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INTERNATIONAL HUMANITARIAN LAW AND THE PROTECTION OF CULTURAL PROPERTY

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From entire libraries burnt to the ground during World War II to the more recent calculated and demonstrative destruction of archaeological sites in Syria, the deliberate attacks against historical monuments in Mali, Libya, and Yemen, or the looting of invaluable artefacts from museums in Iraq, the deleterious effects of war on cultural property are well documented. History has long shown there is an inherent link between the protection of cultural property during armed conflict and the protection of human beings, giving this protection a humanitarian imperative. A comprehensive corpus of international law has been developed since the 1950s to regulate the protection of cultural property against the devastating effects of war. Not only does this corpus establish a set of legal obligations addressed to states in peacetime and to parties to armed conflict—several of which have been crystallized into customary law— it also sets up normative and institutional mechanisms with a view to enhancing its effectiveness.

Certain aspects of the applicable legal framework could be improved. Nevertheless, this chapter argues that international humanitarian law (IHL) provides a solid system of protection for tangible cultural heritage in the event of armed conflict. The key to effectively reinforcing such protection lies in strengthening the implementation of the established conventional and customary rules rather than focusing on ways to alter existing imperfections. In this context, the authors present the key features of some of the existing mechanisms established to ensure compliance with the relevant norms and assess their relevance.

For the purposes of IHL, “cultural property” must be understood as a specific legal concept, which differs from that of “cultural heritage.” The latter, which exists in a variety of international standard-setting instruments, is generally intended to be broader in scope than the notion of cultural property as it also encompasses all the intangible aspects of cultural life.[1] In contrast, while there is no agreed definition of cultural property under international law, one common feature of the definitions provided in IHL treaties is the fact that the notion of protected cultural property is limited to material objects. The protection of the expression of cultural practices is enshrined in important international human rights law instruments—which are applicable at all times, including in time of war—and in the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage. The legal framework discussed in this chapter exclusively refers to the concept of “cultural property,”

The Law of Armed Conflict and Its Primary Sources

International humanitarian law—also referred to as the law of armed conflict or the law of war—is the body of law that seeks to alleviate the human suffering inherently caused by war. It does so by limiting the means (weapons) and methods (tactics) of warfare that parties to an armed conflict can resort to, and by protecting persons who do not, or no longer, participate in hostilities (civilians and military placed *hors de combat* alike).

IHL rules, irrespective of the treaties in which they are codified, share three key features. First, they are the result of a constant compromise between the principle of humanity and the military necessity imposed by the realities of warfare. Accepting that war necessarily entails armed violence is an essential component of IHL, as it ensures that this body of law must be taken seriously by the belligerent parties. However, since the whole raison d’être of IHL is to preserve a minimum level of humanity during wartime, the concept of military necessity also entails that unavoidable violence during such time must be limited to what is strictly necessary to achieve the only legitimate aim of the belligerent parties: to weaken the military capacities of the enemy. As a matter of principle, any use of force that goes beyond that objective is prohibited under IHL.

Second, rather than adjudicating the legality of the resort to force between the belligerent parties (*Jus ad bellum*), the purpose of IHL is exclusively to provide those parties with a set of binding rules that will preserve a minimum of humanity during the chaos of war. Third, IHL rules impose direct obligations exclusively on the belligerent parties, rather than on the civilian population. Whether any category of organized armed carriers (national armed forces, nonstate armed groups, or any other organized armed entity, such as regional military organizations and peacekeeping forces) can be classified as a belligerent party under IHL is a question of facts that must be assessed on a case-by-case basis.

By its very nature, IHL applies to armed conflict, whether of an international character (opposing two or more states) or non-international (opposing one or more states to one or more nonstate armed groups, or between such groups only).[2] The notion of "armed conflict" is a legal concept that corresponds to relatively well-established criteria.[3] Since not all situations of armed violence fall under this concept, adequately classifying the situation at stake will always be a necessary preliminary step before considering the applicability of any IHL instrument, including those related to the protection of cultural property.

The most prominent instruments of contemporary IHL are the four Geneva Conventions adopted in 1949, in the aftermath of World War II, and the two Additional Protocols (AP I and AP II) of 1977, the latter of which apply to situations of international armed conflict (IAC) and non-international armed conflict (NIAC), respectively. Many other treaties also apply to situations of armed conflict and therefore encompass in full or in part some of its core elements.[4]

In addition to treaty law, the importance of custom as a law-creating source of obligations under IHL cannot be underestimated. Rules of customary IHL—including those that relate to the protection of cultural property—derive from the general practice accepted as law and are legally binding to belligerent parties irrespective of treaty ratification. By filling some of the gaps left under treaty law, they undeniably play a key role in the protection afforded to victims of armed conflict.[5]

The Protection of Cultural Property under IHL

Under IHL rules, cultural property is protected in two ways. First, because it is civilian in nature, the general protection afforded by IHL to all civilian objects applies. Parties to a conflict are bound to respect at all times the core provisions regulating the conduct of hostilities which are laid out in AP I and are undisputedly part of customary international law. These include the principle of distinction (which prohibits direct attacks against any target that does not meet the definition of a legitimate military objective); the principle of proportionality (which requires that the effects of attacks on the civilian population and on civilian objects, including of cultural value, must not be excessive in relation to the concrete and direct military advantage sought); and the principle of precaution (which requires the attacking and defending parties to take various precautionary measures to limit the consequences of the hostilities on protected persons and objects).

Second, in addition to these provisions, due to the special character and important value of this category of civilian objects, several international instruments provide for a more specific system of protection for cultural property. The list of these conventional instruments starts with the 1863 Instructions for the Government of Armies of the United States in the Field (the "Lieber Code") and subsequently the Hague Convention II of 1899 and IV of 1907 and their annexed regulations, which

codified at the time the “Laws and Customs of War on Land” and laid out the foundation of the modern protection of cultural property during armed conflict by prohibiting unnecessary destruction and seizure of cultural property during wartime, including in occupied territories.[6]

The cornerstone of this system of protection is undoubtedly articulated in the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the Regulations for the Execution of the Convention, adopted on 14 May 1954 in the aftermath of the extensive destruction of large urban centers during World War II, and in the convention’s two protocols (1954 and 1999). As a direct response to the massive looting of artwork that took place during the war, the First Protocol deals with the prevention of the exportation of movable cultural property from occupied territories and with restitution. The Second Protocol, adopted more than forty years after the convention, critically reinforces the latter’s protection system by addressing some of its important shortcomings. Due to the comprehensive nature of both the convention and the Second Protocol, specific focus will be given to these instruments in the analysis below.

Finally, in addition to the already mentioned core principles related to the conduct of hostilities laid out in the two 1977 Additional Protocols to the four Geneva Conventions, they also contain specific provisions on the protection of cultural property. For example, Article 53 of AP I and Article 16 of AP II prohibit belligerent parties “to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; and to use such objects in support of the military effort.” Since these provisions explicitly apply without prejudice to the provisions of the 1954 Hague Convention, their main purpose is to confirm both the relevance of the core elements of the protection system already laid out in the Hague Convention and to give them prevalence over the text of the Additional Protocols in case of conflict between these instruments.

The Core Features of the 1954 Hague Convention and Its Second Protocol

Under the 1954 Hague Convention, protected “cultural property” is defined as “movable or immovable property of great importance to the cultural heritage of every people.” The convention provides a large, nonexhaustive list of objects, sites, monuments, and buildings (i.e., tangible heritage) that fit that definition, adding that the protection afforded by the convention also extends to “buildings whose main and effective purpose is to preserve or exhibit [] movable cultural property,” such as museums or large libraries and refuges intended to shelter, in the event of armed conflict, movable cultural property, and to “centres containing a large amount of cultural property.”[7]

This definition, which is proper to the convention and its protocols, gives latitude to each state party to decide what falls under the threshold of "great importance to the cultural heritage of every people."[8] This is naturally first and foremost true for the state within which the concerned moveable or immovable cultural properties is located. But unless that state communicates the list of such protected properties to other states or clearly marks them with the Blue Shield distinctive emblem (neither of which is compulsory under the convention), in the event of an armed conflict the responsibility to define which objects are protected will also fall in practice on the shoulders of the opposing party, which can potentially be problematic.[9]

Replicating some of the wording used in the Geneva Conventions, the Hague Convention applies to the protection of cultural property in the event of international armed conflict, which includes belligerent occupation arising between two or more of the state parties, even if the state of war has not been recognized by some of them. More interestingly, in case of NIAC, the provisions that pertain to the "respect" of cultural property apply, as a minimum, to each party to the conflict. These rules, which serve to protect cultural property during active hostilities, are consequently equally binding on state armed forces and nonstate armed groups. This is somewhat remarkable at a time when common Article 3 of the Geneva Conventions was the only provision in the conventions that applied to NIAC, reflecting the fact that these situations were essentially considered by states as a domestic affair.[10] Common Article 3 remains the only universally binding treaty provision governing all NIAC.

The obligation to protect cultural property under the 1954 Hague Convention is articulated around a twofold complementary approach: state parties to the treaty must commit to both "safeguard" and "respect" cultural property, which respectively sets obligations for peacetime measures and in time of armed conflict. In peacetime, states must take preparatory "safeguarding" measures against the foreseeable effects of armed conflict on cultural property as they consider appropriate. Examples of such measures are not provided but, as later listed in the Second Protocol, include, among others, the preparation of inventories or the adoption of emergency plans or protection against fire or structural collapse, the preparation for the removal of movable cultural property, or the provision for adequate in situ protection of such property. The objective of these preventive measures is evidently to ensure that the authorities in charge of the protection of valuable cultural property are prepared in the event of armed conflict.

Other important preventive peacetime measures foreseen by the 1954 Hague Convention include considering the marking of protected cultural property with the distinctive Blue Shield emblem, adapting military regulations in compliance with the convention, and establishing military services or personnel specialized in the protection of cultural property (the so-called "Monuments Men").

When an armed conflict erupts, belligerent parties must refrain from using cultural property in ways that are likely to result in destruction or damage (for instance by using a cultural site for military purposes) or carrying out any acts of hostility against them. Only in case of *imperative military necessity* can these obligations be waived. It is easy to understand why the vagueness and the inherently subjective nature of this concept, which is neither defined in the convention nor in any other IHL treaty, has created major difficulties for those in charge of applying it on the battlefield and why, consequently, clarifying the scope of this notion became one of the key stakes during the drafting of the 1999 Second Protocol. In fact, adequately circumscribing the concept of military necessity under IHL is as necessary as it is challenging.

As mentioned, allowing the belligerent parties to integrate the necessities of war into their military operations constitutes one of the key pillars of the law of armed conflict, ensuring that the warring parties do not globally discard its applicability due to the perception that respecting the rules would be militarily unrealistic. On the other hand, not setting clear limits to the concept of military necessity would simply defeat the purpose of incorporating it into law. This is equally true for the part of IHL that specifically protects cultural property, the focus of which lies on the protection of cultural property rather than human lives. It is therefore not surprising that attempts to find that balance in relation to how protected cultural objects might permissibly be harmed in the course of hostilities, despite their value for all humankind, led to intense negotiations prior to the adoption of the 1954 Hague Convention.

In addition to this general layer of protection, the convention introduced a system of “special protection” for a limited number of immovable objects of “very great importance,” providing they meet a number of specific criteria (one of which is inscription on an international register to that effect, briefly discussed below). The idea behind this system was to provide protected objects with a higher degree of immunity against harmful acts by imposing a stricter application of the concept of military necessity to the belligerent parties than the one applicable to objects under general protection. Harmful acts against these more legally protected objects are temporarily permissible only in “exceptional cases of unavoidable military necessity” and when ordered by a high-ranking commanding officer. Despite best intentions, here again reliance on an inherently subjective and undefined concept proved to be a difficult flaw to overcome at the time. It was finally addressed in 1999 with the adoption of the Second Protocol.

In addition to these prohibitions, “respecting” cultural property in time of armed conflict also implies the unconditional obligation (no waiver is permitted) to protect cultural property against theft, pillage, misappropriation, and vandalism, and to refrain not only from requisitioning movable cultural property situated in the

territory of another state but also from carrying out acts of reprisal against any protected cultural property.

But all these rules cannot be effectively applied if they are not incorporated into domestic and criminal law. To some extent, domestic (and international) criminal law provides an enforcement capability for IHL. By keeping people individually accountable for their serious violations of the rules applicable in time of conflict, criminal law arguably plays an important role in ensuring compliance.

Similarly to the Geneva Conventions, the 1954 Hague Convention follows this path, by imposing on state parties a broadly-framed obligation to take all necessary steps to prosecute and punish perpetrators of crimes under the 1954 Hague Convention within their own domestic legal system (including by amending their national laws and regulations to that effect, if necessary). It was expected that by leaving significant discretionary power to states as to how to process the provision within their domestic legal frameworks, its implementation would naturally be made easier. However, in contrast to the Geneva Conventions, the lack of a clear list of offenses requiring a criminal sanction, and the absence of explicit jurisdictional grounds on which alleged perpetrators could be either tried or extradited, proved to be major impediments to the effectiveness of the provision, which was later corrected by the Second Protocol, significantly advancing the international legal protection of cultural property.

The importance of the Second Protocol in relation to the system of protection put in place by the 1954 Hague Convention cannot be overemphasized. Despite the undeniable progress that the convention represented at the time, its effectiveness was called into question in the 1990s in the aftermath of the Persian Gulf and Balkan Wars, which highlighted a number of weaknesses and gaps preventing it from fully delivering on its intended ambitions. The protocol was a timely instrument that critically improved the system put in place by the convention, including by clarifying the somewhat vague and subjective notion of military necessity, which can now only be invoked if a relevant property technically corresponds to the legal meaning of a "military objective," against which attacks are permitted under certain conditions as a matter of principle under IHL. The concept of military objective has been explicitly defined in AP I and is now indisputedly part of customary IHL, corresponding to "objects which by their nature, location, purpose or use make 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." Unless a cultural property meets both criteria, and providing that all other applicable conditions are met, it can neither be used in support of military action nor be the object of an attack.[11]

The Second Protocol also drastically improved the system of criminal repression of offenses committed against protected cultural property in three ways. First, it defines the five acts that, when committed in breach of the convention or protocol, must be

established as criminal offenses under the domestic law of each state party.[12] Second, it establishes the jurisdictional basis that state parties must apply for the prosecution of these offenses and imposes a duty to establish universal jurisdiction—i.e., jurisdiction over alleged perpetrators irrespective of their nationality and place of the offense—over the three of the five offenses seen as the most serious.[13] Third, by equally applying the advanced sanctions regime to IAC and NIAC, it provides a powerful tool to ensure accountability for crimes committed against protected cultural property in NIAC, which goes considerably beyond the prescriptions of other applicable international instruments.[14]

The Second Protocol also replaced the system of special protection, which never really picked up, with a new and improved system of "enhanced protection," whose main purpose is to complement the prohibition on direct attacks against protected cultural property with an absolute prohibition for the holder of such property to use it for military action and, consequently, to put it at risk by turning it into a military objective. Finally, the protocol established an important new supervisory mechanism, the Committee for the Protection of Cultural Property in the Event of Armed Conflict, whose role is examined below.

Normative and Institutional Mechanisms

From peacetime measures to wartime obligations, in the context of international and non-international conflict, the multiple layers of treaty and custom that apply to the protection of cultural property undeniably constitute a comprehensive system of protection under IHL. But beyond that, many other treaties also contribute to limiting the number and scope of potential consequential gaps in the protective legal arsenal available in the event of armed conflict. These include the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property; the 1995 International Institute for the Unification of Private Law (UNIDROIT) Convention on Stolen or Illegally Exported Cultural Objects; and to some extent the 2003 Convention for the Safeguarding of Intangible Heritage and the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage.

But rules governing the protection of cultural property do not exist in a vacuum. A mere isolated analysis of such rules, no matter how comprehensive, is not enough to understand the state of protection of cultural property under international law since many other factors shape the effectiveness of these rules in practice. They can be grouped into two broad categories: normative and institutional mechanisms.

Normative mechanisms are arrangements embedded in treaties—in this context, those related to the protection of culture—with the objective of supporting implementation of law. These mechanisms do not regulate the conduct of hostilities or entail domestic policy obligations as such. Rather, their rationale is to anticipate

challenges to effective state implementation of provisions within the relevant treaty and to serve as tools to limit foreseen difficulties. Examples of normative mechanisms include mediation or conciliation procedures devised to settle potential disputes between states that may arise regarding the protection of cultural property. The creation of national periodic reporting mechanisms also offers states a tool to model best practices as well as encourage other nations to apply similar initiatives when relevant. The compilation of international lists of cultural property provide yet another example of normative mechanisms. Such lists rapidly identify the most valuable cultural property in the course of an armed conflict. By increasing the international visibility of these cultural sites, these lists significantly reinforce their protection.

Institutional mechanisms or bodies are also important components of today's international system of protection of cultural property. Supervisory or advisory in nature, these are arrangements, inter alia, to monitor the application of and compliance with treaties or to assist in their implementation. Some of these are treaty-based statutory governing bodies, such as intergovernmental committees, while others are based on domestic arrangements or derive from the work of international organizations and entities mandated to work for the protection of cultural property in armed conflict. International governmental and nongovernmental organizations also fall under this category.

International Lists of Cultural Property as Normative Mechanisms

The difficulty of identifying protected cultural property in times of armed hostility and the necessity to preserve, at minimum, sites that are of the "greatest importance for humanity," or posess an "outstanding universal value," paved the way for the creation of international lists of cultural sites. These have been established under their respective treaties in the field of culture and are notable examples of interesting normative mechanisms. They participate in providing a higher level of protection to a limited number of cultural properties, whose higher cultural value is measured by way of specific methodology and based on established criteria.

The idea of special protection for a select number of cultural properties originated in the Draft International Convention for the Protection of Historic Buildings and Works of Art in Time of War prepared by the International Museums Office in 1938. It was later integrated into the 1954 Hague Convention as a separate chapter titled "Special Protection," laying the foundation for the creation of the first international list of protected cultural property, the International Register of Cultural Property under Special Protection. Stato della Città del Vaticano (Vatican City State) became the first cultural site inscribed on the international list, on 18 January 1960.

However, states have demonstrated a lack of interest in the system, resulting from a combination of: the difficulty of meeting the eligibility criteria for special protection

under the 1954 Hague Convention, namely that the concerned property must be situated at an "adequate distance" from large industrial centers or from important military objectives; the perceived politicization of the registration process; and the limited protection that it ultimately offered in practice. As a result, in forty years, by 1994, only nine cultural properties had been inscribed on the register. As mentioned, the system was eventually replaced in 1999 by the adoption of the mechanism of "enhanced protection" under the Second Protocol, which included the creation of the International List of Cultural Property under Enhanced Protection. Since it became operational in 2010, and despite ongoing discussions on how to best establish clear evaluation procedures for inscription on the list, the number of cultural properties registered keeps growing: as of mid-2021 it contained seventeen sites, all immoveable cultural property.[15] By ensuring the uncontested visibility of important cultural properties and their protected status, and with both easier inscription criteria and an effective post-inscription monitoring mechanism, the enhanced protection list has the potential to become an instrumental mechanism of protection for cultural property in the future.

There is also the World Heritage List, the most renowned list of cultural and natural sites. Established under the 1972 convention, it compiles over one thousand one hundred cultural and natural sites having so-called "outstanding universal value." Unlike the lists established by the 1954 Hague Convention and its Second Protocol, the World Heritage List was not devised to provide special immunity for cultural sites in time of armed conflict. But its wider acceptance as an international inventory of cultural and natural sites of universal value de facto transformed it into a global reference list. This is illustrated by the importance given to it by the International Criminal Tribunal for the former Yugoslavia (ICTY) in a case related to the shelling of the Old City of Dubrovnik in 1991 and by the International Criminal Court in a case related to the destruction of the mausoleums in Timbuktu in 2012. In both, the courts considered that the presence of the targeted cultural property on the World Heritage List added to the gravity of the offense.[16]

The full potential of the international lists of cultural property, as normative mechanisms, remain untapped. But for now, beyond the role that they play in improving the identification of protected sites in time of armed conflict, the lists already exert a recognized influence in galvanizing international support and attention when these sites are at risk.[17]

Supervisory and Advisory Institutional Mechanisms

Statutory bodies are institutional mechanisms created under the respective treaties, and are usually intergovernmental. The World Heritage Committee and the Committee for the Protection of Cultural Property in the Event of Armed Conflict are prominent examples: both are charged with broad mandates to discuss questions and

adopt strategic policy orientations related to the preservation of cultural heritage and, as such, play an important role in operationalizing the text of their affiliated treaties.

The initiative to establish a permanent supervisory body entrusted with monitoring the implementation of the 1954 Hague Convention had already been discussed during the diplomatic conference that led to its adoption. Although this option was ultimately abandoned at the time, the value of creating such a permanent body resurfaced during the process leading to the adoption of the 1999 Second Protocol and became one of its key elements. The Committee for the Protection of Cultural Property in the Event of Armed Conflict, established by the protocol, is modelled on the World Heritage Committee.[18] It is composed of representatives of twelve state parties to the protocol, who are elected for a four year mandate, and is primarily tasked with monitoring and supervising its implementation.[19] Since 2006, meeting annually under the auspices of the United Nations Educational, Scientific and Cultural Organization (UNESCO), the committee has proved instrumental in some important areas of protection for cultural property, disseminating good practices related to the implementation of safeguarding measures, creating a platform for international cooperation, granting enhanced protection to seventeen cultural sites, and actively promoting this system on an ongoing basis. However, its ability to effectively discharge its mandate is undoubtedly hampered by the scope of the political considerations that sometimes surface during committee meetings, namely, a focus on procedural matters rather than on potentially more pressing substantive operational actions, and a reluctance to become an international platform for the debate of alleged serious violations of the Second Protocol.

National IHL committees, which exist in one form or another in more than a hundred countries, represent another example of valuable mechanisms to assist and advise government authorities on ways to comply with IHL rules on the protection of cultural property. Although states are not required under IHL to establish such advisory bodies, and there is no standard model for their composition, status, or mandate, experience has clearly demonstrated the instrumental nature of their work in the effective implementation of IHL obligations at the domestic level.[20] As acknowledged in 2016 at the fourth universal meeting of these committees in Geneva, “given their interdisciplinary approach and the nature of their mandate, they can play an important role in setting up those policies, strategies and action plans that are required at national level to protect cultural property (including ratification of/accession to relevant international instruments and enactment of comprehensive domestic legislation/regulations).”[21] In other words, these committees are generally well positioned to deploy the most important preventive measures and policies entail for the concerned government and to propose relevant courses of action.

Intergovernmental and nongovernmental organizations, as well as other international entities, also play an important role. Within their respective field of

expertise and mandate many organizations contribute to the implementation of the protective legal framework, including UNESCO, the International Committee of the Red Cross (ICRC), the Blue Shield International, the International Council of Museums (ICOM), the International Council on Monuments and Sites (ICOMOS), the International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM), the International Council on Archives (ICA), the International Federation of Library Associations and Institutions (IFLA), and the recently created International Alliance for the Protection of Heritage in Conflict Areas (ALIPH). Their work includes activities such as humanitarian diplomacy, support for ratification of international instruments by states, support for the domestic implementation of those treaties, advocacy and awareness raising in case of violations of the law, capacity building and training initiatives, development of international standards, and post-conflict restoration programs. While recognizing that these organizations are an integral part of the international system of protection of cultural property, and that support by states for their work is a key component of this system, maximizing the impact of their work by ensuring proper coordination of their action still represents an important challenge.

Conclusion

As the means and methods of warfare change, constantly querying the strength of rules governing the protection of cultural property is not only inevitable but necessary. However, revisiting the effectiveness of these rules must be conducted in a holistic manner. A focus on the relevance of the existing legal framework must be combined with an interest in strengthening its implementation on the ground.

In this vein, existing international humanitarian law arguably provides for a comprehensive set of rules when it comes to protecting cultural property from the effects of armed conflict. Not only does it restrict the behavior of the warring parties in the course of hostilities, but also purports to prepare the protection of valuable cultural property in peacetime. While small normative gaps exist within the framework, looking for ways to exploit some of the untapped potential of existing implementation mechanisms is one of the key challenges to cultural property protection in time of armed conflict.

Among other things, effective and sustainable monitoring mechanisms, supervised by the competent intergovernmental bodies, must be established or reinforced; clear procedures and strong incentives must be developed for the inscription of cultural properties on international lists; and international assistance and capacity-building activities must continue to be offered to states in order to both assist them in better complying with the law and to restore destroyed cultural property and sites. Support for multilateral institutions must be galvanized to coordinate all these processes. Effective responses to protect cultural property requires not only all important

international actors to find ways to optimize the collective impact of their actions, but to also make the most of relevant and positive practices and policies—approaches that some states have already put in place in order to assist others in aligning their actions accordingly. Finally, while international coordination is important, giving a role and space to local actors is equally crucial, since national responders are often in the strongest position to deliver rapid, culturally appropriate, and sustainable humanitarian assistance to their own communities. In other words, in this field probably more than in any other, both the preventive and the humanitarian response to the lack of protection of cultural property should be as international as necessary and as local as possible.

Overall, the international system of protection of cultural property in time of armed conflict is better equipped today than at any time in history. As a side effect of publicized intentional destruction of cultural sites and looting of artefacts in recent armed conflicts, public sensitivity to this issue is also arguably higher today than ever before. In our view, this creates an unprecedented opportunity ready to be capitalized on.

BIOGRAPHY

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NOTES

1. However, the distinction between the concepts of "cultural heritage" and "cultural property" is not absolute. The 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage uses the term "cultural heritage" to refer to tangible objects.

2. Some aspects of IHL nevertheless apply during peacetime, such as the preventive measures intended to prepare the situation before any war erupts: e.g., training and dissemination obligations, adapting domestic legislation and military doctrine in accordance with IHL obligations, and marking protected buildings, sites, and objects with a distinctive emblem.

3. The constitutive elements of the concept of "armed conflict," which is technically not defined in treaty law, have essentially been defined by the jurisprudence of the ICTY in *Dusko Tadić*, case no. IT-94-1-T, Judgment, 7 May 1997. For an explanation of how this notion should be understood, see, among many other sources, the following opinion paper: International Committee of the Red Cross, "How Is the Term 'Armed Conflict' Defined in International Humanitarian Law?" March 2008, https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf.

4. This is the case for many treaties and other legal instruments that regulate the use of weapons, that apply to naval warfare or to the regulation of the use of mercenaries, and, as explained in this chapter, for treaties related to the protection of cultural property in the event of armed conflict.

5. After a ten-year study mandated by the International Conference of the Red Cross and Red Crescent movement in 1995, the ICRC published a list of 161 rules of customary IHL, four of which specifically apply to the protection of cultural property. The study, which compiles relevant national and international practice related to each identified rule, is updated on an ongoing basis. See, ICRC, IHL Database: Customary IHL, https://ihl-databases.icrc.org/customary-ihl/eng/docs/home.

6. See Regulations to the 1907 (IV) Hague Convention, Art. 27, 56. The 1907 (IX) Hague Convention concerning bombardment by naval forces in time of war also contains a provision on the protection of cultural property (Article 5).

7. 1954 Hague Convention, Art. 1.

8. Within the limits imposed by good faith and by the ordinary meaning of words, as imposed under international law. See Vienna Convention on the Law of Treaties, 23 May 1969, Art. 26, 31.

9. On the other hand, in situations where the enemy has clearly demonstrated its intention not to respect the protective rules imposed by IHL, sharing inventories or the GPS coordinates of protected objects (inc. cultural property, hospitals, objects indispensable to the survival of the civilian population such as power stations or dams) or marking them with a distinctive emblem can in fact put these objects at higher risk. In such exceptional—although not hypothetical—circumstances, where there is indication that the marking of the objects would in fact defeat its intended purpose, the concerned belligerent party must carefully assess the relevance of not marking them and of the alternative protective measures that it will put in place. This can potentially be even more problematic when the marking of specific categories of protected cultural property is compulsory under treaty law, as is the case for buildings and items under the categories of "special" and "enhanced" protection.

10. NIAC, which is by far the most prevalent form of contemporary warfare, is much less regulated under treaty law than IAC. Not only is Article 3 common to the four 1949 Geneva Conventions the only provision in the conventions that deals with situations of NIAC, but there is a major discrepancy between the level of detail laid out in AP I (102 articles) and the rudimentary provisions of AP II (twenty-eight articles).

11. Even when imperative military necessity can successfully be invoked, the attacking party is still bound by the core principles guiding the conduct of hostilities under IHL. This means that before launching an attack against any legitimate military objective (including against cultural property that has lost its protection) the attacking party must take a series of precautionary measures intended to limit the effects of the attack on the civilian population and on civilian objects, and keep them proportionate to the direct and concrete military advantage anticipated by the operation. The attacking party must also cancel or suspend the attack if it becomes apparent that the target is in fact protected under IHL or that collateral damage to protected persons and objects will be disproportionate. These obligations, which are deeply rooted in customary IHL, have been specifically adapted to the protection of cultural property in the 1999 Second Protocol, Art. 7, 8.

12. These acts are: "(a) Making cultural property under enhanced protection the object of attack; (b) Using cultural property under enhanced protection or its immediate surroundings in support of military action; (c) Extensive destruction or appropriation of any protected cultural property; (d) Making any protected cultural property the object of attack; (e) Theft, pillage, misappropriation of or vandalism directed against protected cultural property." See Second Protocol, Art. 15.

13. It is, however, necessary that the alleged offender be apprehended on the territory of the prosecuting state.

14. Beyond the fact that the sanctions regime in the 1999 Second Protocol goes beyond the prescription in AP I, Art. 85 (which only applies to IAC), neither Article 3 common to the Geneva Conventions nor AP II contain provisions on the repression of war crimes in NIAC. The Second Protocol undeniably also goes beyond the prescription of the Rome Statute, which not only distinguishes crimes committed in IAC from those committed in NIAC but more importantly neither criminalizes offenses committed against movable cultural property nor the use of protected cultural property for military purposes. See Rome Statute of the International Criminal Court, Arts. 8.2.b.ix, 8.2.e.iv.

15. See the International List of Cultural Property under Enhanced Protection: UNESCO, "Armed Conflict and Heritage: Enhanced Protection," http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/lists/enhanced-protection/.

16. In the *Al Mahdi* case, the ICC stated that the attack against objects of the World Heritage Site "appears to be of particular gravity as their destruction does not only affect the direct victims of the crimes, namely the faithful and inhabitants of Timbuktu, but also people throughout Mali and the international community." See ICC, *Ahmad Al Faqi Al Mahdi,* case no. ICC-01/12-01/15, Judgement and Sentence, 27 September 2016, para. 80, https://www.icc-cpi.int/CourtRecords/CR2016_07244.PDF.

17. On the other hand, it must be noted that inscribed cultural sites may also attract the attention of warring parties, which may make them vulnerable to damage or destruction. The capture of the site of Palmyra in Syria and its use by the Islamic State of Iraq and the Levant (ISIL, also known as ISIS or Da'esh) to attract public attention is well known.

18. Patrick Boylan, *Review of the Convention for the Protection of Cultural Property for the Protection in the Event of Armed Conflict (The Hague Convention of 1954)* (Paris: UNESCO, 1993).

19. The Second Protocol, Art. 27 lists the functions of the Committee for the Protection of Cultural Property in the Event of Armed Conflict. These include granting, suspending, or canceling enhanced protection for cultural property and maintaining the List of Cultural Property under Enhanced Protection; monitoring and supervising the implementation of the Second Protocol; and considering requests for international assistance.

20. Although each is adapted to the specificities of its own state, national IHL committees or similar bodies are generally composed of representatives of different ministries interested in IHL matters (such as defense, justice, foreign affairs, internal affairs, health, and the office of the chief executive), with sometimes the addition of representatives from the legislature, the judiciary, universities, nongovernmental organizations, and national Red Cross or Red Crescent societies.

21. Universal Meeting of National Committees and Similar Bodies in International Humanitarian Law, *Enhancing Protection in Armed Conflict through Domestic law and Policy: Conference Overview, Geneva, Switzerland, 30 November–2 December 2016* (Geneva: ICRC, 2016), https://www.icrc.org/en/publication/enhancing-protection-armed-conflict-through-domestic-law-and-policy.
