

# **Destruction of Cultural Heritage: A Major Human Rights Violation**

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**Abstract---** Cultural Heritage, which is the embodiment of past, representation of human achievement, their Caliber and beauty belongs to entire humanity and not just to any nation. Unfortunately, such reminiscence of past was subjected to ruthless destruction which interferes with the cultural identity of people. Whether it is Afganisthan, Iraq, Libya or Syria, the rampant destruction of Cultural Heritage has created a worldwide debate that by attacking the Cultural Heritage of these nations, what do we get? Is it a way to destroy the identity of people by destroying their past?

**Ironically to deal with such situation, we have Hague Convention and UNESCO Convention with all their complexities and procedure, but none of them are able to alter the facts that it is not able to stop the destruction of Cultural Heritage that happened in most of the war torn countries. Another question that can be raised here is that how many destruction of Cultural Heritage is intentional in nature. Thus the paper will explore the nature of intentional destruction and how international law replies to such situation. In the word of United Nation expert Ms. Bennoune such attacks “undermines the right to freedom from discrimination and numerous other human rights, including the right to freedom of thought, conscience and religion; the right to freedom of artistic expression and creativity; and the rights to take part in cultural life, and to access and enjoy cultural heritage”.**

**Although attack on Cultural heritage is not new but prosecutions are recent in nature. Statutory and treaty law dating to the Geneva Convention and Nuremberg Trials provide important jurisprudence regarding crimes of cultural destruction, and the International Criminal Tribunal for the former Yugoslavia (ICTY) has been particularly active in pursuing accountability. Now what are those jurisprudences that are developed in these trials and how far it has recognized the destruction of Cultural Heritage as Human Rights violation will be explored in this paper.**

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## **I. INTRODUCTION**

Why this topic, which is relatively mundane in comparison to other human rights issue? Before I answer this question let's imagine an object in our childhood or even now which is very dear to us. But one day it is snatched and destroyed. How we will feel? The answer is obvious anguish coupled with weakness. The feeling of anguish is natural but weakness, yes this sense will be there as we have miserably failed to protect something which we have valued and cherished so much. The same feeling rather in aggravated formed occurs when someone or a group destroys our reminiscence of past which is endear to us. Unfortunately, history is filled with such instances, which has seen **mass scale destruction during war including the seizing of enemy goods and wide scale devastation, looting and pillage of the cultural property of conquered nation.** Ironically on one hand civilizations have observed the cruel destruction of cultural heritage by victorious nation on loosing nation and on the other hand them were customary prohibition on destruction of cultural and ancient properties dated back to classical Greek and Roman period. **The Greek historian Polybius (202- 120 Be) was against the plundering of subjugated towns and inflicting misfortune on its people. Further he wrote that although**

**it may give some benefit to the conqueror but it equates such action with the action of madman.**

**Middle ages have seen wide scale destruction and pillage of towns, villages, castles and churches. Churches tried to protect themselves by stating that taking booty was a sin. The proclamation like Synod of Charraoux (989) accorded protection to property based upon their sacredness only. Even German Emperor Frederick 1 (1152- 1194) through promulgation of 1158 forbade pillage. In 16<sup>th</sup> century and 17<sup>th</sup> century there was considerable stirring of opinion done by the authors of international law emphasizing to show some regard to the work of art, which himay or may not be religious in nature. Unfortunately, Hugo Grotius father of international law do not share the same opinion. For him in the cases of just war emperor has every right to inflict damage to person and property of enemy states.<sup>1</sup>**

**Protection to the work of art is also mentioned in the treaty of Westphalia (1648). Jean Jack Rousseau has made**

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<sup>1</sup> Hugo Grotius, *De Jure Belli Ac Pads Libri Treos* (The Law of War and Peace), Book III, pp.643--4 (III/IV /UI), translated by F.W. Kelse, Oxford, at the Clarendon Press, 1925. Cited in Toman, Jiri, "The Protection of Cultural Property in the Event of Armed Conflict" (1996). *Legal Monographs and Treatises*. Book 11.  
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a distinction between public and private property and he supported the seizing and destruction of those public property used as military assistance during war. Thus it means that public property or building not used for military assistance to be spared. Consideration was given to temples, churches, schools, libraries, collection and laboratories. In fact, it was Napoleonic era that cultural heritage was consider as legacy of humanity in international law.<sup>2</sup> After the downfall of Napoleon in 1815 work of art taken to France was restored to other nation<sup>3</sup>. It is interesting to note here that in treaties between Bonapart and Italian princess one of the mode of war reparation was partly by means of coins and partly by means of object of art.

The respect to Cultural heritage was in existence in some of the pre colonial African Society. Under Islamic law, Caliph Abu Bakr ordered strictly to confine the attacks to military targets and not to destroy palm trees, dwelling houses or cornfield, cut fruit trees or destroyed livestock unless struck by hunger and not to lay hands on monasteries. Such action was termed as ‘ugly and blameworthy’ and can be tolerated only in exceptional circumstances<sup>4</sup>.

The protection to Cultural heritage was recognized for the first time by Professor Francis Lieber, who address the issue in his Lieber Code.

Article 35<sup>5</sup> “secured all classical works of art, libraries,

scientific collections, precious instruments such as astronomical telescope as well as hospitals, against all avoidable injury even when they are contained in fortified places while besieged and bombarded”.

Article 36<sup>6</sup> “further states that works of art, libraries, collections or instruments belonging to a hostile nation or government can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace”.

Article 36 is intriguing as there is no protection but there is an element of theft or looting here. There is no reason to remove the same from the country of origin. What good it will bring? There is no question of settlement of ownership when the cultural property belongs to conquered nation. The article 36 is conflicting in two ways. First the conquering state or nation may order for the seizing and removing of cultural property for the benefit of the said nation. Secondly, if it is for the benefit of the conquered state, then the same should be return unconditionally. Where the question of settlement of ownership comes. Well, is it encouraging or authenticating looting of cultural heritage in the event of armed conflict? Such hideous provisions create more threatening condition for the protection of cultural heritage, then serving any good.

Over a period of time there was considerable public opinion in favour of protection of Cultural Heritage. One of the major pioneer in this field was Henry Dunant, founder member of Red Cross and eminent humanitarian observed, “if the master pieces of human civilizations are threatened by tyrannical absolutism, a day will come when it will destroy the national liberties, trade, industries, agriculture and everything that is dear to humans.”

Henry Dunant and emperor of Russia, contributed in organizing Brussels Conference in 27 July to 27 August 1874, which formed the basis for the Declaration Concerning the Laws and Customs of War 1874. Although the same was never ratified but it played decisive role in

<sup>2</sup> Erika J Trichera, ‘PROTECTION OF CULTURAL HERITAGE IN TIMES OF ARMED CONFLICT: THE INTERNATIONAL LEGAL FRAMEWORK REVISITED’ cited in Toman, Jiri, “The Protection of Cultural Property in the Event of Armed Conflict” (1996). *Legal Monographs and Treatises*. Book 11.

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<sup>3</sup> Stanislaw E. Nahlik, ‘Protection of Cultural Property’, p.204, who cites G.F. Martens, Nouveau recueil de traites d’alliance, de paix, de trêve, de neutralité, de commerce, de limites, d’échange, etc. et de plusieurs autres actes servant à la connaissance des relations étrangères des puissances et États de l’Europe tant dans leur rapport mutuel que dans celui envers les puissances et États dans d’autres parties du globe, depuis 1808 jusqu’à présent, Vol. II, Gottingen, Dieterich, 1817, p.632 et seq. cited in Toman, Jiri, “The Protection of Cultural Property in the Event of Armed Conflict” (1996). *Legal Monographs and Treatises*. Book 11.

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<sup>4</sup> Hamed Sultan, ‘The Islamic Concept’, in Nahlik, International Dimensions of Humanitarian Law, p.38. cited in Toman, Jiri, “The Protection of Cultural Property in the Event of Armed Conflict” (1996). *Legal Monographs and Treatises*. Book 11.

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<sup>5</sup> Article 35 of The Lieber Code, 1863 [https://archive.org/stream/pdfyNG4E2nsEimXkB5mU/The+Lieber+Code+Of+1863\\_djvu.txt](https://archive.org/stream/pdfyNG4E2nsEimXkB5mU/The+Lieber+Code+Of+1863_djvu.txt) last visited 23.06.2021 cited in Toman, Jiri, “The

Protection of Cultural Property in the Event of Armed Conflict” (1996). *Legal Monographs and Treatises*. Book 11.

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<sup>6</sup> Article 36 of The Lieber Code, 1863 [https://archive.org/stream/pdfyNG4E2nsEimXkB5mU/The+Lieber+Code+Of+1863\\_djvu.txt](https://archive.org/stream/pdfyNG4E2nsEimXkB5mU/The+Lieber+Code+Of+1863_djvu.txt) last visited 26.06.2021 cited in Toman, Jiri, “The Protection of Cultural Property in the Event of Armed Conflict” (1996). *Legal Monographs and Treatises*. Book 11.

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future Codification of Law. The subsequent Manual of the Institute of International Law, Oxford 1880 have almost repeated the Brussels Declaration, 1874 in their manual. However, this Declaration was never formally accepted. It was further followed by Law and Custom of War on Land (Hague II), 1899 and Law and Custom of War on Land (Hague IV), 1907. The following comparison reflects upon the serious thought spared on the treatment of Cultural Heritage:

<b>Project of an International Declaration concerning the Laws and Customs of War (Brussels, 27 August 1874)</b>	Law and Custom of War on Land (Hague II), 1899 and Law and Custom of War on Land (Hague IV), 1907
Art. 8. The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences even when State property, shall be treated as private property. All seizure or destruction of, or wilful damage to, institutions of this character, historic monuments, works of art and science should be made the subject of legal proceedings by the competent authorities. <sup>7</sup>	ARTICLE 27 <sup>8</sup> In sieges and bombardments all necessary steps should be taken to spare as far as possible edifices devoted to religion, art, science, and charity, hospitals, and places where the sick and wounded are collected, provided they are not used at the same time for military purposes. The besieged should indicate these buildings or places by some particular and visible signs, which should previously be notified to the assailants.
Art. 15. Fortified places are alone liable to be besieged. Open towns, agglomerations of dwellings, or villages which are not defended can	ARTICLE 47 <sup>10</sup> Pillage is formally prohibited.

<sup>7</sup> Article 8, **Project of an International Declaration concerning the Laws and Customs of War (Brussels, 27 August 1874)**, <https://web.ics.purdue.edu/~wggray/Teaching/His300/Handouts/Brussels-1874.html>, last visited 26.06.2021 cited in Toman, Jiri, "The Protection of Cultural Property in the Event of Armed Conflict" (1996). *Legal Monographs and Treatises*. Book 11.

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<sup>8</sup>Article 27 LAWS AND CUSTOMS OF WAR ON LAND (HAGUE, II), 1899 and Law and Custom of War on Land (Hague IV), 1907 <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000001-0247.pdf>, last visited 26.03.2020 cited in Toman, Jiri, "The Protection of Cultural Property in the Event of Armed Conflict" (1996). *Legal Monographs and Treatises*. Book 11.

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neither be attacked nor bombarded <sup>9</sup> .	
Art. 16. But if a town or fortress, agglomeration of dwellings, or village, is defended, the officer in command of an attacking force must, before commencing a bombardment, except in assault, do all in his power to warn the authorities <sup>11</sup> .	ARTICLE 56 <sup>12</sup> The property of the communes, that of religious, charitable, and educational institutions, and those of arts and science, even when State property, shall be treated as private property. All seizure of, and destruction, or intentional damage done to such institutions, to historical monuments, works of art or science, is prohibited, and should be made the subject of proceedings.
Art. 17. In such cases all necessary steps must be taken to spare, as far as possible, buildings dedicated to art, science, or charitable purposes, hospitals, and places where the sick and wounded are collected provided they are not being used at the time for military purposes.	

<sup>10</sup> Article 47 LAWS AND CUSTOMS OF WAR ON LAND (HAGUE, II), 1899 and Law and Custom of War on Land (Hague IV), 1907 <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000001-0247.pdf>, last visited 26.03.2021, cited in Toman, Jiri, "The Protection of Cultural Property in the Event of Armed Conflict" (1996). *Legal Monographs and Treatises*. Book 11.

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<sup>9</sup> Article 15, **Project of an International Declaration concerning the Laws and Customs of War (Brussels, 27 August 1874)**, <https://web.ics.purdue.edu/~wggray/Teaching/His300/Handouts/Brussels-1874.html>, last visited 26.03.2021 cited in Toman, Jiri, "The Protection of Cultural Property in the Event of Armed Conflict" (1996). *Legal Monographs and Treatises*. Book 11.

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<sup>11</sup> Article 16, **Project of an International Declaration concerning the Laws and Customs of War (Brussels, 27 August 1874)**, <https://web.ics.purdue.edu/~wggray/Teaching/His300/Handouts/Brussels-1874.html>, last visited 26.06.2021

<sup>12</sup> Article 56 LAWS AND CUSTOMS OF WAR ON LAND (HAGUE, II), 1899 and Law and Custom of War on Land (Hague IV), 1907 <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000001-0247.pdf>, last visited 26.06.2021

<p>It is the duty of the besieged to indicate the presence of such buildings by distinctive and visible signs to be communicated to the enemy beforehand<sup>13</sup></p>	
<p>Art. 18. A town taken by assault ought not to be given over to pillage by the victorious troops<sup>14</sup>.</p>	

So far the nature piece meal protection was granted to Cultural property, but World war- I was a major turning point in this area, where the acute need for consolidation of law on the protection of Cultural Heritage was realized.

The consideration was made in Treaty of Versailles for violating The Hague Rules of 1899 and 1907 but the same was not considered.

The Hague Rules of 1923 for the first time made distinction between General and Special Rules for protection to Cultural Heritage but same was not adopted.

Subsequently in USA international agreement resulted into Treaty on the protection of Artistic and Scientific institution and Historic Monuments also known as Roerich Pact was signed. The pact was applicable on eleven states of Western Hemisphere and applied both during war and peace. It talks about the respect and protection to be given to historic monuments, museums, scientific, artistic, educational and cultural institutions and also to the personnel engaged by them. To mark such institution distinctive flag has to be utilized.

World War II has seen the massive destruction in terms of life and property. The International Military Tribunal at Nuremburg also considered in its judgment the massive destruction which were caused to Cultural Heritage. Thus

<sup>13</sup> Article 17, **Project of an International Declaration concerning the Laws and Customs of War (Brussels, 27 August 1874)**, <https://web.ics.purdue.edu/~wggray/Teaching/His300/Handouts/Brussels-1874.html>, last visited 26.06.2021

cited in Toman, Jiri, "The Protection of Cultural Property in the Event of Armed Conflict" (1996). *Legal Monographs and Treatises*. Book 11. [http://digitalcommons.law.scu.edu/monographs/11https://www.researchgate.net/publication/228260427\\_Protection\\_of\\_Cultural\\_Heritage\\_in\\_Times\\_of\\_Armed\\_Conflict\\_The\\_International\\_Legal\\_Framework\\_Revisited](http://digitalcommons.law.scu.edu/monographs/11https://www.researchgate.net/publication/228260427_Protection_of_Cultural_Heritage_in_Times_of_Armed_Conflict_The_International_Legal_Framework_Revisited) last visited 03.07.2021

<sup>14</sup> Article 18, **Project of an International Declaration concerning the Laws and Customs of War (Brussels, 27 August 1874)**, <https://web.ics.purdue.edu/~wggray/Teaching/His300/Handouts/Brussels-1874.html>, last visited 03.07.2021 cited in Toman, Jiri, "The Protection of Cultural Property in the Event of Armed Conflict" (1996). *Legal Monographs and Treatises*. Book 11. [http://digitalcommons.law.scu.edu/monographs/11https://www.researchgate.net/publication/228260427\\_Protection\\_of\\_Cultural\\_Heritage\\_in\\_Times\\_of\\_Armed\\_Conflict\\_The\\_International\\_Legal\\_Framework\\_Revisited](http://digitalcommons.law.scu.edu/monographs/11https://www.researchgate.net/publication/228260427_Protection_of_Cultural_Heritage_in_Times_of_Armed_Conflict_The_International_Legal_Framework_Revisited) last visited 26.06.2021

International Military Tribunal at Nuremburg, United Nation Charter, UDHR and Geneva Convention, all became the basis for The Hague Convention, 1954.

It seems there is always a conflict between destruction and Preservation. But then after looking into the history a question that often cloud my mind is Are we able to prevent the situation of destruction of Cultural Heritage? Even though we may debate, pass resolution frame Conventions, the question arises is Why we are not able to prevent the instant of destruction? Where do we go wrong? I feel our approach is halfhearted. I have reason to say this. The Human Rights Conventions are very proactive in protecting the rights of people. Ironically, Universal Declaration of Human Rights, 1948 forgets that the right also includes, 'cherish and celebrate the past achievements and glory'. After World War II, there were intense debate on the destruction of Cultural Heritage by Nazi Germany, then in that case why specific clause related to protection of cultural Property/ Heritage was not incorporated in Universal Declaration on Human Rights, 1948. Moving ahead the concept of Protection of Cultural Heritage as fundamental Human Rights is also missing from International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights. It seems there was a hesitation to declare protection of Cultural heritage as fundamental to human freedom and dignity. Now let's analyze what The Hague Convention of 1954 has to offer in this case.

For the purposes of the present Convention, the term 'cultural property'<sup>15</sup> shall cover, irrespective of origin or ownership:

- (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 depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);
- (c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as 'centers containing monuments'.

My only Contention with the definition is 'movable or

<sup>15</sup> Article 1, The Hague Convention, 1954



immovable property of great importance'. Who will decide of 'great importance'. A simple structure may be of great value for me but not for you. The importance is always relative. Further we should not forget the emotional value attached along with the historical values.

Hague Convention for the protection of Cultural property in the event of armed conflict, 1954, hereinafter referred as 'Hague Convention', 1954 is the first international instrument which recognizes the destruction of cultural property. Subsequently there are two protocols of 1954 and 1999. These three instruments together forms part of international humanitarian laws. The Convention and the Protocol not only provides protection to cultural heritage during armed conflict but also extend the same in time of peace. It is noteworthy that Cultural heritage does not belong to particular nation but it belongs to world at large. Thus protection should be accorded at any cost. The Hague Convention expects that the State parties shall apply various prohibition, measures and obligation mentioned with Convention.

It also makes provision for the preparation of inventories and designation of competent authorities for safeguarding cultural heritage during peace. This is the element where we have to pay utmost attention specially in country like India, which is rich with Cultural heritage. Each and Every part of India has something new to offer. So Inventories of Cultural Property has to be very carefully drawn. In fact, India's contribution to World Heritage List is nothing in comparison to its cultural heritage. Why? The reason is we are not careful in drawing our inventories. I have no hesitation to say that we are poor with documentation. First we have to recognize and respect our Heritage and only then we can expect the same from others.

The parties are expected to respect the cultural heritage not only within their territory but also within the territory where armed conflict is going on. The same shall be done by refrain from using the cultural heritage and its immediate surroundings in such a way, that it exposes the same to destruction of damage. No act of hostility shall be directed against the cultural heritage.

A special unit is entrusted with the responsibility of protection of cultural heritage shall be established within military forces. Without criminal sanction, convention will be of no use, so there must be an imposition of criminal sanction for the breaches. The Convention has to be promoted among general public, professionals, military and law enforcement officials. It is very disheartening to see the promotional situation as many so called educated people are not aware about the Convention and its protocols. Very few except those who are dealing with Cultural Heritage are aware about domestic legislations. When it comes to promotional part, it is majorly restricted to attract tourism.

As an academician I believe promotion also includes people who are the major stakeholder. People of the country should be made aware about their rich Cultural heritage. It can be done through small street plays, documentary, films generating not only awareness but sense of pride among people about past achievements and glory. If that is done, then the next point that is Article 3 to safeguard the property in the time of peace shall suffice.

Article 4 outlines the respect that is to be shown to cultural property situated not only within their territory but also within the territory of High Contracting Party. Cultural Property shall not be subjected to any attack. Movable Cultural property shall not be removed or misappropriated. Is it really done. We have seen mass scale destruction, pillage, theft and misappropriation of property during peace time. After gulf war, even today the artefacts which were misappropriate or subjected to theft are reported from either smuggled market or are subjected to auction. Unfortunately, it is the so called literate class who are buying those artefacts disregarding the provenance of same. This is where we require promotion and awareness.

The derogation from obligation is allowed only in cases of 'military necessity'. Interestingly a State Party is not entitled to ignore the Convention simply because other State Party has failed in the execution of measures.

Article 5 cast an obligation on the occupying powers to support national authorities in its preservation and repair when necessary. under special protection regime, State Parties have to immune Cultural Property from any act of hostility. This protection is granted to following property:

- i. Refuges intended to shelter movable cultural property
- ii. Centre containing monuments
- iii. Other immovable property of great importance

For obtaining the special protection, the Cultural property must be located at adequate distance from an industrial center or location and must not be used for military purpose. Interestingly, 'property must be located at adequate distance' from industrial center or 'Industrial center should be located away from Cultural property'. A thoughtful interpretation is required here. What if the industrial center is near to Cultural property, does not it raises the question with respect to lack of attention of administration or government with respect to the wellbeing of Cultural Property. Thus due to the lacuna in The Hague Convention, 1954 the first protocol came into existence.

The first protocol to Hague Convention came into existence in year 1954. It primary deals with movable property. The export of movable cultural property is prohibited from occupied territory. If that is done, then same has to be returned at the end of hostility. Occupying power may have to pay indemnity to state whose property was removed during hostility.

Deficiencies in Hague Convention and its first protocol was reflected, when there was a massive destruction with respect to cultural properties in the year 1980 and 1990. Based on the review done by Professor Patrick Boylan, the second protocol to Hague Convention was adopted in the year 1999. Second Protocol expanded The Hague Convention by including the developments in International Humanitarian Laws and providing greater safeguard to Cultural Heritage Property.

The Second Protocol incorporated the concept of enhanced protection which means once the relevant cultural property is inscribed in the list of Cultural Property under enhanced protection, the same shall be immune from military attack. The Hague Convention, 1954 forbids the state from targeting cultural property except in cases of military necessity. But Second Protocol states that even if the Cultural Property under enhances protection becomes the target of military object the same shall not be attacked unless and until such attack is the only feasible means of terminating the use of property in that way. I fail to understand that whether second protocol is saying anything new. To my mind it is just explaining the concept of ‘military necessity’<sup>16</sup>. Although it is not possible to define ‘military necessity’ but it is better to leave it as it is without creating further complications. To my mind I believe, we can clarify the situation by stating that ‘Every effort shall be made to dissuade the party to utilize Cultural property for military objective’. The same can be done by opposite party in hostilities or UNESCO, once they receive the information that Cultural Property is utilize for military purpose. This is the way to show respect to the Cultural Property of other nation. The above situation is applicable only for those Cultural properties which are either under special protection or enhanced protection.

Enhanced protection to cultural property is granted on three grounds:

It must be of greatest importance to humanity

It is adequately protected under domestic legal and administrative measure, which recognizes its greatest historic and cultural value.

It is not used for military purpose or to shield any military sites and the same has been declared by party exercising control over the cultural heritage and to used, the same for such military purpose in future.

Second Protocol further makes provision for a 12 members committee for the protection of Cultural Property during armed conflict. They are responsible for granting, suspension and cancellation of enhanced protection of cultural property. They are responsible for providing international assistance, disbursement of fund and develop

guidelines for implementation of Convention<sup>17</sup>.

Voluntary Contribution is made by the State Parties to the fund to ascertained the protection of Cultural Property not only during armed conflict but also during peacetime. It provides assistance to State Parties for emergency and safeguarding measures<sup>18</sup>.

Further Article 15 and 16 of the Second Protocol specifies sanction to be imposed for serious violation against cultural property. It recognizes the individual criminal responsibility for such attack. To this effect five serious kind of attacks are specified:

Cultural Property under Enhanced Protection	Cultural Property protected under Convention and Protocol
When Cultural Property becomes object of attack	When Cultural Property becomes subject of extensive destruction and misappropriation
When the surrounding area of the Cultural Property is utilized for military action	When Cultural Property becomes subject matter of attack
	When Cultural Property becomes subject matter of theft, pillage and vandalism

States are requiring to adopt appropriate legislation domestic to declare it a criminal offense to prescribe penalties for those offences and established jurisdiction over those offences. It includes Universal Jurisdiction over three of the five serious violations.

Now, the next viable point that comes to mind that even in Convention and Two Protocols in place, whether there is any destruction of Cultural Heritage caused in recent time.

## II. DESTRUCTION OF CULTURAL HERITAGE IN RECENT TIME

In January 2012, the Islamist group Al-Qaeda in the Islamic Maghreb joined with Tuareg rebels in the northern part of Mali as part of a revolt against the government with the goal of establishing an independent country, Azawad, under the control of a militant group, Ansar al-Dine.<sup>68</sup> Several aspects of Sharia law were imposed on the local population, but of greatest relevance here was the attacks on the shrines and mausolea of Timbuktu. Perhaps one of the most consistent aspects of the destruction of religious sites in the “Arab spring” and other recent conflicts is attacks on Sufi shrines by Al-Qaeda-linked elements (in the case of Mali, Ansar Dine and Al-Qaeda in the Islamic Maghreb). These groups

<sup>16</sup> Article 13 of 1999 Protocol

<sup>17</sup> Article 24 of Second Protocol, 1999

<sup>18</sup> Article 29 of Second Protocol, 1999

oppose Sufism, viewing its focus on saints and shrines as heretical. Sufi shrines have been damaged or destroyed in Mali, particularly in Timbuktu, and elsewhere in Egypt, Tunisia, and Libya as well as in Syria.<sup>19</sup>

Destruction of cultural heritage in Syria has come in many different forms—the bombing of and fighting in urban centers, attacks on religious structures and archaeological remains as part of the ever-increasing sectarian violence, the use of archaeological sites as strategic vantage points or militarily useful locations, and the looting of sites and museums for objects to be sold on the international market to raise funds for a variety of purposes, including the purchase of arms and munitions. The Islamic State of Iraq and the Levant (ISIL) has focused on the destruction of shrines belonging to minority sects of Islam, as well as Christian and ancient structures, out of a stated desire to purify the region from what are considered to be heretical depictions and faith<sup>20</sup>.

The conflicts that resulted from the “Arab spring” uprisings, which began in Tunisia in the fall of 2010 but first attained significant effect on cultural heritage during the Egyptian revolution of January 2011,<sup>61</sup> have been disastrous for cultural heritage, as well as for the people of the region. Nonetheless, the effect of conflict on cultural heritage in the Middle East actually began with the U.S.-led invasion of Iraq in 2003. The looting of the Iraq Museum in Baghdad and the looting and burning of other cultural repositories including the Iraqi archives in April of 2003 received the most media attention. Of greater significance for cultural heritage than the looting of the Museum was the intensive looting of archaeological sites, particularly those of the 3rd to 2nd millennia B.C.E. and those of the later Achaemenid and Parthian time periods. The loss of the contextual information, as well as of many of the artifacts that were considered less desirable on the international market, produced a devastating effect on our knowledge and understanding of the past<sup>21</sup>.

The above instances are basically reproduction from ‘Patty Gerstenblith, *The Destruction of Cultural Heritage: A Crime Against Property or a Crime Against People?*’, Where the enormity of destruction is shown by the author, one question which can often asked is about the psychology of perpetrator behind such destruction.

David Campbell in his book ‘Writing security<sup>22</sup>’ stated that identity requires difference and difference project danger,

hence the state’s identity is premised upon the production of danger (threat). We feel comfortable with similar kind of people sharing similar characteristics, but feels threatened in the presence of different group. It is more so if the different group threatens or disrupts our identity or basic order or states of the world.

The threat to ideology accentuated by subjugation and destruction is so dangerous that extent of harm caused is not realize. The destruction of Cultural heritage site by ISIL not only with the purpose of establishing *tawhid* (monotheism)", and "eliminating *shirk* (polytheism), but it also practical reasons.<sup>23</sup> Through such activities world attention and extensive media, coverage has propagated their activities. In addition to this destroying historical heritage will wipe the reminisces of previous culture and civilization and the group may establish its own identity as beginner of new civilization.

### III. CRIME AGAINST HUMANITY

The Geneva Convention, Nuremburg Trials and International Criminal Tribunal for former Yugoslavia play a decisive role in expanding the horizon of crime against Cultural Heritage.

The prosecution and sanction of Ahmad Al Faqi Al Mahdi’s by the International Criminal Court (ICC), on September 18, 2015, is noteworthy. He was prosecuted on charges of destroying cultural heritage sites in Timbuktu. It is the first case *Prosecutor v. Ahmad Al Faqi Al Mahdi*<sup>24</sup> where a member of Islamist armed group has appeared for ICC, where he has made admission of his guilt and only instance in which destruction of cultural heritage as war crime has been the primary subject matter of the prosecution.

The decision was criticized on many grounds. One of the major grounds was that, crime against cultural heritage is a crime against property. The same is secondary to heinous crimes such as rape, torture and murder. It is also stated that the case narrowly focused “only on cultural crimes and psychological harm.” Although attempt was made to show that crime against Cultural property is secondary crime but nevertheless Al-Mahdi’s case established a crime against Cultural Heritage cannot be treated as secondary crime as such crimes are attack against the people’s civilization at large.

<sup>19</sup> 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).

<sup>20</sup> Supra note 19 at pg 8

<sup>21</sup> Supra note 19 at pg 8

<sup>22</sup> Campbell, David. **1992/1998. *Writing Security: United States Foreign Policy and the Politics of Identity.* Minneapolis, MN: University Of Minnesota Press.**

<sup>23</sup> <https://en.unesco.org/> last visited 05.02.2020

<sup>24</sup> *Prosecutor v. Ahmad Al Fagi Al Mahdi*, ICC-01/12-01/15, Pre Trial Chamber-1, (Int’l Crim. Trib. for the Former Yugoslavia Mar. 24 2016) [hereinafter Al Mahdi]. cited in 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: <https://scholarlycommons.law.case.edu/jil/vol49/iss1/5>

In the case of *Prosecutor v. Ahmad Al Faqi Al Mahdi*<sup>25</sup> “On July 18, 2012, the Malian Government referred the case to the ICC.14 In July 2012, the Office of the Prosecutor (OTP) started preliminary examination to decide whether it was reasonable to launch a formal investigation. On the basis of the preliminary investigation, the Prosecutor declared there was a reasonable basis to consider that international crimes were committed including: (1) murder (constituting a war crime under article 8(2)(c)(i)); (2) mutilation, cruel treatment and torture (article 8(2)(c)(i)); (3) intentionally directing attacks against protected objects (article 8(2)(e)(iv)); (4) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court (article 8(2)(c)(iv)); (5) pillaging (article 8(2)(e)(v)), and (6) rape (article 8(2)(e)(vi)). The case was assigned to Pre-Trial Chamber I”. “On September 18, 2015, the Court issued an arrest warrant for Al Mahdi. Eight days later (September 26, 2015), he was surrendered by Niger authorities and transferred to The Hague. Al Mahdi appeared before the ICC, on September 30, 2015, charged with the war crime of destroying Mali’s cultural heritage”.

ICC Prosecutor Fatou Bensouda has eloquently described the impact of the loss: “To destroy Timbuktu’s mausoleums is therefore to erase an element of collective identity built through the ages. It is to eradicate a civilisation’s landmark. It is the destruction of the roots of an entire people, which irremediably affects its social attitudes, practices and structures”.

Al Mahdi, as head of the *Hisbah*, or morality brigade, personally directed and oversaw the attack against the ten buildings in question. In the end, the Prosecutor’s position has been vindicated. Mr. Al Mahdi admitted to the war crimes charges. Because Al Mahdi admitted guilt, the trial lasted only a few days. Al Mahdi was sentenced to nine years in jail.

In the case of *Attorney General of the Government of Israel v. Eichmann*<sup>26</sup>, the Court noted that as soon as Hitler came to power, “the persecution of the Jews became manifest in the systematic destruction of the synagogues.” “The importance of a synagogue to the life and identity of the Jewish community is in this respect comparable to the

reverence shown to the mausoleums and mosques of Timbuktu by its citizens. By purposefully destroying these symbols, the perpetrators are carrying out “a profound attack on the identity, the memory and, therefore, the future of entire populations.” Still, cultural destruction continued to be viewed as “collateral damage” rather than a pre-meditated act intended to eliminate a people’s identity.

For instance, in *The United States of America v. Wilhelm von Leeb*<sup>27</sup>86 (“The High Command Trial”), “former high-ranking officers in Germany were charged *inter alia* with war crimes and crimes against humanity for offenses including plunder of public and private property”.

In another World War II case, *The United States of America v. Ernst von Weizaecker*<sup>28</sup> (“The Ministries Trial”), “the defendant was found guilty of the seizure and destruction of cultural property, in reference to Article 56 of the 1907 Hague Regulations”. “In 1947, France’s Permanent Military Tribunal heard a case against German national Karl Lingenfelder<sup>29</sup>, who was charged with the destruction of public monuments.92 The Tribunal noted that such crimes could amount to clear violations of the laws and customs of war and, therefore, could be punishable as war crimes”.

In the trial of Arthur Greiser, before the Supreme National Tribunal of Poland, Mr. Greiser was charged, along with other war crimes and crimes against humanity, with the following:

“Systematic destruction of Polish culture, robbery of Polish cultural treasures and germanization of the Polish country and population, and illegal seizure of public property.”<sup>30</sup>

Greiser oversaw the closing of 1,200 to 1,300 churches in the Wartheland. The churches closed were completely despoiled, including the removal of all bells, church books,

<sup>25</sup> *Prosecutor v. Ahmad Al Fagi Al Mahdi*, ICC-01/12-01/15, Pre Trial Chamber-I, (Int’l Crim. Trib. for the Former Yugoslavia Mar. 24 2016) [hereinafter *Al Mahdi*]. cited in 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: <https://scholarlycommons.law.case.edu/jil/vol49/iss1/5>

<sup>26</sup> *Attorney-General of the Government of Israel v. Eichmann*, 36 I.L.R. 5 [1962] (Isr.); *The Prosecutor v. Tihomir Blaki*, Case No. IT-95-14-T, Judgment, 230 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000), cited in 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: <https://scholarlycommons.law.case.edu/jil/vol49/iss1/5>

<sup>27</sup> *Trial of Wilhelm von Leeb and Thirteen Others*, Dec. 30, 1947–Oct. 28, 1948 (Ger. High Command Trial) (United States Military Trib., Nuremberg), [https://www.loc.gov/rr/frd/Military\\_Law/pdf/Law-Reports\\_Vol-12.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-12.pdf) [https://perma.cc/5QKG-RPHY]. cited in 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: <https://scholarlycommons.law.case.edu/jil/vol49/iss1/5>

<sup>28</sup> *United States v. Ernst von Weizsäcker*, Judgment of Apr. 11, 1949 (The Ministries Trial) (United States Military Trib., Nuremberg), <http://werle.rewi.hu-berlin.de/ministries.pdf> [https://perma.cc/32C6-82HG]. cited in 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: <https://scholarlycommons.law.case.edu/jil/vol49/iss1/5>

<sup>29</sup> *Trial of Karl Lingenfelder*, Case No. 51, Judgment (Perm. Military Trib. At Metz Mar. 11, 1947). cited in 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: <https://scholarlycommons.law.case.edu/jil/vol49/iss1/5>

<sup>30</sup> *Trial of Gauleiter Arthur Greiser*, Jun. 21–Jul. 7, 1946 (Sup. Nat’l Trib. Of Poland), [https://www.loc.gov/rr/frd/Military\\_Law/pdf/Law-Reports\\_Vol-13.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-13.pdf) [https://perma.cc/9WBV-8T6E]. cited in 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: <https://scholarlycommons.law.case.edu/jil/vol49/iss1/5>



documents and libraries as well as chalices, monstrances and candles.

In *Prosecutor v. Slobodan Milošević*<sup>31</sup>, “Milošević was charged *inter alia* with three counts of destruction or wilful damage to historic monuments and institutions dedicated to education or religion, punishable under Article 3(d), and Articles 7(1) and 7(3) of the ICTY Statute”.

In *Prosecutor v. Radovan Karadžić & Ratko Mladić*<sup>32</sup>, “both Karadžić and Mladić were charged under those same articles for the “widespread and systematic damage to and destruction of Muslim and Roman Catholic sacred sites.”<sup>149</sup> Committed on a vast scale, the attacks “dehumanised” and “traumatised” the local Bosnian Muslim and Bosnian Croat populations”.

Additionally, in *Prosecutor v. Mićo Stanišić & Stojan Župljanin*<sup>33</sup>, “the accused were charged with the intentional destruction of mosques and other Muslim religious and cultural buildings. The Trial Chamber noted that the attacks, which were selective and systematic, were carried out deliberately to discriminate against Muslims and Croats on the basis of their ethnicity”.

In *Prosecutor v. Miodrag Jokić*<sup>34</sup>, “the ICTY stressed that attacks against cultural property affect “not only the history and heritage of the region, but . . . the cultural heritage of humankind.” The *Jokić* case underscored “the inherent value and irreplaceable nature of cultural treasures, raising the cost for any loss of “original, historically authentic material.” “The targeting of property on the World Heritage List only heightened the gravity of the offense”, which was deemed “especially wrongful conduct.”

An assessment of the severity of cultural property crimes was similarly made in *Prosecutor v. Biljana Plavšić*<sup>35</sup>. The

Court noted that “the scope of the wanton destruction of property and religious buildings” contributed to the offense being “a crime of utmost gravity, involving . . . a campaign of ethnic separation.”

In *Prosecutor v. Pavle Strugar*<sup>36</sup>, “the Court determined that the consequences of attacks on cultural property (Old Town) could be “grave. Noting that such property is, by definition, of great

importance to the cultural heritage of [a] people,” the emphasis shifted away from individual victims toward the region’s shared heritage.

Furthermore, in determining the seriousness of particular crimes, the Trial Chamber in *Prosecutor v. Momčilo Krajišnik*<sup>37</sup> had to assess the “consequences of destruction of the property of its members and their cultural and religious monuments.”

The jurisprudence of the ICTY relating to the gravity of the crime of cultural destruction will be relevant to the ICC. ICC Prosecutor has to conduct preliminary investigation and to satisfy that: (1) there is a reasonable basis to believe that a crime exists and that the Court would have jurisdiction over the crime (2) the case meets the admissibility requirements of and (3) the crime is of *sufficient gravity* to justify further action by the Court. The concept of gravity is very ambiguous as the prosecutor has to distinguish between major and minor criminals. It largely depends upon the number of victims. One of the criterion for determining gravity is that the conduct must amount to a systematic or large scale pattern of destruction.

in the case of *Bahar Idriss Abu Garda*<sup>38</sup> “There, the Pre-Trial Chamber noted that the case did not automatically meet the gravity threshold simply because the accused was charged with the most serious crimes. The Court held that not only quantitative, but also qualitative factors must be taken into account”. Several factors are relevant to the qualitative approach:

“[T]he extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the

<sup>31</sup> Prosecutor v Slobodan Milošević, Case No. IT-02-54-T, Second Amended Indictment ¶¶ 72, 83 (Int’l Crim. Trib. for the Former Yugoslavia 2004). cited in 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: <https://scholarlycommons.law.case.edu/jil/vol49/iss1/5>

<sup>32</sup> Prosecutor v. Radovan Karadžić & Ratko Mladić, Case No. IT-95-5-I, Indictment, (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). cited in 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: <https://scholarlycommons.law.case.edu/jil/vol49/iss1/5>

<sup>33</sup> Prosecutor v Mićo Stanišić & Stojan Župljanin, Case No. IT-08-91-T, Judgment Summary (Int’l Crim. Trib. for the Former Yugoslavia Mar. 27, 2013). cited in 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: <https://scholarlycommons.law.case.edu/jil/vol49/iss1/5>

<sup>34</sup> Prosecutor v. Miodrag Jokic, Case No. IT-01/42/1-S, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Mar. 18, 2004). cited in 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: <https://scholarlycommons.law.case.edu/jil/vol49/iss1/5>

<sup>35</sup> Prosecutor v. Biljana Plavšić Sentencing Judgment, Case No. IT-00-39&40/1-S (Int’l Crim. Trib. for the Former Yugoslavia Feb. 27, 2003). cited in 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: <https://scholarlycommons.law.case.edu/jil/vol49/iss1/5>

<sup>36</sup> Prosecutor v. Pavle Strugar, Case No. IT-01-42-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005). cited in 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: <https://scholarlycommons.law.case.edu/jil/vol49/iss1/5>

<sup>37</sup> Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Sep. 27, 2006). cited in 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: <https://scholarlycommons.law.case.edu/jil/vol49/iss1/5>

<sup>38</sup> *The Prosecutor v. Abu Garda*, Doc. ICC-02/05-02/09, Decision on the Confirmation of Charges, ¶ 32 (Feb. 8, 2010). cited in 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: <https://scholarlycommons.law.case.edu/jil/vol49/iss1/5>

crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location”.

Both the 1954 Convention and the Convention’s 1999 Protocol contain provisions for establishing individual criminal responsibility for cultural destruction crimes. The establishment of individual criminal responsibility is must with international courts. For instance, in *Prosecutor v. Tihomir Blaškić*<sup>39</sup> and *Prosecutor v. Stanislav Galic*<sup>40</sup>, “it was implied that customary international law applicable to both non-international and international armed conflict recognizes individual criminal responsibility for intentionally launching an attack in the knowledge it will cause . . . damage to civilian objects, including cultural property, which is excessive in relation to the concrete and direct military advantage anticipated.”

The nexus between the destruction of property and the particular conflict, whether non international or international should be established besides focusing on individual criminal responsibility. In *Blaškić*, for example, “it was determined that the perpetrator’s conduct had to fit within the “geographical and temporal context” of the conflict. This does not mean that the crimes committed have to take place in the “precise” geographical location; but they must be “closely linked” to the hostilities”.

In addition to the “nexus” requirement, *Prosecutor v. Naletilić & Martinović*<sup>41</sup> stated that “a cultural-property crime is committed under Article 3(d) of the ICTY Statute when: (i) it meets the general requirements of Article 3 of the Statute; ii) the property destroyed had a religious purpose; iii) the property was not used for military purposes; and iv) the perpetrator acted with the intent to destroy the property”.

Under Customary international law if a cultural property which is not subject matter of “special protection” is attacked, it will not be considered as unlawful if the same is utilized for military objective. But the degree of proportionality will always be assessed of such attack. For instance, the Trial Chamber in *Prosecutor v. Jadranko*

*Prlic et al*<sup>42</sup> noted that “the destruction of the Old Bridge in Mostar “had a very significant psychological impact on the Muslim population of Mostar,” due to its “immense cultural, historical and symbolic value.” “Despite its being justified by military necessity, the Trial Chamber found that the effect on the civilian population was “indisputable and substantial” and, therefore, disproportionate to the military advantage gained”.

Article 3(d) of the ICTY Statute criminalizes the “seizure,” “destruction,” and “wilful damage” done to institutions dedicated to religion, charity, education, the arts and sciences, historic monuments, and works of art and science to the extent only that the conduct was intentional. The distinction between destruction and damage is not specified and also there is not clarity with respect to the extent of destruction. The element of mens rea has to be established to show that perpetrator caused the destruction or willful damage to cultural property. It is a part of individual criminal responsibility. For instance, in *Prosecutor v. Mladen Naletilic & Vinko Martinovic*<sup>43</sup>, “the Trial Chamber stated that, in order to satisfy the *mens rea* requirement for the destruction of property, the perpetrator must have acted with the intent to destroy the protected property or in reckless disregard of the likelihood of its destruction.”. This requirement was affirmed by the Trial Chamber in *Prosecutor v. Radoslav Brdanin*<sup>44</sup>. According to the *Strugar* Appeals Chamber, “mere negligence” is not enough. In *Blaškić*, the ICTY Trial Chamber, with reference to the destruction or wilful damage to institutions dedicated to religion or education, stated as follows:

“The damage or destruction must have been committed intentionally to institutions which may clearly be identified as dedicated to religion or education and which were not being used for military purposes at the time of the attacks. In addition, the institutions must not have been in the immediate vicinity of military objectives”.

In *Prosecutor v. Dario Kordić & Mario Čerkez*<sup>45</sup>, “it was

<sup>39</sup> *Prosecutor v Tihomir Blaškić*, Case No. IT-95-14, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000). cited in 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: <https://scholarlycommons.law.case.edu/jil/vol49/iss1/5>

<sup>40</sup> *Prosecutor v Stanislav Galic*, Case No. IT-98-29, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003). cited in 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: <https://scholarlycommons.law.case.edu/jil/vol49/iss1/5>

<sup>41</sup> *Prosecutor v. Naletilić & Martinović*, Case No. IT-98-34, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003). cited in 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: <https://scholarlycommons.law.case.edu/jil/vol49/iss1/5>

<sup>42</sup> *Prosecutor v. Prlic et al.*, Case No. IT-04-74-T, Trial Judgment (Int’l Crim. Trib. for the Former Yugoslavia May 29, 2013). cited in 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: <https://scholarlycommons.law.case.edu/jil/vol49/iss1/5>

<sup>43</sup> *Prosecutor v. Naletilic & Martinovic*, Case No. IT-98-34-T, Trial Judgment (Int’l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003) cited in 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: <https://scholarlycommons.law.case.edu/jil/vol49/iss1/5>

<sup>44</sup> *Prosecutor v Radoslav Brdanin*, Case No. IT-99-36-T, Judgment, ¶ 599 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004). cited in 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: <https://scholarlycommons.law.case.edu/jil/vol49/iss1/5>

<sup>45</sup> *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). cited in

determined that the act (destruction and damage of religious or educational institutions), when perpetrated with a discriminatory intent, “amounts to an attack on the very religious identity of a people.”

The ICTY did recognize the fact that the destruction of Cultural heritage has wide impact on humanity at large. For instance, in the case of *Kordić & Čerkez*, the Trial Chamber stated that “all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects.” In *Prosecutor v. Milan Milutinović et al.*<sup>46</sup>, “the Trial Chamber wanted to emphasize this point and, thus, made a distinction between elements of Article 3(d) of the Statute (Grave Breaches of the Geneva Convention relating to cultural destruction) and the jurisprudence of cultural-property destruction as an underlying offense for a crime against humanity”. Considering prior cases including *Blaškić*, the Trial Chamber in *Stanišić & Župljanin*<sup>47</sup> set forth clear guidance as to how to prove that intentional destruction of cultural property was a crime against humanity. “The following elements must be satisfied:

- (a) the destruction or damage of religious or cultural property occurs on a large scale;
- (b) the destruction or damage of religious or cultural property is not justified by military necessity; and
- (c) the perpetrator acted with the intent to destroy or damage the religious or cultural property or in reckless disregard of the likelihood of its destruction or damage”. Considering the wider impact of these crimes, the Court in *Prosecutor v. Radislav Krstić*<sup>48</sup> determined that “deliberate attacks on culture could even form part of the *mens rea* of genocide: The Trial Chamber . . . points out that where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of intent to

physically destroy the group. In this case, the Trial Chamber will thus take into account as evidence of intent to destroy the group the deliberate destruction of mosques and houses belonging to members of the group”.

It’s interesting to note that Raphael Lemkin, the lawyer and writer who later coined the term genocide, proposed in 1933 that vandalism and destruction of cultural heritage be included among punishable international offenses. He insisted that a racial, national, or religious group cannot continue to exist unless it preserves its spiritual and moral unity<sup>49</sup>. Early drafts of the 1948 Genocide Convention included his formulation, but it was left out of the final version. During the Convention’s negotiations, the Soviet Union, in its document entitled “Basic Principles of a Convention on Genocide,” argued for coverage of measures and actions aimed against the national language or national culture. It referred to this as “national-cultural genocide” and gave as an example the “destruction of historical or religious monuments, museums, documents, libraries and other monuments and objects of national culture or of religious worship.” Despite the exclusion of “cultural genocide” in the Genocide Convention, it is clear that the cultural component is relevant “as evidence of the intent to destroy a group.” Proof that a perpetrator “was involved in the destruction of cultural monuments or similar acts directed against the culture of the group will aid a tribunal in assessing the elements of intent and motive.”<sup>50</sup>

Thus the above instances show that it is a crime against humanity no doubt. It is not just the property which is destroyed but the emotions of an individual attached to that property is also effected. But again we come back to the same question, how to prevent such mass scale destruction?

#### IV. CONCLUSION AND SUGGESTION

**UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, 2003 has defined intentional destruction and made few recommendations to this behalf.**

For the purposes of this Declaration “intentional destruction” means an act intended to destroy in whole or in part cultural heritage, thus compromising its integrity, in a manner which constitutes a violation of international law or an unjustifiable offence to the principles of humanity and dictates of public conscience, in the latter case in so far as such acts are not already governed by fundamental

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<sup>46</sup> *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009), cited in 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: <https://scholarlycommons.law.case.edu/jil/vol49/iss1/5>

<sup>47</sup> *Prosecutor v. Stanišić & Župljanin*, Case No. IT-08-91-T, Trial Judgment, ¶88 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 27, 2013) (citing *Prosecutor v. Šainović et al.*, Case No. IT-05-87-T, Trial Judgment, ¶ 206 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009)), cited in 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: <https://scholarlycommons.law.case.edu/jil/vol49/iss1/5>

<sup>48</sup> *Prosecutor v. Krstić*, Case No. IT-98-33-T, Trial Judgment (Int’l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001), cited in 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: <https://scholarlycommons.law.case.edu/jil/vol49/iss1/5>

<sup>49</sup> WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 180 (1st ed. 2000), cited in 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: <https://scholarlycommons.law.case.edu/jil/vol49/iss1/5>

<sup>50</sup> 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: <https://scholarlycommons.law.case.edu/jil/vol49/iss1/5>

principles of international law.

Appropriate measures in the form of legislative, administrative, educational and technical in nature should be taken to protect the cultural heritage. Of course those measures should be within the economic framework of the nature. It is also to be seen that the same is revised periodically so that it remains best suited according to the national and international laws on cultural heritage protection standards.

Unless and until there is an awareness through educational and informational programmes the people will not realize its value of Cultural heritage. There must be an element of respect among people across the state regardless of their caste, creed, religion or Colour for Cultural heritage of the nation.

The nation should become parties to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two 1954 and 1999 Protocols and the Additional Protocols I and II to the four 1949 Geneva Conventions, if they have not yet done so;

Not only elaboration and adoption of legal instruments are necessary but application of existing and future legal instrument plays immense role for the protection of Cultural heritage. I believe pro activeness on the part of the government is also necessary for the protection of cultural heritage.

Protection of cultural heritage during peace time and during armed conflict is also carefully taken by the existing government.

If the state is responsible for the destruction of Cultural heritage intentionally or fails to take measures to prohibit, prevent stop and punish the perpetrator responsible for the destruction of Cultural Heritage of great importance, it will responsible for such destruction to the extent provided by international law. It is regardless of the matter whether the Cultural Property is inscribed on a list maintained by UNESCO. For the purpose of this, State in accordance with international law has to establish jurisdiction over and provide effective criminal sanctions against the perpetrator of the same.

In order to avoid such situations of intentional destruction of Cultural Property, Cooperation includes exchange of information regarding circumstances creating risk of intentional destruction of cultural heritage, consultation in such event, assistance in the form of promotion of educational awareness and capacity building programme for the prevention and repression of any intentional destruction of cultural heritage and judicial and administrative assistance should be immediately provided.

Thus the intentional destruction of Cultural Heritage is declared as gross violation of human rights and international humanitarian law. But the question remains, which is a grey

area and can be taken up for further research is why in spite of so many efforts cultural heritages are destroyed indiscriminately and mercilessly. Have we grown so mean that we are not able to tolerate the past glory of others and feels that destruction is the only way to wipe out the past. I feel more research into the mind of perpetrator is required in this field, so that it can indicate towards some concrete answer. At the same time perpetrators should also be destroyed giving them the taste of their own medicine, so that they realizes the pain they have caused to people at large by bringing destruction to something which is their own.

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