



**Enhancing the Protection of Cultural
Property in Syria Against Unlawful
Acts: Challenges and Possible
Opportunities**

A Study According to Public
International Law Rules

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Acronyms

AAAS	American Association for the Advancement of Science
AP II	Additional Protocol II of 1977 to the Geneva conventions of 1949
CA3	Common Article 3 of Geneva conventions 1949
CIA	Central Intelligence Agency
CIL	Customary International Law
DGAM	Syrian Directorate General of Antiquities and Museums
DoD	Department of Defense
FSA	Free Syrian Army
IAC	International Armed Conflict
ICC	International Criminal Court
ICL	International Criminal Law

ICJ	International Court of Justice
ICTY	International Tribunal for Former Yugoslavia
IHL	International Humanitarian Law
IMT	Nuremberg International Military Tribunal
ISIS	Islamic State in Iraq and Syria
NIAC	Non-International Armed Conflict
SARG	Syrian Arab Republic Government
SDF	Syrian Democratic Forces
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNSC	United Nations Security Council

Introduction

The ongoing armed conflict in Syria has severely impacted human lives. More than 250,000 Syrians have lost their lives and more than 11 million were displaced from their homes.¹ The impact of the conflict has been extended to the invaluable cultural property of Syria. The Syrian exceptional rich and unique cultural property was in the middle of hostilities, which took various forms including: bombing; fighting in or near the archaeological sites using heavy equipment; looting and illicit trafficking of invaluable objects and artefacts.² As a result, many cultural sites were totally destroyed

¹ Syria: The story of the conflict, BBC News, dated 11 March 2016, available at: <http://www.bbc.com/news/world-middle-east-26116868>. (all internet references were accessed in January 2019).

² Patty Gerstenblith, The Destruction of Cultural Heritage: A Crime Against Property or a Crime Against People?, 15 J. Marshall Rev. Intell. Prop. L. 336 (2016). Available at:

<https://repository.law.uic.edu/cgi/viewcontent.cgi?article=1382&context=ripl>

, also, Emma Cunliffe and others, The Destruction of Cultural Property in the Syrian Conflict: Legal Implications and Obligations, International Journal of Cultural Property (2016), pp.1-3. Available at:

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2762264

or left under near-destruction and many cultural objects were looted, illegal excavated or trafficked.¹

Of course, human lives are the most important value during armed conflict, which must come first; though, protecting cultural property is linked to human lives and significantly affects their life. In fact, cultural property carries a symbolic idea of the people's identity and represents the value that is inherited from the ancestors and should be retained for the future generations. The prosecutor of the International Tribunal for Former Yugoslavia (ICTY) summarized this symbolic idea, in Krstic case, by stating that

¹ Many museums have been looted such as: Raqqa Museum and Citadel of Jaabar; Museum of Hama; Museum of Folklore in Aleppo; and Maarrat Museum. In addition, excavations of archaeological sites were done systematically in various areas, such as: Palmyra site; the storehouse of Herqla archaeological site (10 km far from Raqqa); and the Ancient Villages in the north of Syria, such as: El-Jabel Aalaa; El-Jabel Wastani; El-Jabel Baricha; El-Jabel Zawia. More information is available at: <https://fr.unesco.org/syrian-observatory/>. Also see: Youssef Kanjou, The Syrian cultural heritage tragedy: cause, effect, and approaches to future protection, Journal of Disaster Mitigation for Historical Cities, Vol. 8 (July 2014), available at: <https://core.ac.uk/download/pdf/60544917.pdf>

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what remains after cultural destruction, will only live in the biological sense, nothing more.¹

Accordingly, protecting cultural property is not a mere protection of stones or pieces of art for its beauty or uniqueness, but rather a protection of people's memory and identity, as "all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects."² Based on this, international law protects cultural property during armed conflict and the grave violations of this protection are amount to international crimes.³ The 1954 Hague Convention for the Protection of Cultural

¹ He added that "It's a community in despair; it's a community clinging to memories; it's a community that is lacking leadership; it's a community that's a shadow of what it once was". prosecutor v. Radislav Krstic, ICTY Case No. IT-98-33-T, (2 August 2001), para 592. <http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf>

² Prosecutor v. Kordić & Čerkez, Case No. IT-95-12/2-T, Trial Judgment, ¶ 207 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001).

³ Fatouma Harber, Why the ICC has the wrong man on trial over invasion of Timbuktu, THE GUARDIAN (Sept. 30, 2015), <https://www.theguardian.com/world/2015/sep/30/icc-mali-timbuktu-invasion-trial> ; Eva Vogelvang & Sylvain Clerc, The Al Mahdi Case: Stretching the Principles of the ICC to a Breaking Point?, JUSTICE HUB (Aug. 29, 2016), <https://justicehub.org/article/al-mahdi-case-stretching-principles-iccbreaking-point>

Property in the Event of Armed Conflict (the 1954 Convention) along with its two additional protocols, are representing the core legal instruments in this field.¹ In addition, the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 (the 1970 UNESCO convention)² and the Convention Concerning the Protection of the World Cultural and Natural Heritage of 1972 (the

¹ The 1954 Hague Convention was the first international convention to address exclusively the protection of cultural property during armed conflict. The full text of the 1954 Convention and the two additional protocols are available at: <http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/convention-and-protocols/states-parties/>. There are currently 128 states parties to the convention, 105 to the first protocol, and 72 to the second protocol. Togo was the last state to accede the convention in January 2017. The status of ratification is available at:

<http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/List-State-members-electoral-group-EN-Final-2020.pdf>.

² UNESCO, "Illicit Trafficking of Cultural Property: Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property - 1970", available at: www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/.

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1972 World Heritage Convention) are also relevant.¹ Further, the protection of cultural property during armed conflict is embedded within Customary International Law (CIL) rules.² In addition, as per the International Criminal Law (ICL), unlawful acts against cultural property are prosecutable as war crimes and in certain circumstances as crimes against humanity. Nonetheless, a creative approach introduced by judges and scholars suggests that these unlawful acts could also be used as evidence of the *dolus specialis* of the crime of genocide.³

Although the provisions of protection and punishment are well-established in international law, it seems to fail in protecting cultural property in Syria or deterring unlawful acts against them. To this end, this Article aims to examine the application of the

¹ UNESCO, "The Convention Concerning the Protection of the World Cultural and Natural Heritage of 1972, 16 November 1972, available at: <https://whc.unesco.org/archive/convention-en.pdf>

² International Committee of the Red Cross, "Customary International Humanitarian Law," 29 October 2010, available at: <http://www.icrc.org/eng/war-and-law/treaties-customary-law/customary-law/overview-customary-law.htm>

³ Roger O'Keefe, Protection of Cultural Property under International Criminal Law, 11 Melbourne Journal of International Law (2010), p.337. Available at: <https://ssrn.com/abstract=3496642>.

international law rules with respect to the protection of cultural property and their effectiveness in protection and prosecution with regard to the armed conflict in Syria.

Therefore, this Article is divided into four parts. Part I introduces an overview on the current conflict in Syria and its implication on the cultural property. Part II exposes to the protection of cultural property in international law with relation to the conflict in Syria. Part III examines the criminalization of the unlawful acts against cultural property as per International Criminal Law. Part IV suggests possible venues for prosecuting unlawful acts against cultural property in Syria. The Article concludes with remarks on the effectiveness of current provisions of international law with respect to the protection of cultural property and suggests possible ways for enhancement.

I. Overview: The Implications of The Conflict in Syria on Cultural Property

The applicability of international law with regard to the protection of cultural property during armed conflicts depends on the type of the conflict and the extent of violations.¹ Therefore, this part provides a brief overview about the origin of the conflict in Syria

¹ This is discussed in detail in part II of this Article.

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and how it affected cultural property. This overview is intended to pave the way for the subsequent parts of this Article.

The Conflict

In early 2011, the anti-governmental demonstrations have begun in Syria, coinciding with the outbreak of the “Arab Spring” in neighbour Arab counties, Tunisia and Egypt. The demonstrations started peacefully to denounce the oppressive regime; soon it turned into violent attacks against vital government premises.¹ To suppress the demonstrations and contain the violence, the Syrian Arab Republic Government (SARG) deployed the security forces and civilian police; then, the military forces; and soon the Shabbiha militias.² According to the UN Higher Commission for

¹ Christopher Phillips, Syria’s Bloody Arab Spring, in Nicholas Kitchen (ed.), *After the Arab Spring Power Shift in the Middle East?*, IDEAS Special Reports, May 2012, pp. 37–42. Available at:

<https://www.lse.ac.uk/ideas/Assets/Documents/reports/LSE-IDEAS-After-the-Arab-Spring.pdf>

² Shabbiha is an Arabic word, means savages break the law. There are many reasons to assume that the Shabbiha are in close connection with the Syrian government, and their actions are likely attributed to the government of Syria. Firstly; the Commission of inquiry defines in its report the government forces as including the shabbiha, in addition to several subsequent reports referring to shabbihas’ actions in conjunction with the

Human Rights reports,¹ SARG used force and violence against demonstrators; other reports indicated to arresting and torturing

government. Secondly; it is alleged by one author that the president Assad's family supplies shabbiha with weapons, and some members of the shabbiha are from Assad's family. Thirdly; the secret nature of the shabbiha's establishment, and their unlawful acts suggests that this group was established to do the "dirty work" that the government couldn't. For more see; Charles Lister, The Free Syrian Army: A decentralized insurgent band, The Brookings Project on U.S. Relations with the Islamic World, No. 26, November 2016. Available at: <https://www.brookings.edu/research/the-free-syrian-army-a-decentralized-insurgent-brand/>. Also, the report of the Higher Commissioner for Human Rights on the situation of human rights in the Syrian Arab Republic of September 15th, 2011, A/HRC/18/53. Available at:

https://ap.ohchr.org/documents/E/HRC/report/A_HRC_18_53.pdf

¹ See; U.N. Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HCR/S-17/2/Add.1 (Nov. 23, 2011); U.N. Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/19/69 (Feb. 22, 2012); U.N. Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/21/50 (Aug. 16, 2012); U.N. Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/22/59 (Feb. 5, 2013); U.N. Human Rights Council, Report of the Independent International

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demonstrators too.¹ By August 2011, the president of the United Nations Security Council (UNSC) issued a statement condemning the widespread violations of human rights, and calling for restraint on all sides.² In November 2011, the Arab League suggested a “Plan of Action” on the SARG to end up the violence against demonstrators, which met the SARG’s agreement. However, violence escalated and the SARG failed to adhere to the Plan. Soon, the government appeared to crack down and the Arab League took a decision to suspend the membership of Syria.³

Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/23/58 (Jul. 18, 2013).

¹ For more see: Christopher M. Ford, Syria: A Case Study in International Law, an article available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2951235

² The statement states that: “The Security Council expresses its grave concern at the deteriorating situation in Syria, and expresses profound regret at the death of many hundreds of people”, and that “The Security Council condemns the widespread violations of human rights and the use of force against civilians by the Syrian authorities. See; Statement by the President of the Security Council, U.N. Doc. S/PRST/2011/16 (Aug.3, 2011). Available at:

http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PRST/2011/16

³ At an emergency session in Cairo, the league decided to exclude Syria until it stops the violence. See; Syria suspended from the Arab League, The Guardian, (12 November 2011), available at:

As the violence escalates, the SARG became weaker in containing them or imposing security over its territory. As a result, a number of opposition groups has been established across the country. The Free Syrian Army (FSA), established in Turkey, was one of the strongest armed opposition groups against the Syrian regime.¹ By the beginning of 2012, the “Joint Military Command of the Syrian Revolution” was established by FSA with more than twenty-two organized separate military forces under its command, including Al-Nusra front military group, which subordinates al-Qaeda;² and Ahrar al-Sham group, that has ties

<https://www.theguardian.com/world/2011/nov/12/syria-suspended-arab-league>

¹ FSA had announced its foundation through a video released through the internet on July 2011. Since that time different rebel groups have joined FSA, including: the Farouq bridge, Liwa-Al Islam, Al-Nusra Front, Ahrar Al Sham, and Tawheed Bridge. Valeria Scuto, The Syrian Conflict: an Analysis of the Crisis in the Light of International Law, 2016, p.12. available at: http://tesi.luiss.it/17597/1/072682_SCUTO_VALERIA.pdf

² Al-Nusra front had begun its operations in Syria in January 2012 to overthrow Al-Assad regime and establish an Islamic state in Syria, Christopher M. Ford, Syria: A Case Study in International Law, an article available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2951235

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with Al-Qaeda affiliates.¹ FSA also established military councils in various cities and issued its own rules of engagement, which are claimed to be in line with International Humanitarian Law (IHL).² However, FSA failed to respect and comply with IHL, or even to tightly control its units, because actual operations taken place far from its headquarter in Turkey.³

¹ Ahrar al-Sham is a Sunni Salafist armed group that aims to replace Assad's regime with an Islamic government. It is considered as one of the largest and most powerful armed groups in Syria. See: Non international armed conflict in Syria, available at: <http://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-syria#collapse5accord>. In February 2018, the group merged with Nour al-Din al-Zenki to form the Syrian Liberation Front (SLF). For more see: Aneesa Bellal, The War Report: Armed Conflicts in 2018, p.129. Available at: <https://www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202018.pdf>

² Cosmin Ivanciu, The status of Armed Conflicts. A Case Study: The Conflict in Syria, Scientific Research and Education in The Air Forces – AFASES 2016, p. 589.

³ Valeria Scuto, The Syrian Conflict: An Analysis of the Crisis in the Light of International Law, op.cit., p.12.

In early 2013, the Islamic State in Iraq and Syria (ISIS) began to initiate its first operation in Syria.¹ By 2014, it was estimated that ISIS controls over 34,000 square miles in Syria and Iraq.² Hezbollah, allegedly controlled by Iran, began its operations in Syria by February 2013.³ In 2015, the Syrian Democratic Forces (SDF) has been established to fight ISIS and other rebel groups.

¹ ISIS is the acronym of the Islamic State in Iraq and Syria, while Daesh is the Arabic acronym of Islamic State for Iraq and Levant (ISIL) (Levant is the old name of modern-day Syria, Lebanon, Israel, Palestine and Jordan). The three acronyms are synonym and refer to a group established by Abu Musab al-Zarqawi in 1999. See; Lizzie Dearden, Isis vs Islamic State vs Isil vs Daesh: What do the different names mean – and why does it matter? France has changed the name it uses to avoid legitimising terrorists, the Independent newsletter, (23 September, 2014) <http://www.independent.co.uk/news/world/middle-east/isis-vs-islamic-state-vs-isil-vs-daesh-what-do-the-different-names-mean-9750629.html>

² ISIS has detached itself from al-Qaeda in 2014 to form its own organization with the aim of creating an Islamic state (caliphate) across Iraq and Syria. In its prime, ISIS controlled 34,000 square miles in Iraq and Syria in 2014 and, in 2015, it was believed to be holding around 3,500 people as slaves. Aneesa Bellal, The War Report: Armed Conflicts in 2018, op.cit., at 128.

³ U.N. Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/22/59 (Feb. 5, 2013)

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It consists of a US-backed alliance of Arab, Turkmen, Armenian and Kurdish fighters. By 2017, the SDF was very powerful and took control over almost a quarter of Syria.¹ Hay'at Tahrir al-Sham is another armed group, which aims to overthrow the Assad regime and introduce Sharia Law in Syria. It consists of five different rebel Islamist organizations and considered as one of the strongest opposition groups to Assad's government.²

In addition to these organized armed groups, "Foreign Fighters" were involved in the conflict.³ Generally, the Foreign Fighters

¹ In an interview with Russia Today in May 2018, President Assad stated that "the only problem left in Syria is the SDF". He continued by saying that there are two options to deal with the SDF: negotiations, which the government claims to have started, or retaking SDF-controlled areas by force. Aneesa Bellal, *The War Report: Armed Conflicts in 2018*, op.cit., at 129.

² The group has between 7,000 and 11,000 troops. F. Brinley Bruton and A. Cheikh Omar, 'Syria's Civil War Has Been Raging for 7 Years. What's Behind it?', 21 February 2018, NBC News, <https://www.nbcnews.com/news/mideast/syria-s-civil-warhas-been-raging-7-years-what-n849851> .

³ This new phenomenon has emerged in Afghanistan in the 80s by Abdallah Azzam. The Geneva Academy defined them as follows: "a foreign fighter is an individual who leaves his or her country of origin or habitual residence to join a non-state armed group in an armed conflict abroad and who is

involvement in the conflicts is a relatively new phenomenon, which emerged in Afghanistan in the 80s. The Foreign Fighter is defined as “an individual who leaves his or her country of origin or habitual residence to join a non-state armed group in an armed conflict abroad and who is primarily motivated by ideology, religion, and/or kinship”.¹ It has been estimated that the number of foreign fighters in Syria is between 3000 to 13000 fighters from different countries.²

The above mentioned illustrates obviously that there are two types of armed conflicts in Syria: one is between the armed groups and the Syrian government; and the other is between the armed groups themselves. Both types are characterized as Non-International Armed Conflict (NIAC), either as per the meaning of

primarily motivated by ideology, religion, and/or kinship”. Academy Briefing No.7: Foreign Fighters Under International Law 6, Geneva Academy (Oct. 2014), available at:https://www.geneva-academy.ch/joomlafiles/docman-files/Publications/Academy%20Briefings/Foreign%20Fighters_2015_WEB.pdf

¹ This definition was provided by Geneva Academy in Academy Briefing No.7. see *Ibid.*

² It was stated that foreign fighters in Syria came from Saudi Arabia, Libya, Jordan, Lebanon, Tunisia, France, Germany and the UK. See: *Ibid.*

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the Common Article 3 of Geneva conventions 1949 (CA3) or Article 1 of the Additional Protocol II of 1977 to the Geneva conventions of 1949 (AP II).

With regard to the applicability of CA3, two conditions should be fulfilled: the intensity of the acts of violence; and the armed groups should have a minimum degree of organization, which both are existed in the armed conflict between armed groups themselves.¹ With regard to the applicability of AP II, the Protocol describes the NIAC as that which “take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups”; whereas the dissident armed forces or the organized armed groups should: have a responsible command, and exercise a territorial control, which “enable them to carry out sustained and concreted military operations and to implement this protocol”.² Based on this description, and as demonstrated by the military operations in

¹ See: Common Article 3 to the Geneva Conventions of 12 August 1949. Available at: <https://www.icrc.org/ihl/WebART/375-590006>

² Article 1 of the Protocol Additional to the Geneva Conventions of 1949, and relating to the Victims of Non-International Armed Conflicts 1977 [hereinafter: AP II].

battlefield and formal reports,¹ it is clear that there are a number of NIACs between armed groups and the government falling within the description of APII in addition to a number of NIACs between armed groups with each other within the description of CA3.²

¹ Human Rights Council Report of the independent international commission of inquiry on the Syrian Arab Republic, No. A/HRC/S-17/2/Add.1, p.8, para 28. Available at:

<https://www.ohchr.org/en/hrbodies/hrc/iicisyrria/pages/documentation.aspx>

² In July 2012, the International Committee of the Red Cross concluded that “there is currently a non-international (internal) armed conflict occurring in Syria opposing Government Forces and a number of organised armed opposition groups operating in several parts of the country”. ICRC, Syria: ICRC and Syrian Arab Crescent Maintain Aid Effort Amid Increased Fighting, 2012, available at:

<https://www.icrc.org/en/doc/resources/documents/update/2012/syria-update-2012-07-17.htm>. In its 2012 report, the Independent International

Commission of Inquiry on the Syrian Arab Republic determined that “the intensity and duration of the conflict, combined with the increased organizational capabilities of anti-Government armed groups, had met the legal threshold for a non-international armed conflict”. The report is available at:

<https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-50.doc>.

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In addition to the armed groups' involvement in the conflict, some states were involved too, justifying their intervention on different legal grounds such as: humanitarian intervention; collective self-defence; or state consent. However, this was not always the case. The U.S.-led coalition began airstrikes against ISIS in September 2014, clearly without the consent of the SARG.¹ Further, reports show that the US has unlawfully intervened in the conflict by supporting rebels in Syria through two training programs, the first was run by the Central Intelligence Agency (CIA) to moderate rebels and equip the trusted ones with weapons to fight the SARG; and the second was run by the Department of Defence (DoD) to train and equip rebels against ISIS.² In 2017 , the U.S. has targeted Syrian government

¹ The U.S-led coalition consists of 77 states including: Australia, Belgium, France, Germany, Jordan, the Netherlands, the United Kingdom, Saudi Arabia and the United Arab Emirates, to combat ISIS in Iraq and Syria. Global Coalition, 79 Partners United in Defeating Daesh, available at: <http://theglobalcoalition.org/en/partners/>. It is alleged that the number of the U.S. troops deployed in Syria is around 2,000, and that it had already spent nearly \$30 billion on the war in Syria and requested an additional \$13 billion for fiscal year 2018. Available at: <http://time.com/5229691/syria-trump-putin-saudi-arabia/>

² Christopher M. Ford, Syria: A Case Study in International Law, op.cit., pp.24-25.

positions in response to an alleged use of chemical weapons by the Syrian government.¹

Turkey has been involved in the conflict as part of the US-led coalition, in addition it has acted unilaterally against the Kurdish militant groups. The intervention of Turkey had started since 2016, without the consent of the SARG,² and currently it occupies part of northern Syria.³ Turkey has conducted intensive

¹ on 7 April 2017, the United States conducted missile strikes against a Syrian Air Force airfield, claiming that it is a response to the Syrian government's use of chemical weapons. Furthermore, in May and June 2017, "the U.S. launched attacks against Syrian government forces and pro-government militias to prevent them from advancing towards the area of operations of U.S. special forces working with armed opposition groups and shot down a Syrian government fighter plane". Death by Chemicals, Human Rights Watch, 2017, available at: <https://www.hrw.org/report/2017/05/01/death-chemicals/syrian-governments-widespread-and-systematic-use-chemical-weapons>

² President Erdogan clarified that Turkish troops will remain until a general election is held. Erdogan: Turkey Will not Leave Syria Until an Election Is Held, Al Jazeera, 4 September 2018, <https://www.aljazeera.com/news/2018/10/erdogan-turkey-leave-syria-election-held-181004174206836.html>.

³ Valeria Scuto, The Syrian Conflict: An Analysis of the Crisis in the Light of International Law, op.cit., pp.12-14.

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airstrikes since October 2017 to support the FSA in their war against Kurdish militia.

Russia had begun airstrikes in Syria by September 2015, then it has engaged into a conflict with Turkey, after the latter shot down a Russian fighter jet in November 2015. Iran was alleged to have dispatched senior military officials from the Islamic Revolution Guard Corps, along with Iranian fighters to support the Assad's regime tighten its control over western Syria.¹ Israel has repeatedly launched missiles and airstrikes to prevent Iran from transferring advanced weapons to Hezbollah and from establishing permanent military bases in Syria.² Saudi Arabia and

¹ Why the Syrian Civil War Is Becoming Even More Complex, an Article in *Times*, available at: <http://time.com/5229691/syria-trump-putin-saudi-arabia/>

² In 2018, Israel launched different attacks against Syrian military infrastructures claiming to target the Iranian sites in Syria, who backs the Syrian government, in response to an alleged crossing of an Iranian drone by the Syrian-Israeli border. It has been estimated that Israel has launched more than 100 airstrikes against Hezbollah, since the beginning of the war in Syria. Article in the Atlantic, No Matter Who Wins the Syrian Civil War, Israel Loses, available at: <https://www.theatlantic.com/international/archive/2018/08/israel-gamble-assad-syria/568693/>

the United Arab Emirates had also participated in the airstrikes against Islamic State targets in Syria.¹

The Syrian government has condemned the use of force by the U.S.-led coalition and by Turkey in the Syrian territory. Although U.S.-led coalition has targeted mainly ISIS and Turkey has targeted mainly ISIS and Kurds, the Syrian government has repeatedly declared that "Syria has not made any request to that effect", and described such actions as "acts of aggression", furthermore, President Assad has declared during his cabinet in 2012 that Syria is in "a state of war".²

According to Common Article 2 of the 1949 Geneva Conventions, the International Armed Conflict (IAC) takes place in "all cases of declared war of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them", and also "all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed

¹ Islamic State: Where key countries stand, BBC News, 3 December 2015. Available at: <https://www.bbc.com/news/world-middle-east-29074514>

² President Assad Declares Syria In A State Of War, NPR, 27 June 2012. Available at: <https://www.npr.org/2012/06/27/155823932/state-run-tv-station-in-syria-attacked>

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resistance”. The ICTY explained that an IAC exists “whenever there is a resort to armed forces between states”.¹ It is also established in scholars’ writings that IAC exists in cases of states confrontations, in other words, when one state or more use armed forces against another state.²

Therefore, the involvement of states in the conflict demonstrates the existence of some parallel International Armed Conflicts (IAC) with the concurring NIACs. According to the War Report of 2018, there is an IAC between Syria and the U.S coalition, and a short-lived IAC between Syria and Israel and between Israel and Iran on the Syrian territory. This is in parallel to at least seven NIAC between Syria and armed groups or between the armed groups with each other.³

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¹ ICTY, *The Prosecutor v. Dusko Tadic*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para 70.

² See generally, Dietrich Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols RCADI*, Vol. 163-II, 1979, in: *Collected Courses of the Hague Academy of International Law*, p. 131. Available at: http://dx.doi.org/10.1163/1875-8096_pplrhc_A9789028609303_03.

³ Aneesa Bellal, *The War Report: Armed Conflicts in 2018*, op.cit., at 128.

Syria is one of the ancient world countries, which had witnessed many civilizations such as: Phoenicians, Romans, and Arabs. These civilizations left their significant imprints all over the territory and made from Syria an “open-air museum”.¹ Currently, Syria has six declared world heritage sites, namely: the Ancient City of Damascus, the Ancient City of Bosra, the Site of Palmyra, the Ancient City of Aleppo, Crac des Chevaliers and Qal’at Salah El-Din, and the Ancient Villages of Northern Syria.² In addition to twelve sites on the Tentative List of World Heritage, including the Ebla, Apamea, Dura Europos, and Mari sites. According to the American Association for the Advancement of Science (AAAS) report of 2014, the high-resolution satellite imagery showed that except the Ancient City of Damascus, all five of the six Syrian World Heritage sites have endured sustainable damages since

¹ Cheikhmous Ali, Syrian Heritage under Threat, Journal of Eastern Mediterranean Archaeology & Heritage Studies, vol. 1, no. 4, 2013, pp. 351-366, JSTOR, available at: www.jstor.org/stable/10.5325/jeasmedarcherstu.

² All the six UNESCO World Heritage Sites in Syria are now either destroyed, ruined or severely damaged. See: Syria's six UNESCO World Heritage Sites all damaged or destroyed during civil war, Independent, 16 March 2016. Available at: <http://www.independent.co.uk/news/world/middle-east/syrias-six-unesco-world-heritage-sites-all-damaged-or-destroyed-during-civil-war-a6934026.html>.

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the beginning of the conflict, and the sites on the tentative list of world heritage were exposed to extensive looting and damage as well.¹

Since the conflict has been intensified in Syria, the invaluable cultural properties and sites were subject to different kinds of destruction, distortion, looting, in addition to acts of illegal excavations of cultural sites and illegal trafficking in cultural objects. Most tragically, many clashes took place in historical and cultural sites, causing serious and irrevocable damages to those sites. In the Ancient City of Aleppo, clashes between the SARG and the opposition groups resulted in massive destruction in historic mosques and madrassas, government buildings, civilian structures, and historic buildings in the city.²

¹ American Association for the Advancement of Science (AAAS), Ancient History, Modern Destruction: Assessing the Current Status of Syria's World Heritage Sites Using High-Resolution Satellite Imagery [hereinafter: the AAAS report]. Available at: <http://www.aaas.org/page/ancient-history-modern-destruction-assessing-status-syria-s-tentative-worldheritage-sites-7#Dura-Europos>

² Aleppo city was inscribed on the World Heritage List in 1986 for its importance as a commercial hub and a trade center since the 2nd millennium BC. More information about the City is available at: <https://whc.unesco.org/en/list/21/>. The destruction extended to the Great Mosque of Aleppo; the nearby Suq al-Madina; the Grand Serail of Aleppo;

According to AAAS report, fortified vehicle track, and a number of probable shell craters were constructed through the archaeological area in the ancient city of Bosra.¹ The Ancient site of Palmyra and its surrounding archaeological area were of no better luck, as the site has been used by the SARG as a military base. The pictures taken by satellite showed that rocket launchers and tanks were stated inside the archaeological site, which made Palmyra a legitimate military objective.² In addition, the site was

the Hammam Yalbougha an-Nasry; the Khusruwiye Mosque; the Carlton Citadel Hotel; and the Khan Qurt Bey caravanserai. See: Michael D. Danti and others, ASOR Cultural Heritage Initiatives (CHI): Planning for Safeguarding Heritage Sites in Syria and Iraq, ASOR Cultural Heritage Initiatives, Weekly Report 91-92 — April 27 – May 10, 2016. Available at: http://www.asor-syrianheritage.org/wp-content/uploads/2016/05/ASOR_CHI_Weekly_Report_91%E2%80%9392r.pdf

¹ The Ancient City of Bosra includes significant Roman remains from its period as the northern capital of the Nabataean kingdom of the Roman province of Arabia. Bosra has long been recognized as an important archaeological site and was inscribed on the World Heritage List in 1980. During 2013, there were reports of snipers regularly shooting from the Roman Theater/Fortress. See *ibid.*

² Palmyra's monumental Greco-Roman and Persian ruins were one of the major tourist attractions in Syria prior to the present conflict. Other archaeological remains in the ancient city of Palmyra include an agora,

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exposed later to looting, thefts, and shelling by ISIS, who also destroyed the tetra pylon¹ and part of a Roman theatre in the ancient city of Palmyra; the city's museums; blew up the 2,000-year-old towering Temple of Bel and the Arch of Victory; and looted other priceless artefacts.²

Deir ez-Zor province has seen intensified violent clashes between ISIS, and FSA and Al Nusra Front. The clashes resulted in serious damage and looting of Dura-Europos and Mari, which is

theatre, urban quarters, and other temples. Palmyra was inscribed on the World Heritage List in 1980. See the AAAS report.

¹ The tetrapylon, a collection of monumental pillars on a raised platform near the ancient city's entrance, and part of the facade of the Roman theatre, where musicians from St Petersburg's Mariinsky orchestra had performed at a victory concert. See the AAAS report.

² When government troops recaptured Palmyra in 2016, they revealed the extent of the damage; the famed Temple of Bel was blown to pieces; the Temple of Baalshamin was destroyed; artefacts in the museum were smashed; the iconic Arch of Triumph was in ruins. For more see: ISIS Destroys Ancient Theatre, Tetrapylon in Palmyra, Syria Says, NPR 20 January 2017. Available at: <http://www.npr.org/sections/thetwo-way/2017/01/20/510732864/isis-destroys-ancient-theater-tetrapylon-in-palmyra-syria-says>

part of the Euphrates Valley Landscape.¹ Furthermore, several violent clashes between armed combatants and SARG have occurred in Ebla (Tell Mardikh), which resulted in serious damages to the site, in addition to other acts of illegal excavation. Moreover, the city of Hama has seen bloody violent since the beginning of the conflict, which resulted in destroying many cultural and historical sites including the Norias of Hama, which was burnt in 2014.²

The city center of Raqqa has exposed to serious damages, for example, Statues of Lions in the Al Rasheed Park have been destroyed; and the shrine tombs of Uwais al-Qarani, Obay ibn Qays, and Ammar ibn Yasir have been bombed.³ It is alleged that many parties are accused of destructing Raqqa city, as it was

¹ Dura-Europos is also known as "Pompeii of the desert," was nominated to the World Heritage Tentative List in 1999. It came under the control of ISIS in June 2014. See the AAAS report.

² The Norias of Hama are large wooden wheels on the banks of the Orontes River, which was established in 469 BC. In 1999 Syria had submitted the Norias to be inscribed in the Tentative World Heritage. See the AAAS report.

³ The city of Raqqa was founded in approximately 300 BC. It is known for its brick monuments, well-preserved city wall, towers, and gates. It was nominated to be inscribed in the World Heritage Tentative List in 1999. See the AAAS report.

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first captured by Ahrar Al Sham and Al Nusra Front, then ISIS took control over the city in October 2013 after a fierce fighting with Al Nusra Front, then in September 2014 the US coalition led an airstrike campaign against ISIS in the city. The airstrike campaign has resulted in extensive damages inside the old city area, especially next to the Raqqa Museum.¹ In November 2014, the city was bombed by SARG, and according to the Syrian Observatory for Human Rights this bombing has caused extensive damages inside the city.²

It has been indicated that ISIS had established a Ministry of Antiquities to officially control looting sites, facilitate trafficking in cultural artefacts, and even imposing taxation on site loots and

¹ The United Nations Commission of Inquiry on the Syrian Arab Republic mentioned that some of the reported airstrikes by the international coalition “raise concerns regarding distinction, proportionality, and precautions in attacks under international humanitarian law”. International armed conflict in Syria. Available at: <http://www.rulac.org/browse/conflicts/international-armed-conflict-in-syria#collapse5accord>

² Susan Wolfenbarger et al., Ancient History, Modern Destruction: Assessing the Status of Syria’s Tentative World Heritage Sites Using High-Resolution Satellite Imagery, (2014), available at: <http://www.aaas.org/page/ancient-history-modern-destruction-assessing-status-syria-s-tentative-world-heritage-sites-7>.

excavations.¹ This situation has encouraged organized groups, and even individuals to carry out both planned and unplanned looting without the fear of being caught and sentenced.² ISIS and other extremist armed groups are claiming that their unlawful acts against cultural property are done according to their declared ideology to fight any pre-Islamic, heretical and polytheism art works wherever found.³ Though, according to their online magazine Dabiq, ISIS gained a lot of profit out of looting cultural

¹ U.N. Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/22/59 (Feb. 5, 2013). ISIS has legalized the taxation of site looting and created a Ministry of Antiquities to officially control the looting of sites and the sale of objects. Taxes reached up to 20% on looters in Syria. See: Amr al-Azm, Salam al-Kuntar and Brian I. Daniels, ISIS' Antiquities Sideline, N.Y. TIMES, (Sept. 2, 2014), http://www.nytimes.com/2014/09/03/opinion/isis-antiquities-sideline.html?_r=0.

² Emma Cunliffe and others, The Destruction of Cultural Property in the Syrian Conflict, op.cit., pp.1-31.

³ According to ISIS, pre-Islamic sites represent the kuffār [unbelievers] nations that should be destroyed for disbelieving in Allah and His messengers. Erasing History: Why Islamic State is Blowing Up Ancient Artifacts, Ancient Origins, 10 June 2017. Available at: <https://www.ancient-origins.net/news-history-archaeology/erasing-history-why-islamic-state-blowing-ancient-artifacts-008221>

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sites and trafficking in artefacts,¹ in addition it has been stated in the magazine that the destruction of cultural property was done to guarantee people's faith and loyalty through cutting any relation between these people and their ancient cultural.²

In all, the extent of unlawful acts against cultural property in Syria have reached a serious level of gravity. It was described as a "new war crime and an immense loss for the Syrian people and for humanity" and a "cultural cleansing" that has been led by violent extremists "to destroy both human lives and historical monuments in order to deprive the Syrian people of its past and its future".³

¹ ISIS gets "masses of publicity every time they blow up or destroy something that is valued by the world". ISIS Destroys Ancient Theatre, Tetrapylon in Palmyra, Syria Says, NPR 20 January 2017. Available at: <http://www.npr.org/sections/thetwo-way/2017/01/20/510732864/isis-destroys-ancient-theater-tetrapylon-in-palmyra-syria-says>

² The same scenario happened in Mali, Libya and previously in Iraq. For more see: Yaya J. Fanusie and Alexander Joffe, Monumental Fight: Countering the Islamic State's Antiquities Trafficking, Report of the Foundation for Defense of Democracies (Nov. 2015), available at http://www.defenddemocracy.org/content/uploads/documents/Monumental_Fight.pdf.

³ Palmyra: destruction of ancient temple is a war crime, says UNESCO chief, The Guardian, 24 August 2015, available at:

II. Protecting Cultural Property in International Law

The destruction of cultural property during armed conflict has long been prohibited in religion and the writing of scholars.¹ Within the

<https://www.theguardian.com/world/2015/aug/24/palmyra-destruction-ancient-temple-baal-shamin-war-crime-un-isis#:~:text=The%20chief%20of%20the%20UN's,as%20a%20%E2%80%9Cwar%20crime%E2%80%9D.&text=Irina%20Bokova%2C%20the%20Unesco%20chief,Syrian%20people%20and%20for%20humanity.>

¹ Islam prohibits wanton destruction of buildings and plunder of towns. In the Prophet Mohammed (PBUH) instructions to the Muslim troops, he said: "Refrain from demolishing the houses of the unresisting inhabitant; destroy not the means of their subsistence, nor their fruit trees and touch not the palm and do not mutilate bodies and do not kill children". Bennoune, K., "As-Salamu Alaykum? Humanitarian Law in Islamic Jurisprudence", (1994) Vol.15, No 2, MICH. J. INT'L L., p. 613. The first Caliph, Abu Bakr Siddiq (632- 634AD), instructed his troops to not molest Christian or Jewish worshipers or their monasteries. François Bugnion, The origins and development of the legal protection of cultural property in the event of armed conflict, Speech, Fiftieth Anniversary of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. Geneva: ICRC, 2004. Available at: <https://www.icrc.org/eng/resources/documents/article/other/65shtj.htm>.

Vattel wrote in 1758 that certain buildings of "remarkable beauty" should not be destroyed, because its destruction will not add to the strength of the enemy. Rousseau maintained that private property of civilians and public

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international law remit, the protection of cultural property during armed conflicts was embedded for the first time in the 1899 and the 1907 Hague Conventions.¹ Then, it was clearly stated in the 1954 Convention, which represents the main convention in treaty law for the protection of cultural property during armed conflicts. In addition, the protection of cultural property is also recognized in CIL and the grave violations of such protection are clearly prosecutable under the ICL.

property like education and worship buildings should be spared from hostilities. See: Emer de Vattel, *Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains*, (1758, reprinted 1916), Book 3, ch 9, p.168. Available at: https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/1051/0586-01_Bk.pdf. See also: Rousseau, *the Social Contract*, (1762, reprinted 1968) at 56-57.

¹ For full texts of both conventions see: Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907. Available at:

<https://scannedretina.files.wordpress.com/2018/12/Hague-Conventions.pdf>, and the Convention (II) with Respect to the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, July 29, 1899, [hereinafter 1899 Hague Convention]. Available at <http://www.icrc.org/ihl.nsf/WebPrint/150-FULL?OpenDocument>.

Accordingly, this part aims at introducing the protection of cultural property as provided in treaty law and CIL and how far this protection was ensured with regard to the conflict in Syria. Before this, it is important to briefly expose to the definition of cultural property.

Definition

The first mention of the term "Cultural Property" in an international instrument was in the 1954 Convention. As per Article 1 of the Convention, cultural property includes:

- “ a) 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;
- b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and

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depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);

c) centres containing a large amount of cultural property as defined in subparagraphs (a) and (b), to be known as “centres containing monuments”.

Both additional protocols to the 1954 Convention have referred to the definition of cultural property as stated in Article 1 of the Convention.¹ Cultural property, within this meaning, includes limited and selective types of cultural property, which have a physical character and of “great importance to the cultural heritage of every people”. Article 1 introduces some examples of cultural property such as “monuments of architecture, art or history, whether religious or secular; archaeological sites ...”; though, these objects and sites are stated for example and non-exhaustive.²

The term “cultural heritage” has been used in the 1972 World Heritage Convention to stand for sites and groups of buildings of

¹ Article 1 of the First additional protocol of 1954 and Article 1 of the second additional protocol of 1999.

² Patty Gerstenblith, *The Destruction of Cultural Heritage*, op.cit., pp337-389.

an “outstanding universal value”. Article 1 of the 1972 World Heritage Convention defines cultural heritage as: ¹

“For the purpose of this Convention, the following shall be considered as “cultural heritage”:

– monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;

– groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;

– sites: works of man or the combined works of nature and man, and areas including archaeological

¹ The 1972 World Heritage Convention has entered into force on 17 December 1975. Full text is available at: <http://whc.unesco.org/pg.cfm?cid=246>

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sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.”

According to the above definition, the concept of cultural heritage is narrow in comparison with the concept of cultural property. While the cultural property definition, as provided in the 1954 Convention, encompasses movable and immovable cultural property, cultural heritage, as provided in the 1972 World Heritage Convention, applies only to immovable cultural property and some limited moveable cultural property or repositories of movable cultural property provided that the repository is itself considered to be a World Heritage Site.¹ On the other hand, while the cultural property is characterized by its “great importance to the cultural heritage of every people”, cultural heritage is very limited to a small selective group of cultural property which are “of outstanding

¹ Micaela Frulli, *The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency*, 22 EUR. J. INT'L L. (2011), pp.203–205; Manlio Frigo, *Cultural property v. cultural heritage: A “battle of concepts” in international law?*, IRRC June 2004 Vol. 86 No 854, pp.367–378. Available at: <https://www.cambridge.org/core/journals/international-review-of-the-red-cross/article/abs/cultural-property-v-cultural-heritage-a-battle-of-concepts-in-international-law/DF36EBF545EAD1BEC9053899795922F3>

universal value". Within this sense, cultural heritage is a very stringent term comparing to cultural property, or as has been described by one author, cultural heritage as a term encompasses "la crème de la crème, the best of the best".¹

Both terms, cultural property and cultural heritage, are being used in legal scholarship of international law interchangeably.² In this Article, the term "cultural property" is being used to signify the meaning as included in the 1954 Convention.

The Protection of Cultural Property in Treaty Law and Custom

Under treaty law, the 1954 Convention along with its two protocols are the core conventions for protecting cultural property during times of armed conflicts. The first protocol was drafted at the same year of drafting the main convention.³ The Protocol

¹ Marina Lostal, Challenges and Opportunities of the Current Legal Design for the Protection of Cultural Heritage During Armed Conflict, op.cit., pp.228-238.

² Patty Gerstenblith, The Destruction of Cultural Heritage, op.cit., p.338

³ The First Protocol (1954) to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, entered into force on 7 August 1956 [hereinafter: The First Protocol]. Available at:

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focuses exclusively on the status of movable cultural objects and the prevention of the export of cultural objects and the return of the illegally exported ones.¹ The second protocol was adopted in 1999 to complement and enhance the protection stated in the 1954 Convention.² The Protocol includes provisions on the criminal responsibility of individuals, and further clarification of the military necessity exception.

Under the auspicious of the UNESCO, two conventions were adopted with regard to the protection of cultural property. One is the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 (the 1970 UNESCO convention). The Second is the Convention Concerning the Protection of the World Cultural

http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/1954_Protocol_EN_2020.pdf

¹ Article (I) of the First Protocol. The protection of moveable objects was split off from the main Convention because of the United States objection. Therefore, this issue has been included in a separate protocol to encourage the United States to ratify the main Convention without having to go through argument about the question of movable objects. Patty Gerstenblith, *The Destruction of Cultural Heritage*, op.cit., pp337–389.

² Serge Brammertz, Kevin C. Hughes, Alison Kipp and William B. Tomljanovich, *Attacks against Cultural Heritage as a Weapon of War: Prosecutions at the ICTY*, *Journal of Criminal Justice*, Vol. 14, No. 5, 2016.

and Natural Heritage of 1972 (the 1972 World Heritage Convention). Although, the two conventions are mainly designed to apply during peacetime, their application was extended in practice to apply during time of armed conflicts as well.¹

As shown in Table (1) below, Syria has ratified the 1954 Convention and the first additional protocol; therefore, Syria is clearly obliged to adhere to their provisions. With regard to the other unratified treaties, Syria is obliged, in accordance with its signature or acceptance, not to act in a manner which would “defeat the object and purpose” of these treaties.² Moreover, any other state involved in the conflict is also obliged to adhere to the ratified treaties from their side or with the related principles of the CIL.

The 1954 Convention for the Protection of Cultural Property	Ratification:06.03.1958
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¹ Roger O’Keefe and others, Protection of Cultural Property: Military Manual, UNESCO 2016, p. 7. Available at: <https://unesdoc.unesco.org/ark:/48223/pf0000246633>

² Article 18 of the 1969 Vienna Convention on the Law of Treaties. Available at: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

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The 1954 First Additional Protocol	Ratification:06.03.1958
The 1999 Second Additional Protocol	Signature:17.05.1999
The 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property	Acceptance:21.02.1975
The 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage	Acceptance:13.08.1975

Table (1) the status of ratification/signature/acceptance by Syria.

According to one author, although armed groups do not enjoy the international legal personality that enables them to ratify treaties, they are still bound by international conventions based on (i) respecting international obligations of the state in which they operate their functions on its territory; (ii) all parties of any given armed conflict, including armed groups, are bound by CIL, which

includes main principles relating to the protection of cultural property.¹

In all cases, treaty law, no matter how developed, remains confined with its nature that recognizes only states as being "parties" to the treaty and binds only ratifying states. Accordingly, CIL, the oldest source of international law, is standing out as an important source of international obligations that "fills gaps left by treaty law in both international and non-international conflicts".²

As defined in Article 38 of the statute of the International Court of Justice (ICJ), International Custom is "a general practice accepted as law". So, any rule can be promoted to be part of CIL, even if this rule was included in a treaty, if two elements are fulfilled: the general state practice; and the international community belief that such practice is binding. According to this, many international humanitarian law treaties has been recognized as part of the CIL, including, the 1907 Hague IV convention, which protects

¹ Kevin Chamberlain, War and Cultural Heritage: A Commentary on The Hague Convention 1954 and Its Two Protocols (2d ed. 2013), at 6.

² International Committee of the Red Cross, "Customary International Humanitarian Law," 29 October 2010, available at:<http://www.icrc.org/eng/war-and-law/treaties-customary-law/customary-law/overview-customary-law.htm>

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immovable cultural property, if housed within a protected building and the 1923 Hague Air Rules, which provides a general protection to all cultural property and a special protection to monuments of greater historic importance.¹

Yet, the customary status of the 1954 Convention and the 1999 Protocol is still under debate.² Even in the UN Reports, no reference has been made to the 1954 Convention as part of the CIL, although other conventions have been considered as such.³ Conversely, some scholars has argued that several parts of the 1954 Convention has reached the status of international custom

¹ As indicated by the Nuremburg International Military Tribunal of 1946, the entire 1907 Hague IV convention is "recognized by all civilized nations and ... regarded as being declaratory of the laws and customs of war", including its provisions protecting cultural property. International Military Tribunal of Nuremberg, Trial Part 22 (22 August–1 October 1946), Judgment, 1 October 1946, p. 497.

² Yaron Gottlieb, Criminalizing Destruction of Cultural Property: A Proposal for Defining New Crimes under the Rome Statute of the ICC, Penn State International Law Review: Vol. 23: No. 4, (2005), p.859. Available at: <http://elibrary.law.psu.edu/psilr/vol23/iss4/16>

³ *Ibid.*

and therefore are part of the CIL.¹ These parts encompasses, at least, the basic principles applicable to both State and non-State parties, such as: avoid targeting cultural sites subject to imperative military necessity waiver; prevent its own military from acts of pillage, theft and misappropriation of cultural property; refrain from acts of reprisal against cultural property.²

However, other scholars claim that the entire 1954 Convention is part of the CIL.³ The customary nature of the convention can be inferred from many factors: the nature of the convention itself, which is of a norm-creating character; the large number of states party to the convention; the widespread acceptance of the Convention between its member states, especially those who owns rich cultural property such as Egypt, Greece, and Italy; and the adherence of the Convention by states not party such as the U.S. All this reflects the believe amongst international community of its binding character.

¹ Emma Cunliffe and others, *The Destruction of Cultural Property in the Syrian Conflict*, op.cit., pp.1-31; Patty Gerstenblith, *The Destruction of Cultural Heritage*, op.cit., pp337-389.

² *Ibid.*

³ Emma Cunliffe and others, *The Destruction of Cultural Property in the Syrian Conflict*, op.cit., pp.1-31.

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In international practice, there are some evidence to support the customary nature of only few provisions of the 1954 Convention as well. For example, during the 27th session of the General Conference of the UNESCO, a resolution was adopted with regard to the protection of cultural property during armed conflicts, which reaffirmed that "the fundamental principles of protecting and preserving cultural property in the event of armed conflict could be considered part of international customary law".¹ Moreover, the ICTY in Strugar Case, clarified that Article 3(d) of the ICTY Statute, which specifically refers to the protection of cultural property, is a rule of IHL which reflects the CIL and applies to both international and non-international armed conflicts.² In Tadic case, the ICTY Appeals Chamber found that Article 19 of the 1954 Convention, which refers to the obligation of High Contracting Parties to protect cultural property during conflicts not

¹ The UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage, Adopted by the thirty-second session of the UNESCO General Conference, Paris, (Oct. 17, 2003), available at: <http://unesdoc.unesco.org/images/0009/000956/095621E.pdf>

² Prosecutor v. Strugar, Judgment, ICTY Trial Chamber, Case IT-01-42-T (Jan.31, 2005) at para 230.

of an international character, have become part of customary law.¹

According to treaty law and custom, all parties to the conflict in Syria are obliged to respect cultural property.² This obligation has been recognized by several military manuals and legislation of many states including states not party to the 1954 Convention, in addition, it has also been recognized by the ICTY as part of CIL, which can be applied to both IAC and NIAC.³

Under the obligation to respect cultural property, the 1954 Convention distinguish between two types of protection. The “general protection”, which is placed to monuments, archaeological sites, groups of buildings, works of art, books,

¹ Prosecutor v. Tadic, Decision, ICTY Appeals Chamber, para. 98, Case No. IT-94-1 (Oct. 2, 1995) (decision on the Defence Motion for Interlocutory Appeal Jurisdiction).

² According to the ICRC study, the obligation to respect cultural property has become “a norm of customary international law applicable in both international and non-international armed conflicts”. Jean-Marie Henckaerts & Louise Doswald-Beck eds., Customary International Humanitarian Law, (2 volumes), (2005).

³ See: Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Prosecutor v. Hadzihasanovic et al., ICTY, Appeals Chamber, 16 July 2003.

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scientific collections, archives, and other buildings including museums, libraries, archival depositories and refuges (Article 1). According to this type of protection, parties are obliged to prohibit and prevent any destruction, wilful damage, pillage or vandalism directed against such sites (Article 4/3); refrain from any act of seizure, capture, or reprisals against protected objects (Article 4/4), as well as any act of utilizing cultural property and its immediate surroundings for military purposes or any other purpose that is likely to expose it to damage or destruction (Article 4/1).

The second type of protection is the “special protection”, which is placed to objects of “great importance” such as; buildings dedicated to religion, art, science, education or charitable purposes and historic monuments, provided they are not used for military purposes. Under this type of protection, cultural property shall be marked with a distinctive emblem (Article 10), and when feasible may be transported to a safer place, in addition, it shall remain immune from any act of hostility except in two cases: the abusive utilization, and the military necessity (Article 11).

The 1999 protocol provides a similar protection under the two abovementioned types. The Protocol obliged states to “do everything feasible” to provide the general protection to the

cultural property and refrain from attacking property if the attack would cause incidental damage (Article 7/a). It also established a system of special protection for cultural property of great importance termed "enhanced protection" (Article 10), which resembles "the special protection" under the 1954 Convention.

In both the 1954 Convention (Article 4/2) and the 1999 Protocol (Article 6), the "imperative military necessity" has been included as an exception to the general principle to protect cultural property against destruction. The 1999 Protocol was more specific than the 1954 Convention by requiring two cumulative conditions and certain precautions to be taken in case of waiving the protection based on the exception of the military necessity. These are: (i) when the cultural property has, by its function, been made into a military objective, and (ii) there is no feasible alternative but to target the property.

With regard to the first condition, the cultural property should have, by its function, been made into a military objective. The ICTY elaborated on this condition in Tadic case by stating that the cultural property may become a military objective basically on

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grounds of its use not its location,¹ therefore the mere existence of the property in the battlefield is not enough to justify the attack, but rather there should be a function of the property in the hostilities.² The second condition requires that there should be no feasible alternative available but to target the cultural property, which means that before directing any attacks against cultural property, an evaluation for other alternatives should be done, and the cultural property should be favoured.

In addition to the two cumulative conditions, certain precautions should be taken. The Protocol requires that the decision to launch an attack shall only be made by an “officer commanding a force the equivalent of a battalion in size or larger” (Article 6/c), and “an effective advance warning shall be given whenever circumstances permit” (Article 6/d). However, the exception of military necessity is still under debate, as it depends totally on the discretion of the decision-makers that differs from situation to another and from person to another.³

¹ Berenika Drazewska, *The Human Dimension of the Protection of the Cultural Heritage from Destruction during Armed Conflicts*, *International Journal of Cultural Property*, vol.22 (2015), p.217.

² Patty Gerstenblith, *The Destruction of Cultural Heritage*, op.cit., p. 353.

³ Lyndel V. Prott and Patrick J. O'Keefe, 'Cultural Heritage' or 'Cultural Property'?, available at: <https://www.cambridge.org/core>.

It is clear in various reports, and as demonstrated in part I of this article, that Syria's cultural property has been extensively damaged and destroyed.¹ The examples to support this are countless. The ancient city of Palmyra has been the battleground between SARG and opposition forces since early 2012;² the citadel in Aleppo has been used as a military base by the SARG since August 2012; the Armenian Cathedral and part of the wall of the twelfth century Citadel of Aleppo were destroyed by ISIS; the Waquifiyya Library and its entire collection was burned.³ Though, no reference has been mentioned in any report to justify these actions on grounds of the use of the military necessity exception.

¹ Polina Levina Mahnad, Protecting cultural property in Syria, op.cit, pp. 1037-1074

² From mid-June 2015, it was reported that ISIS started intentionally destroying cultural property in Palmyra. On 20 January 2017, the UNSC adopted a press statement on the destruction of cultural heritage and executions in Palmyra, Syria. UNSC, "Press Statement on Destruction of Cultural Heritage, Executions in Palmyra", UN Doc. SC/12690, 20 January 2017.

³ In September 2015, the Syrian Directorate General of Antiquities & Museums indicated that the total number of protected buildings and sites destroyed or damaged during the conflict exceeds 750.

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As a response from the international community, the UNSC unanimously adopted Resolution 2139, in February 2014, calling all parties to the conflict in Syria to "save Syria's rich societal mosaic and cultural heritage, and take appropriate steps to ensure the protection of Syria's World Heritage Sites".¹ While not adopted under Chapter VII, this resolution positioned the protection of cultural property as a concern linked to the violence and deterioration of the humanitarian situation in Syria. One year later, in February 2015, the UNSC unanimously adopted Resolution 2199, acting under Chapter VII of the UN Charter.² The Resolution focused on the destruction of cultural heritage in Iraq and Syria by ISIS, "whether such destruction is incidental or deliberate, including targeted destruction of religious sites and objects",³ affirming the UNSC commitment to prevent trade in cultural materials illegally removed from Iraq and calling all UN

¹ UNSC Res. 2139, 22 February 2014, Preamble. UNSC Res. 1483, 22 May 2003, para. 7. UNSC Resolution 1483, adopted on May 22, 2003, marks the first response of the UNSC to acts against cultural property in Iraq. Polina Levina Mahnad, *Protecting cultural property in Syria*, op.cit., pp. 1037-1074

² UNSC Resolution 2199, S/RES/2199 (February 12, 2015), available at <http://unscr.com/en/resolutions/doc/2199>.

³ *Ibid.*

member states to take appropriate steps to prevent such trade.¹ In March 2017, the UNSC adopted unanimously Resolution 2347, as the first ever UNSC resolution to focus on cultural heritage. The Resolution has clearly condemned ISIS for committing crimes including the destruction of cultural heritage and trafficking of cultural property.²

The prohibition of pillaging, looting, and theft of cultural objects is included in the 1954 Convention (article 4/3). Adherence to the obligation to respect cultural property assumes that states refrain from any act of pillage, looting, or theft, which demonstrates that both obligations are interrelated and of equal importance. The exportation of cultural property is also prohibited under the First Protocol; the Second Protocol; and the 1970 UNESCO Convention.³ The obligation to return cultural property illegally

¹ Vincent Négri, "Legal Study on the Protection of Cultural Heritage through the Resolutions of the Security Council of the United Nations", UNESCO, 2015, available at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Study_Negri_RES2199_01.pdf.

² UNSC Res. 2379, 21 September 2017, Preamble, fourth recital.

³ Article 2(2) of the Convention on the Illicit Trade in Cultural Property (the 1970 UNESCO convention). Article 11 of the Convention states that "the export and transfer of ownership of cultural property under compulsion

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exported is included in the First Protocol¹ and the 1970 Convention.² The 1995 UNIDROIT Convention has expanded the scope restitution of cultural objects to include objects which “unlawfully excavated, or lawfully excavated but unlawfully retained” (Article 3/2). It further enabled states to request the return of a cultural object, illegally exported from its territory, from the court or other competent authority in another state (Article

arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit” and “remove their causes, putting a stop to current practices, and by helping to make the necessary reparations”.

¹ Article 3 stipulates that: “Each High Contracting Party undertakes to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property which is in its territory, if such property has been exported in contravention of the principle laid down in the first paragraph. Such property shall never be retained as war reparations”.

² Article 13 states that: “The States Parties to this Convention also undertake, consistent with the laws of each State: (b) to ensure that their competent services co-operate in facilitating the earliest possible restitution of illicitly exported cultural property to its rightful owner; (c) to admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners; (d) to recognize the indefeasible right of each State Party to this Convention to classify and declare certain cultural property as inalienable which should therefore ipso facto not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported”.

5/1).¹ Despite the limited scope of application for both treaties, that is confined to the cases where states are occupied by a foreign power, their scope of application could be widened based on state practice, different UN statements, in addition to the ICRC study, which all support that the obligation to return illicitly exported cultural property is customary.²

With respect to the conflict in Syria, a number of reports indicated to the wide range of looting and illegal excavation acts, that in sometimes was organized by ISIS Ministry of Antiquities, as previously explained. In response to the unlawful acts of illicit trafficking, the UNESCO has issued a Plan in 2013 to train the humanitarian actors in Syria on reporting with respect to the condition of cultural property to DGAM and UNESCO. The UNESCO has also created an Observatory for the Safeguarding

¹ The Full text of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects is available at:
<http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1995-unidroit-convention/>

² Marina Lostal, Challenges and Opportunities of the Current Legal Design for the Protection of Cultural Heritage During Armed Conflict, op.cit., pp.228-238.

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of Syria's Cultural Heritage;¹⁶⁹ and called for the creation of "protected cultural zones" around historical sites in Syria.¹⁷⁰

However, the restitution of cultural property of Syria might not be feasible for the following reasons: (i) the weak international control and deterrence over trafficking in antiquities, as many cases caught by custom officers in many states were ended up by returning the stolen objects without any criminal proceedings; (ii) the inability to prove the ownership of the cultural property directly excavated from archaeological sites, which hasn't been inventoried by the Ministry of Antiquities in Syria; (iii) the restitution process depends basically on the diplomatic relations and cooperation between states, which are almost cut or tense with many states, in addition, some states, such as U.S, do not recognize the Syrian government as a legitimate authority; (iv) while the restitution is aimed at concealing the cultural harm by returning the looted important piece of art to its original place, some intrinsic pieces, like floor mosaic, lose its fundamental value

¹⁶⁹ UNESCO, "UNESCO to Create an Observatory for the Safeguarding of Syria's Cultural Heritage", 28 May 2014.

¹⁷⁰ UNESCO, "UNESCO Conference Calls for Protected Cultural Zones to be Established in Syria and Iraq", 3 December 2014.

once detached from its original context, and even if returned the cultural harm will still exist.¹

Prosecuting unlawful acts against cultural property has been stated in the 1954 Convention. Article 28 of the Convention states that "the High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention". Though, in practice, this provision was ineffective, because it didn't specify the exact offences that could trigger criminal liability and left this issue to the domestic laws of the parties.²

¹ For example, between 1991 and 1998, Canadian customs seized 76 pieces of floor mosaic declared as Lebanese handicrafts. However, expert analysis suggested the pieces had come from western Syria. All were returned to the ownership of Syria in 1999. Also, while more than 2000 objects were discovered in the luggage of incoming air passengers, no prosecutions or convictions were ever reported. Presumably recovery and return were considered an appropriate and sufficient response. Neil Brodie, Syria and its Regional Neighbors: A Case of Cultural Property Protection Policy Failure? *International Journal of Cultural Propert*, 2015, pp.317-335.

² Yaron Gottlieb, *Criminalizing Destruction of Cultural Property*, op.cit., pp.857-896.

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Unlike the 1954 Convention, the 1999 Protocol includes an exact description of the unlawful acts against cultural property that should be prosecuted. The Protocol stipulated on the individual responsibility for committing any of the following acts: (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 cultural property protected under the Convention and this Protocol; (d) making cultural property protected under the Convention and this Protocol the object of attack; (e) theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention. Moreover, the 1999 Protocol obliged member states to prosecute offenders within its domestic jurisdiction (Article 16) and to commit to the principle to either extradite or prosecute (Article 17).¹

In fulfilling its obligation to respect and protect cultural property, Syria has enacted the 1963 Antiquities law (last amended 1999), which criminalizes acts of vandalization, looting, and damage of

¹ Also, the Additional Protocol I to the Geneva Convention treats the extensive destruction of cultural property as a grave breach, unless they are being used 'in support of the military effort'.

Antiquities. The Law stipulates that “it is prohibited to destroy, transform, and damage moveable and immoveable antiquities by writing on them, engraving them or changing their features, or removing parts of them”.¹ Furthermore, the law proposed penalties that range from substantial fine to imprisonment from five to ten years. In addition, the DGAM was established to inventor all cultural sites and objects in Syria. The DGAM has worked effectively during and before the conflict to inventor all cultural sites and objects, as well as transport the moveable ones to secret locations for safekeeping, including those from Palmyra.²

In conclusion, it is clear that almost all parties to the conflict in Syria are non-compliant with the related treaty law provisions with respect to the protection of cultural property during armed conflicts. The reasons for incomppliance may include: the economic gain profited out of trading in cultural objects; cultural cleansing; or terrorizing people. The ICJ, in the case of Bosnia

¹ Chapter 1, Article 7 of the Law.

² Silvia Perini and Emma Cunliffe, Towards a protection of the Syrian cultural heritage: A summary of the national and international responses Volume III (Sept 2014 - Sept 2015), available at: https://en.unesco.org/syrian-observatory/sites/syrian-observatory/files/Towards-a-protection-of-the-Syrian-cultural-heritage_Vol3.pdf

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and Herzegovina v. Serbia and Montenegro, held that “where there is physical or biological destruction, there are often simultaneous attacks on cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group”.¹ In the same vein, it is worth quoting Raphael Lemkin words: “Burning books is not the same as burning bodies ... but when one intervenes ... against mass destruction of churches and books, one arrives just in time to prevent the burning of bodies”.²

III. Unlawful Acts Against Cultural Property

As previously explained, the 1954 Convention and its additional protocol of 1999, include provisions on criminalizing unlawful acts against cultural property. In addition, within the remit of ICL, the statutes of international criminal tribunals criminalize, with very slight variations, three core categories of international crimes: war crimes, crimes against humanity, and genocide. Unlawful acts against cultural property fits perfectly as war crimes within these statutes. Nonetheless, under certain conditions, these unlawful

¹ ICJ, Case Concerning Application of The Convention on the Prevention and Punishment of the Crime of Genocide – Bosnia and Herzegovina v. Serbia and Montenegro, Judgment, 26 February 2007, para. 344.

² *Ibid.*

acts could amount to crime of persecution, which falls under the category of the crimes against humanity. Also, these unlawful acts could be used as evidence on the existence of crime of genocide. Accordingly, this part exposes to the criminal protection of cultural property as envisaged in the ICL and as demonstrated by the international jurisdiction.

a. War Crimes

As early as 1919, “pillage” and “wanton destruction of religious, charitable, educational, and historic buildings and monuments” were included as war crimes to be prosecuted by the Sub Commission III on the Responsibilities of the Authors of War and on Enforcement of Penalties for Violations of the Laws and Customs of War. These offences are copying Articles 27, 28, and 56 of the 1907 Hague Regulations.¹ After World War II, the Nuremberg International Military Tribunal (IMT) was established to prosecute those who are responsible for committing violations of Laws and Customs of War. Article 6 (b) of the IMT extended its jurisdiction to include “plunder of public or private property,

¹ Ana Filipa Vrdoljak, Cultural Heritage in Human Rights and Humanitarian Law (May 8, 2009), International Human Rights and Humanitarian Law, pp.250–302, O. Ben-Naftali, ed., Oxford University Press, 2011, Available at: <https://ssrn.com/abstract=1401231>.

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wanton destruction of cities, towns or villages, or devastation not justified by military necessity”.¹ The most notable prosecution in this regard was the trial of Alfred Rosenberg,² the chief of an educational research institute. The IMT found Rosenberg guilty of “organized plunder of both public and private property through the invaded countries”³ on grounds of collecting more than 21,000 artworks stolen from all over German-occupied Europe and housed them in depots.⁴

¹ Article 6 (b) of the Charter of the International Military Tribunal, Nuremberg annexed to the Agreement by United Kingdom, United States, France and USSR for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 82 UNTS 279. Available at: https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2_Charter%20of%20IMT%201945.pdf

² Rosenberg was found guilty of plundering and persecuting the Jewish people in Europe as a war crime and crimes against humanity, of which he was sentenced to death. Roger O’Keefe, Protection of Cultural Property under International Criminal Law, op.cit., p.337.

³ *Ibid.*

⁴ Germans were required to restore plundered art works to their original owners; nevertheless, many art works never been restored. More on seizing cultural materials during WWII is available at: <https://www.ushmm.org/information/exhibitions/online-exhibitions/special-focus/offenbach-archival-depot/einsatzstab-reichsleiter-rosenberg-a-policy-of-plunder>

The ICTY statute, in Article 3, criminalized the “seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science”. In Strugar Case, the ICTY Trial Chamber held that the accused is found guilty of committing war crime within the meaning of art 3 (d) of the ICTY Statute, asserting these acts, as in Article 3, constitute war crime regardless of being committed in the international or non-international armed conflict.¹

Under the Rome Statute of the International Criminal Court (ICC), war crime of destruction of cultural property encompasses “[i]ntentionally 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”,² whether committed in international or non-international armed conflict.³

¹ Roger O'Keefe, Protection of Cultural Property under International Criminal Law, op.cit., p.337.

² Article 8(2)(e)(iv) of the ICC Statute. The term ‘attack’ is defined in Article 49(1) of the Additional Protocol I as “acts of violence against the adversary, whether in offence or in defense”.

³ Article 8(2)(b)(ix) of the ICC Statute in case of an IAC and Article 8(2)(e)(iv) in case of NIAC.

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It has been noted that while the ICTY statute considered the actual destruction of cultural property a requisite for establishing war crime, the ICC statute considers only “directing attacks”, regardless of its result, a sufficient requisite to establish war crime.¹ Hence, the ICC statute is providing, in this sense, two levels of protection: the protection against the attack itself irrespective of its result, and the protection against the damage or destruction as such. Though, it has also been noted that the protection against attacks, in this article, is confined with two limiting conditions. First, the attack must be intentional; therefore, the cases where attacks are launched recklessly or in extreme negligence against cultural property are excluded. As argued by one author, although the attacks against cultural property, as war crimes, are defined to be intentional, this sight should be changed in light of recent developments in armed conflicts to consider acts committed in reckless or willful negligence war crimes.² In the author’s view, the international practice confirms this, for

¹ Nout Van Woudenberg & Liesbeth Lijnzaad (eds), *Protecting Cultural Property in Armed Conflict: An Insight into the 1999 Second Protocol to The Hague Convention of 1954 for The Protection of Cultural Property in The Event of Armed Conflict* (2010).

² Patty Gerstenblith, *The Destruction of Cultural Heritage*, op.cit., pp337-389.

example, the UNSC, with regard to the armed conflict in Syria, has referred in its resolution to both intentional and unintentional destruction of cultural heritage. Second, although the “military objectives” was mentioned in Rome Statute, both Rome Statute and the ICC Elements of Crimes did not include any definition for the “military objectives”. Therefore, the traditional definition as recognized in the IHL treaties is applied. Accordingly, by applying both conditions, it turns out that the main elements of the war crime of destruction of cultural property are similar to that of the early Hague Conventions.

With respect to seizing cultural property, the Trial Chamber, in *Kordić and Čerkez*, considered that the obligation to prohibit the seizure of “institutions dedicated to religion”, in particular, is customary.¹ Similarly, Rome Statute of the ICC criminalized the seizure of the enemy’s property unless imperatively demanded by the necessities of war.²

Although Rome Statute was diligent in improving the description of acts constituting war crimes in general, it failed to recognize

¹ *Prosecutor v Miodrag Jokić*, Trial Judgment, No IT-01-42/1-S, Trial Chamber I, ICTY (18 March 2004) at 46; *Dario Kordić and Mario Čerkez*, Trial Judgment, No IT-95-14/2-T (26 February 2001) at 36 and 360.

² Articles 8(2)(b)(xiii) and 8(2)(e) (xii) of the Rome Statute.

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the usage of cultural property in support of military actions as an act constituting war crime; despite being recognized by the 1977 Protocols and in the ICTY jurisprudence as a violation of the protection of cultural property.¹ Also, in modern armed conflicts, the use of cultural sites as depots and sanctuaries has been increased and proved to be a serious threat to the protection of cultural property.² In the author's view the international courts may be enabled to enjoy the discretion to include other acts such as: theft, unlawful appropriation, or utilizing cultural property for military purposes etc. as war crimes. War crimes are defined, in both ICTY and ICC statutes, as "serious violations of the laws and customs". The word "serious violations" hasn't been clearly defined in any international instrument, which indicates, in one author's view, that the acts constitute war crimes, as provided in the ICTY and ICC statutes, are non-exhaustive.³ Therefore,

¹ In Strugar Case, the Trial Chamber ruled that if the Croatian defenders had defensive military positions in the Old Town of Dubrovnik, it would have been "a clear violation of the World Heritage protected status of the Old Town." See: Prosecutor v. Strugar, Judgment, ICTY Trial Chamber, at para. 183, Case IT-01-42-T (Jan. 31, 2005).

² Yaron Gottlieb, *Criminalizing Destruction of Cultural Property*, op.cit., p.867.

³ Caroline Ehlert (ed.), *Prosecuting the Destruction of Cultural Property in International Criminal Law*, Brill 2013.

judges enjoy the discretion to widen the scope of acts against cultural property, which considered as “serious violations” on a case by case basis and as long as it fulfils the seriousness threshold set by the statute. This is supported by the Appeals Chamber in Tadić case, as the Chamber stated that certain requirements must be fulfilled in an act in order to be promoted to a “serious violation”, among them is that it “must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim”. Based on this, it is presumed that any act of violation to the protection of cultural property can fall within the meaning of war crimes provided that it fulfils certain level of gravity, as decided by the court on a case by case basis.

The key characteristic of war crimes is the nexus between committing those crimes and the “existence of an armed conflict”. The Appeals Chamber in Stakic case adopted wide interpretation in explaining this nexus, by including acts geographically remoted from actual fighting, provided that it was committed “in furtherance or under the guise of the armed conflict”.¹ Similarly, the ICC

¹ Judgment, Stakic (IT-97-24-A), Appeals Chamber, 22 March 2006, section 342; Prosecutor v. Duško Tadić, ICTY (Appeals Chamber), Decision of 2 October 1995, para. 70..

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Elements of Crimes stated that “[t]he conduct took place in the context of and was associated with an (international) armed conflict”. So, it is not necessarily that war crimes committed during actual hostilities, but rather there must be a close relation between the act and the armed conflict.

b. Crimes Against Humanity

Although crimes against humanity haven’t been codified in a distinctive treaty, the definition of this category of crimes found its roots in a variety of sources, including the early statutes of international criminal tribunals and their jurisdiction, as well as, modern statutes of international tribunals such as ICTY statute and Rome Statute of the ICC. As per these sources, some unlawful acts against cultural property can, in certain conditions, amount to a crime of persecution, which falls under the category of the crimes against humanity.

The IMT in Nuremberg, which is marked as the first tribunal to address the crimes against humanity, held that the crime of persecution includes: confiscation, plunder and destruction of religious and cultural property.¹ During that time, a correlation was

¹ Ana Filipa Vrdoljak, *Cultural Heritage in Human Rights and Humanitarian Law*, op.cit., p.288; Yaron Gottlieb, *Criminalizing Destruction of Cultural Property*, op.cit., p.873.

presumed between crimes against humanity and war crimes; however, this view has been changed in modern statutes. It is well-established in the ICL and CIL that crimes against humanity are independent and that no nexus with war crimes is required. Also, unlike war crimes, no nexus with the armed conflict is required; therefore, crimes against humanity could be committed during peacetime or time of armed conflict.¹

The definition of the unlawful acts against cultural property as a crime of persecution has been developed and expanded over time. The Draft code of Crimes Against Peace and Security related to persecution on social, political, religious, or cultural grounds prepared by the International Law Commission in 1991 held that, persecution, as a crime against humanity, includes destruction of monuments, buildings, and sites of highly symbolic value, as long as it is committed in a systematic manner or on a mass scale against specific social, religious, or cultural group. Similar expansion has also recognized by the international

¹ Yaron Gottlieb, Criminalizing Destruction of Cultural Property, op.cit., p. 873; Roger O'Keefe, Protection of Cultural Property under International Criminal Law, op.cit., p.357.

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tribunals established under the auspices of the United Nations since the 1990s.¹

The ICTY Statute defines crimes against humanity as encompasses, among other crimes, “persecutions on political, racial and religious grounds”,² whether committed during international or non-international armed conflict. Therefore, a nexus with an armed conflict is required. Although a direct reference to “cultural grounds” hadn’t been mentioned clearly in the ICTY statute, its jurisprudence has established a link between the discriminatory unlawful acts against cultural property and the crime of persecution. In *Blaškić* case, the Trial Chamber held that persecution encompasses acts committed against cultural property “so long as the victimized persons were specially selected on grounds linked to their belonging to a particular community”. In this case, the Trial Chamber has built its conviction based on the destruction and confiscation of “symbolic buildings” of the Muslim population.³ In *Krajišnik*, the Trial Chamber held

¹ Ana Filipa Vrdoljak, *Cultural Heritage in Human Rights and Humanitarian Law*, op.cit., p.288.

² Article 5/h of the ICTY Statute.

³ The trial chamber found that ‘the methods of attack and the scale of the crimes committed against the Muslim population or the edifices symbolizing

that “an act of appropriation or plunder that has a severe impact on the victim, carried out on discriminatory grounds, and for which the general elements of crimes against humanity are fulfilled, constitutes the crime of persecution”.¹ It has been also stated and upheld by various ICTY chambers that the crime of persecution encompasses, when discriminatory, the destruction of cultural property,² as well as, acts of confiscation and misappropriation of cultural property.³

their culture sufficed to establish beyond reasonable doubt that the attack was aimed at the Muslim civilian population’ *Blaškić*, Trial Judgment, at 233

¹ Roger O’Keefe, Cultural Heritage and International Criminal Law, in Cordonier Segger & Jodoin (eds), Sustainable Development, International Criminal Justice, and Treaty Implementation (Cambridge: Cambridge University Press, 2013), pp. 120–150 , Available at: <https://ssrn.com/abstract=3496737>

² As concluded by the Trial Chamber in *Milutinović*, “the Tribunal’s jurisprudence specifically [recognizes] destruction of religious sites and cultural monuments as persecution, a crime against humanity”, if discriminatory. Roger O’Keefe, Cultural Heritage and International Criminal Law, op.cit., pp. 120–150.

³ The ICTY held that the destruction or damaging of the institutions of a particular political, racial, or religious group is clearly a crime against humanity of persecution under Article 5(h). *Kordić and Čerkez*, Trial Judgment, at 207. Also Art 2(h) Statute of the Special Court for Sierra

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The drafters of Rome Statute of the ICC have built on the approach of the ICTY by clearly adding the “cultural” discrimination as a ground for the crime of persecution. Article 7 of the Statute states that the discriminatory ground comprises “any identifiable group” whether political, racial, national, ethnic, cultural, religious, gender, or any “other grounds that are universally recognized as impermissible under international law”.¹ Unlike the ICTY statute, the ICC statute doesn’t require a nexus between crimes against humanity and an armed conflict; therefore, according to the ICC statute, crimes against humanity is perceived during peacetime as well as armed conflict. However, with regard to the crime of persecution, precisely, the ICC statute requires that any act must be accompanied by some other act amounting to a crime within the jurisdiction of the Court.²

Leone; Art 9 Statute of the Special Court for Cambodia; Art 3 and Art 5 of the Law on the Establishment of Cambodian Extraordinary Chambers.

¹ Article 7.1.h Article 7 of Rome Statute of the ICC, for more; Mark S. Ellis, The ICC's Role in Combatting the Destruction of Cultural Heritage, 49 Case W. Res. J. Int'l L. 23 (2017) Available at: <http://scholarlycommons.law.case.edu/jil/vol49/iss1/5>

² Article 7(1)(h) of Rome Statute of the ICC. Also, Roger O'Keefe, Cultural Heritage and International Criminal Law, op.cit., pp. 120–150.

The ICTY statute hasn't defined the "persecution"; however, in *Blaškić*, the appeals chamber stated that the act of persecution must "constitute the denial or infringement upon a fundamental right laid down in customary international law".¹ This definition has been embraced by the ICC statute, as it defined clearly the crime of persecution as: "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity".²

As a crime of persecution falling under the category of crimes against humanity, certain conditions must be met in the unlawful acts against cultural property. First, there are general conditions required in crimes against humanity; the crime must be committed as a part of "widespread or systematic" attack and must be directed against "civilian population". In explaining the "widespread or systematic" attack, the ICTY Appeals Chamber held, in *Kunarac* case, that "only the attack, not the individual acts of the accused, must be widespread or systematic" and that "a single or relatively limited number of acts on his or her part would qualify as a crime against humanity, unless those acts may be

¹ Prosecutor v. Tihomir Blaški, Appeals Judgment, Case No.IT-95-14-A, Appeals Chamber,ICTY, (29 July 2004), para.139

² Article 7(2)(g) of Rome Statute of the ICC.

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said to be isolated or random”.¹ Hence, even a single act of discriminatory destruction of cultural property would qualify as a crime against humanity, as long as it is committed as part of a broader attack against the civilian population.² With respect to the “civilian population”, the ICTY held that this term should not be interpreted in strict sense to include only “all persons who are civilians as opposed to members of the armed forces and other legitimate combatants”,³ but it may include also “those who were members of a resistance movement and former combatants – regardless of whether they wear uniform or not – but who were no longer taking part in hostilities”.⁴ In Kunarac case, the Trial Chamber noted that “the expression “population” does not mean

¹ Prosecutor v. *Kunarac*, Kovac and Vukovic, “Appeals Judgement”, IT–69–23/IT–96–23–1, 12 June 2002, para. 85.

² *Kordić and Čerkez*, Trial Judgment, at 196, 199, 205, and 207.

³ ICTY, Prosecutor v. *Kunarac*, Kovac and Vukovic, “Judgement”, IT–96–23–T and IT–96–23/1–T, 22 February 2001, para. 425.

⁴ Prosecutor v. *Kordić and Cerkez*, “Judgement”, IT–95–14/2–T, 26 February 2001, para. 643. See also Prosecutor v. *Blaškić*, “Judgement”, IT–95–14–T, 3 March 2000, para. 214; ICTR, Prosecutor v. *Bagilishema*, “Judgement”, ICTR–95–1A–T, 7 June 2001, para. 79; ICTR, Prosecutor v. *Semanza*, “Judgement”, ICTR–97–20–T, 15 May 2003, para. 330; ICTY, Prosecutor v. *Tadić* (alias “Dule”), “Judgement”, IT–94–1–T, 7 May 1997, para. 64.

that the entire population of the geographical entity in which the attack is taking place (a state, a municipality or another circumscribed area) must be subject to the attack".¹

Second, three conditions are required exclusively in the crime of persecution: (i) it must constitute deprivation of fundamental right contrary to international law; (ii) it must be severe; and (iii) it must be committed on discriminatory grounds. The author noted that the jurisprudence of the ICTY has linked between these three conditions and the status of civilians, in other words, the linkage between the crime of persecution and the cultural property of great importance for its intrinsic value was not clear. In one hand, the ICTY interpreted the violations of fundamental right as including the destruction of homes and property of peoples, when it causes forced transfer or deportation of a targeted group of

¹ Prosecutor v. *Kunarac*, Kovac and Vukovic, "Judgement", IT-96-23-T and IT-96-23/1-T, 22 February 2001, para. 424. See also ICTY, Prosecutor v. Tadić (alias "Dule"), "Judgement", IT-94-1-T, 7 May 1997, para. 644. According to the *Tadić* Trial Chamber judgement "the 'population' element is intended to imply crimes of collective nature and thus exclude single or isolated acts which, although possibly constituting war crimes or crimes against penal legislation, do not rise to the level of crimes against humanity." Prosecutor v. Tadić (alias "Dule"), "Judgement", IT-94-1-T, 7 May 1997, para. 644.

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people and therefore, persecution.¹ The threshold of gravity is measured based on having a severe impact on the victim, rather than the cultural property itself.

Third, as a general rule, the existence of an armed conflict is not a legal precondition for the crime against humanity; however, in crimes of persecution, a nexus is required between the crime of persecution and the commission of any crime within the jurisdiction of the Court.²

In the author's view, all the above supports that unlawful acts against cultural property, as envisaged by the IHL, are not by necessarily crimes against humanity of persecution within the ICL framework. This is because the ICL protects cultural property as part of protecting civilians, not for their intrinsic value. However, the author is of the view that this sight should be revisited and the crimes against humanity should include unlawful acts against cultural property as a distinct crime because the attacks against such property is an attack against the mankind. According to one author,³ crimes against humanity constitute, in its abstract

¹ *Blaškić*, Trial Judgment, at 227–228.

² Article 7(1)(h) of Rome Statute of the ICC.

³ Polina Levina Mahnad, Protecting cultural property in Syria, op.cit, pp. 1037–1074

concept, an attack not only against the immediate victims but also against all humanity, because each and every member of the mankind is harmed by this crime, whatever their nationality or ethnicity etc. Thus, all the international community has an interest of punishing this crime.

c. Genocide

The term “genocide” was first introduced by Lemkin in 1943, as the crime which aims to destroy the physical and cultural elements of a targeted group.¹ He also emphasized that genocide is more than a murder crime because it resulted in “the specific losses of civilization in the form of the cultural contributions which can only be made by groups of people united through national, racial or cultural characteristics”,² which accordingly, does not need any nexus with armed conflict, though it usually occurred under the guise of war.

¹ Kenneth Roth, Endorse the International Criminal Court, Edited by :Alton Frye, Toward an International Criminal Court?, Published by council Policy Initiative (1999), p.19

² Raphael Lemkin, Axis rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress, Washington: Carnegie Endowment for World Peace, 1994. Available at: <http://www.preventgenocide.org/lemkin/AxisRule1944-1.htm>

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The 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the 1949 Genocide Convention) enumerates five acts, which constitute crime of genocide, when committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.¹ The focus on “cultural identity” was highlighted during drafting the genocide convention of 1949. The proposal to criminalize “cultural genocide” included forms of actions which aim at destroying cultural identity such as: systematic destruction of books printed in the national language; destruction of dispersion of documents of historical, artistic, or religious value; and prohibition of using the national language.

¹ As per Article II of the convention, these acts are: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group. Convention on the Prevention and Punishment of the Crime of Genocide. Approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948. Entry into force: 12 January 1951, in accordance with article XIII. Available at: https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf

However, the concept of “cultural genocide” was excluded from the convention, because of the wide opposition by states.¹ A subsequent resolution of the General Assembly, issued in 11 December 1946, affirmed that genocide is a crime under general international law, “whether committed in time of peace or in time of war”.²

Although the concept of cultural genocide hadn't been stated in the statutes of international criminal tribunals, unlawful acts against cultural property, such as destruction, has been used by the ICTY to demonstrate the genocidal intent.³ For example, in

¹ Cultural genocide was included in the draft Genocide Convention. The elements of cultural genocide listed in the draft included: prohibition on the use of the national language, systematic destruction of books printed in the national language or of religious works; systematic destruction of historical or religious monuments or their diversion to alien uses, and destruction or dispersion of documents and objects of historical, artistic, or religious value, and of objects used in religious worship. However, several of the States participating in the negotiations objected to these provisions and the concept of cultural genocide was ultimately excluded from the Convention itself. Patty Gerstenblith, *The Destruction of Cultural Heritage*, op.cit., pp337-389.

² Roger O'Keefe, *Cultural Heritage and International Criminal Law*, op.cit., pp. 120-150.

³ Patty Gerstenblith, *The Destruction of Cultural Heritage*, op.cit., pp337-389.

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Krstić case, the Trial Chamber explained that the destruction of mosques and houses of Bosnian Muslims denotes the specific intent *mens rea* element of genocide. The Trial Chamber added that although attacking cultural property is not constituting *per se* crime of genocide; however, physical destruction of the targeted group is often accompanied with attacks on their cultural and religious property, those attacks may be considered as evidence of an intent to physically destroy the group.¹

In conclusion, unlawful acts against cultural property hasn't been stated as constituting crime of genocide; however, the precedents of international criminal tribunals show that these acts were seen in various judgments as evidence on the genocidal intent.² The ICJ has illustrated this in its judgment in the Genocide case. The Court held that although the destruction of historical, cultural and religious heritage is directed to the elimination of all traces of the cultural or religious presence of a group, it does not fall within the

¹ Ana Filipa Vrdoljak, *Cultural Heritage in Human Rights and Humanitarian Law*, op.cit., p. 296

² In *Krstić*, the appeal chamber stated that destruction of cultural property of the targeted group deprives humanity of "the manifold richness its nationalities, races, ethnicities and religions provide". *Krstić*, Appeals Judgment, at 36.

categories of acts of genocide set out in Article II of the 1949 Genocide Convention.¹

IV. Possible Venues for Prosecution

As described in various reports,² serious international crimes have been committed by parties involved in the Syrian conflict including those committed against cultural property. As provided in the 2013 Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, the unlawful attacks against cultural property are amount to war crimes and in certain circumstances crimes against humanity of persecution.³ Supposedly, these crimes may be prosecuted according to either national or international law frameworks; however, prosecution is still an issue that faces significant challenges either on the national or the international level. Accordingly, this part introduces possible routes for prosecuting unlawful acts against cultural property in Syria and the main challenges that might be emerged.

National Prosecutions

¹ ICJ *Genocide* case, at 191–201, especially at 194.

² U.N. Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/22/59 (Feb. 5, 2013).

³ *Ibid.*

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Syria has a well-established national legislative framework to prosecute unlawful acts against cultural property, encompasses the 1963 Antiquities law (last amended 1999)¹ and the 1949 Syrian Penal law (Last amended 2011).² These laws are consistent with Syria's international obligations to prosecute the violations of the 1954 Convention, as well as, rules of CIL. Based on these laws, unlawful acts against cultural property could be tried through the national courts. This route carries many advantages, including: the feasibility to collect on-site evidence; immediate implementation of arrest warrants; accessibility to witnesses and victims; in addition to attaining both punitive and deterrent purposes of justice on the territory where the victims live. Unlike international prosecutions, which rely mainly on States cooperation, and the justice is geographically remoted from victims.³

However, national prosecutions by the concerned state (Syria) faces many challenges, either when conducted during the ongoing

¹ The full text is available in English at:

https://zh.unesco.org/sites/default/files/sy_antiquitieslaw1963_engtof.pdf

² Syrian Penal Law No 148 of 1984, last amended 2011. Available at:

http://www.unesco.org/culture/natlaws/media/pdf/syrianarabrepublic/sy_penalcode_49_arorof.pdf

³ Lindsay Raub, Hybrid Trials: Core Elements, op.cit., pp.1-34.

conflict or after the conflict ends. National prosecution during the ongoing conflict is unlikely to be successfully triggered, because of the rapid change of power and control over the territory by multiple forces, this is from one side. From the other, the structure of justice, including courts, prosecution and police services, is massively damaged either physically or operationally. This is an addition to concerns with regard to the impartiality and fairness of such prosecutions. Therefore, it is more likely that the prosecution will wait until the conflict is completely resolved. However, even this choice might not be the best, as the precedents of similar situations showed that post-conflicts' national prosecutions are most likely to favour the victors of the conflict.¹

National prosecution may also be conducted by any state other than the concerned state (Syria). As per Article 28 of the 1954 Convention, all state parties must take "all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention"; therefore, national prosecutions by national courts of other states might also take place. Although never been utilized, Article 28 is theoretically

¹ Emma Cunliffe and others, *The Destruction of Cultural Property in the Syrian Conflict*, op.cit., pp.1-31.

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sufficient to prosecute serious violations of the Convention by any ratified state.¹ Arab states' courts are the perfect nominees for these types of prosecution, given that they share with Syria many common characteristics such as: language, culture and lots of similarity in their legal systems.

Beside the Convention, the principle of universal jurisdiction might be also used as a ground for national prosecution.² The principle of universal jurisdiction enables third states to exercise jurisdiction over certain crimes of serious gravity, even if it lacks territorial or nationality nexus with the crime.³ Lately, two Arab countries, UAE and Bahrain, have enacted laws for prosecuting international crimes. The UAE Federal Law of International Crimes No.12 of

¹ *Ibid.*

² Brian Finucane, Enforced Disappearance as a Crime Under International Law: A Neglected Origin in the Laws of War, *The Yale Journal of International Law*, Vol. 35, 2010, available at: <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1382&context=yjil>

³ Christian Tomuschat, **Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes**, Institute of Int'l Law, Seventh Comm'n Resolution, (Aug. 26, 2005). Available at: http://www.idi-iil.org/idiE/resolutionsE/2005_kra_03_en.pdf.

2017,¹ was the first of its kind in the Arab world. The Bahraini Law of International Crimes No.44 of 2018 is almost copying the UAE law.² Both laws considered the crime of “intentionally directing attacks against cultural properties” war crime, whether committed in international or non-international armed conflict. This is seen as an advancement, as most national laws, which applies the principle of universality, excludes crimes committed during NIACs from its jurisdiction.³ However, these two laws do not permit prosecution according to the principle of universality, except in very limited cases with very stringent conditions. The UAE law requires that the crime must be committed by or against any national of the state or other members of its armed conflict. Likewise, the Bahraini Law requires that the crime must be committed by or on a national or a resident provided that he has

¹ Federal Decree Law No. 12 of 2017 on International Crimes. Available at: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=437D8ED5B96C8D49C1258248005021AD&action=openDocument&xp_countrySelected=AE&xp_topicSelected=GVAL-992BU6&from=state&SessionID=DZV9MQ5V47

² The Bahraini Law of International Crimes No.44 of 2018. Available at: <http://www.legalaffairs.gov.bh/Media/LegalPDF/L4418.pdf>

³ Beth Van Schaack, Mapping War Crimes in Syria, 92 Int'l L. Stud. 282 (2016), Stanford Public Law Working Paper No. 2748776, at 36. Available at: <https://ssrn.com/abstract=2748776>

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no nationality; in addition, the accused must be present on the Bahraini territory after he had committed the crime. Although it is promising to see enacted laws on international crimes in the Arab region, it is still early to judge on their effectiveness to try international crimes committed abroad, specially that courts of Arab states have no experience in exercising universal jurisdiction.

Although national prosecutions by states other than Syria according to the principle of universal jurisdiction are theoretically reasonable, it is still challenging due to domestic laws requirements, and the immunity of officials before any national court, which is affirmed by the ICJ.¹

The International Criminal Court

According to the principle of complementarity, the ICC exercise its jurisdiction to supplement national jurisdiction, when the latter is unwilling or unable to prosecute serious international crimes.

¹ Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 para. 58 Brian Finucane, Enforced Disappearance as a Crime Under International Law: A Neglected Origin in the Laws of War, The Yale Journal of International Law, Vol. 35, 2010, available at: <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1382&context=yjil>

This principle is one of the fundamental pillars of the ICC competence.¹ Therefore, resorting to the ICC is another route for prosecuting international crimes, which offers the advantage of avoiding the restrictions of national prosecutions by states other than the concerned state or the influence that may be exerted on the national courts of the concerned state.²

As provided earlier, unlawful acts against cultural property in Syria may fall under two categories as per the ICC statute. These are: war crimes as per Article 8 and crimes against humanity crime of persecution as per Article 7. According to Article 15 of the Statute, any situation may be referred to the ICC through one of three ways: (i) by a state party; (ii) by the UNSC acting under Chapter VII of the U.N. Charter; or (iii) by the Prosecutor himself when he assesses that there is a reasonable basis to proceed with the investigation.

In 2000, Syria has signed, but not ratified, the Rome Statute of the ICC; therefore, the ICC will only have jurisdiction over the

¹ Article 17 of Rome Statute.

² William W. Burke-White, A Community of Courts: Toward A System of International Criminal Law Enforcement, Michigan Journal of International Law 1, pp.15-16.

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situation in Syria in two cases: if the situation is referred by the UNSC,¹ or if Syria declared its acceptance of initiating the investigation by the prosecutor. Both scenarios seem to be impossible at the current time. The permanent members of the UNSC are divided with regard to the conflict in Syria. In 2013, 64 states had supported the referral of the Syrian situation to the ICC including the U.K, France, and four members of the UNSC;² however, the decision was blocked by Russia claiming that such

¹ Articles 12 and 13 of the Rome Statute.

² Amnesty International has identified 64 countries that supported the referral of the situation in Syria to the ICC, including six members of the UNSC. See: The Countries that Support Referring Syria to the International Criminal Court—and Some Absent ‘Friends’, Amnesty International UK, available at: <http://www2.amnesty.org.uk/blogs/campaigns/syria-icc-international-criminal-court>. In January 2013, Switzerland, together with the governments of 56 States, including the U.K. and France, requested the UNSC “to act by referring the situation in the Syrian Arab Republic as of March 2011 to the International Criminal Court (ICC) without exceptions and irrespective of the alleged perpetrators.” See Letter from the Permanent Mission of Switzerland to the United Nations Security Council Secretariat, Jan. 14, 2013, available at: <http://www.news.admin.ch/NSBSubscriber/message/attachments/29293.pdf>.

referral may destabilize chances for peaceful solution.¹ The other way to refer the situation to the ICC is through the concerned state, when Syria declares its acceptance of initiating the investigation by the prosecutor on proprio motu basis, under Article 12 (3) of the Rome Statute.² So far, no state has ever accepted the jurisdiction of the court while the conflict is still running. In addition, it is hard to determine the legal representative of Syria in the current time, in other words, who should have the right to accept the jurisdiction of the court. Even if we assumed that the legal representative is defined, it is not assured that this legal authority would prefer to accept the jurisdiction of the court, especially that all parties of the conflict were involved in hostilities and are likely to have a dirty hand in committing international crimes.

¹ Russia Opposes Syria Crisis War Crimes Referral, Reuters (Jan. 15, 2013), available at: <http://www.reuters.com/article/2013/01/15/syria-crisis-russia-idUSL6N0AKCN B20130115>.

² An investigation has been initiated in such a manner in the Côte d'Ivoire. See Situation in the Côte d'Ivoire, Case No. ICC-02/11-14, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the situation in the Republic of Côte d'Ivoire, Pre-Trial Chamber III, (Oct. 3, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1240553.pdf>.

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Apart from these difficulties, resorting to the ICC faces many challenges, as the Court depends totally on states cooperation in doing most of investigation tasks such as: apprehending suspects, transferring them to the court premise, protecting witnesses, visiting sites, collecting evidences, etc. Therefore, the whole process may be threatened if the Court failed to cooperate with the concerned state party, which is most likely to happen if the Syrian authority has been changed after the referral, or if the UNSC has referred the situation against the Syrian Authority's will. Although Rome statute contains provisions to oblige states to cooperate with the Court, such as referring the matter to the Assembly of State Parties (of the court) or to the UNSC to take necessary actions, it would still be ineffective as long as the state itself is not convinced with the cooperation with the ICC. ¹

¹ However, it is doubtful that ICC could try these crimes, as the prosecutor of the ICC stated in many occasions that the court will try only the most serious crimes, and the leaders who bears the greatest responsibility. This means that international crimes of less gravity and suspects of less responsibility are falling out of the ICC jurisdiction. See: Office of the Prosecutor, Paper on Some Policy Issues Before the Office of the Prosecutor, International Criminal Court, 3 (Sept. 2003), available at: http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/1435_94/030905_policy_paper.pdf.

Internationalized Prosecutions

The UNSC has failed to refer the situation in Syria to the ICC, therefore it is doubtful to success in establishing an ad hoc International Criminal Tribunal for Syria, similar to these established by the UNSC for the Former Yugoslavia and Rwanda. In addition, establishing a new ad hoc tribunal is very costly especially with regard to recruiting personnel, collecting evidence, in addition to other problems with states cooperation. Therefore, another option has been emerged in the field, which is the internationalized criminal tribunals, which combines the benefits of both national and international prosecutions has been proliferated recently. There are many examples of these tribunals such as: the Special Court for Sierra Leone (SCSL), the Iraqi Special Tribunal (IST), the Extraordinary Chambers for Cambodia (EC-Cambodia), the Special Panels for Serious Crimes in East Timor (SPSC) and the UNMIK court system in Kosovo.¹ These tribunals offer a hybrid system of justice that recognizes national applicable laws, judges, personnel, and at the same time benefit

¹ Lindsay Raub, Hybrid Trials: Core Elements, International Law and Politics, June 2003, pp.1-34. Available at: https://syriaaccountability.org/wp-content/uploads/PILPG-Syria-Hybrid-Tribunals-Memo-2013_EN.pdf

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from involving international judges, personnel, and international criminal law.¹

A blueprint draft proposal for the establishment of a special court located in Syria, “The Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes”, was set in August 2013 to prosecute those who bears the most responsibility for atrocities committed in Syria.² The Proposal states that the Tribunal shall have “jurisdiction over atrocity crimes, defined as crimes of genocide, crimes against humanity, and war crimes”.³ The list of war crimes stated in Article 20 of the Proposal is similar to the list of the ICC war crimes, which includes, among other crimes, “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”; “Pillaging a town or place, even when taken by assault”; “intentionally directing attacks

¹ *Ibid.* For more see also: International criminal justice: The institutions, Advisory Service On International Humanitarian Law, ICRC, available at: <https://www.icrc.org/en/document/international-criminal-justice-institutions>

² The Draft Statute for a Syrian [Extraordinary/Special] Tribunal to Prosecute Atrocity Crimes can be found in the Chautauqua Blueprint for a Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes (Aug. 27, 2013), available at: <http://insct.syr.edu/wp-content/uploads/2013/09/Chautauqua-Blueprint1.pdf>. Article 5.

³ *Ibid.*, Article 17.

against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law”.¹

The draft proposal was subject to criticism and some suggested changes have been raised including tightening the way of selecting judges; ensuring the involvement of international judges in trials; developing the proceedings mechanism in a way that ensures impartiality and non-biasness;² amending the list of crimes according to the latest rectifications as advised by most recent international crimes laws and practices; and lastly ensuring that the government of Syria does not have a big share or control over the court’s budget.³

In conclusion, each route for prosecution has its own advantages and some killer disadvantages. Therefore, in the author’s view, a combination between the three routes would be beneficial. Domestic courts could prosecute crimes of less gravity or

¹ *Ibid*, Article 20.

² Carsten Stahn, Syria, Security Resolution 2118 and Peace versus Justice: Two Steps Forward, One Step Back?, EJIL (Oct. 3, 2013), available at: <http://www.ejiltalk.org/syria-security-resolution-2118-2013-and-peace-versus-justice-two-steps-forward-one-step-back/>.

³ Lindsay Raub, Hybrid Trials: Core Elements, op.cit., pp.1-34.

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prosecution for those who enjoys impunity in foreign jurisdiction. The ICC or internationalized courts may handle crimes that are most politically sensitive and prosecute the higher-level perpetrators, whilst lower level perpetrators are left to domestic courts. In addition, domestic courts can benefit from the international and internationalized courts and vice versa depending on the nature and degree of interaction between them and efforts made to transfer expertise to local courts.

V. Concluding Remarks

This article has examined the effectiveness of international law with respect to protecting cultural property and prosecuting unlawful acts against cultural property, with reference to the Syrian conflict. The bottom line, as demonstrated in different parts of this article, is that although international law provides a significant level of protection for cultural property, its effectiveness in practice case of Syria was below expectations.

With regard to the protection of cultural property as provided in international treaty law and custom, the actual hostilities in Syria demonstrate that almost all parties, whether states or armed

groups, have failed to comply with their obligations under international law. The violations include the utilization and targeting of cultural sites and monuments, which have been considered by the Human Rights Council as war crimes and crimes against humanity in several official reports about the situation in Syria. However, the response of the international community was influenced by politics rather than the rule of law. The starkest example is the deliberate omission of Syria from the UNSC resolution in 2015 of "saving the cultural heritage of Iraq", and the failure to refer the situation in Syria to the ICC in 2014 because of the veto from China and Russia.

With respect to the prosecution of unlawful acts against cultural property, it has been demonstrated in this Article that although there are different routes for prosecution, each has some challenges and advantages. Therefore, in the author's view, a combination between the three routes would be beneficial. However, assuming a prosecution was made, it might be difficult to identify those responsible for violations and bring them to justice because many actors had been involved in the conflict and it is not clear who did what.

In light of what has been stated earlier, this article suggests two approaches to enhance the effectiveness of international law with

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regard to the protection of cultural property and the prosecution of unlawful acts against them. The first approach is related particularly to the conflict in Syria. Since, evidences are essential in prosecution and holding the predators guilty for their unlawful actions. It is suggested that evidences should be collected to build up solid documentation to assist in potential prosecutions. The Syrian DGAM, so far, is working extensively to protect and preserve cultural property and is doing impressive work with regard to cooperation with UNESCO and the UN. Therefore, DGAM could start with collecting evidences and documenting violations to assist in future prosecutions. Also, humanitarian organizations and civil society could play an important role in documenting the violations against cultural property.

The second approach is related to the improvement of the international law in general. It is noticed that the protection of cultural property as envisaged in the 1954 Convention and its two protocols, as well as, other relevant treaties are proved to be unfit for their purpose. These treaties failed to protect cultural property in Syria and had also failed to protect cultural sites in the Balkans, or during the Iran-Iraq war of the 1980s and during Iraq's invasion of Kuwait in 1991. However, the problem, as noticed by many commentators, is not in the legal framework, but rather with the its application. Therefore, recognizing the customary statues

of the current main treaties would presumably elevate the obligation to protect cultural property to be applicable to all parties and any person involved in the conflict. Further, unlawful acts against cultural property should be viewed as a threat to the whole international community, the modern and diverse society; therefore, criminalization of these acts should be viewed as attacks against the very essence of humanity.