



Protection of Cultural Property in Armed Conflict

Wing Commander (Dr) UC Jha (Retd)

“For whatever cause a country is ravaged, we ought to spare those edifices which do honour to human society, and do not contribute to increase the enemy’s strength ... such as temples, tombs, public buildings, and works for remarkable beauty. What advantage is obtained by destroying them?”

Emmerich de Vattel¹

Introduction

The ongoing armed conflicts have highlighted the problems with which the international community and national authorities are confronted while trying to protect cultural property during armed conflict. The counter-attacks by the Israeli Defence Forces after the horrific killings of civilians by Hamas on 07 Oct 2023 have resulted in the serious destruction of Gaza’s cultural heritage. The impact of the Russia-Ukraine War on the cultural heritage of Ukraine has also been alarming. There are allegations that attacks on cultural heritage sites have been carried out by Russians to destroy Ukrainian culture and erase their cultural memories. It has also been reported that Russian soldiers have stolen artefacts from museums and kidnapped museum directors.² The conflict in Syria has led to the destruction of a significant amount of the country’s cultural heritage sites. Warfare, artillery bombardment, and bombings destroyed numerous ancient monuments, including all six United Nations Educational, Scientific and Cultural Organisation (UNESCO) World Heritage Sites in Syria.³ The intentional assaults on religious and cultural property were described by UNESCO’s Director-General as ‘Cultural Cleansing’ and as constituting war crimes.

Earlier, during the occupation of Iraq, the American forces stood idle as looters ransacked government

buildings, stores, churches and private homes, stealing anything they could carry and defacing symbols of the defunct Saddam Hussein regime. The looting of the museum and several other important cultural sites in Iraq has raised the important issue that the American military failed to provide adequate security to the cultural property of the Iraqi people.⁴ In Afghanistan, one of the most barbaric acts against cultural property occurred. At the beginning of Mar 2001, the Taliban authorities completely destroyed the great rock sculptures of the Buddhas of *Bamiyan* (Bamiyan Province in Central Afghanistan). The destruction of the *Bamiyani* sculptures was well-planned and announced to the world media. The appeals of the United Nations (UN), UNESCO, and other organisations were ignored.⁵ The destructions perpetrated in Afghanistan by the Taliban were directed at all non-Islamic cultural objects and now the Islamic State of Iraq and Syria does not spare even Islamic cultural sites. The response of the international community to these destructions has underlined a growing global consensus that cultural property is entitled to protection as a matter of international human rights.

The desire to protect cultural property in war dates back to the latter half of the 19th Century, when states first began to codify rules to limit the adverse effects of warfare. However, the law has not kept pace with societal expectations or the changing nature of warfare. Today, three sets of treaties form the framework for the protection of cultural heritage in times of war and its aftermath. These are: The Hague Conventions of 1899 and 1907, the Fourth Geneva Convention of 1949, and the Additional Protocols I and II to the Geneva Conventions; the Hague Convention of 1954 and its two protocols; and the rules of customary International Humanitarian Law (IHL), the International Criminal Tribunal for

The intentional assaults on religious and cultural property were described by UNESCO’s Director-General as ‘Cultural Cleansing’ and as constituting war crimes.

the former Yugoslavia (ICTY) and the 1998 Rome Statute of the International Criminal Court (ICC). Together, they address four threats to cultural heritage: deliberate attack, incidental damage, pillage and outright theft and, all of these are discussed in the succeeding paragraphs.

The Hague Conventions of 1899 and 1907

The international protection of cultural property within the laws of armed conflict could be traced to the provisions of the Hague Conventions (II of 1899 and IV of 1907). The Convention II, Article 25 explicitly forbids attacks on undefended towns, buildings or dwellings. Article 27 of the Convention provides: “In sieges and bombardments all necessary steps should be taken to spare as far as possible edifices devoted to religion, art, science, and charity, hospitals, and places where the sick and wounded are collected, provided they are not used at the same time for military purposes”. It has been further provided in Article 27 that if the enemy uses cultural sites for military purposes, the immunity enjoyed by cultural property is waived. The Hague Convention requires defenders “To indicate the presence of such buildings or places by distinctive and visible signs”.⁶

The most important aspect of the Hague Conventions in relation to cultural property is Convention IV of 1907, which includes Annexed Regulations. It contains a number of provisions relating to civilian private property, such as Article 23(g) of the Regulations, which provides that it is prohibited “To destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war”. These regulations further contain two articles specifically designed to provide protection for cultural property. Article 27 provides:

“In sieges and bombardments, all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes. It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand”.

Like Article 23, the protection provided is not, from the terms of Article 27, absolute, being subject to the overriding exemption of military necessity contained in the Article in the form of the phrase ‘As far as possible’. The protection provided by Article 27 is narrow, applicable only in cases of siege or bombardment, and only if the besieged have notified the enemy of the existence of such cultural property beforehand and have then indicated the presence of this property with ‘Distinctive and visible signs’.

Article 56 of the Regulations concerns cultural property in occupied territory and declares that the property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden and should be made the subject of legal proceedings.

Article 5 of the Hague Convention (IX) of 1907 concerning Bombardment by Naval Forces in Time of War asserts that: “In bombardments by naval forces all the necessary measures must be taken by the commander to spare as far as possible sacred edifices, buildings used for artistic, scientific, or charitable purposes, historic monuments, hospitals, and places where the sick or wounded are collected, on the understanding that they are not used at the same time for military purposes”. Also, “It is the duty of the inhabitants to indicate

such monuments, edifices, or places by visible signs, which shall consist of large, stiff rectangular panels divided diagonally into two coloured triangular portions, the upper portion black, the lower portion white”. As in Article 27 of the Regulations of the Fourth Convention of The Hague of 1907, the protection is not absolute, as it is limited by the consideration of military necessity. This protection is also limited geographically to the immediate area of combat.

However, during World War I, the destruction of French and Belgian churches, cathedrals, museums and libraries revealed the ineffectiveness of the Hague Convention of 1907. The German forces removed valuable cultural objects and both sides targeted culturally protected sites.⁷ The regime protecting cultural property during wartime was widely ignored during World War II. The Hague Convention of 1907 went largely unobserved as the Nazis engaged in large-scale looting and cultural plunder, and both

It has been further provided in Article 27 that if the enemy uses cultural sites for military purposes, the immunity enjoyed by cultural property is waived.

Axis and Allied powers abandoned the principles of military necessity and razed thousands of important cultural sites in Europe.

The Fourth Geneva Convention, 1949

In response to the vast losses in cultural property during World War II, in 1949 the international community adopted the Fourth Geneva Convention with the hope that the Convention would clarify the responsibilities and duties of armed forces and governments during armed conflicts. Article 53 of the Convention forbids “Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”, but these protections are no broader than those afforded by the 1907 Hague Convention.

However, the Geneva Convention requires the contracting parties to disseminate the contents amongst the members of the armed forces.

The 1954 Hague Convention

The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict is the first international attempt to enunciate a comprehensive regime to protect cultural property during armed conflicts. The term cultural property means movable or immovable property of great importance to the cultural heritage of people (e.g., buildings and other monuments of historic, artistic, or archaeological significance; archaeological sites; works of art, antiquities, manuscripts, books, and collections thereof; archives; etc.), whether of a secular or religious nature and irrespective of origin or ownership. The term extends to buildings for preserving or exhibiting, and refuges intended to shelter, movable cultural property and the centres containing a large amount of cultural property, known as ‘Centres containing monuments’.⁸

The definition is broad enough to cover all the property which is considered to be of great importance to cultural heritage, whether religious or secular. Protection is also offered by the Convention to temporary wartime shelters, to authorised means of emergency transport in times of hostilities, and to authorised specialist personnel. The concept is derived directly from the protection for civilian air-

raid shelters, hospitals and ambulances in relation to humanitarian protection in the Geneva Conventions of 1949.

Protection. The 1954 Convention provides for two-tiers of cultural property protection: general and special protection. General protection applies to all cultural property while special protection applies to a subset thereof. The scope of general protection, as contained in Article 4 of the 1954 Convention, provides that the High Contracting Parties agree to refrain from using cultural property, its immediate surroundings and appliances for purposes that are likely to expose it to damage in the event of armed conflict; acts of hostility directed against cultural property; and reprisals against cultural property, even if the enemy has unlawfully attacked cultural property. Article 4(3) further provides that parties are

obliged to prevent theft, pillage, misappropriation and acts of vandalism against cultural property and shall refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party. In addition, the protection afforded to cultural property may only be waived in the event where ‘Military necessity imperatively requires such waiver’.

The definition is broad enough to cover all the property which is considered to be of great importance to cultural heritage, whether religious or secular. Protection is also offered by the Convention to temporary wartime shelters, to authorised means of emergency transport in times of hostilities, and to authorised specialist personnel.

Distinctive Emblem. The Convention also makes provision for a cultural property to bear a distinctive emblem so as to facilitate its recognition. The distinctive emblem takes the form of a single blue and white triangular shield and may be used alone or repeated three times to indicate the type of cultural property under protection. This emblem is to be prominently displayed on the exterior of the structure or within the perimeter of sites containing cultural property.

Military Measures. Chapter I of the Convention concludes with important provisions contained in Article 7, requiring the peacetime training of the armed forces:

- The High Contracting Parties undertake to introduce in times of peace into their military regulations or instructions such provisions as may ensure observance of the present Convention, and to foster in the members of their armed forces a spirit of respect for the culture and cultural property of all peoples.

- The High Contracting Parties undertake to plan or establish in peacetime, within their armed forces, services or specialist personnel whose purpose will be to secure respect for cultural property and to cooperate with the civilian authorities responsible for safeguarding it.

- The importance of military forces in the protection of cultural property in armed conflict is abstract, strategic and legal. In abstract terms, cultural property forms a vital part of the cultural identity of individuals, communities, peoples and all humanity. Its preservation is essential to human well-being. In strategic terms, the protection of cultural property in armed conflict is imperative. Avoidable destruction and misappropriation of cultural property by military forces, as well as its looting by others endangers mission success. Legally, the state may find itself compelled to make reparation to another state or to individuals for destruction, damage or misappropriation of cultural objects, buildings and sites of historic, artistic or archaeological significance. Culpable individuals include not just those who physically destroy, damage or misappropriate the property but also military commanders who fail, intentionally or negligently, to take all necessary and reasonable measures within their power to prevent or repress such crimes or to submit them to the competent authorities for investigation and, where appropriate, prosecution.⁹

Special Protection. Article 8 of the 1954 Convention introduces a special protection regime for cultural property. It provides:

There may be placed under special protection, a limited number of refuges intended to shelter movable cultural property in the event of armed conflict, of centres containing monuments and other immovable cultural property of very great importance, provided that they:

- Are situated at an adequate distance from any large industrial centre or from any important military objective

constituting a vulnerable point such as, for example, an aerodrome, broadcasting station, establishment engaged upon work of national defence, a port or railway station of relative importance or a main line of communication.

- Are not used for military purposes.

If the cultural property in question is situated in the vicinity of an important military objective, it may continue to benefit from special protection in accordance with Article 8(5), provided that the party concerned undertakes to make no use of the military objective. The special protection is accessible only to a 'Limited Number' of objects of 'Very great importance'. It is granted to the states of cultural property by its entry into the 'International Register for Cultural Property Protection' made in accordance with the provisions and conditions of the Convention. Special protection may also be granted to transports exclusively engaged in the transfer of cultural property provided that the triple emblem along with a signed and dated authorisation by

the contracting party is displayed on the exterior of the mode of transport.

Enforcement and Regulations for Execution of the Convention. The execution of the Convention rests on six pillars: The system of protecting powers, international assistance, dissemination, reporting, a specific institutional framework and the criminal prosecution of persons violating the Convention. The High Contracting Parties are obliged to disseminate the contents of the Convention widely within their countries, certainly among the military, and if possible, to the civilian population. The enforcement provisions contained in Article 28 of the Convention provide: "The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all steps necessary to prosecute and impose penal or disciplinary actions upon those persons, whatever nationality, who commit or order to be committed a breach of the present Convention".

UNESCO is assigned a special role, comparable to the International Committee of the Red Cross (ICRC) role in the Geneva Conventions, concerning the coordination of efforts and keeping records of specially protected cultural property. The 1954 Convention was amended by 'Regulations for the

The execution of the Convention rests on six pillars: The system of protecting powers, international assistance, dissemination, reporting, a specific institutional framework and the criminal prosecution of persons violating the Convention.

Execution of the Convention and Protocol I', which contains provisions to prevent the exportation of cultural property from occupied territories and regulates the safeguarding of cultural property in third States during armed conflict.

The Hague Regulations

The 1954 Hague Regulations, which form an integral part of the Convention, set out first the practical procedures to be followed in relation to the compiling by the Director-General of UNESCO of an international list of persons qualified to carry out the functions of Commissioners-General, and procedures to be followed in the event of armed conflict, including the arrangements for the appointment of cultural representatives, Commissioners-General and the responsibilities of the Protecting Powers (appointed in accordance with the Hague 1907 and Geneva 1949 principles).

The second part (Articles 11-16) of the Regulations deals with the practical arrangements and procedures for the granting and registration of 'Special Protection', including the notification of all proposals to every High Contracting Party and arrangements for the submitting of objections and for eventual arbitration on these, if necessary, as well as provisions for the cancelling of special protection where appropriate. Chapter III of the Regulations (Articles 17-19) sets out in some detail the procedures for the transport of movable cultural property to a place of safety for protection, with the approval of the neutral Commissioner-General overseeing cultural heritage matters during the conflict. The final part, Chapter IV, regulates the use of the Official Emblem and identity cards and other identifying markers of persons duly authorised to undertake official duties in relation to the implementation of the Convention.

The 1954 Protocol

A separate legal instrument, concurrent to the Hague Convention was created known as the 1954 Protocol for the Protection of Cultural Property in the Event of Armed Conflict. The Protocol deals primarily with issues relating to the protection of movable cultural property from occupied territory, and the return of such exported property at the end of the conflict. The objective of the Protocol is that it

prohibit the looting and pillage of cultural property by belligerents during armed conflicts. The Protocol only applies to a limited class of objects that constitute the cultural or spiritual heritage of peoples. In terms of Article 1 of the Protocol, Contracting Parties are to: prevent the exportation of cultural property from territories occupied by the party during armed conflict; return any imported cultural property from any territory occupied by it; and indemnify 'Good Faith' purchasers of cultural property when returning property to the previously occupied country. Article 5 of the protocol provides that when cultural property has been deposited for protection within the territory of another contracting party, the objects are to be returned following the cessation of hostilities at the request of the competent authorities of the territory whence it came.

Shortcomings of the 1954 Hague Convention and Protocol

The definition of cultural property contained in Article 1 of the 1954 Convention differs from those contained in other IHL treaties. The Hague Regulations Respecting the Laws and Customs of War on Land 1907 as well as the Additional Protocol-I, both work on the basis of somewhat different categories of objects protected as 'Cultural Property'. In practice, these differences need to be solved by determining in each particular situation of armed conflict which treaty is applicable and prevails over the other. Under the 1954 Convention, the obligations to safeguard and respect cultural property may be waived in cases where military necessity 'Imperatively' requires such a waiver. The Convention does not define what constitutes imperative military necessity. It is, therefore, up to each State Party to interpret these terms. This entails a high risk of ambiguity in State practice and a potential for misuse of this waiver.

The armed conflicts in Cambodia, former Yugoslavia, Iraq and Afghanistan have clearly revealed major problems in the implementation of the Convention. In particular, the Convention lacked full application, as most of the armed conflicts since 1954 have been of a non-international character. It also lacked proper execution as it is based on the functioning of 'Protecting Power' and 'Commissioner General', which had been unworkable in practice. The Convention also lacked adequate provisions to cope

The Convention does not define what constitutes imperative military necessity. It is, therefore, up to each State Party to interpret these terms. This entails a high risk of ambiguity in State practice and a potential for misuse of this waiver.

with the extensive and systematic destruction of cultural property during recent armed conflicts, as it contained no mandatory criminal sanctions regime.

In particular, the armed conflicts in Croatia and in Bosnia and Herzegovina, where the destruction of cultural property was part of the policy of so-called 'Ethnic Cleansing', led to international efforts to revise the existing Convention with the goal of improving the protection of cultural property in the event of armed conflict. The weakness of the Convention stems largely from its reliance on national laws and ad-hoc criminal tribunals to prosecute individuals. Currently, 135 States are Parties to the 1954 Convention and only 112 States are Parties to the First Protocol to the Convention.¹⁰

The 1999 Second Protocol to the Hague Convention

The 1954 Convention applied to various States Parties in a number of conflicts in the following forty-five years. However, the destruction of cultural property in conflicts such as in Afghanistan following the Soviet invasion; in the Iran-Iraq war; in the First Gulf War, particularly in Kuwait; and in the former Yugoslavia, highlighted a number of inadequacies in the Convention and required its revision, which took the form of a Protocol to the Convention in 1999. It has entered into force on 09 Mar 2004 and has been ratified by 88 countries.¹¹ The Protocol has expanded the scope of protection of cultural property during armed conflicts. It has established the 'Committee for the Protection of Cultural Property in the Event of Armed Conflict', consisting of twelve States Parties.

Article 5 of the Protocol provides that preparatory measures must be taken in times of peace for the safeguarding of cultural property against the foreseeable effects of an armed conflict. The provisions of the Second Protocol could be put into practice by the State Parties by ensuring the following measures: preparation of the National Inventory of Cultural Property; preparing microfilms of documents or documentation of buildings; making viable disaster plans for each object; preparing evacuation plans indicating movable objects, their precise location and priority for evacuation; constructing shelters for movable objects; and the training of civilian and military personnel.

Article 6, dealing with the respect for cultural property provides that with the aim of ensuring respect for cultural property (Article 4 of the Convention), a waiver on the basis of imperative military necessity may only be invoked to direct an act of hostility against cultural property as long as cultural property has, by its function, been made into a military objective; and there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective. The decision to invoke imperative military necessity shall only be taken by an officer commanding a battalion or larger force.

Article 7 dealing with precautions in attack provides that each party to conflict shall:

- Do everything feasible to verify that the objectives to be attacked are not cultural property protected under Article 4 of the Convention;

- Take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimising, incidental damage to cultural property protected under Article 4 of the Convention;

- Refrain from deciding to launch any attack which may be expected to cause incidental damage to cultural property protected under Article 4 of the Convention which would be excessive in relation to the concrete and direct military advantage anticipated; and

- Cancel or suspend an attack if it becomes apparent: that the objective is cultural property protected under Article 4 of the Convention; that the attack may be expected to cause incidental damage to cultural property protected under Article 4 of the Convention which would be excessive in relation to the concrete and direct military advantage anticipated.

Under Article 8 of the Protocol, the Parties to the conflict must, to the extent feasible, remove movable cultural property from the vicinity of military objectives or provide for adequate *in-situ* protection; and avoid locating military objectives near cultural property. Article 9 of the Protocol provides that occupying nations "shall prohibit and prevent" the export, transfer of ownership or removal of cultural

Article 9 of the Protocol provides that occupying nations "shall prohibit and prevent" the export, transfer of ownership or removal of cultural property, illicit archaeological excavations, and the concealment or destruction of cultural or historical evidence.

property, illicit archaeological excavations, and the concealment or destruction of cultural or historical evidence.

Enhanced Protection. As the special protection regime of the 1954 Convention had turned out to be more or less ineffective in practice, the Second Protocol established a new (and third) category of cultural property-cultural property under 'Enhanced Protection'. Moreover, in order to be eligible for enhanced protection, cultural property must fulfil the following three conditions:

- It must be a cultural heritage of the greatest importance for humanity,
- It must be protected by adequate domestic legal and administrative measures recognising its exceptional cultural and historic value and ensuring the highest level of protection, and
- It 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.¹²

The protection afforded to cultural property under enhanced protection differs from the level of protection of cultural property under 'Normal' protection pursuant to Chapter 2 of the Second Protocol and to Chapter I of the Convention. In exceptional cases, where a State Party requesting inclusion of cultural property in the list of cultural property under enhanced protection cannot fulfil the criteria of adequate domestic measures, enhanced protection may nevertheless be granted, provided that the requesting State submits a request for international assistance.¹³

Article 15 establishes five new explicit crimes in relation to intentional breaches of the laws governing the protection of cultural property: making cultural property under enhanced protection the object of attack; using cultural property under enhanced protection or its immediate surroundings in support of military action; extensive destruction or appropriation of cultural property protected under the 1954 Hague Convention and the Second Protocol; making cultural property protected under the 1954 Hague Convention and the Second Protocol the object of

attack; and theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the 1954 Hague Convention.

The first three of the aforementioned provisions are subject to universal jurisdiction and are extraditable offences. In addition, States are required to prosecute or extradite any person accused of committing offences against property under enhanced protection or of having caused extensive damage to cultural property. Provision is also made for general obligations with regard to mutual legal assistance, investigations, extraditions or obtaining evidence.

Article 21 provides that parties to the Second Protocol must adopt the necessary legislative, administrative or disciplinary measures to terminate or impose sanctions on other violations when they are committed intentionally. These include any use of cultural property in violation of the 1954 Hague

Convention or the Second Protocol, and the intentional illicit export, other removal or transfer of cultural property.

Chapter 5 concentrates on non-international armed conflicts, such as civil wars and internal 'Liberation' conflicts. It does not however apply to internal disturbances such as riots and

isolated or sporadic acts of violence as specified by Article 22(2). The provisions of the 1999 Protocol may not be invoked as a justification for direct or indirect intervention by an external State in the territory in which the conflict occurs. Chapter 6 establishes a clear role for civil society. The International Committee of the Blue Shield (ICBS) has important standing advisory roles in relation to the Committee established under the Protocol.

The International Committee for the Protection of Cultural Property in the Event of Armed Conflict is assigned with the responsibility for maintaining a list of property under enhanced protection and supervising the implementation of the Protocol (Article 24). The most important functions of the Committee under Article 27 are:

- To grant, suspend or cancel enhanced protection for cultural property.
- To establish, maintain and promote the List of Cultural Property under Enhanced Protection.

States are required to prosecute or extradite any person accused of committing offences against property under enhanced protection or of having caused extensive damage to cultural property.

- To monitor and supervise the implementation of the Protocol.
- To consider and comment on the reports on the implementation of the Protocol submitted to it by the Parties every four years.

A state party to the Protocol may request the Committee under Article 32 to provide: international assistance for cultural property under enhanced protection, and assistance with respect to the preparation, development or implementation of the laws, administrative provisions and measures for the enhanced protection of cultural property pursuant to Article 10 (b). States who wish to include their cultural property to the list, are to direct their proposals to the Committee which has the final decision for inclusion of property in the list.

The Fund for the Protection of Cultural Property: The institutional novelty of the Second Protocol is the establishment of the Fund. The Fund is established in close cooperation with UNESCO under Article 29, and it is constituted in conformity with the provisions of the financial regulations of UNESCO. The resources of the Fund consist of voluntary contributions made by the Parties; contributions, gifts or bequests made by other States, UNESCO or other organisations of the UN system, other non-governmental organisations, or private bodies or individuals. The Fund may be used to provide financial and technical assistance to support preparatory measures in times of peace, emergency measures during armed conflict and restoration measures after the cessation of hostilities.

Chapter 7 of the Protocol strengthens the 1954 Hague provisions in placing an obligation on States to ensure dissemination and training for the protection of cultural property. The Protocol obliges a State to take all the necessary steps under its domestic law to make such offences punishable by appropriate penalties when they are committed intentionally and in direct violation of the 1954 Convention or the Protocol.

The International Committee of the Blue Shield

In Apr 1996, the ICBS, adopting the emblem of the 1954 Convention was established by four specialists

in Non-Governmental Organisations associated with UNESCO: International Council on Archives, International Council of Museums, International Council on Monuments and Sites, and International Federation of Library Associations and Institutions. The ICBS has, as its main goal, to protect cultural property, to intervene in order to prevent and respond to disasters and to take actions such as coordinating preparations to meet and respond to emergency situations as well as post-crisis support. It also launches awareness-raising campaigns. In general, the ICBS intervenes as an advisor and cooperates with other bodies including UNESCO, the International Centre for the Study of the Preservation and Restoration of Cultural Property and the ICRC.¹⁴

Protection under International Criminal Tribunal for the former Yugoslavia

The ICTY has applied Article 3(d) of the 1993 ICTY Statute in judgment where a few individuals were found guilty of a crime against cultural property due to their deliberate armed attacks on ancient mosques in Bosnia and Herzegovina.¹⁵ Article 3(d) of ICTY provided that the Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.¹⁶

The International Criminal Tribunal for the former Yugoslavia (ICTY) has applied Article 3(d) of the 1993 ICTY Statute in judgment where a few individuals were found guilty of a crime against cultural property due to their deliberate armed attacks on ancient mosques in Bosnia and Herzegovina.

The Rome Statute

Article 8 of the Rome Statute of the International Criminal Court, 1998, provides, “Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives” are considered as “Other serious violation of the laws and customs applicable in international armed conflict, within the established framework of international law”.

The ICC took cognisance of the destruction of religious and historical sites in Timbuktu (Mali) on 26 Sep 2015. Ahmad Al Faqi Al Mahdi was surrendered to the ICC by the authorities of Niger.¹⁷ He was

charged with the war crime of intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, and historic monuments under Article 8(2)(e)(iv) of the Rome Statute of the ICC. On 27 Sep 2016, Trial Chamber VIII of the ICC unanimously found as a co-perpetrator, of the war crime of intentionally directing attacks against historic monuments and buildings dedicated to religion, including nine mausoleums and one mosque in Timbuktu, Mali, in Jun and Jul 2012.¹⁸ Al Mahdi was sentenced to 9 years of imprisonment, which was confirmed in appeals on 08 Mar 2018.¹⁹

Protection under other Conventions

The 1972 Convention for the Protection of the World Cultural and Natural Heritage has created a new avenue for the protection of immovable property during wartime and reaffirms the internationalist values of the 1954 Hague Convention. Article 6 provides that the member parties have an obligation to cooperate and must “Give their help in the identification, protection, conservation, and presentation of international cultural and natural heritage”. The State Parties are prohibited from taking measures which might directly or indirectly damage or destroy listed sites. The World Heritage Convention provides for the protection of cultural property from direct military assault, as well as from the destabilising conditions created by warfare. Because members are liable for the ‘Indirect’ effects of their actions, they may be accountable to occupied nations for cultural property losses.

The Role of the UNESCO

UNESCO is widely recognised as the central institution for the protection of cultural property in the event of armed conflict. However, UNESCO faces a major challenge in this regard because different definitions of cultural property are used in different UNESCO instruments. The main criterion for determining cultural property protected under the 1954 Hague Convention is the standard of “Great importance to the cultural heritage of every people”, while the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property mentions only

‘Importance’ as the main criterion and basically leaves to every state party to determine the extent of that importance. The situation is further complicated by the definition of cultural property under the 1972 Convention for the Protection of the World Natural and Cultural Heritage, which introduces the criterion of ‘Outstanding universal importance’. The common approach is that the cultural property protected under the 1972 Convention meets the criterion for protection under the 1954 Hague Convention.

It is generally acknowledged the UNESCO Constitution (Article 1, paragraph 2. c) gives UNESCO ‘The general right of cultural initiative’. That means that UNESCO can offer its services and to take an initiative toward (state) parties whenever it finds necessary. It has been accepted universally that the international community has given UNESCO the right to take cultural initiatives, such as formulating

recommendations, adopting international conventions, offering its services, making proposals and giving advice. The 1954 Hague Convention (Article 19, paragraph 3) recognises the right of UNESCO to offer its services to belligerent parties. It enables, thus, UNESCO to play an active role in protecting cultural property in the event

of non-international armed conflict. Under Article 23 of the 1954 Hague Convention, UNESCO may offer ‘Technical Assistance’ to parties upon their request, in addition to making proposals on its own initiative.²⁰

The role of UNESCO in relation to the main international instrument for the protection of cultural property in the event of armed conflict, the 1954 Hague Convention, was strengthened with the adoption of the Second Protocol, especially due to the creation of the Committee and the Fund. While the weak enforceability of international treaties is inherent in international law, it is also considered to be the most symptomatic weakness of the 1954 Hague Convention.

The United Nation Security Council Resolution 2199

The UN Security Council Resolution 2199, adopted on 12 Feb 2015, condemned the destruction of cultural heritage in Iraq and Syria particularly by the Islamic State of Iraq and the Levant and the Al-Nusrah Front, whether such destruction was incidental or deliberate, including targeted destruction of religious

The 1954 Hague Convention (Article 19, paragraph 3) recognises the right of UNESCO to offer its services to belligerent parties. It enables, thus, UNESCO to play an active role in protecting cultural property in the event of non-international armed conflict.

sites and objects. The Resolution does not only generally bind all UN Member States to take 'All Appropriate Steps' to prevent the illegal trade in Iraqi and Syrian cultural property, but it also specifically binds States to prohibit cross-border trade in such items. The Resolution has been called by the Director-General of UNESCO as a milestone in order to increase the protection of cultural heritage in Iraq and Syria. The Director-General of UNESCO, while communicating Resolution 2199 to the Member States, reminded them of a number of existing tools to be used in the fight against the illicit trafficking of cultural property, namely: the Interpol's Stolen Works of Art Database, the UNESCO Database of National Cultural Heritage Laws and the Emergency Red List of Cultural Objects at Risk, created by the International Council of Museums.

In fact, the preservation of cultural heritage should not be considered in isolated framework separated from the protection of human rights. By definition, cultural heritage is identified because of its value, its significance for the life of people, and direct aggression to cultural heritage usually occurs in situations of general and serious violation of human rights. Combating the destruction of cultural heritage is an important contribution to the protection of human rights and must not be perceived as distracting attention from them. On the contrary, the effective protection of human rights is enhanced if this relevant feature of their aggression is properly addressed.

Combating the destruction of cultural heritage is an important contribution to the protection of human rights and must not be perceived as distracting attention from them.

Conclusion

The destruction of cultural property in armed conflicts has become common in recent years, with repeated, egregious violations of the existing international norms aimed at safeguarding the cultural heritage of all mankind. The protection of cultural property and places of worship received special attention in the 1954 Hague Cultural Property Convention - protection from attacks as well as protection from the use for military purposes. UNESCO plays an important role in the protection of cultural property. It is the driving force behind the promotion and implementation of the international instruments governing the protection of cultural property in the event of armed conflict, of which it is the depositary. Measures to

protect cultural property in the event of armed conflict need to be adopted in times of peace. The landmark conviction of Al Mahdi by the ICC in 2016 has been welcomed throughout the international community. As of today, there are no concrete examples of the implementation of the criminal aspects of the 1999 Second Protocol at the

national level. However, the ICTY and the ICC provide illustrative examples of the fight against impunity at the international level. India must enact a stand-alone act containing provisions that correspond directly with treaty obligations clearly specifying types of conduct are criminal. In order to ensure the protection of cultural property during armed conflict, the government must ensure training programmes for armed forces, emergency service members, the personnel of cultural institutions and the general public. The international community must protect cultural heritage against both conventional military forces' operations during symmetric combat and terrorist groups' propaganda activities.

Endnotes

- 1 Emmerich de Vattel (1714-1767); Sharon A. Williams, *The International and National Protection of Movable Cultural Property: A Comparative Study* (Dobbs Ferry, New York: Oceana, 1978), p. 5-6.
- 2 Kocak Bilgin Yasemin and Hazarhun Eda, *The Cultural Heritage Impact of The Russia-Ukrainian War*, *Tourism Academic Journal*, 02 (2023), pp. 307-321.
- 3 24 Jun 2014, a month after ISIS leader Abu Bakr al-Baghdadi declared the formation of an Islamic Caliphate stretching from northern Syrian into Iraq, ISIS militants, who had taken control of the city of Mosul in Iraq, methodically laid explosives in and around the famed shrine and mosque of the Prophet Younis and blew up the ancient site. The destruction reduced the shrine and Iraq's oldest mosque to a mound of rubble. It was captured on video and subsequently posted online. The shrine was a popular destination for Muslim and Christian pilgrims from around the world.
- 4 Arimatsu Louise and Choudhury Mohbuba, *Protecting Cultural Property in Non-International Armed Conflicts: Syria and Iraq* *International Law Studies*, Vol. 91, 2015, pp. 641-698.

5 In Afghanistan, the Taliban sought to erase the cultural identity of Buddhism by destroying the Bamiyan Buddhas. These statues were two of the world's largest Buddhas, and stood in Afghanistan for more than 1,700 years before the Taliban destroyed them with the use of tanks, anti-aircraft fire and dynamite.

6 O'Keefe Roger, 2006, *The Protection of Cultural Property in Armed Conflict*, New York: Cambridge University Press.

7 The Washington Treaty on the Protection of Artistic and Scientific Institutions and Monuments (The Roerich Pact, 1929) was developed on the initiative of Professor Nicholas Roerich. The United States and twenty other countries entered into a pan-American agreement, commonly referred to as the Roerich Pact, for the protection of cultural property. It came into force in 1935 and is the first treaty dedicated exclusively to the protection of cultural property. The language of the Roerich Pact mirrors the language of the Hague Convention of 1907, but the protections afforded to cultural property are broader. The Treaty provides historic, artistic, scientific and educational sites neutral status in times of war. It holds that parties have an obligation to "respect and protect" these sites and also provides for the exchange of lists of institutions and monuments "for which the parties desire protection". This treaty remains the sole regional international instrument designed to protect cultural property during wartime. Milligan Ashlyn, *Targeting Cultural Property: The Role of International Law*, <https://www.princeton.edu/jpia/past-issues-1/2008/5.pdf>.

8 This definition is based on the combined reading of Article 1 of the 1954 Hague Convention, Article 53 of 1977 Additional Protocol I, and Article 16 of Additional Protocol II to the Geneva Conventions of 1949. Fleck Dieter (ed), 2021, *The Handbook of International Humanitarian Law*, Oxford University Press, p. 467-479.

9 O'Keefe Roger, Peron Camille, Tofig Musayev and Gianluca Ferrari, *Protection of Cultural Property: Military Manual*, UNESCO, 2016, pp. 100.

10 States Party to the Following International Humanitarian Law and Other Related Treaties, 26 Jun 2024: https://ihl-databases.icrc.org/public/refdocs/IHL_and_other_related_Treaties.pdf

11 China, India and the US have not ratified the 1999 Second Protocol to the Hague Convention.

12 Article 10, the 1999 Second Protocol to the Hague Convention of 1954.

13 Such protected but unmarked objects would be the Taj Mahal, the Pyramids, the Eiffel Tower, the Washington Monument, and similarly significantly and universally recognized objects.

14 The role of the International Committee of the Blue Shield is: (i) To promote the ratification and implementation of the Hague Convention and its Protocols; (ii) To encourage the safe guarding and respect for cultural property; (iii) To train experts at national and regional level to prevent, control and recover from disasters; (iv) To act in an advisory capacity for the protection of endangered heritage; and (v) To consult and co-operate with other bodies.

15 The Prosecutor v. Kordic and Cerkez, case No.IT-95-14/2-T, Trial Chamber Judgment of 26 Feb 2001; and Appeals Chamber Judgment of 17 Dec 2004.

16 For more details see: Serge Brammertz, Kevin C. Hughes, Alison Kipp, William B. Tomljanovich, *Attacks against Cultural Heritage as a Weapon of War: Prosecutions at the ICTY* Get access Arrow, *Journal of International Criminal Justice*, Vol. 14, Issue 5, Dec 2016, pp. 1143–1174.

17 The warrant of arrest was issued against Al Mahdi on 18 Sep 2015. Al Mahdi was allegedly responsible for intentionally directing attacks against historic monuments and/or buildings dedicated to religion, including nine mausoleums and one mosque in Timbuktu, Mali, allegedly committed between about 30 Jun 2012 and 10 Jul 2012. Case: Prosecutor v. Ahmad Al Faqi Al Mahdi [ICC 1/12-1/15].

18 It was alleged that the protected objects were intentionally damaged or destroyed, in some cases repeatedly and pursuant to the ideology of alleged perpetrators that these objects have had to be destroyed. The religious and historical sites were demolished with axes, hatches and picks, while the wooden parts of the objects were burned.

19 Mr Al Mahdi admitted guilt as to the war crime consisting in the destruction of historical and religious monuments in Timbuktu (Mali), between around 30 Jun 2012 and 11 Jul 2012. This is the first international trial focusing on the destruction of historical and religious monuments, and the first ICC case where the defendant made an admission of guilt.

20 UNESCO is the world leader in protection of international cultural heritage and property during times of peace and armed conflict. It plays a key role in the implementation of the provisions of the 1954 Convention. The UNESCO's technical assistance had taken the following forms: (i) Assistance provided to the State Parties for the establishment of national committees; (ii) Affixing of distinctive emblems on monuments; (iii) Compilation of records of protected property; (iv) Construction of refuges and other technical forms of protection; (v) Preparation of protective packing; and (vi) Protection against fire or the effects of bombardment.

About the Author



Wing Commander (Dr) UC Jha (Retd), a military veteran, did his PhD in Law and Governance from Jawaharlal Nehru University. His research focuses on the military legal system, international humanitarian law and human rights law and their impact on the functioning of the armed forces. His work comprises 30 books and over 150 articles published in various Journals and newspapers. His recent books include Chinese Military Legal System; Biological Weapon: Coronavirus, Weapon of Mass Destruction? Human Rights in the Armed Forces: An Analysis of Article 33; Modern Non-Lethal Weapons: Concepts, Application, Legal and Moral Perspective; and Nuclear Weapons: Untangling the Societal Enigma.

About the USI

The United Service Institution of India was founded in 1870 by a soldier scholar, Colonel (later Major General) Sir Charles MacGregor 'For the furtherance of interest and knowledge in the Art, Science and Literature of National Security in general and Defence Services, in particular'. It commenced publishing its Journal in 1871. USI also publishes reports of its members and research scholars as books, monographs, and occasional papers (pertaining to security matters). The present Director General is Major General BK Sharma, AVSM, SM** (Retd).



United Service Institution of India (USI)

Rao Tula Ram Marg, Opposite Signals Enclave, New Delhi-110057
 Tele: 2086 2316/ Fax: 2086 2315, E-mail: dde@usiofindia.org