

DESTRUCTION OF CULTURAL PROPERTY BY NON-STATE ACTORS: CULTURAL BARBARISM AT ITS WORST?

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ABSTRACT

There is a growing trend involving the non-State actors burgeoning and perpetrating attacks on cultural property in order to further their religious and political motives. Recognizing that traditional International law norms and arrangements are unquestionably inadequate to deal with the problems related to cultural property destruction by the non-state actors, a need for amending, clarifying and extending the scope of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols to non-state actors is shown by the authors. These observations have been made in light of the non-state actors possessing significant de facto financial power without a corresponding legal responsibility.

The article further identifies the current threats to such heritage sites, the motivations behind these threats, and how the international community has responded to these threats. The authors have attempted to conclude by showing how criminal responsibility can be entailed to the non-state perpetrators and the need to have concrete and effective regulations governing them in the changing world scenario.

“For whatever cause a country is ravaged, we ought to spare those edifices which do honour to human society, and do not contribute to the enemy’s strength,—such as temples, tombs, public buildings, and all works of remarkable beauty. What advantage is obtained by destroying them? It is declaring one’s self an enemy to mankind, thus wantonly to deprive them of these monuments of art and models of taste...”

– Emer de Vattel³

The ethical importance of cultural sites does not merely lie in the beauty they behold or their historical significance. They are important because they belong to the *common heritage of*

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³ EMER DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, WITH THREE EARLY ESSAYS ON THE ORIGIN AND NATURE OF NATURAL LAW AND ON LUXURY 571 (Knud Haakonssen et al. ed., Thomas Nugent, trans., Liberty Fund, Inc. 2008) (1758).

mankind. They have a distinguished universal value – they belong to all and must be protected by all. Majorly after World War II, the idea that the cultural symbols are a larger part of history of mankind, has been acknowledged⁴ and has become an essential part of the principled debate for preserving culture in times of conflict.

“To the victor goes the spoils”⁵ has been the underlying rule of war for centuries. Pillage, vandalism and destruction are perceived as inevitable consequences of war. The intentional plundering or destruction of sites and objects of cultural importance, is a hindrance to peace and creates long lasting disharmony. Culture is targeted to invoke threat in the minds and hearts of the people throughout the globe especially in this increasingly connected world where media plays a pivotal role.

For ages, there has been some emphasis on how special protection must be attributed to art and cultural property. The Greek historian Polybius, observed that “*no one can deny that to abandon oneself to the pointless destruction of temples, statues and other sacred objects is the action of a madman.*”⁶ However, International law formally recognised the duty to protect cultural property only in the later centuries.

The Lieber Code, also known as “The Instruction for the Government of Armies of the United States in the Field,” was the earliest codification for a standing army which created explicit protection for churches, hospitals, and other establishments, including “museums of the fine arts, or of a scientific character.”⁷ Being the first of its kind to provide protection for cultural property during wartime, the Lieber Code was extremely impactful in Europe and “provided the foundation for subsequent agreements on the protection of cultural property,” including the 1899 and 1907 Hague Conventions.⁸ The Hague Conventions gained significance because they were the first international treaties dealing with cultural property protection. The appalling destruction during the course of World War I and II brought to light the fallacies of

⁴ Jennifer Otterson Mollick, *The Fate of Cultural Property in Wartime: Why it Matters and What Should Be Done*, Carnegie Council for Ethics in International Affairs, (September 17, 2013), http://www.carnegiecouncil.org/publications/ethics_online/0085.

⁵ Andrea Cuning, *The Safeguarding of Cultural Property in Times of War & Peace*, 11 TULSA J. COMP. & INT’L L. 211, 212 (2003).

⁶ JIŘÍ TOMAN, *THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT* 4 (ed. 1996).

⁷ Burrus M. Carnahan, *Lincoln, Lieber, and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT’L L. 213, 222 (1998).

⁸ Andrea Cuning, *The Safeguarding of Cultural Property in Times of War & Peace*, 11 TULSA J. COMP. & INT’L L. 215 (2003).

these Conventions and necessitated the need for better embargos against the destruction of cultural property.⁹

In World War II, art and cultural objects were the key targets of the Nazi forces. “Trophy brigades” were created by Germany to locate and capture specific artefacts.¹⁰ Public and private collections were raided across Italy, France and Belgium and countless pieces of art were ravaged or sent to Germany and Austria for addition to the collection of Hitler.¹¹ All this culminated in an international effort to enforce greater safeguards for cultural property protection. This led to the drafting of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict in 1954 (hereinafter referred to as ‘the Convention’) and its First Protocol.

The Hague Convention is based on the premise that cultural property is invaluable not only to the country to which it belongs, but to mankind as a whole.¹² The Preamble to the Convention states that “*damage to [any] cultural property ... means damage to the cultural heritage of all mankind, since each [group of] people makes its [own] contribution to the culture of the world.*”¹³

Parties to the Convention are bound by it.¹⁴ However, in the changing world scenario, majority of the damage to cultural property is caused by rebels, insurgents, terrorist organisations etc., who are essentially called the non-state actors in international law. Therefore, the critical question becomes – how can the Convention be applicable to the non-state actors and to what extent will they be responsible or liable under the current state of the international legal regime.

APPLICATION OF THE 1954 HAGUE CONVENTION TO NON-STATE ACTORS

The 1954 Hague Convention defines cultural property in Article 1(a) as –

⁹ Zoë Howe, *Can The 1945 Hague Convention Apply to Non-State Actors?: A Study of Iraq and Libya* 2012, 47(2) TEXAS INT’L L. JOURNAL 407.

¹⁰ ROBERT M. EDSEL, THE MONUMENTS MEN: ALLIED HEROES, NAZI THIEVES, AND THE GREATEST TREASURE HUNT IN HISTORY 297, 298 (ed. 2009).

¹¹ *Ibid.*

¹² KEVIN CHAMBERLAIN, WAR AND CULTURAL HERITAGE 24 (ed. 2004).

¹³ Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, Preamble, May 14, 1954 (entered into force Aug. 7, 1956), S. TREATY DOC. NO. 106-1 (1999), 249 U.N.T.S. 215 [Hereinafter “1954 Hague Convention”]; available at: <http://treaties.un.org/doc/Publication/UNTS/Volume%20249/volume-249-I-3511-English.pdf>.

¹⁴ Hague Convention 1954, art. 4; Second Protocol to 1954 Hague Convention, art. 3, March 26, 1999.

“...movable or immovable property of great importance to the cultural heritage of every people, 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 defined above.”

During armed conflict, the cultural property is mainly targeted for the following reasons – *Firstly*, the collateral damage arises out of military necessity and the hardships of war. This can be seen in the case of the use of the Iraq Museum in Baghdad by Iraqi forces during the invasion by the United States in 2003 because the museum was arguably situated in a strategic military position and Iraqi forces had prepared fighting positions and military fortifications within the museum.¹⁵ The primary question after the destruction of Iraq’s cultural property was whether the United States had breached its duty to protect the National Museum.¹⁶ The United States justified its stance on grounds of military necessity.¹⁷ It rather prioritized disassembling the remnants of Saddam Hussein’s regime and protecting the Ministry of Oil over shielding the National Museum.¹⁸

Secondly, that the intentional destruction of cultural property as a concerted policy of warfare employed by one or both parties to the conflict. The armed conflict between Serbian government forces and the Kosovo Liberation Army in 1998–99 is an example of this. A counterinsurgency campaign began in March, 1998 by the Serbian forces which was against the ethnic Albanian population of Kosovo. As a result of this, numerous ethnic Albanians were forced to move out of their homes. At the same time, the historic architecture having any association with the Albanian culture was systematically targeted and destroyed.¹⁹

¹⁵ Bogdanos, Matthew, *The Casualties of War: The Truth About the Iraq Museum*, AMERICAN J. OF ARCHAEOLOGY 109: 501 (2005).

¹⁶ Constance Lowenthal & Stephen Urice, *An Army for Art*, N.Y.TIMES, Apr. 17, 2003, <http://www.nytimes.com/2003/04/17/opinion/an-army-for-art.html>.

¹⁷ Douglas Jehl & Elizabeth Becker, *Experts’ Pleas to Pentagon Didn’t Save Museum*, N.Y. TIMES, Apr. 16, 2003, <http://www.nytimes.com/2003/04/16/world/a-nation-at-war-the-looting-experts-pleas-topentagon-didn-t-save-museum.html>.

¹⁸ Matthew Thurlow, *Protecting Cultural Property in Iraq: How American Military Policy Comports with International Law*, 8 YALE H.R. & DEV. L.J. 176 (2005).

¹⁹ Andrew Herscher & Andras Riedlmayer, *Monument and Crime: The Destruction of Historic Architecture in Kosovo*, 1 Grey Room, 109, 111 (Autumn ed., 2000).

The aforementioned cases involve the Nation-States who can be brought under the ambit of the Hague Convention if they have violated the provisions of the same. Since there is a considerable growth in the number of conflicts involving non-state Actors,²⁰ the crucial question involving the effectiveness and ability of the current International law to create a system that can appropriately address the issues related to the non-state actors in this area must be answered.

The concept of non-state actors is often used to refer to armed groups, terrorists, civil society, religious groups or corporations i.e., it is generally understood as including any entity that is not actually a State.²¹

Non-state actors being new players in International law lack any corresponding legal responsibility yet possess significant *de facto* financial and institutional power. This imbalance between power and responsibility needs to be recognized and rectified. Traditional International law norms and mechanisms are unquestionably meagre to deal with the problems posed by this disproportionateness.

For effective protection of cultural property by the Hague Convention, it must apply to non-state actors in non-international armed conflicts scenario. To achieve this, there is a need to strengthen and clarify the application of the Hague Convention to non-State actors.

The Second Protocol to the 1954 Hague Convention was chiefly developed to clarify the provisions safeguarding cultural property in these non international armed conflicts.²² Article 19(1) of the Convention applies to the provisions relating to respect for cultural property to the parties involved in non-international armed conflicts.²³ Article 22(1) of the Second Protocol expands the scope of application in non-international armed conflicts by stating that all of the provisions of the Second Protocol will apply “*in the event of an armed conflict not of an international character, occurring within the territory of one of the Parties.*”²⁴

²⁰ Andreas Wenger & Simon Mason, *The Growing Importance of Civilians in Armed Conflict*, CSS ANALYSES IN SECURITY POL'Y, Dec. 2008, at 1, 1.

²¹ MOHAMMAD H. ZAREI, AZAR SAFARI, THE STATUS OF NON-STATE ACTORS UNDER THE INTERNATIONAL RULE OF LAW: A SEARCH FOR GLOBAL JUSTICE 3 (2014).

²² 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) [hereinafter UNESCO Conference on the Second Protocol], <http://unesdoc.unesco.org/images/0013/001332/133243eo.pdf>.

²³ Hague Convention, 1954, art. 19.

²⁴ Hague Convention, 1954, art. 19; Second Protocol to 1954 Hague Convention, art. 22; Roger O'Keefe, *Protection of Cultural Property*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 605, 623 (Dieter Fleck ed., 2008).

Although the primary purpose of the Second Protocol was to bring clarity to the Hague Convention, there is a lack of clarity in both agreements as neither of them attempt to define “non-international armed conflict.”

The meaning of the term “non-international armed conflict” by virtue of Common Article 3 to the Geneva Conventions of 1949 means “*armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties.*” These include armed conflicts in which one or more non-governmental armed groups are involved.²⁵

Although, Article 22 would come across as directly binding the non-state armed groups, however, treaties are generally binding only on signatory parties, and the non-state groups are not signatories to the 1954 Hague Convention.²⁶

Articles 34 through 36 of the Vienna Convention on Law of Treaties provide that a treaty can create obligations for a third party if two conditions are met –

- the contracting parties must have intended the treaty to grant such rights or impose such obligations on third parties; and
- a third party must accept the rights or obligations.²⁷

It is not easy to apply the provisions of the Hague Convention through the Vienna Convention without the non-state actors accepting the obligations set out by it.

However, customary international law can be used as a method by which the Hague Convention can be applied to non-state actors. Customary international law is a general and consistent practice followed by the States due to a sense of legal obligation among them. Unlike the treaty law, customary international law will bind non-state actors even if they have not formally accepted to abide by the obligations created by the international law.²⁸ Therefore, if the provisions of an international treaty are commonly accepted by both signatory and non signatory states, they become a part of customary international law, and

²⁵ How is the Term “Armed Conflict” Defined in International Humanitarian Law?, INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC) Opinion Paper, March (2008).

²⁶ Andrew Clapham, *The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement* 3 (Feb. 1, 2010) (draft for comment), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1569636.

²⁷ Antonio Cassese, *The Status of Rebels Under the 1977 Geneva Protocol on Non-International Armed Conflict*, 30 INT’L & COMP. L.Q. 423 (1981).

²⁸ Andrew Clapham, *The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement* 11 (Feb. 1, 2010) (draft for comment), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1569636.

hence will also bind the non-state actors such as rebel factions or secessionist groups.²⁹ Article 19 and other key provisions of the 1954 Hague Convention are regarded to have attained the customary international law status.³⁰

Although certain provisions of the Hague Convention have become a part of customary international law, the Convention per se would be more efficient if it provided better protection for cultural property in non-international armed conflicts. Although it has been clarified by the Second Protocol that the Convention applies in non-international armed conflicts, it has not provided a definition of that term. If the Convention has to be an effective tool in safeguarding the cultural property, there must be no ambiguity with respect to the situations where the Convention is applicable.

TARGETING OF CULTURAL PROPERTY BY NON STATE ACTORS

In the past two decades there has been a rampant increase in the destruction of historic sites especially in the politically disturbed areas of Middle East and Africa. The Middle East, being the cradle of civilization, was the centre of world's richest and earliest cultural artefacts.³¹

The two statues of Buddha in the Bamiyan Valley in Afghanistan were devastated by the Taliban in March 2001.³² This act was affirmed by the Taliban Supreme Court on the grounds of idolatry.³³ Such an atrocious act did not attract any action for prosecution of Taliban officials by international organisations.³⁴ Another example is the bombing of the al-Askari mosque, in the city of Samarra, by al-Qaeda in Iraq at the peak of the Iraqi civil war in 2006. In 2008, the Somali group al-Shabaab destroyed Sufi (mystical Islamist) graves and shrines in Kismayo, Somalia's third-largest city. Ensuing Muammar Gaddafi's declension in March 2012, the shrine of Abdel Salam al-Asmar was destroyed in Zlitan, Libya.³⁵

²⁹ Christopher Greenwood, *Relevance of Other Fields of International Law*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW (Dieter Fleck ed., 2008).

³⁰ Roger O'Keefe, *Protection of Cultural Property*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 443–53 (Dieter Fleck ed., 2008).

³¹ Patty Gerstenblith, *From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century*, 37 GEO. J. INT'L L. 245, 273-76 (2006).

³² David Bosco, *Waking the Buddha*, 58 ARCHAEOLOGY 1, 18 (2005); Patty Gerstenblith, *From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century*, 37 GEO. J. INT'L L. 245, 246 (2006).

³³ Barbara Crossette, *Taliban Explains Buddha Demolition*, N.Y. TIMES, Mar. 19, 2001, at A9, <http://www.nytimes.com/2001/03/19/world/19TALI.html>.

³⁴ Kevin D. Kornegay, *Destroying the Shrines of Unbelievers: The Challenge of Iconoclasm to the International Framework for the Protection of Cultural Property*, 221 MIL. L. R. 153, 155 (2014).

³⁵ David Kilpatrick, *Libya Officials Seem Helpless as Sufi Shrines Are Vandalized*, N.Y. TIMES, August 28, 2012, <http://nyti.ms/1Gdv1WL>.

The Islamic State of Iraq and Syria (ISIS), now known as the Islamic State (IS), is an organization of radical Islamists currently sweeping across Syria and Iraq.³⁶ It is pursuing a movement of destruction against the cultural heritage of Iraq and Syria, a theologically-motivated rampage on a scale believed to be without precedent in modern history.

The IS forces destroyed the tomb of Jonah in Mosul in Northern Iraq in July 2014 which led to an outcry at the international level. They have also attacked Christian sites, such as St. Ephrem's Cathedral, and have destroyed the Eliyahu Hanhavi synagogue in Damascus, in an effort to "purify" the region.³⁷ Recently in February 2015, the Church of the Virgin Mary was vandalized following the beheading of 21 Coptic Christians by IS fighters in Libya.³⁸ Also, IS forces generate income from selling looted artefacts.³⁹

In such a precarious situation where it has become very difficult to stop the IS from attacking the cultural property in Syria, one of the first moves must be protecting the most at-risk movable artefacts. By doing this, the government can prevent the selling of such artefacts in the black market through which these rebels generate funds. Also, the other States must fund the Iraqi troops and help in restoration of already damaged cultural property.

The law of war must improve and evolve to ensure these cultural sites are sufficiently protected in light of recurring conflicts in areas bristling with such sites.

CRIMINAL RESPONSIBILITY OF NON-STATE ACTORS UNDER THE 1954 HAGUE CONVENTION

The State Parties to the 1954 Hague Convention are obliged to take, within the framework of their ordinary criminal jurisdiction, all mandatory steps to punish those persons, of whatever nationality, who commit or order to be committed a breach of the Convention.⁴⁰ This obligation, in practice, is an exception rather than a rule. At the end of an armed conflict, the concern of prosecuting primarily for crimes against life or limb supersedes the concern to

³⁶ Bill Roggio, *ISIS Announces Formation of Caliphate, Rebrands as 'Islamic State'*, THREAT MATRIX: A BLOG OF THE LONG WAR JOURNAL (June 29, 2014), http://www.longwarjournal.org/threatmatrix/archives/2014/06/isis_announces_formation_of_ca.php#.

³⁷ Graham Bowley, *Antiquities Lost, Casualties of War: In Syria and Iraq, Trying to Protect a Heritage at Risk*, N.Y. TIMES (Oct. 3, 2014), <http://www.nytimes.com/2014/10/05/arts/design/in-syria-and-iraq-trying-to-protect-a-heritage-at-risk.html>.

³⁸ Jack Phillips, *ISIS Blows up Church of the Virgin Mary in Iraq: Reports*, EPOCH TIMES (February 24, 2015), <http://www.theepochtimes.com/n3/1260590-isis-blows-up-church-of-the-virgin-mary-in-iraq-reports/>.

³⁹ Security Council Resolution 2199, paragraph 17, U.N. Doc. S/RES/2199 (Feb. 10, 2015).

⁴⁰ Hague Convention, 1954, art. 19.

prosecute persons for breaching the Convention. Therefore, one of the main drawbacks of the Convention is its weak enforcement mechanism.

Three categories of crimes and offences are established by the Second Protocol which acts as a supplement to the Convention: *firstly*, Second Protocol related violations which necessitate criminal responsibility and the perpetrators must either be tried or extradited; *secondly*, other serious violations which necessitate criminal responsibility; and *finally*, other violations of the Convention or the Protocol.⁴¹ From the aforementioned crimes, it is clear that by way of this Protocol that only armed forces members and State nationals that are parties to the Second Protocol or have otherwise accepted its provisions, incur individual criminal responsibility.

The relevant provisions of the Convention can be applied to the non-State actors by virtue of them being a part of customary international law. Also, the International Criminal Tribunal of the former Yugoslavia (ICTY) and the International Criminal Court (ICC) have both recognized their jurisdiction over crimes against cultural property.

In September 2015, Ahmad Al Mahdi Al Faqi, who was the first suspect in the Mali investigation, was surrendered to the International Criminal Court (ICC) by the authorities of Niger. The charges against him pertain to the destruction of cultural heritage during the war in Mali 2012.⁴²

However, the case against Ahmad Al Mahdi Al Faqi is a remarkable development in this field in several respects. A war crime against cultural heritage constitutes the pivotal charge of an international criminal proceeding for the first time. The Director-General of the United Nations Educational, Scientific and Cultural Organization (UNESCO), has time and again reaffirmed that destruction of cultural heritage in and of itself constitutes a war crime of sufficient gravity so as to deserve the full attention of the ICC. Also, this case is particularly timely in light of the nefarious trend of deliberate destruction of cultural heritage in Syria and Iraq at the hands of Islamic State.

One of the paramount aims of international criminal law is to set a universal example to deter the future perpetration of crimes. ICC is presented with an opportunity by the *Al Faqi* case

⁴¹ Hague Convention, 1954, art. 15(1), 18, 21.

⁴² Marina Lostal, *ICC opens a case for the destruction of cultural heritage in Mali*, GLOBAL POLICY FORUM (October 2, 2015), <https://www.globalpolicy.org/home/163-general/52814-icc-opens-a-case-for-the-destruction-of-cultural-heritage-in-mali.html>.

wherein it can transform the existing landscape of non-compliance with the treaties addressing the need for protection of cultural heritage.⁴³

CONCLUSION

Cultural heritage is a record of our shared past the destruction of which is an attack on history, identity and civilization. So far the world has witnessed this carnage with a growing sense of helplessness and alarm. But in the face of vandalism of this scale and at this level of wantonness and depravity, something larger is called for.⁴⁴ Most importantly, the States and national military authorities must have the political will to adopt the Hague Convention principles and rules and must be determined to efficiently implement these, in active cooperation with the national and international cultural heritage sector. With the recurrence of conflicts involving non-state actors, the 1954 Hague Convention should be enhanced and refined so that it compels both state and non-state actors to respect cultural property during times of conflict. Also, concrete rules must be devised to effectively make the non-state actors responsible for their acts of cultural barbarism. Else, the effectiveness of international cultural property protection in future will be uncertain because the world has changed and the law must change with it.

⁴³ Marina Lostal, *ICC opens a case for the destruction of cultural heritage in Mali*, GLOBAL POLICY FORUM (October 2, 2015), <https://www.globalpolicy.org/home/163-general/52814-icc-opens-a-case-for-the-destruction-of-cultural-heritage-in-mali.html>.

⁴⁴ Eric Gibson, *The Destruction of Cultural Heritage Should be a War Crime*, THE WALL STREET JOURNAL, March 2, 2015, <http://www.wsj.com/articles/the-destruction-of-cultural-heritage-should-be-a-war-crime-1425073230>.