocument>), last accessed Feb 12, 2017.

<sup>64</sup> Id, Art 1-5.

<sup>65</sup> Ibid.

<sup>66</sup> J. Boylan, Supra note 2.

<sup>67</sup> Second Protocol to the Hague Convention of the 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 38 I.L.M. 769, 2253 U.N.T.S. 172 [hereinafter Second Protocol]; See also Diplomatic Conference on the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 15–26, 1999, UNESCO Summary Report (June 1999).

protection” could be instituted by a party to the 1954 convention.<sup>68</sup> One important addition in this second protocol was also the introduction of criminal sanctions if states were found at fault with Articles 15 and 16.<sup>69</sup> Another equally significant step made by the second optional protocol is also extending the conventions protection to non-international armed conflicts.<sup>70</sup>

### **3.3. Scope of Application of the Hague Convention**

The 1954 Hague convention applies to situations of declared war; international armed conflict and cases of partial or total occupation, even if there is no armed resistance and also the Convention has set few minimum standards to be observed during an armed conflict ‘not of an international character’.<sup>71</sup> The Convention has failed to define "armed conflict not of an international character” which led to debate over whether definitions in various international treaties would apply.

Likewise, the provisions lead to argument on the binding effect of the treaties concerning non-State actors and the practical and legal problems involved in the attempt to talk with unconventional forces.<sup>72</sup> The second protocol seems to have an aim to make progress with the current situation and its procedure is expected to be applied to situations of ‘non-international armed conflicts’.<sup>73</sup> However, an attempt on declaration of international law as binding upon parties not subject to international law or not parties to the treaty, often leads to ignorance of most basic and existing principles of international law.

In principle the mere fact of rebellion or insurgency will not make non-state parties to a non-international armed conflict be subjected to international law, unless other states have accepted the parties as aggressive craving for war. Meanwhile, the rules of international humanitarian law governing international armed conflicts and those stipulated in treaty law need to be respected by the non-state parties apart from the set of minimum rules on “elementary consideration of humanity” under the customary international law.<sup>74</sup> Even Second Protocol felt the need to

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<sup>68</sup> Id, Art 6.

<sup>69</sup> Id, Art 15-16.

<sup>70</sup> Id, Art 22.

<sup>71</sup> Edwin R. Micewski and Gerhard Sladek, “Protection of Cultural Property In The event Of Armed Conflict – A Challenge In Peace Support Operations”, (2002); See also 1954 Hague convention, supra note 14.

<sup>72</sup> Zoë Howe, “Can the 1954 Hague Convention Apply to Non-state Actors?: A Study of Iraq and Libya”, Texas International Law Journal, Vol 47, 2012

<sup>73</sup> Second Protocol, Supra note 67.

<sup>74</sup> Micewski and Sladek, Supra note 71.

explicitly restrain the progressiveness by introducing safeguard-clauses stressing State sovereignty and the international rights of a State.

Accordingly article 22 of the Second Protocol has to be interpreted restrictively to imply the provisions of the Second Protocol shall apply in the event of an armed conflict not of an 'international character'.<sup>75</sup> Similarly the Second Protocol failed to define the term "armed conflict" by a mere stipulation of situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature do not come within its scope of application. The terminology of armed conflict shall be interpreted in relation to the meaning developed under customary international law.

### **3.4. Current Rules on "Special Protection"**

The so-called "special protection" is stated in the convention to a limited number of immovable cultural properties of "very great importance", to be situated at an "adequate" distance from any large industrial center or from any important military objective, and is not used for military purposes.<sup>76</sup> The Convention further stipulates special protection will be given to cultural property by its entry in the "International Register of Cultural Property under Special Protection". The procedure will help to understand the type and location of cultural property under "special protection".<sup>77</sup> The apparent benefit of this publicity is the substantial saving of the possibility of accidental damage or destruction of cultural property appropriately registered. But also, it escalates the risk of deliberate destruction. Both recent and past conflict demonstrations have shown us occupying forces are likely to use deliberate destructions on target collections of cultural properties.

Cognizant to that, the "special protection" of cultural property appears to propose no conclusive benefit in relation with "normal" protection. Ironically, cultural property under "special protection" appears to be less protected by law than cultural property under "normal" protection. For the "special protection" concept, the Convention had turned out to be more or less ineffective in

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<sup>75</sup> Second Protocol, Supra note 67, Article 22.

<sup>76</sup> Jan Hladik, "Marking of Cultural Property with the Distinctive Emblem of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict", *International Review of the Red Cross*, Vol 86, (2004)

<sup>77</sup> The 1954 Hague Convention, Supra note 14, Articles 16 and 17.

practice due to many reasons. The Diplomatic Conference on the Second Protocol decided to launch a third class of cultural property under "enhanced protection".<sup>78</sup>

Eligibility for enhanced protection is given upon fulfilling the following conditions:

- must be cultural heritage of the greatest importance for humanity,
- protected by adequate domestic legal and administrative measures recognizing its exceptional cultural and historic value and ensuring the highest level of protection, and
- Must not be used for military purposes or to shield military sites and a declaration must have been made by the Party which has control over the cultural property, confirming that it will not be so used. Even though the first and the third condition are necessary, the second (adoption of adequate domestic measures) is not. In special cases, where a State Party ask for insertion of cultural property in the list of cultural property under enhanced protection cannot fulfill the conditions of satisfactory domestic measures, enhanced protection may still be allowed, provided that the requesting State submits a request for international assistance.

The Second Protocol forms a specific institutional framework, inter alia for the safeguarding of cultural property under enhanced protection, which is known as “Committee for the Protection of Cultural Property in the Event of Armed Conflict and a List of cultural property under enhanced protection”.<sup>79</sup> Apart from the usual process for approving enhanced protection, the Second Protocol similarly grants for an emergency procedure in case of armed conflict. Safeguard of cultural property under enhanced protection varies from the level of "normal" protection pursuant to Chapter 2 of the Second Protocol and to Chapter I of the Convention, as well as from the standard of protection provided for cultural property under special protection pursuant to Chapter II of the Convention mainly in three ways:<sup>80</sup>

First, the possibility of waiver of an obligation is null for the Parties to an armed conflict to ensure the "immunity" of cultural property under enhanced protection by abstaining ‘from making such property the object of attack or from any use of the property or its immediate surroundings in

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<sup>78</sup> Hladik, supra note 76, p.380

<sup>79</sup> Marina Lostal Becerril, The Meaning And Protection Of ‘Cultural Objects And Places Of Worship’ Under The 1977 Additional Protocols, Netherlands International Law Review, Vol 59, (2012)

<sup>80</sup> As explained by Micewski and Sladek, Supra note 71.

support of military action'. Any misuse of cultural property under enhanced protection for military action will result in losing of enhanced protection either by suspension or cancellation of the enhanced protection status by the Committee.

Second, even if the cultural property concerned has been used for military objective and thereby lost its enhanced protection status, 'it may only be the object of attack if the attack is the only feasible means of terminating such use of the property', if all possible protections are wisely taken with a view to ending such usage and evading, or in any incident reducing, destruction to the cultural property, and if, unless situations do not permit, due to conditions of instant self-defense, the attack is ordered at the highest operational level of command, effective advance warning is issued to the opposing forces requiring the termination of the use and reasonable time is given to the opposing forces to redress the situation.

Thirdly, making cultural property under enhanced protection the object of attack constitutes a serious violation of the Protocol which entails individual criminal responsibility, when committed intentionally and if it is in violation of the convention or the second protocol.

Despite the fact putting much effort in drafting the provisions on enhanced protection and improving the Diplomatic Conference did not designate cultural property under enhanced protection status. Thus the decision to establish a distinctive emblem under the guise of article 16 of the convention as a marking for cultural property is to be decided by the committee.<sup>81</sup>

### **3.5. The Execution of the 1954 Hague Convention**

The execution of the 1954 Convention rests on six pillars:<sup>82</sup> The system of Protecting Powers, international assistance, dissemination, reporting, a specific institutional framework and the criminal prosecution of persons violating the 1954 Convention

#### **3.5.1. The System of Protecting Powers**

First, the Convention lures on the system of Protecting Powers, already used in the Geneva Conventions of 1949, and syndicates it with a Commissioner-General for Cultural Property to be chosen by agreement.<sup>83</sup> However, in reality any application of this system barely observed, since

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<sup>81</sup> The 1954 Hague Convention, Supra note 14, Articles 16 and 17.

<sup>82</sup> As explained by Thomas Desch, Supra note 5, see also R. O'Keefe, Supra note 3.

<sup>83</sup> Ibid, O'Keefe p. 44.

also the Protecting Power System did not play a significant role in the conflicts since 1954. The main drawback of the Second Protocol lies in building of a system Protecting Powers, which is practically ineffective. The Second Protocol is mainly a reflection of the Convention, but adds a system of conciliation in the lack of Protecting Powers. From the wording of the provisions it appears to be unclear whether it applies in case of contention about the appointment of delegates of Protecting Powers only, or whether it offers a general dispute settlement procedure for any dispute among States Parties on the application or interpretation of the Second Protocol.

### **3.5.2. International Assistance**

Second, Parties to the Convention may call upon the UNESCO for technical support in forming the safeguarding of their cultural property, or in association with any other challenges coming out of the implementation of the Convention.<sup>84</sup> The Organization is also legally approved to initiate proposals to parties to the convention.

The Second Protocol also encompasses provisions keen to the concept of international assistance. It empowers Parties to the convention to appeal from the Committee for the Protection of Cultural Property in the Event of Armed Conflict global aid for cultural property under enhanced protection as well as support with regards to the ‘preparation, development or implementation of adequate domestic laws, administrative provisions and measures for the protection of such property’.<sup>85</sup> The application for the right to request is to be applied for both armed conflict and peace times.

Finally, the Second Protocol discusses about peace-time aid or assistance for Parties to the convention in forming the safeguarding of their cultural property such as preparative action to protect cultural property, pre-emptive and organizational procedures for emergency circumstances and composing of national records of cultural property.<sup>86</sup> All Parties to the Second Protocol has a right to call upon UNESCO for technical assistance in relation to challenges arising out of the implementation of the Second Protocol. UNESCO has the power to initiate proposals on related matters and shall provide assistances within the scope of its program and resource limitations.

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<sup>84</sup> The 1954 Hague Convention, Supra note 14.

<sup>85</sup> Second Protocol, Supra note 67, Articles 29, 32 and 33.

<sup>86</sup> Ibid

### **3.5.3. Dissemination**

Third, Parties to the Convention have an obligation to distribute words of the Convention as wide as possible, even by an inclusion of it to their military and civilian programs. In a similar manner the second protocol reflects about the need for dissemination using similar wordings of the convention but also added a slight detail.<sup>87</sup>

### **3.5.4. Reporting**

Another important point is parties to the Convention shall periodically forward to the Director-General of UNESCO a report giving information deemed to be appropriate in relation to any measures being taken, organized or anticipated by their relevant administrations in fulfillment of the Convention.<sup>88</sup>

In principle, the periodical reporting system is highly beneficial if sharing knowledge and experience is made properly, but in reality it has not functioned as expected. Records show only 20 % of the reports that should have been prepared by States Parties according to the requirements of the Convention have actually been submitted. The Second Protocol, in a similar manner with Convention dictates Parties to interpret the Second Protocol into their official languages and to communicate these official translations to the Director-General of UNESCO.

### **3.5.5. Institutional Framework**

Fifthly, assemblies of the Parties of the Convention are being used as a platform to examine the challenges in relation to the implementation of the Convention, and to articulate recommendations in respect thereof. The Second Protocol on the other hand, forms a new institutional structure providing the parties to participate closely in the safeguarding cultural property in the event of armed conflict. This institutional structure contains the assembly of the States Parties, the Committee for the Protection of Cultural Property in the Event of Armed Conflict.<sup>89</sup> The assembly of the States Parties of the Second Protocol shall be organized at the same time as the General Conference of UNESCO and in co-ordination with eventual Meetings of the States Parties to the Convention. At the request of at least one-fifth of the States Parties, an Extraordinary Meeting of

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<sup>87</sup> Id, Chapter 7

<sup>88</sup> The 1954 Hague Convention, Supra note 14, Article 26(2); see also Second Protocol, Supra note 67, Article 37(2).

<sup>89</sup> Id, Second Protocol, Article 23 and 24.

the States Parties shall be convened by the Director-General of UNESCO.<sup>90</sup> The assembly of the States Parties shall elect the members of the Committee, validate the strategies prepared by the Committee for the implementation of the Second Protocol, provide guidelines for, and supervise the use of the Fund by the Committee, consider the reports submitted by the Committee on the implementation of the Protocol, and discuss any problem related to the application of the Protocol, and make recommendations, as appropriate.

The Committee for the Protection of Cultural Property in the Event of Armed Conflict shall be composed of representatives of twelve States Parties which shall be elected by the Meeting of the States Parties for four years and shall be eligible for immediate re-election only once.<sup>91</sup> The Committee shall develop guidelines for the implementation of the Protocol, grant, suspend or cancel enhanced protection for cultural property and establish, maintain and promote the List of cultural property under enhanced protection, and promote the identification of cultural property under enhanced protection. Furthermore, it shall monitor and supervise the implementation of the Protocol, consider and comment on reports of the Parties, seek clarifications as required, and prepare its own report on the implementation of the Protocol for the Meeting of the States Parties.

Finally, it shall receive and consider requests for international assistance, determine the use of the Fund, and perform any other function which may be assigned to it by the Meeting of the Parties. The Fund for the Protection of Cultural Property in the Event of Armed Conflict shall serve to provide financial or other assistance in support of preparatory or other measures to be taken in peacetime, and to provide financial or other assistance in relation to emergency, provisional or other measures to be taken in order to protect cultural property during periods of armed conflict or of immediate recovery after the end of hostilities.<sup>92</sup> The resources of the Fund shall consist of voluntary contributions made by the States Parties, of contributions, gifts or bequests made by other States, UNESCO or other organizations of the United Nations system, other intergovernmental or non-governmental organizations, and public or private bodies or individuals, of any interest accruing on the Fund, of funds raised by collections and receipts from events organized for the benefit of the Fund, and of all other resources authorized by the guidelines

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<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

<sup>92</sup> Thomas Desch, *Supra* note 5.



applicable to the Fund. Disbursements from the Fund shall be used only for such purposes as the Committee shall decide.

### **3.5.6. Criminal Prosecution**

Finally, within normal criminal jurisdiction, parties of the Convention have an obligation to take all the needed steps to prosecute and penalize persons of irrespective of nationality, who is in violation of the Convention. Nevertheless, in reality compliance of this obligation is the exception rather than the rule. In other words, after an armed conflicts prosecution for crimes are usually for crimes against life or limb’.

During the review process, the fragile execution mechanism of the Convention was thought to be one of its main challenges. The Second Protocol adds some features to the Convention by forming three categories of crimes and offences: Serious violations of the Second Protocol which involve criminal charge and the offenders of which must either be tried or extradited, other serious violations which bring about criminal charge, and other violations of the Convention or the Protocol.<sup>93</sup> It is obvious that only members of the armed forces and nationals of a State which is a Party to the Second Protocol or has otherwise accepted its provisions; do incur individual criminal charge by the advantage of this Protocol.

Serious violations of the Convention or the Second Protocol shall bring about criminal charge under domestic law. States Parties to the Second Protocol are expected to adopt such measures as may be necessary to form as criminal violations under their domestic law the violations under both the above-mentioned first and second category of violations and to make them punishable by appropriate penalties.<sup>94</sup> This does not prevent the incurring of individual criminal charge for such offences under international law. The third category of "other violations" of the Convention or the Second Protocol does not necessarily involve criminal charge. It merely obliges States Parties to adopt "such legislative, administrative or disciplinary measures as may be necessary" to suppress such violations.

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<sup>93</sup> Second Protocol, Supra note 67, Articles 15-21.

<sup>94</sup> Ibid.

### **3.6. What is The Legal Framework for Applying the 1954 Hague Convention to Non-state Actors?**

Due to the growing nature of non-international armed conflicts and their impact on cultural property the question of whether or not The Hague convention applies to conflicts involving non-state actors has grown in importance in recent years. This was one of the objectives in the development of the Second Protocol to the 1954 Hague Convention as to clarify provisions protecting cultural property in non-international armed conflicts.<sup>95</sup>

In this context of cultural property protection the 1954 Hague convention states:

#### *ARTICLE 18 – APPLICATION OF THE CONVENTION*

- 1. Apart from the provisions which shall take effect in time of peace, the present Convention shall apply in the event of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by, one or more of them.*

It also goes on to state that:

#### *ARTICLE 19 – CONFLICTS NOT OF AN INTERNATIONAL CHARACTER*

- 1. In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as, a minimum, the provisions of the present Convention which relate to respect for cultural property.*
- 2. The parties to the conflict shall endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.*

Additional Protocol II of the Hague convention also states in Article 22:

- 1. This Protocol shall apply in the event of an armed conflict not of an international character, occurring within the territory of one of the Parties.*

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<sup>95</sup> Zoë Howe, "Can the 1954 Hague Convention Apply to Non-state Actors?: A Study of Iraq and Libya", Texas International Law Journal, Vol 47, Issue 2, (2012).

2. *This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.*

3. *Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.....*

5. *Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the Party in the territory of which that conflict occurs.*

These articles highlights that the 1954 convention and its additional protocols can be applied to either international or non-international armed conflicts. Especially the Second Protocol states that it will apply “in the event of an armed conflict not of an international character, occurring within the territory of one of the Parties.”<sup>96</sup> However neither the 1954 Convention nor the Second Protocol defines “non-international armed conflict.” To this end, on a commentary on Article 3 of the Geneva Conventions, Jean Pictet provides that an armed conflict must entail:

*“That the Party in revolt . . . possesses an organized military force [and] an authority responsible for its acts . . . . That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory... That the [legal] Government has recognized the insurgents as belligerents; or . . . claimed for itself the rights of a belligerent; or . . . that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.”<sup>97</sup>*

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<sup>96</sup> Second Protocol, supra note 67, art. 22(1); see also Dieter Fleck, “The Law of Non-International Armed Conflicts”, in The Handbook of International Humanitarian Law, at 605, 623 (The Second Protocol “extended all provisions of the [1954 Hague Convention] to non-international armed conflicts, thus further amplifying its scope of application.”).

<sup>97</sup> The Geneva Conventions of 12 August 1949, Commentary, Art. 3, At 49–50 (Jean Pictet Ed., 1952).

While these criteria's are useful in determining the character of a conflict, Pictet is quick to point out that this list is not exhaustive, and does not preclude the application of international law to conflicts that do not fulfill any of the listed conditions.<sup>98</sup>

In this regard Article 22 of the Second Protocol expands the application of cultural property protections to non-international conflicts.<sup>99</sup> However, there is still a question of whether the Hague Convention can bind non-state actors. While Article 22 would seem to directly bind non-state armed groups, treaties are generally only binding on signatory parties, and the 1954 Hague Convention was not open to signature by non-state groups. As explained by Desch “the question then becomes whether the Convention can legally bind third parties”.<sup>100</sup> To this end, the Vienna Convention on the Law of Treaties has indicated, through Article 34 up to 36 “that a treaty can create obligations for a third party in two conditions one being that “the contracting parties must have intended the treaty to grant such rights or impose such obligations on third parties”; and secondly “a third party must accept the rights or obligations.”<sup>101</sup>

When looking at Articles 19 of the Hague convention and Article 22 of its protocol II, Howe explains “the text seems to point that the contracting parties did not intend to extend obligations to third parties.”<sup>102</sup> However Jean-Marie Henckaerts, who observed the drafting of the Second Protocol indicates:<sup>103</sup>

*“Although Article 22 of the Second Protocol does not spell it out as clearly as it could have, the Protocol applies to all parties to a non-international armed conflict, whether governmental or insurgent forces. This was clearly acknowledged at the final plenary session. A certain confusion arose because Article 1 of the Protocol defines the word “Party” as a State Party to the Second Protocol. However, the understanding was that*

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<sup>98</sup> Ibid.

<sup>99</sup> Second Protocol, Supra note 67, Art. 22.

<sup>100</sup> Thomas Desch, Supra note 5.

<sup>101</sup> Vienna Convention on the Law of Treaties arts. 34–36, May 23, 1969, 1155 U.N.T.S. 331, available at <http://untreaty.un.org/ilc/texts/instruments/english/conventions/.pdf>. Accessed on June, 15, 2017.

<sup>102</sup> Howe, Supra note 72, p. 421.

<sup>103</sup> Jean-Marie Henckaerts, “New Rules for the Protection of Cultural Property in Armed Conflict: The Significance of the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict,” International Review of The Red Cross, No. 835 (Sept. 30 1999), available at <http://www.icrc.org/eng/resources/documents/misc/57jq37.htm>; see also States Parties to the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, UNESCO, <http://portal.unesco.org/la/convention.asp?KO=15207&language=E&order=alpha> [hereinafter States Parties to the Second Protocol to the 1954 Hague Convention]. As discussed in Howe, Supra note 72.

*throughout the text the word “Party” in the phrase “Party to the conflict” includes rebel groups of States party to the Second Protocol but not third States which have not ratified the Second Protocol. The reasoning was that nongovernmental forces involved in a non-international armed conflict within a State party to the Protocol are bound by the Protocol through the ratification of the State concerned.”*

Also subsequently the summary report of the Second Protocol indicates application to all parties in a non-international conflict, whether state parties or non-state parties.<sup>104</sup>

However a counter argument is forwarded by some scholars as to whether the element of “accepting the obligations created by the treaty” by a non-state actor is fulfilled.<sup>105</sup> This according to Howe entails that “without confirmation from a non-state group that it has accepted the obligations created by the Hague Convention, it would be difficult to say that the Convention can be applied to non-state actors through the Vienna Convention.”<sup>106</sup>

In contrast customary international law provides a viable route adherent to the concept that “customary international law will bind non-state actor groups even if the non-state group has not formally accepted the obligations created by the international law”.<sup>107</sup> So, “The provisions of an international treaty, if commonly accepted among both signatory and non-signatory states, can become part of customary international law, and will therefore bind not just states but non-state actors such as rebel factions or secessionist groups.”<sup>108</sup>

Because provisions of the 1954 Hague Convention are regarded as having achieved customary international law status (such as Article 19),<sup>109</sup> these provisions shall bind “both state and non-

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<sup>104</sup> Diplomatic Conference on the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, Mar. 15–26, 1999, Summary Report (June 1999), <http://unesdoc.unesco.org/images/0013/001332/133243eo.pdf> [hereinafter UNESCO Conference on the Second Protocol]. Accessed on August, 12, 2017.

<sup>105</sup> Antonio Cassese, “The Status of Rebels Under the 1977 Geneva Protocol on Non- International Armed Conflict, International & Comparative Law Quarterly, Vol 30, p. 416, 423, (1981) (analyzing this question as regards application to rebels of Additional Protocol II to the Geneva Conventions).

<sup>106</sup> Howe, *Supra* note 72, p. 422-26.

<sup>107</sup> Andrew Clapham, “The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement”, (Feb. 1, 2010), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract>. (“It is clear that the exclusion of armed groups from the normal treaty-making process and their subsequent inability to become parties to the relevant treaties means that alternative regimes have had to be adopted.”).

<sup>108</sup> *Id.*, Roger O’Keefe, “The Protection of Cultural Property In Armed Conflict”, Vol 18, (2006)

<sup>109</sup> *Ibid.*

state actors in international and non-international armed conflicts, even though the non-state actors have not formally accepted the obligations imposed by the Hague Convention”.<sup>110</sup>

### **3.7. Cultural Heritage during the Conduct of Hostilities**

In the event of an armed conflict, the belligerents’ cultural heritage will be harmed by acts of active hostilities<sup>111</sup>. The primary effect of the hostilities will be seen on the tangible heritage; but indirectly the damage caused to museums, theatres, cathedrals and other cultural sites can also affect the intangible aspect of this cultural heritage.

The conflict in Mali in 2012 reflect the effects on cultural heritage. What may be recalled by the international community is the physical destructions of the Timbuktu mausoleums, but at the back of it, there was grave harm caused to the intangible heritage at these sites<sup>112</sup>. Which can mostly be observed in certain cultural rituals that need to be held in a specific location that in this case was destroyed.<sup>113</sup>

The regulation of the conduct of hostilities is conducted exclusively by the law of armed conflict, which unquestionably constitutes a *lex specialis* in this area. The four fundamental principles relating to the conduct of hostilities in armed conflict are the pillars of this legal regime. These are the principles of military necessity, distinction, proportionality and precaution. Described in the jurisprudences of the International Court of Justice (ICJ) as “cardinal” principles.<sup>114</sup> These four principles will be discussed below.

#### **3.7.1. The Principle of Military Necessity**

In the evolution of international protection of cultural property in armed conflict the term military necessity plays a key part. From its evolution form the time of the Lieber Code of the American

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<sup>110</sup> Howe, *Supra* note 72, p. 422.

<sup>111</sup> An armed conflict can consist of several phases: the hostilities phase, when fighting takes place between the adverse parties, followed by a phase in which one party falls into the power of the opposing party. This situation may stem from a military occupation, depending on the circumstances in each case. During this second phase, other provisions of the law of armed conflict govern situations of this type.

<sup>112</sup> See UNESCO, “World Heritage Committee Calls for End to Destruction of Mali’s Heritage and Adopts Decision for Its Support”, 3 July 2012, available at: [www.unesco.org/new/en/media-services/single-view/](http://www.unesco.org/new/en/media-services/single-view/) , Accessed on September 3, 2017.

<sup>113</sup> Christiane Johannot-Gradis, “Protecting the past for the future: How does law protect tangible and intangible cultural heritage in armed conflict?, The evolution of warfare”. *International Review of the Red Cross* (2015), 97 (900), 1253–1275.

<sup>114</sup> ICJ, *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion*, 8 July 1996, para. 78.

civil war the term garners a different meaning from its time in the past to present (due to the scope of this research the following discussion will focus on international agreements).<sup>115</sup> International agreements such as the 1907 Hague Convention defines military necessity as “anything that was necessary for offense or defense, either during battle or in preparation for battle” and the creation of “an explicit waiver of protection for any historical monuments being used for military purposes”.<sup>116</sup>

The 1954 Hague Convention also contributed heavily to the evolution of the concept of military necessity by the use of terms such as “unavoidable” and “imperative” when establishing the waiver of protection for military necessity.<sup>117</sup> The convention did not define these terms, granted that the drafters felt “military necessity was already an internationally-recognized principle of warfare” requiring “military objective could not be achieved by any other means, and that any damage to cultural property would be restrained to what was absolutely necessary to achieve that objective”.<sup>118</sup>

A report by Patrick J. Boylan (the Boylan Report sanctioned by UNESCO), in this regard recognized this problem of the 1954 convention and promptly recommended that “the waiver for military necessity” as it gave states too much leeway.<sup>119</sup>

In response to this report the Second Protocol had not removed the waiver rather it added to its articles a definition of the term “military necessity as “an object which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”<sup>120</sup>

### **3.7.2. The Principle of Distinction**

The principle of distinction, is where by belligerents must at all times differentiate constituents of cultural heritage from other property. It prohibits the parties to the conflict, on one hand from using

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<sup>115</sup> Craig J.S. Forrest, *The Doctrine of Military Necessity and the Protection of Cultural Property During Armed Conflicts*, *California International Law Journal*, Vol 37, (2007), p. 188–91.

<sup>116</sup> The 1907 Hague convention, Art 23.

<sup>117</sup> See discussions of article Articles 4 and 11 of the Hague convention in Hannah G. He, *Supra* note 38.

<sup>118</sup> *Ibid*.

<sup>119</sup> The J. Boylan report, *Supra* note 2, at 51-57.

<sup>120</sup> The Second Protocol, *Supra* note 67, Art 1(f).

them for military purposes and on the other hand; committing acts of hostility against cultural heritages; which makes this principle essential in preserving cultural heritage. Additional Protocol I and the 1999 Second Protocol; puts forth the initial prohibition against hostile acts with better clarity and by deliberating greater protection on cultural heritage.<sup>121</sup> These means; for an act of hostility to be defensible, the property in query must also have been changed into a military objective.<sup>122</sup> Which expands the obligation to distinguish which was restricted solely to distinguishing the constituents of the heritage from other property. Obligations such as the obligation to verify, assess and take precautions; are assumed by the parties to the conflict; which is used to make a valid distinction. Which are some of the additional conditions put forth by the Second Protocol<sup>123</sup>; whose demands increase with the significance of the object in question.<sup>124</sup>

“Using” components of cultural heritage for military purposes is also prohibited by the principle of distinction. It’s evident that if the property is used in such manner it will be harmed; and can bring a valid precondition and motive for the later launch of an attack.<sup>125</sup> This prohibition, which was not present under the 1907 Hague Regulations, was incorporated in Article 4(1) of the 1954 Convention and further reinforced by the 1999 Protocol. Furthermore; Article 6 of the 1999 Protocol also places the belligerents under additional obligations, such as the obligation for the attacking forces to ensure that there is “no feasible alternative available to obtain a similar military advantage”.<sup>126</sup>

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<sup>121</sup> Under the regime of the 1907 Hague Regulations, the principle of distinction chiefly concerned the differentiation between “defended” and “undefended” cities and towns; Article 27 of the Regulations nonetheless provides that, even in the case of defended cities and towns, certain property – i.e., “buildings dedicated to religion, art, science, or charitable purposes” – must be spared “as far as possible”. Even in these circumstances, therefore, the principle of distinction must be observed.

<sup>122</sup> The adoption of the concept of “military objective” in AP I was aimed at differentiating such objectives from civilian objects. Thus, even before an attack is launched, Article 52 of AP I requires belligerents, in accordance with the principle of distinction, to differentiate military objectives from civilian objects. Under this provision, therefore, civilian objects are, for the first time, expressly protected.

<sup>123</sup> The Second Protocol specifies the conditions under which an object can be turned into a military objective by requiring that it be so transformed “by its function”; this requirement implies an immediate use of the object for military purposes, thereby enhancing its protection.

<sup>124</sup> Depending on whether the object in question enjoys “general” protection, according to both the 1954 Convention and the Second Protocol, or “special” or “enhanced” protection, respectively regulated by Articles 8–11 of the 1954 Convention and Articles 10–14 of the Second Protocol.

<sup>125</sup> Among the causes for an object’s transformation into a “military objective”, Article 52 of AP I expressly refers to the object being “used” in such a way as to “make an effective contribution to military action”.

<sup>126</sup> Second Protocol, *Supra* note 67, Art. 6(a)(ii); Article 7 of this instrument also dictates various precautions that constitute means of implementing the obligation to comply with the principle of distinction.



An example illustrating this can be; the case of the Church of the Nativity in Bethlehem, Palestine. Under the circumstances; the 1999 Protocol was not formally applicable. But the facts of the case show that the Church was used as a refuge by troops of the Palestine Liberation Organization in 2002 at the time of conflict with Israel; meaning the principle of distinction was violated because the church was used for military purposes; making it a military objective. An attack could be deliberated by the Israeli army, if several other conditions were met.<sup>127</sup> Even though the high international pressure aided in making Israel opt for other options; it created the motive for an attack.<sup>128</sup>

### **3.7.3. The Principle of Proportionality**

The third principle that of proportionality, is a general principle of law.<sup>129</sup> It connotes the search for a balance between ensuring respect for fundamental values and military considerations. It enshrines the foundation of the law of armed conflict, the main aim of which is to reconcile military necessity with the necessities of humanity. This principle was explicitly incorporated in positive law only through Article 57(2)(a)(iii) and (b) of Additional Protocol I, and further, in light of instruments for cultural heritage protection, by Article 7(c) and (d)(ii) of the 1999 Protocol.

However, there are problems in the implementation of this principle. In order to determine whether a planned military action is or is not lawful; is the major one faced by belligerents. On one hand there is the “direct and concrete advantage” as a consequence of attacking that property, and on the other hand, the “excessive damage” that is expected to be caused; are to be weighed by the party to a conflict.

Evaluating the first part may be relatively more direct and simple. But assessing the excessive damage it may cause requires a detailed knowledge of the property in question, its value and its quality. Hence, judging whether the damage would be excessive is complicated, especially as the decisions to attack are mostly time sensitive.

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<sup>127</sup> As the Second Protocol did not apply to this scenario, this analysis is hypothetical.

<sup>128</sup> See Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, Cambridge, 2004, p. 163.

<sup>129</sup> See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: Rules, Cambridge University Press, Cambridge, 2005, (issued by ICRC customary law study), pp.47.

### 3.7.4. The Principle of Precaution

The principle of precaution, reinforces compliance with the principle of proportionality and the principle of distinction by shading light on main aspects of their implementation. Minimizing and limiting the damage arising from the conduct of hostilities is the major purpose of this principle. The legal development enshrined in AP I<sup>130</sup> in relation to cultural heritage; and reaffirmed in the Second Protocol deliberates considerably greater protection on the constituents of this heritage.<sup>131</sup> Depending on whose hands the heritage is with; different protection is expressed through a series of measures.

For the sake of explanatory examples; two cities which experienced heavy bombing in different conflicts and eras, namely Isfahan, Iran, in 1985 and Dubrovnik, Croatia, in 1991 can be taken. These two cases showcase the obligations of the attacking party and the defending party, respectively, in relation to the principle of precaution.

In the mist of the Iran–Iraq War (1980–86), the Iraqi air force conducted a missile attack on Isfahan, which is home to big petroleum refineries. This caused grave damage to one of the oldest mosques in the Islamic world; namely the Jameh (Friday) Mosque. It was evident that various measures laid out by the principle of precaution were not abide by at the time; for example, the military objective targeted didn't have no monitoring or verification as to the existence of a component of cultural heritage or of whether the methods used were correct in light of the situation at the ground.<sup>132</sup> This attack could therefore be labelled unlawful as it is indiscriminate.<sup>133</sup>

An illustration of the obligations of the defending party; can be seen from the attacks on the Old City of Dubrovnik at the time of the Balkan conflict; which took place from 1991– 95. From the view of the Serbs, the alleged existence of ammunitions depot on the out skirts of the city justifies the attacks. Nevertheless; moving military objectives away from properties comprising components of cultural heritage; is one of the obligations of parties.<sup>134</sup> As prohibited by law; the

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<sup>130</sup> The prescriptions in Part IV, Section I of AP I, and specifically in its Articles 52, 57 and 58, are restated in Articles 6 and 7 of the 1999 Protocol concerning cultural property. The purpose of the latter two norms was to clarify Article 4 of the 1954 Convention, according to which the obligation to “respect” cultural property could be lifted with only one condition, that of military necessity

<sup>131</sup> AP I, Supra note 63, Art. 57. and Second Protocol, Supra note 67, Art. 7, respectively.

<sup>132</sup> AP I, Supra note 63, Art. 57(2)(a)(i) and (ii).

<sup>133</sup> See UNESCO, “Information on the Implementation of the Convention for the Protection of Cultural Property in the Event of Armed Conflict”, The Hague, 1954, 1989 Reports, Doc. CC/MD-11, December 1989, notes 4–8.

<sup>134</sup> AP I, Supra note 63, Art. 58(b).

closeness of military objectives to cultural property; is meant to deter the enemy forces from initiation of an attack against the military target. As evidenced in the case of the Temple of Ur military equipment is mostly kept next to cultural objects with the intent of using the cultural object as shield. Any object or activity liable to be branded with a military objective had carefully been evacuated from the Old City of Dubrovnik by the concerned body during the years preceding the conflict.<sup>135</sup> No attack could be justified on the above grounds; since the demilitarization was conducted with the aim of averting any attack. The International Criminal Tribunal for the former Yugoslavia (ICTY) concluded in the 2005 Strugar judgment<sup>136</sup> that the attacks of December 1991 were illegal.

### **3.8. Customary International Law in light of Cultural Heritage Protection**

Customary international law is defined as “a general practice accepted as law.”<sup>137</sup> The rule must be a part of State practice (*usus*) and there must be “a belief that such practice is required, prohibited or allowed . . . as a matter of law (*opinio juris*).”<sup>138</sup>

Evaluation of the first element; i.e. State practice is done by two measures. The first measure is State selection of rules, as validated through weaponry types used, methods of combat, military trainings, and national legislation. The second measure is an evaluation of State practice in that the practice must be “representative, virtually uniform, and extensive.” In cases of a particular rule being violated, if the violation is widely condemned; the rule may still be viewed as uniform. In evaluating the extensiveness of a rule, in addition to assessing the number of States that abide to it, one must also look in to whether States “whose interests are specially affected” abide by the rule. Since general acceptance of a rule suffices; even if it is not universal acceptance.

The element of *opinio juris* is more challenging to validate; because it is mostly difficult to determine if it is a matter of practice or of legal conviction; that led to a State to engage in or

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<sup>135</sup> Christiane Johannot-Gradis, Protecting the past for the future: How does law protect tangible and intangible cultural heritage in armed conflict?, *The evolution of warfare, International Review of the Red Cross* (2015), 97 (900), p 1253–1275.

<sup>136</sup> ICTY, *The Prosecutor v. Pavle Strugar*, Case No. IT-01-42, Judgment (Trial Chamber), 31 January 2005, para. 295.

<sup>137</sup> Statute of the International Court of Justice, Art. 38(1)(b).

<sup>138</sup> Jean-Marie Henckaerts, Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict, 87, International Review of the Red Cross (2005), p 175, 178-82,

refrain from an act. Another deliberation in evaluating whether a rule has become part of customary international law is whether the rule has been incorporated in a multilateral treaty. Upon this happening; the extent of the ratification of the treaty is looked into. Specifically; how States that have ratified the treaty behave in relation to States that are not party to it, and whether States that are not a party consistently follow the rule are of paramount importance.

Even before the ratification by the United States in 2009; the status of customary international law was attained various elements of the 1954 Hague Convention; this is substantiated by Article 3(d) of the Statute of the International Criminal Tribunal for the former Yugoslavia. At a bare minimum these basic provisions has reached the status; the substantive obligations to refrain from targeting cultural property in the absence of imperative military necessity (Article 4(1) and (2)) and to prevent one's own military from engaging in vandalism, theft and misappropriation of cultural property (Article 4(3)).<sup>139</sup> Nevertheless, attainment of the status of customary international law of the narrower versions of this articles in the Second Protocol is still not answered by the international community.

## **CHAPTER FOUR: Applying International Law; the Case of Syria**

### **4.1. Introduction**

In any armed conflict; the most invaluable and primary concerns which cannot be measured are the amount of human lives lost, the injuries and displacements; compared to that destruction of cultural heritage may look like a secondary importance. But in most cases these two are present together; the Syrian conflict shows us the one of the most widespread destruction of cultural heritage in recent history. The intentional destructions of religious and ancient sites that are the foundations of the people and that are sources of livelihoods; show the high degree of link between the people and cultural heritage. This destructions by Islamic State of Iraq and the Levant (ISIL); in one side are shaking the very foundations of the Syrian people, and on the other side are reflecting the impotence of the western world; which has claimed this heritage as part of all mankind. Applicability and effectiveness of the available international legal instruments that are intended to protect cultural heritages pose a big unanswered question. Putting this in mind the first part of this chapter assess the Syrian case in light of the applicability of the law; in the involvement

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<sup>139</sup> Kevin Chamberlain, *War and Cultural Heritage: A Commentary On The Hague Convention 1954 And Its Two Protocols* p.16-17, (2d ed. 2013).

of non-state actors, obligations assumed for prosecution by both sides to the conflict and the issue of looting and theft of cultural property.

When coming to the second part of this chapter; in the past decade international law has evolved to a state where there are significant indications that there could be a concrete jurisprudence to deal with the issue of cultural heritage in the future. This is more evident after recent action in Syria which have showed the international community of the implications of destructions cultural property will have in preservation of culture as a whole. To this end the second part of the chapter will seek to assess the recent trends and developments in international law and jurisprudence.

#### **4.2. Non-State Actors and Conflicts Not of an International Character: A Syria Perspective**

One of the concerns of the existing conflict in Syria is the degree to which the 1954 Hague Convention applies to internal conflicts. Article 18 shows the Convention's applicability to an international armed conflict; while Article 19 relates to armed conflict "not of an international character."<sup>140</sup> The Second Protocol to the 1954 Hague Convention stipulates that it does not apply to "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature."<sup>141</sup> Demarcating when a scenario of internal disturbance; that beyond the scope of the 1954 Hague Convention, turns into a non-international armed conflict;<sup>142</sup> which brings it into the scope of the convention is very challenging; as can be seen in the case of Syria.<sup>143</sup>

Extending the scope of international law to encompass internal armed conflict, raising legal arguments of breaching national sovereignty; was initiated in Common Article 3 of the 1949 Geneva Conventions with the purpose of having the law "apply as broadly as possible to conflicts

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<sup>140</sup> The 1954 Hague Convention, Supra note 14, Article 18 states that the Convention "shall apply in the event of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties . . ." Article 19 provides that "In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions" of the Convention.

<sup>141</sup> Second Protocol, Supra note 67, Art. 22(2). This definition tracks the exclusion found in Additional Protocol II to the 1949 Geneva Conventions, Article 1, Paragraph 2. See Chamberlain, supra note 10, p 52.

<sup>142</sup> Chamberlain, supra note 10, at 50-51

<sup>143</sup> See Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment in the Appeals Chamber, at 35-51, (International Criminal Tribunal for the Former Yugoslavia, 15 July 1999), available at <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>

occurring between states and non-state entities in order to maximize its effectiveness and reach.”<sup>144</sup> In 1994, the ICTY offered an inclusive definition of armed conflict as “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”<sup>145</sup>

Based on the ICTY’s statement; two major elements for defining armed conflict were pin-pointed; i.e. intensity of the fighting and organization of the parties; but this test questionably became over technical by necessitating that both elements be independently satisfied, rather than being regarded as factors within the bigger picture.<sup>146</sup> The ineffectiveness of this test resulted in the delay in recognizing that the rebellion in Syria, which started in March 2011, had reached the level of “armed conflict,” thus falling under the umbrella of the humanitarian protections of the law of armed conflict. Evidently; on July 2012 the International Committee of the Red Cross determined that it saw the situation in Syria as constituting a non-international armed conflict.<sup>147</sup>

### **4.3. Prosecuting Cultural Heritage Destruction in Syria and Iraq**

#### **4.3.1. Destruction by the Islamic State of Iraq and the Levant (ISIL)**

As mentioned earlier, ISIL has committed extensive damage and destruction to known and unknown cultural heritage sites and objects without even a facade of a justification based on military necessity. To mention some; the destructions included the blowing up of the Nebi Yunus mosque in Mosul, numerous Christian churches and monasteries in the northwest region of Iraq, and several components of the ancient site of Palmyra. Furthermore, ISIL also released videos of the jackhammering of one of the lamassu at the Gate of Nineveh and the demolition of objects in the Mosul Museum. In the aforementioned cases,<sup>148</sup> ISIL follows a similar technique by

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<sup>144</sup> M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 *Journal of Criminal Law & Criminology* 711, 712, (2008). P.698.

<sup>145</sup> Ibid. (quoting *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, P 70 (*International Criminal Tribunal for the Former Yugoslavia Oct. 2, 1995*)).

<sup>146</sup> Ibid. The Commentary to Common Article 3 to the 1949 Geneva Conventions enumerates several factors to be considered in determining whether a genuine armed conflict exists rather than an unorganized and short-lived insurrection. *Commentaries on the 1949 Geneva Conventions*, Art. 3, Chapter 1, General Provisions (1949), at 49-50, available at <http://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments>

<sup>147</sup> Stephanie Nebehay, Exclusive: Red Cross Ruling Raises Questions of Syrian War Crimes, Reuters, (July 15, 2012), available at: <http://www.reuters.com/article>. See also Laurie R. Blank and Geoffrey S. Corn, *Losing the Forest for the Trees: Syria, Law and the Pragmatics of Conflict Recognition*, *Vanderbilt Journal of Transnational Law* (2013).

<sup>148</sup> These are just a few of the better known structures intentionally destroyed by ISIL. It is very likely that ISIL has destroyed a large number of other religious structures, but these incidents are not as well documented, either through

undertaking intricate placement of explosives around the site, and then detonates the explosives, attaining the maximum visual effect. This destructions were carried out in a well-organized manner; with an objective of creating terror on the people and display control. The high visual effects; also seem to be there in order to show their control to the international community, which has regularly bemoaned these incidents without the ability to prevent them in any way.

It is evident that this acts constitute a violation of the 1954 Hague Convention, customary international law, and other international legal instruments; since there were no military activities in the vicinity; or the fact that this structures are not military objects substantiate the violation of international law.

Furthermore from previous chapter discussions on non-state actors and conflicts not of an international character, one can conclude that the provisions of the 1954 Hague Convention apply to ISIL, even if it doesn't hold the status of a recognized State. Even though there is no course of military engagement that resulted in this destructions, they are taking place in the context of armed conflict and this satisfies another element required for the 1954 Hague Convention to apply. Nevertheless, these are just primary steps in determining whether appropriate punishment can ever be given. The challenge of imposing any criminal punishment on these actors becomes a question of legal instrument under which to prosecute them and of a venue in which to have the proceedings.

#### **4.3.2. Destruction by the Syrian Arab Republic Government (SARG)**

Unlike that of ISIL the circumstances of the harm caused by SARG has not yet been determined; so let's look in to it in a theoretical manner.<sup>149</sup> Instances of damage caused by SARG include the bombing of the medieval Crac des Chevaliers castle in western Syria; the use of the vicinity of Palmyra as a military base, making Palmyra a military objective and exposing Palmyra to damage and destruction, and extreme damage to civilian objects and populations in such cities as Aleppo, damage to the Umayyad mosque complex and Ottoman structures in the historic core of Aleppo.

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ISIL media releases or through independent, objective research, usually conducted through satellite imagery and other forms of remote sensing.

<sup>149</sup> Until the United States initiated bombing raids against ISIL, which focused primarily on eastern parts of Syria, SARG had the only air power in the conflict. Therefore any damage caused by aerial bombardment could be easily attributed to SARG. However, once Russia initiated its own bombing raids in the fall of 2015 and these were not limited to actions against ISIL but rather cover significant portions of Syria, it became significantly more difficult to determine which party to the conflict may have been responsible for what episode of destruction.

Unlike the case with ISIL destruction, most of these events were carried out during armed conflict and therefore SARG would possibly defend its action based on imperative military necessity.

For instance, efforts at protection were taken at the Ma'arra Mosaics Museum, located in Idlib province in western Syria; one of the best collections of Roman mosaics were in the museum; during that time the area was under the control of the Free Syrian Army. The efforts to protect the museum were done by Syrian curators who had been trained by the Safeguarding the Heritage of Syria and Iraq consortium in how to protect mosaics by using simple materials like tyvek and sandbags.<sup>150</sup> A barrel bomb launched by SARG forces landed in the courtyard of the museum; on June 2015.<sup>151</sup> Except the mosaics that had been sandbagged which were not harmed; most of the unprotected areas of the museum were destroyed. Determining whether the museum was intentionally targeted will be a challenging task; if found to be intentional, would the targeting be excused by imperative military necessity; provided that rebel troops were fighting in the vicinity.<sup>152</sup> These facts are not determined at this time and it may even be very difficult to do so later, although the responsibility for the destruction lying on the SARG forces is a certainty. Therefore, the likelihood of establishing a violation of the 1954 Hague Convention is very low.

To reflect on a different view it's relevant to recall the prosecution of the Croatian military leaders for the destruction of the Mostar Bridge.<sup>153</sup> Since the Muslim Forces used it; the Mostar Bridge was considered to be a valid military objective. Hence, the leaders responsible for the Bridge's demolition were not convicted for violating Article 3(d) of the ICTY, which depend on on the 1954 Hague Convention as evidence of customary international law. The leaders were convicted due to the destruction being excessive pursuant to Article 3(b).<sup>154</sup> The principles of distinction

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<sup>150</sup> Eden Stiffman, Cultural Preservation in Disasters, War Zones Presents Big Challenges, Chronicle of Philanthropy, May 11, 2015, available at <https://philanthropy.com/article/CulturalPreservation>, Accessed on September,7,2017.

<sup>151</sup> Diane Orson, Syrian Cultural Heritage Site Allegedly Bombed by Assad Regime, Worldwide Naval Projections Report (June 16, 2015), available at <https://wnpr.org/post/syrian-cultural-heritage-site-allegedly-bombed-assadregime> Accessed on September,7, 2017,

<sup>152</sup> Emma Cunliffe, Nibal Muhesen and Marina Lostal, The Destruction of Cultural Property in the Syrian Conflict: Legal Implications and Obligations, 23 International Journal of Cultural Property (2016).p.8-9.

<sup>153</sup> 111 Years in Prison for Herceg Bosna Leaders, Sense Tribunal, (May 29, 2013), available at <http://www.sense-agency.com/icty/111-years-in-prison-for-herceg-bosnaleaders.29.html>. Accessed on September,7,2017.

<sup>154</sup> Prosecutor v. Prlic et al., Judgment, 29 May 2013, Vol. III, at 459-61, available at <http://www.icty.org/x/cases/prlic/tjug/en/130529-3.pdf>. Accessed on September,7,2017.



and proportionality are incorporated into the Second Protocol of the 1954 Hague Convention. But since Syria is not a State Party to the second protocol this case law can't be applied.

In another light, it may be practical to conclude that the Assad regime violated Article 51 and 57 of Additional Protocol I to the Geneva Conventions in its bombing of the Ma'arra Museum<sup>155</sup>; because it has ratified the Protocol.

### **4.3.3. Looting and Theft**

The studies of the American Association for the Advancement of Science; reflect that tentative world heritage sites of; Dura-Europos and Mari; which are archeological sites have suffered paramount looting after falling under ISIL control.<sup>156</sup>

Looting of sites in Assad regime-controlled territory have also been revealed by other studies. Image of the site of Apamea, taken on April 2012 compare to the one taken in July 2011, show the gravity of the destruction, which was conducted with the intention of theft for Hellenistic and Roman period mosaics.<sup>157</sup>

The third and second millennium B.C.E. site of Ebla; located in western Syria is yet another Site that incurred damage both from military activity and from looting.<sup>158</sup> It is not advocated that either ISIL or the Assad regime conducts the looting itself. But they are gaining the economic benefits indirectly. They are letting the looting happen; and are benefiting from taxation, control of smuggling routes and direct selling of artifacts. This conclusion is a certainty for ISIL and there may also be some instances where some sections of the Assad regime is doing the same.

Article 4(3) of the 1954 Hague Convention is the only unequivocal provision that prohibits looting and theft of cultural objects. However, this provisions applies to the obligation of a military power to prevent its own troops from engaging in theft, vandalism and misappropriation of cultural

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<sup>155</sup> Roger O'Keefe, Protection of Cultural Property Under International Criminal Law, 11 Melbourne Journal of International Law. p.353(2010).

<sup>156</sup> Susan Wolfinger et al., Ancient History, Modern Destruction: Assessing the Status of Syria's World Heritage Sites Using High-Resolution Satellite Imagery (2014), available at <http://www.aaas.org/page/ancient-history-modern-destruction-assessing-current-status-syria-> See also; Jesse Casana, Satellite Imagery-Based Analysis of Archaeological Looting in Syria, 78:3 Near Eastern Archaeology 142 (2015).

<sup>157</sup> Trafficking Culture, Looting at Apamea recorded via Google Earth, available at <http://traffickingculture.org/data/data-google-earth/looting-at-apamea-recorded-via-google-earth/>. Apamea is located in the far western part of Syria and has not been under ISIL control.

<sup>158</sup> C.J. Chivers, Grave Robbers and War Steal Syria's History, New York Times, (Apr. 7, 2013), at A1. A video is available at: <http://www.nytimes.com>. Accessed on October, 11,2017.

property.<sup>159</sup> Other international legal instruments addressing the issue would be the First and Second Protocols to the 1954 Hague Convention. But the scope of provisions is limited to instances in which one State Party is occupying the territory of another State Party<sup>160</sup> and hence are not applicable to the Syrian case at hand.

Nonetheless, what we are witnessing here is an unprecedented level of looting of archaeological sites carried out in an organized fashion and on an industrial scale and, in all likelihood, thefts from museums and other collections.<sup>161</sup>

The intent of these pillages is with a very specific and targeted economic gain with an aim of funding terrorism and armed conflict being conducted by organized entities as in the case of ISIL. This looting; carried out on such a large scale and with the intent of aiding armed conflict, the looting of archaeological sites, should be categorized as just another form of destruction of cultural property. Based on this argument, the conclusion would be seeing this form of looting as a violation of the 1954 Hague Convention and creating accountability under other legal instruments as a form of targeted and intentional destruction of cultural property.

The international legal regime has imposed an artificial dichotomy on our thinking about cultural heritage destruction and this makes it difficult to envision the looting of archaeological sites as a war crime. In the past, while theft and pillage were carried out as a part of armed conflict and so was prohibited by the various legal instruments that form the law of armed conflict, At a glance one can see that the 1970 UNESCO Convention and the 1995 Unidroit Convention address looting of archaeological sites as a problem of international movement of cultural objects, rather than as a part of the law of armed conflict. This creates a false dichotomy; that arises from the separation of cultural heritage issues into two different legal sects after the Second World War. On the one hand there is; the 1954 Hague Convention and its Protocols as part of international humanitarian law and the law of armed conflict, and on the other hand the 1970 UNESCO Convention. The nexus of this two treaty regimes was evident in mist of World War II but the international

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<sup>159</sup> From Bamiyan to Baghdad: The Conduct of Warfare and the Preservation of Cultural Heritage at the Beginning of the Twenty-First Century, 37 *Georgia Journal of International Law* p.309-11 (2006).

<sup>160</sup> Marina Lostal, Syria's World Cultural Heritage and Individual Criminal Responsibility, 3 *International Legal Review*, 1, p.15.(2015).

<sup>161</sup> For example, the Kurdistan Democratic Party, in an entirely unconfirmed story, reported that ISIL had stolen 99 archaeological pieces from the Mosul University Museum and taken them to Raqqa. ISIS steals 99 rare archaeological pieces from Mosul University Museum, (Mar. 6, 2016).

community may have forgone this intertwined relation in recent time. The case of Syria has foremost reminded us of this close nexus. The large scale and orchestrated looting conducted; especially with the intent of funding armed conflicts; it should construct the war crime of intentional and targeted destruction.<sup>162</sup> In light of these assertion uniting these two sides of cultural heritage law is a necessity.

#### **4.4. Recent Developments in International Law**

##### **4.4.1. The UNESCO declaration of 2003 and the ICJ Preah Vihear Case**

The Taliban in 2001 were responsible for the destruction of Buddha statues monuments in the city of Bamiyan,<sup>163</sup> in which, scholars like Francioni and Lenzerini suggested such a destruction was “a violation of customary international law”.<sup>164</sup> In order to substantiate this point the refer to various sources of international law such as the 1954 Hague Convention, the ICTY statute and cases, several UNESCO recommendations, and the 1972 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage.<sup>165</sup>

After assertions were made that by scholars including Francioni and Lenzerini that cations of the Taliban had violated international law there UNESCO responded by issuing a declaration in 2003 entitled ‘the Intentional Destruction of Cultural Heritage’.<sup>166</sup>

When dissecting this instrument us according to three important concepts to consider.<sup>167</sup> The first is that it constitutes a destruction committed by the ‘governing authority’ (Taliban in Afghanistan at the time) and ‘within its territory’ thus constituting an unjustifiable offence beyond the scope of armed conflict.<sup>168</sup> The second element to this conflict is that actions were manifesting in peacetime

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<sup>162</sup> The parallel with the large-scale thefts of cultural objects perpetrated by the Nazis during World War II finds another parallel in that stolen works of art were at times sold onto the international art market in order to raise hard currency for the Nazi war effort. As explained in: Patty Gerstenblith, *Supra* note 9, p. 377. (2016).

<sup>163</sup> Francesco Francioni and Federico Lenzerini, “The Destruction of the Buddhas of Bamiyan and International Law”, *European Journal of international Law*, Vol 14, p. 619, 630-38, (2003).

<sup>164</sup> *Ibid.*

<sup>165</sup> *Id.*, p. 637.

<sup>166</sup> UNESCO Declaration concerning the International Destruction of Cultural Heritage, UNESCO, (Oct. 17, 2003), available at ([http://portal.unesco.org/en/ev.php\\_URL\\_ID=17718 & URL\\_DO= DO\\_TOPIC & URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php_URL_ID=17718&URL_DO=DO_TOPIC&URL_SECTION=201.html)). Accessed on November,17,2017.

<sup>167</sup> Marina Lostal, Syria’s World Cultural Heritage and Individual Criminal Responsibility, *International Legal Review.*, Vol 3, (2015),

<sup>168</sup> UNESCO Declaration, *Supra* note 166, Article 2 (2),

and the declaration accordingly grants protection of cultural heritages even during peace time.<sup>169</sup> The last element to consider is that definition of state responsibility forwarded by the declaration as “a State that intentionally destroys or intentionally fails to take appropriate measures to prohibit, prevent, stop and punish any intentional destruction of cultural heritage of great importance for humanity . . . bears the responsibility for such destruction to the extent provided for by international law.”<sup>170</sup> When we consider these elements to the current case of Syria they could have significant bearing on how current Assad government could have possibly violated international law.

In this context another significant development to consider is the two opinions<sup>171</sup> that have emerged from the ICJ *Cambodia v. Thailand*, concerning the Temple of Preah Vihear. The first opinion, Judge Cançado Trindade sought to “link the human elements to the Temple cultural heritage site”.<sup>172</sup> In doing so Judge Trindade wanted to incorporate and link elements such as territoriality human life and the preservation of culture and heritage together. The court’s decision eventually read out as “encompassed the human rights to life and to personal integrity, as well as cultural and spiritual world heritage . . . . [T]he Court’s order went ‘well beyond State territorial sovereignty, bringing territory, people and human values together,’ well in keeping with the *ius gentium* of our times.”<sup>173</sup>

#### **4.4.2. United Nations Security Council Resolution: Mali, Iraq and Syria**

In 2013 one of the most significant developments in the protection of cultural property came about through the protections the resolutions passed by the United Nations Security Council addressed

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<sup>169</sup> Id, Preamble, states “the development of rules of customary international law . . . related to the protection of cultural heritage in peacetime as well as in the event of armed conflict.”

<sup>170</sup> Id, Article 6; Lostal, however criticizes the declaration by stating that one of its critical drawbacks was its emphasis on intentionality in the definition of “intentional destruction”, its narrow definition of “destruction”, and its reliance on individual States to establish criminal liability. See Lostal, *Supra* note 167, p.111-20.

<sup>171</sup> Request for Interpretation of the Judgment of 15 June 1962 in the case concerning the Temple of Preah Vihear (*Cambodia v. Thailand*), Summary of the Order of 18 July 2011, Separate opinion of Judge Cançado Trindade, 5-6, p. 20-26, available at (<http://www.icj-cij.org/docket/files/151/16584.pdf>); See also; Request for Interpretation of the Judgment of 15 June 1962 in the case concerning the Temple of Preah Vihear (*Cambodia v. Thailand*) (11 Nov. 2013), Separate opinion of Judge Cançado Trindade, 333-34, available at <http://www.icj-cij.org/docket/files/151/17708.pdf>.

<sup>172</sup> Gerstenblith, explain that while the case ‘the case technically involved a boundary dispute between Cambodia and Thailand involving technical questions of determining the proper border and of interpreting the court’s earlier opinion on this issue, Judge Trindade sought to link territoriality, preservation of human life, and the cultural and spiritual heritage dimension, in the interest of preventing spiritual damage; See Gerstenblith, *Supra* note 9, p.384.

<sup>173</sup> ICJ, *Cambodia v. Thailand*, (11 Nov. 2013), at p. 33

the situation in Mali in several resolutions more specifically resolution 2100.<sup>174</sup> Resolution 2100 first and foremost condemns the actions of “all abuses and violations of human rights and violations of international humanitarian law,” including the “destruction of cultural and historical heritage.”<sup>175</sup>

The significance of this document lies in its inclusion of destruction of cultural and historical sites which in turn led to the establishment of the Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) tasked with the mission of peacekeeping and stabilization in Mali.<sup>176</sup> MINUSMA is mandated with the cultural preservation by “assist[ing] the transitional authorities of Mali, as necessary and feasible, in protecting from attack the cultural and historical sites in Mali, in collaboration with UNESCO.”<sup>177</sup> This action put cultural property protection in line or in proportion with other more significant human rights and humanitarian assistance programs in Mali.

While the security resolutions which were enacted in the case of Mali were more general to the country and region, the UN Security Council in its resolutions regarding Iraq and Syria took a more specific approach.<sup>178</sup> These resolution more or less referred to ‘deterrence of looting of cultural institutions and archaeological sites’.<sup>179</sup> Security Council Resolution 1483 called for all U.N. member states to take actions in the prevention and trade in cultural property those of which were attained through illegal channels from Iraq and hence help in the return of these items.

Later in 2015, the Security Council resolution which reaffirmed the decision to protect the illegal trade of cultural property which in this case was taken from Syria form march 2011. Specifically the resolution condemned the destruction of cultural heritage “whether such destruction is incidental or deliberate, including targeted destruction of religious sites and objects.”<sup>180</sup> While the provision merely ‘calls’ upon members of the UN, the term ‘incidental’ gives a more greater

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<sup>174</sup> United Nations Security Council Resolution 2100, S/RES/2100 (April 25, 2013), available at [http://www.un.org/en/peacekeeping/missions/minusma/documents/mali%20\\_2100\\_E\\_.pdf](http://www.un.org/en/peacekeeping/missions/minusma/documents/mali%20_2100_E_.pdf), Accessed on November 27, 2017.

<sup>175</sup> Id, Art 2.

<sup>176</sup> Id, at Section 16(f).

<sup>177</sup> Ibid.

<sup>178</sup> United Nations Security Council Resolution 2199, S/RES/2199, February 12, 2015, available at (<http://unscr.com/en/resolutions/doc/2199>) [here in after UNSCR 2199] See also United Nations Security Council Resolution 1483, passed on May 22, 2003, which called for the lifting of the broad trade sanctions against Iraq that had been in place since 1990, when Iraq invaded Kuwait.

<sup>179</sup> Ibid.

<sup>180</sup> UNSCR 2199, Supra note 178, p. 15.

leeway as compared to the more restrictive parameter of the 1954 Hague convention which need substantiation on the basis of principles such as distinction and proportionality. In the case of Syria it is of the focus of this resolution to limit or deter on looting of repositories and archaeological sites as a source of funding terrorist groups such as ISIS.<sup>181</sup>

#### **4.4.3. International Criminal Court (ICC) Criminal Prosecution: the case of Mali and its implications**

The ICC through an arrest warrant it issue on September 2015, apprehended Ahmad Al Faqi Al Mahdi to appear before the court.<sup>182</sup> The charge brought against Al Mahdi (as member of Ansar Dine, an armed Islamist group whose aim is to impose sharia law throughout Mali) entailed that he used his role as Hisbah (the morality brigade of the Islamic tribunal established by Ansar Dine) to destroy a series of historic and religious buildings and monuments in Timbuktu that they considered to be idolatrous and a “visible vice”.<sup>183</sup> The case brought to the chamber in the Hague found the prosecution in this case had established a reasonable ground to prove that Al Mahdi committed war crimes and hence was “criminally responsible for having committed, individually and jointly with others, facilitated or otherwise contributed to the commission of war crimes” by intentionally directing attacks against two mosques.

This heralded the first ICC criminal prosecution of an individual which did not commit other war crimes and crimes against humanity. This was a distinct recognition by the ICC in regards to the nature of the crime against cultural heritage having great implications on how seriously such a crime is being viewed in international legal jurisprudence.

The Prosecutor in this case made numerous references to the fact that religious sites had implications not only for in the religious context but how they strongly relate to the cultural

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<sup>181</sup> A subsequent Security Council Resolution, United Nations Security Council Resolution 2254, S/RES/2254 (18 December 2015), included a demand that all parties cease attacks against civilians and civilian objects and “any indiscriminate use of weapons, including through shelling and aerial bombardment . . .” and although cultural property is not specifically mentioned, it is included as a subset of civilian objects.

<sup>182</sup> Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15, available at ([https://www.iccpi.int/en\\_menus/icc/situations%20and%20cases/situations/icc0112/Pages/situation%20index.aspx](https://www.iccpi.int/en_menus/icc/situations%20and%20cases/situations/icc0112/Pages/situation%20index.aspx)) [hereinafter the Case Report] Accessed on November,27,2017.

<sup>183</sup> Charge brought by the Prosecution against Ahmad AL FAQI AL MAHDI, ICC-01/12-01/15-70-AnxA, International Criminal Court (December 17, 2015) [hereinafter Charges]. Accessed on January,7,2018.

heritage and history of Timbuktu and in a much broader sense to the cultural historical significance of these structures for the region of Africa and for all of humanity.<sup>184</sup> The Prosecutor commented;

*“... This case is not about determining who was right or wrong from a religious point of view. The bottom line is that the attacked monuments had a religious use and had an historic nature. To intentionally direct an attack against such monument is a war crime under the Rome Statute, regardless of the judgment by other people on the religious practices by the inhabitants of Timbuktu”*

The case highlights the shift towards recognizing that cultural and historic structures in international criminal jurisprudence.

### **Analysis of the case:**

When looking at the Rome statutes establishing the criminal court we find that Article 17(1)(d) in order for a case before the ICC to be admissible, it must be “of sufficient gravity to justify further action by the Court.”<sup>185</sup> In line with this notion question of whether the gravity threshold met, it is ultimately the court’s decision as to determine this factor. However the prosecution also plays a role here as to decide to proceed with opening the case to start with.<sup>186</sup>

Generally speaking it is the role of the Office of the Prosecutor to directly specify that its assessment in this matter regarding the gravity of crimes ‘includes both quantitative and qualitative considerations based on the prevailing facts and circumstances’.<sup>187</sup> While there are no guidelines in both the Rome statute nor the drafting history outlining what meets this gravity threshold, it can be seen in the Regulations of the Office of the Prosecutor that “the non-exhaustive factors that

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<sup>184</sup>Prosecutor of International Criminal Court, Fatou Bensouda statement in Mr. Ahmad Al-Faqi Al Mahdi case (01/03/2016) [ hereafter Prosecutor Statement ], available at ([https://www.iccpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-01-03-16.aspx](https://www.iccpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-01-03-16.aspx)). Accessed on December ,21,2017.

<sup>185</sup> Rome statute; Supra note 54.

<sup>186</sup> See Margaret M. De Guzman, “What is the Gravity Threshold for an ICC Investigation? Lessons from the Pre-Trial Chamber Decision in the Comoros Situation”, *ASIL INSIGHTS*, Vol 19, (Aug 11, 2015), available at (<https://www.asil.org/insights/volume/19/issue/19/what-gravity-threshold-icc-investigation-lessons-pre-trial-chamber>) Accessed on November,12,2017.

<sup>187</sup> Ansar Eddine, “Situation in Mali: Article 53(1) Report, International Criminal Court, Office of the Prosecutor”, *Open Society Justice Initiative* (January 16, 2013)[hereinafter Article 53(1) Report]

guide the Office's assessment of gravity include the scale, nature, manner of commission of the crimes, and their impact."<sup>188</sup>

The main question here lies in the assessment of these factors within the limits of the war crime of destruction of cultural property. To this end, additional questions such as incorporation of universality aspect verses the relative aspect and the examination of the effects of the destruction on local community comes to mind.<sup>189</sup>

In the Al Mahdi case, the Prosecutor's Office reached its decision to bring further action against and in the end charges, were as per the prosecutor partially was based on the notion the World Heritage status of the Timbuktu sites.<sup>190</sup> This is suggestive that it took a more universal approach.

Looking at the statements of the prosecutor we find that it mentions that "at least nine mausoleums out of 16 mausoleums listed in the UNESCO's World Heritage List, two great mosques out of three great mosques listed in the UNESCO's World Heritage List, and two historical monuments, in the city of Timbuktu."<sup>191</sup> This is indicative of the role UNESCO designation of cultural heritage site played in the analysis.

When determining the nature of destruction the prosecutor also determines objects Article 8(2)(e)(iv) of the Rome Statute as being afforded special protection under Additional Protocol I to the 1949 Geneva Conventions.<sup>192</sup> The office of the prosecutor' makes this assessment on the notion that 'without specifically discussing any other indicators of cultural, religious or historical significance of the sites to Timbuktu', the fact that these sites had been on the World Heritage list since 1988.<sup>193</sup>

Lastly analysis was also made by the prosecutor on the impact of the destruction on the community. In this regard determination was made by the prosecutor "the destruction of religious and historical World Heritage sites in Timbuktu appears to have shocked the conscience of humanity," and cites the UN Secretary General's recognition of the sites as "part of the indivisible heritage of

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<sup>188</sup> De Guzman, Supra note 186. p.28.

<sup>189</sup> John Darlington, Timbuktu Shrines Trial: Why the Destruction of Cultural Heritage is History Repeating Itself, *Newsweek*, Mar. 5, 2016, available at (<http://www.newsweek.com/timbuktu-shrines-international-criminal-court-433384>)

<sup>190</sup> Case Report, Supra note 182, Article 53(1)..

<sup>191</sup> Prosecutor Statement, Supra note 184, p. 21

<sup>192</sup> Ibid.

<sup>193</sup> Id. p.31



humanity.”<sup>194</sup> While this may be true the considerations to look at here is the fact that the prosecutor did not specifically assess the impacts on the immediate community in Timbuktu but took a more ‘universal’ approach on the impact it had on the world at large.<sup>195</sup>

To this end judgments, such as the Jokić Judgment, the Strugar Judgement, and Judge Antonetti’s partially dissenting opinion in Prlić et al., come to mind in the sense that they were case where international criminal jurisprudence utilized the status of world heritage site to gravitate towards the commission of war crimes.<sup>196</sup>

This so called “gravity threshold” warrants the question now of whether in the future cases need to meet the threshold of World Heritage Site with “outstanding universal value” to merit such treatment by the ICC?.<sup>197</sup>

When we revisit Article 8(2)(e)(iv) the text of the Rome statute there is a more the ‘relativist definition of cultural property’ which indicated that prosecution for the destruction of cultural heritage relating to an armed conflict could occur for sites that aren’t inscribed as World Heritage Sites, especially in cases where the destruction may be up on a large, widespread scale and is committed as part of a plan or policy.<sup>198</sup>

While cases like this are not yet been brought to the ICC per se, Authors such as De Guzman argue “that the widespread destruction of cultural sites, even if they are not World Heritage Sites, could meet this gravity threshold”.<sup>199</sup> To this end in the Comoros case it was stated that “the physical, psychological or emotional harm suffered by the direct and indirect victims of the identified crimes must not be undervalued and needs not be complemented by a more general impact of these crimes beyond that suffered by the victims”.<sup>200</sup>

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<sup>194</sup> Ibid.

<sup>195</sup> De Guzman, supra note 186, p.112

<sup>196</sup> Judgement, Strugar (IT-01-42), Trial Chamber, 31 January 2005 [hereinafter Strugar Judgement]; Judgement, Jokić (IT-01-42/1), Trial Chamber, 18 March 2004, see also 3 Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Čorić and Berislav Pušić, Case No. IT-04-74-T ICTY (29 May 2013). See also Judgement Summary for Jadranko Prlić and Others, International Criminal Tribunal for the Former Yugoslavia (29 May 2013).

<sup>197</sup> Darlington, supra note 191.

<sup>198</sup> Rome statute, Supra note 54, Art 8.

<sup>199</sup> De Guzman, Supra note 186. p.128

<sup>200</sup> Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation, Case No. ICC-01/13-34 ICC, International Criminal Court, Pre-Trial Chamber I (July 16, 2015) [hereinafter Comoros],

Thus it was of the courts understanding that “the significant impact of such crimes on the lives of the victims and their families ... is, as such, an indicator of sufficient gravity.”<sup>201</sup> While the facts and crimes in this case vary from cases such as Al Mahdi some scholars suggest that “it could open the door for a more relativistic gravity threshold analysis in the cultural heritage context”.<sup>202</sup>

Such an approach warrants a more protectionist approach beneficial to the international criminal jurisprudence where cultural heritage and property represents “an essential part of the collective memory of a community,” hence the destruction as such can have devastating consequences to the identity of a local population whether or not designated as being as part of the wider world cultural heritage.<sup>203</sup> In another regards, it seems also harsh to just base gravity solely on universal basis when the impact is felt more on the local community whose close bonds with cultural heritage is destroyed.

Finally, recent actions in Syria by groups a such as ISIS also bring to mind the seriousness of protecting cultural heritage as it as seen ICTY Trial Chamber’s conviction of Radislav Krstić “where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group.”<sup>204</sup>

Destruction of cultural heritage sites such as the ancient cities of Palmyra and Aleppo by ISIS have been coupled with the death of countless amounts of people and as stated by the United Nations Secretary-General at the time Ban Ki-moon “[a]s the people of Syria continue to endure incalculable human suffering and loss, their country’s rich tapestry of cultural heritage is being ripped to shreds”.<sup>205</sup> Statements like this not only highlight the destruction of priceless cultural property in Syria and beyond but also link this actions to the increasingly serious and dangerous nature of the situation. To this end it is of the opinion of this author that in future cases that international criminal court should not only take the universal approach, those of which might help

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<sup>201</sup> Ibid.

<sup>202</sup> As reflected in; Case Analysis, Situation in the Republic of Mali: The Prosecutor v. Ahmad Al Faqi Al Mahdi, International Criminal Court. (Aug. 24, 2016).

<sup>203</sup> Darlington, Supra note 189, p.88.

<sup>204</sup> Judgment, Prosecutor v. Radislav Krstić (IT-98-33), Trial Chamber, 2 Aug. 2001

<sup>205</sup> Statement by UN Secretary-General Ban Ki-moon, UNESCO Director-General Irina Bokova and UN and League of Arab States Joint Special Representative for Syria Lakhdar Brahimi: The destruction of Syria’s cultural heritage must stop, (12 Mar. 2014), available at (<http://www.un.org/sg/statements/index.asp?nid=7521>) Accessed on December, 3, 2017.

prosecute destructions to cultural sites such as Aleppo and Palmyra as ancient sites of universal value. But also consider the idea that cultural heritage destruction is indicative of a much serious crimes protected under the ICC statutes.

## **CHAPTER FIVE: Conclusion and Recommendations**

### **5.1. Conclusion**

As various incidents in human history has made us realize; the protection of cultural property needs to be seen in a wider perspective than what comes to mind when we think of the word cultural property and what was intended when the 1954 Hague convention was put forth. Cultural property has both tangible and intangible dimensions; cases such as Mali; in which the ceremonies that were conducted at the mausoleums of Timbuktu are destroyed with the physical destruction; show the intertwined nature of components of cultural heritages. This shows that the protection forwarded by the applicable law should have the scope of encompassing both components of cultural heritage. The international humanitarian law through the 1954 convention addresses only one side of the coin; which is the preservation of cultural property; while the protection of intangible cultural heritage is addressed in an implicit manner. However; the law of armed conflict in general does encompass the means to address this intangible component of cultural heritage. Individual protection for the physical well-being and human dignity; which encompass protection of the cultural and spiritual identity; are granted by various norms emanating from the 1949 Geneva Conventions and their additional protocols. This is directly related to the protection of their living cultural heritages.

Practically speaking; the aforementioned norms are mostly not specific enough to be applied to occurring cases as they are sourced from broad interpretations of the word “respect for human dignity”. In addition; most of the provisions apply only in cases of military occupation; which leaves gaps in cases of non-international armed conflicts. In most cases; common Article 3 and the relevant provisions of the law of armed conflict apply to fill this gap. The application of this norm would supplement the law of armed conflict; resulting in a better effectiveness in cultural heritage protection be it international or non-international armed conflict or in another dimension whether the cultural property is tangible or intangible.

When cases such as the ICTY case reflected the shortcomings of the 1954 convention; the Second Protocol was introduced into the legal regime; the adoption of this protocol was a major step in the right direction; it tried to address gaps in the 1954 convention. It clarifies the obligations to take precautionary measures and disseminate the Convention and the Second Protocol, it updates the 1954 Convention by introducing concepts contained in Additional Protocol I of 1977, it offers the opportunity to make the regime of “special protection” effective by replacing it with a new and improved system of “enhanced protection”, it improves the enforcement mechanism by defining serious violations which have to be punished with a criminal sanction and by imposing a duty upon States to establish jurisdiction over those violations, it develops humanitarian law by defining those serious violations and by extending the scope of application to non-international armed conflicts. Further to this specific developments attained; On a bigger note, the objective of bringing back into public focus the need for protection of cultural property during armed conflict and securing such protection through an effective legal regime has taken major strides.

The Hague Convention is still the sole legal text that has all necessary approaches for the protection of cultural property during armed conflicts. That said, there is indeed a striking difference between regulating an issue and achieving the necessary consent, and implementing the obligations that arise from the ratification of a Convention. One can observe that the applicability of the 1954 Hague convention is limited since it only applies during armed conflicts; and could even be obsolete in recent times without the aid of other international organs and its two additional protocols.

The nature of recent cases in Syria and Iraq show that; the involvement of non-state actors is becoming a common variable. In the last two decades there have been significant advances in the legal protection of cultural property in NIAC. What has been documented to date indicates that a significant proportion of the destruction and damage to Syria’s cultural heritage over the years has come about as a consequence of the hostilities between the different armed groups. Much of it is likely to be justified on the basis of military necessity or to be deemed incidental in nature.

While human life is still more important than objects, it is nevertheless essential to have rules protecting cultural property, as such objects constitute the collective memory of humanity, examples of its greatest achievements, and symbolize human life itself. If cultural property is destroyed, civilian life suffers greatly as well. Such damages observed in Syria are generally

treated with silence by States; the commitment by States to the protection of cultural property in armed conflict nonetheless remains equivocal both in practice and in law; which is an approach that should change for the better. An approach of creating a synergy between the 1954 Hague convention and UNESCO instruments is paramount in creating a protection regime that encompasses all components of cultural heritage.

Another recent development that may shape the legal regime is the criminal prosecution for the destruction of Timbuktu in the Mali; this case the first of its kind in successfully prosecuting an individual for crimes of cultural property destruction is a great milestone. The approach taken to determining the merits and admissibility of charges of intentionally directing attacks against cultural heritage under Article 8(2)(e)(iv) at the ICC provides a promising alternative to the established practice of international criminal courts and tribunals, which have used the “outstanding universal value” recognized through status as a World Heritage Site as a proxy for the gravity required for admissibility. This approach would also be more consistent with the text and legislative history of the provision in the Rome Statute, which declined to define protected objects with reference to their cultural or spiritual significance and instead defined them based on their dedication or use.

Crimes against cultural heritage must be taken seriously, due to their correlation with other more tangible crimes that are also under the jurisdiction of the ICC. These issues are likely to become increasingly relevant to ICC practice in the years to come, considering the recent rise in the systematic destruction of cultural heritage in the context of armed conflict by groups like ISIS in Syria and Iraq. In order to acquire justice for the populations that are being subjected to such destruction and ensure that such destruction does not lead to yet more heinous crimes, the international criminal law community must advocate for a more relativist approach to the prosecution of cultural heritage destruction.

Cultural heritage destruction constitutes a crime against people, not simply a loss of property. This becomes clear when we recognize the paramount human dimension of cultural heritage, whether from a local, regional or global perspective. The international community should honor this human dimension by moving beyond the restraints and shortcomings that have characterized its approach and by taking more fundamental and effective steps for the preservation of this heritage for future generations.

## 5.2. Recommendations

- At first glance the separation of Cultural Property Protection into a distinct convention i.e. the 1954 Hague Convention; is supposed to enhance the protection. But it has also had a negative effect, when we see the contrast between cultural property and other civilian objects, the 1954 convention receives secondary attention when compared to other human right treaties, So in order to give equal level of protection as other civilian objects; the author recommends recognizing all contents of the second protocol of the 1954 convention as customary international law as its necessary to cope with the nature of recent conflicts.
- With regards to recent developments such as the Syrian case; coupled with recognition of the second protocol as customary international law; the 1954 Convention should be interpreted in light of the concepts of proportionality, distinction and feasible precautions, this are principles that are part of the second protocol. In addition; application of the above principles and defining imperative military necessity; should encompass the conduct of hostilities even among states that have not ratified the Second protocol and even extend to non-state actors.
- There is a divide between the protection given to cultural property during armed conflict and protection given to cultural property outside of the context of conflict; the author recommends bridging the gap in order to elevate the scope of protection. Although not within the scope of this study, allowing international human rights law to serve as an avenue for protection of cultural property.
- The UNESCO needs to further advocate the implementation of synergies between the 1954 Convention and other UNESCO instruments, particularly the 2003 Convention, that aims to ensure protection of cultural property. This will enhance the effectiveness of protection of both tangible and intangible cultural property.
- Organizations like ISIL; which are creating a menace in the world; are generating a lot of their funds from looting of cultural property; the international community and organizations like UNESCO should emphasize on the widespread and systematic looting of archaeological sites

as a type of damage and destruction to cultural property in order to create criminal responsibility.

- The case in Mali; and prosecution of Al-Mahdi has shown the international community the approach taken by the ICC which has enabled for the first individual criminal responsibility case to be prosecuted for cultural property destruction. Going forward, encouragement should be given to the ICC and criminal accountability should be put forth in a consistent manner in order to show the teeth of the legal regime and create the deterrence effect required.

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