

# Protecting cultural property in Syria: New opportunities for States to enhance compliance with international law?

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## Abstract

*The war in Syria has lasted for six years and has led to massive destruction and loss of life. Stymieing international peace efforts from the outset, there is increasing doubt that the conflict will reach a resolution or political settlement in the near future. This frustration has triggered an appetite among States, civil society and the international community for finite and concrete measures that can contribute to greater protection and compliance with international law. A recent constellation of events around the protection of cultural property appears to herald a shift in the response of the international community toward prescribing practical and actionable measures for third-party States. Drawing on the responsibility of third States “to respect and ensure respect for” international humanitarian law, this article examines the legal framework protecting cultural property and recent innovative protection responses that contribute to ensuring compliance with international law in Syria, short of military assistance and intervention.*

**Keywords:** Syria, cultural property, cultural heritage, compliance, common Article 1, 1954 Hague Convention, innovation, protection.



“A nation stays alive when its culture stays alive.”

The motto of the National Museum of Afghanistan, where some 2,750 pieces were destroyed by the Taliban in 2001.

## Introduction

With political negotiations yielding no results, international humanitarian law (IHL) routinely ignored and international humanitarian agencies severely restricted, the crisis in Syria has led to fatigue and frustration across the international community. The human cost of the conflict is widely considered to be without historical precedent among civil wars<sup>1</sup> and a threat to international peace and security.<sup>2</sup> However, political channels remain blocked, there is no appetite for military intervention, and the binding and instructive decisions of the United Nations (UN) Security Council prescribing respect for IHL have gone unheeded.<sup>3</sup> Since so few avenues to peace seem to exist at present, there is an interest in any concrete, practical measures that could improve compliance with IHL in Syria. To this end, this article examines the innovative protection responses that have emerged to protect cultural heritage in the conflict which has engulfed Syria and spread to Iraq.<sup>4</sup> These responses illustrate how an international legal framework can provide a roadmap for States to develop a toolbox of positive measures for respecting and ensuring respect for IHL.<sup>5</sup>

This article starts by presenting an overview of the legal regimes, both in IHL and other bodies of law, that are relevant to the protection of cultural property in the Syrian conflict. It then examines why the protection of cultural property is important, even in a war that has been characterized by such levels of brutality and human suffering. Through assessing the international protection

- 1 Max Fischer, “Syria’s Paradox: Why the War Only Ever Seems to Get Worse”, *New York Times*, 26 August 2016.
- 2 UN News Centre, “Syria’s Brutal War Threatens International Peace and Security, Says UN Rights Panel”, 27 August 2014.
- 3 UNSC Res. 2139, 22 February 2014, para. 6, demanding that all parties, in particular the Syrian authorities, promptly allow rapid, safe and unhindered humanitarian access for UN humanitarian agencies and their implementing partners across conflict lines and across borders; UNSC Res. 2268, 26 February 2016, para. 1, endorsing a cessation of hostilities agreement aimed at ending five years of conflict; UNSC Res. 2401, 24 February 2018, para. 1, demanding the cessation of hostilities without delay by all parties for a durable humanitarian pause for at least thirty consecutive days throughout Syria.
- 4 Helga Turku, *The Destruction of Cultural Property as a Weapon of War: ISIS in Syria and Iraq*, Palgrave Macmillan, Cham, 2018.
- 5 In seeking to generate respect for IHL, there have been efforts to clarify the extent to which States are bound by the customary obligation to “respect and ensure respect” for their provisions “in all circumstances”, as articulated in Article 1 common to the four Geneva Conventions and echoed in other IHL treaties including the 1954 Hague Convention, as obligations *erga omnes partes*, and to what extent this imposes an obligation on third States not involved in a given armed conflict to influence the parties to the conflict. See Knut Dörmann and Jose Serralvo, “Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations”, *International Review of the Red Cross*, Vol. 96, No. 895/896, 2015. A toolbox of practical measures – rather than obligations that States may find onerous – remains elusive, however.

response and surveying innovations in protection that have emerged in response to the destruction of cultural property in Syria, the author seeks to identify some concrete measures that could be considered as part of a compliance toolbox and used as a model for future action. Finally, the article identifies gaps in that protection response and proposes possible measures to fill them.

## The legal framework protecting cultural property in Syria

Syrian cultural property is protected under a broad legal framework made up of IHL, international treaties on transnational law enforcement, human rights law, and binding UN Security Council resolutions.

### International humanitarian law

The ongoing armed conflict in Syria is governed by treaty and customary IHL. Beyond the protections contained in Article 3 common to the four Geneva Conventions of 1949, as Syria is not party to Additional Protocol II (AP II) of 1977, the conduct of hostilities in Syria is subject to the rules of IHL that are today accepted as having attained customary status.<sup>6</sup> Cultural property has long been widely recognized as being protected in armed conflict as a matter of custom. In 1946, the Nuremberg International Military Tribunal declared that the entire Hague Convention (IV) respecting the Laws and Customs of War on Land was “recognized by all civilized nations and ... regarded as being declaratory of the laws and customs of war”, including its paragraphs protecting cultural property.<sup>7</sup> The 27th session of the General Conference of the UN Educational, Scientific and Cultural Organisation (UNESCO) adopted a resolution on the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954 (1954 Hague Convention), 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”.<sup>8</sup> In its decision on the defence motion interlocutory appeal on jurisdiction in the *Tadić* case, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) included Article 19 of the 1954 Hague Convention along with the core of AP II as being part of customary law.<sup>9</sup> The Appeals Chamber also emphasized that customary rules

6 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study).

7 International Military Tribunal of Nuremberg, Trial Part 22 (22 August–1 October 1946), Judgment, 1 October 1946, p. 497; also appearing in *Annual Digest of Public International Law*, 1946, pp. 253–254. The International Military Tribunal judgment cites the Regulations annexed to Hague Convention (IV) respecting the Laws and Customs of War on Land of 18 October 1907 (1907 Hague Regulations).

8 UNESCO, *Records of the General Conference*, 27th Session, Paris, October–November 1993, available at: <http://unesdoc.unesco.org/images/0009/000956/095621E.pdf> (all internet references were accessed in May 2018). Reaffirming that the rules contained in Articles 3 and 4 of the 1954 Hague Convention could be considered part of international customary law.

9 ICTY, *The Prosecutor v. Dusko Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para 98.

applicable to non-international armed conflict cover the protection of civilian objects, and “in particular cultural property”.<sup>10</sup> These rules, which prescribe respect for cultural property<sup>11</sup> and include a prohibition against “acts of deliberate destruction of cultural heritage of major value for humanity”,<sup>12</sup> also apply to the conduct of non-State armed groups fighting in Syria.<sup>13</sup>

This body of law extends protections to cultural property through rules obliging each party to the conflict to respect cultural property by setting out four basic obligations: (1) prohibition of the use of cultural property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict (except in cases of imperative military necessity); (2) prohibition of acts of hostility directed against cultural property (this obligation may also be waived where required by imperative military necessity); (3) the obligation “to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against cultural property”; and (4) the absolute prohibition of acts of reprisal directed against cultural property.<sup>14</sup>

These core protections stem from the 1954 Hague Convention and its two protocols, which together make up the only treaties explicitly addressing the protection of cultural heritage in wartime. While Syria ratified the 1954 Hague Convention and its First Protocol in 1958, it has not ratified its Second Protocol, which expands protections to cultural property. Other States involved in the Syrian conflict have also ratified the 1954 Convention, including the Russian Federation and the United States. Most recently, the United Kingdom ratified both the 1954 Convention and its Second Protocol, and France acceded to the Second Protocol.<sup>15</sup> Adopted in 1999 in response to concerns about the effectiveness of the 1954 Hague Convention during the Second Gulf War and the Balkan Wars that led to massive targeting and destruction of cultural property, the Second Protocol contains a number of provisions that significantly improve the protection of cultural heritage during conflict.<sup>16</sup> The 1954 Hague Convention, however, as the paramount international

10 *Ibid.*, para 127.

11 Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, The Hague, 14 May 1954 (entered into force 7 August 1956) (1954 Hague Convention), Arts 4, 19.

12 Francesco Francioni and Federico Lanzerini (eds), *The 1972 World Heritage Convention: A Commentary*, Oxford University Press, Oxford, 2008, p. 635.

13 The International Criminal Court (ICC) has prosecuted Ahmad al Faqi al Mahdi, a member of the Ansar Al Dine armed group who presided over a morality tribunal known as the Hisbah and played a crucial role in implementing the decision to destroy shrines and mausoleums in Timbuktu, which were classified by UNESCO as World Heritage Sites. ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Case No. ICC-01/12-01/15, Judgment (Trial Chamber), 27 September 2016.

14 1954 Hague Convention, Art. 19; *ibid.*, Arts 4 and 19.

15 See the International Committee of the Red Cross (ICRC) “Treaties, States Parties and Commentaries” database for list of States Parties and State signatories to the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999, available at: <https://ihl-databases.icrc.org/ihl>.

16 See 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.

instrument for the protection of cultural property in peacetime and armed conflict including occupation, provides substantial protection as a standalone instrument. Drafted in the aftermath of the Second World War, which saw the devastation of entire cities full of monuments and cultural heritage, the 1954 Convention sought to limit such destructive practices.<sup>17</sup> As such, it bears striking relevance to the Syrian conflict, which has been characterized by the ruin of urban areas and their historical cores, such as the Old City of Aleppo and the historic area of Homs.<sup>18</sup>

The 1954 Hague Convention defines the single term “cultural property” to include three categories: immovable and movable items of intrinsic artistic, historic, scientific or other cultural value such as historic monuments, works of art or scientific collections; premises used for the housing of movable cultural property, such as museums, libraries, archive premises and temporary wartime shelters; and “centres containing monuments” such as important historic cities or archaeological zones.<sup>19</sup> Limited protection is also offered to authorized means of emergency transport in times of hostilities and to authorized specialist personnel, in a restricted set of circumstances.<sup>20</sup> These concepts follow a logic similar to the protection for civilian air-raid shelters, hospitals and ambulances in the Geneva Conventions,<sup>21</sup> and are necessary for the comprehensive protection of cultural property.<sup>22</sup>

Since military use and targeting are two of the main causes of damage to cultural property sites in Syria,<sup>23</sup> the relevant provisions of the 1954 Hague Convention deserve particular attention. The 1954 Hague Convention requires the parties to protect cultural property, which comprises the safeguarding of and respect for such property.<sup>24</sup> Safeguarding cultural property demands that States take preparations in peacetime against the foreseeable effects of armed conflict.<sup>25</sup>

17 Jean-Marie Henckaerts, “New Rules for the Protection of Cultural Property in Armed Conflict”, *International Review of the Red Cross*, Vol. 81, No. 835, 1999.

18 See ICRC, “Syria: Aleppo ‘One of the Most Devastating Urban Conflicts in Modern Times’”, 15 August 2016, available at: [www.icrc.org/en/document/syria-news-cities-aleppo-one-most-devastating-urban-conflicts](http://www.icrc.org/en/document/syria-news-cities-aleppo-one-most-devastating-urban-conflicts); Associated Press, “4 Years On, Ancient Heart of Homs Still Abandoned Ruins”, 17 January 2018, available at: [www.voanews.com/a/ancient-heart-of-homs-still-abandoned-ruins/4211616.html](http://www.voanews.com/a/ancient-heart-of-homs-still-abandoned-ruins/4211616.html).

19 1954 Hague Convention, Art. 2.

20 The prohibition on any act of hostilities against transports, and the immunity of transports from seizure, capture and placing in prize, only extends to those transports that are under special protection (*ibid.*, Arts 12(3), 14) as indicated by the distinctive red cross or red crescent emblem. Personnel engaged in the protection of cultural property are to be respected, as is consistent with the interests of security and in the interests of such property, if they fall into the hands of the opposing party, and should be allowed to continue their duties (*ibid.*, Art. 15).

21 ICC, *Al Mahdi*, above note 13, para. 14.

22 Patrick J. Boylan, “The Concept of Cultural Protection in Times of Armed Conflict: From the Crusades to the New Millennium”, in Neil Brodie and Kathryn Walker Tubb (eds), *Illicit Antiquities: The Theft of Culture and the Extinction of Archaeology*, Routledge, London, 2012, p. 66.

23 UN Institute for Training and Research (UNITAR), *Satellite-Based Damage Assessment to Cultural Heritage Sites in Syria*, 22 December 2014. This report notes that military activity, including hostilities and construction of fortified fighting positions, can lead to damage to cultural heritage locations (p. 13).

24 1954 Hague Convention, Art. 2.

25 *Ibid.*, Art. 3.

Once armed conflict has broken out, to “protect” cultural property means taking active measures to prevent it from being damaged or harmed.<sup>26</sup> This includes, under Article 4, the negative obligation to refrain from using cultural property, its immediate surroundings, or the appliances in use for its protection, for purposes that are likely to expose it to destruction or damage in the event of armed conflict, whether in a State’s own territory or within the territory of other parties.<sup>27</sup> It also includes positive obligations to “respect” cultural property, including to refrain from attacking it or carrying out “any act of hostility directed against such property”;<sup>28</sup> to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against cultural property; and not to carry out acts of reprisal directed against cultural property.<sup>29</sup>

Under the 1954 Hague Convention, cultural property loses its protection against military use and acts of hostility in “cases where military necessity imperatively requires such a waiver”.<sup>30</sup> The obligations against theft, pillage, misappropriation, vandalism and reprisals are absolute and cannot be waived. There is extensive debate about the nature of the “military necessity” waiver, and whether it makes the “scope for invoking [imperative military necessity] quite large”<sup>31</sup> or whether it provides a stringent legal standard anchored in the general obligation to protect cultural property.<sup>32</sup> Article 11 of the 1954 Convention establishes a special protection regime, adding that for registered cultural property, immunity may be withdrawn “only in exceptional cases of unavoidable military necessity, and only for such time as that necessity continues”, provided that such necessity is established at a high level of command.

As Jiří Toman’s Commentary to the 1954 Hague Convention Second Protocol has pointed out, the 1954 Convention was adopted well before the 1977 Additional Protocols to the Geneva Conventions codified developments in international humanitarian law defining the notion of a “military objective”.<sup>33</sup> The 1999 Second Protocol to the 1954 Hague Convention, which Syria has signed but not ratified, integrates the Additional Protocol I (AP I) definition of “military objective” into the rules protecting cultural property. It does this through setting

26 See ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016 (ICRC Commentary on GC I), Art. 19, para. 1799; Art. 24, paras 1982–1994. Although not applicable to cultural property (or non-international armed conflict) as such, Geneva Convention I (GC I) provides useful guidance on the meaning of terms and interpretation of principles that appear throughout IHL.

27 1954 Hague Convention, Art. 4.

28 See ICRC Commentary on GC I, above note 26, Art. 19, para. 1799; Art. 24, paras 1982–1994.

29 1954 Hague Convention, Art. 19; *ibid.*, Arts 4, 19.

30 *Ibid.*, Art. 4(2).

31 Jan Hladik, “The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the Notion of Military Necessity”, *International Review of the Red Cross*, Vol. 81, No. 835, 1999.

32 Marina Lostal, “The Meaning and Protection of ‘Cultural Objects and Places of Worship’ under the 1977 Additional Protocols ”, *Netherlands International Law Review*, Vol. 59, No. 3, 2012.

33 Jiří Toman, *Cultural Property in War: Improvement in Protection – Commentary on the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, UNESCO Publishing, Paris, 2009, p. 177.

out that a waiver on the basis of imperative military necessity under Article 4 of the 1954 Hague Convention can only be invoked when (i) that cultural property has, by its function, been made into a military objective (meaning an object which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage);<sup>34</sup> and (ii) there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective.<sup>35</sup> This implies that where there is a choice among several objectives, the attack should be directed against the target(s) that are not cultural property, even if their damage or destruction would yield less of a military advantage. Thus, the Second Protocol to the 1954 Convention introduced more explicit conditions, clarifying the notion of “military necessity” to include the principle of distinction that was codified in the 1977 Additional Protocols to the Geneva Conventions. The result is a further affirmation of cultural property deserving treatment sitting “above and beyond” that of other civilian objects.<sup>36</sup>

Even though the specific rules set out in the Second Protocol to the 1954 Hague Convention may not apply to Syria, it is notable that cultural property is protected by a particularly robust and developed area of IHL. The specific treaty provisions addressing cultural property in armed conflict are further complemented by the prohibitions on attacking cultural property contained in Article 53(1) of AP I and Article 16 of AP II, which do not provide for a waiver in case of imperative military necessity.<sup>37</sup> The extent to which any of these aspects of the Second Protocol to the 1954 Hague Convention, AP I or AP II are customary and therefore applicable to Syria is beyond the scope of this article.

It is worthwhile to note, however, that the ICTY Statute<sup>38</sup> and the Rome Statute of the International Criminal Court (ICC)<sup>39</sup> echo the approach found in earlier instruments, such as the 1907 Regulations Respecting the Laws and

34 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999 (Second Protocol to the 1954 Hague Convention), Arts 1(f), 6(i); Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 52(2).

35 Second Protocol to the 1954 Hague Convention, Art. 6.

36 Micaela Frulli, “The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency”, *European Journal of International Law*, Vol. 22, No. 1, 2011, pp. 203, 205.

37 AP I, Art. 53(1); Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978), Art. 16.

38 Article 3(d–e) of the ICTY Statute lists “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” and “plunder of public or private property”. Other provisions of the ICTY Statute which were used to prosecute acts against cultural property but were not specifically aimed at this objective are Article 3(b), “wanton destruction of cities, towns or villages, or devastation not justified by military necessity”, and Article 3(c), “attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings”. Article 3(d) is inspired by Articles 27 and 56 of the 1907 Hague Regulations.

39 Rome Statute of the International Criminal Court, 17 July 1998 (entered into force 1 July 2002) (Rome Statute).

Customs of War on Land.<sup>40</sup> The Rome Statute criminalizes “[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”, in both international and non-international armed conflict, and the “destruction and appropriation of property” that is protected under the Geneva Conventions of 1949 in international armed conflict.<sup>41</sup> These two crimes stem from the two provisions of the 1907 Hague Regulations that mention cultural property,<sup>42</sup> one in the context of the conduct of hostilities or “sieges and bombardments”,<sup>43</sup> and the other in situations where a belligerent exercises military authority over a territory and is prohibited from seizing, destroying or wilfully damaging cultural property.<sup>44</sup> While some have criticized these provisions as being insufficiently specific and failing to address the concern that cultural property deserves protection beyond its material dimension due to its cultural value for the local community and for humanity as a whole,<sup>45</sup> this is reflective of custom. According to the International Committee of the Red Cross’s (ICRC) articulation of customary law, in the context of hostilities, each party to a conflict must respect cultural property, with special care taken in military operations “to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives”; and “property of great importance to the cultural heritage of every people must not be the object of attack unless imperatively required by military necessity”.<sup>46</sup> While there have not been many international criminal cases that have adjudicated “military necessity” in the context of attacks on cultural property, at the ICTY the reversal of the Trial Chamber finding on the destruction of the Old Mostar Bridge by the Appeals Chamber in the *Prlić et al.* case hinged on whether “military necessity” is defined by the absence of an alternative to the destruction of the cultural property in question.<sup>47</sup>

40 1907 Hague Regulations.

41 Rome Statute, Art. 8(2)(a)(iv).

42 For a discussion on how these provisions were applied (or misapplied) by the Trial Chamber of the ICC in the *Al Mahdi* case, see William Shabas, “Al Mahdi Has Been Convicted of a Crime He Did Not Commit”, *Case Western Reserve Journal of International Law*, Vol. 49, No. 1, 2017.

43 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 (Hague Convention IV), Art. 27.

44 *Ibid.*, Art. 56.

45 M. Frulli, above note 36.

46 ICRC Customary Law Study, above note 6, Rule 38.

47 See ICTY, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-A, Appeal Judgment (Appeals Chamber), 29 November 2017, in which the Appeals Chamber found, by majority, that the “Trial Chamber erred in finding that the destruction of the Old Bridge of Mostar constituted the crime of wanton destruction not justified by military necessity as a violation of the laws or customs of war”. In his Dissenting Opinion, Judge Fausto Pocar (para. 7) disagreed with the majority with respect to: (i) it erroneously conflating the notion of a military target with that of military necessity; (ii) its failure to discuss the fact that the attack on the Old Bridge of Mostar was disproportionate and the consequences thereof; (iii) its failure to account for the fact that the Old Bridge of Mostar constitutes cultural property protected under the general principles of international humanitarian law; and (iv) the consequences of the above errors with respect to persecutions on political, racial, and religious grounds as crimes against humanity.

The *Strugar* case has also demonstrated the challenges that the concept poses in international criminal law.<sup>48</sup>

As mentioned above, the 1954 Hague Convention establishes a system of special protection. This system deserves brief consideration as Syria hosts six World Heritage Sites,<sup>49</sup> all of which are in danger, and eleven other sites of outstanding universal cultural value that are set to be considered for inscription on the World Heritage List.<sup>50</sup> The special protection system has several pillars, including advance warning, listing, and the requirement that any attack against cultural property be ordered at a high level of operational command. The listing system was initially designed for a limited number of refuges intended to shelter movable cultural property, centres containing monuments and other immovable cultural property of great importance. Special protection is granted by entry in the International Register of Cultural Property under Special Protection. This system – and the subsequent List of Cultural Property under Enhanced Protection established under the Second Protocol to the 1954 Hague Convention – have been used to little success. While the International Register was updated in 2015 to include a number of cultural sites in Mexico, prior to that, the last time a State entered a site into the register was in 1978, with the result that the special protection mechanism never reached its full potential.<sup>51</sup> The subsequent enhanced protection system, which combined aspects of special protection from the 1954 Hague Convention and the criteria for listing cultural property under the 1972 UNESCO Convention concerning the Protection of World Cultural and Natural Heritage, has only twelve sites listed as being under enhanced protection.<sup>52</sup> All twelve have also been listed as UNESCO World Heritage Sites. *De facto*, UNESCO's World Heritage List<sup>53</sup> has taken the place of both the special protection and enhanced protection lists when it comes to criminal sanctions for violations, as evidenced by the *Jokić* case at the ICTY<sup>54</sup> and the *Al Mahdi* case at the ICC.<sup>55</sup> The essence of the current protection system is that it entails some form of “registered” or “certified protection”, whose holder registers or certifies that the property will never be used for military purposes. If this is complied with, the property could thus never become the object

48 See ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42, Judgment (Trial Chamber), 31 January 2005, paras 328–330.

49 UNESCO World Heritage Centre, Syrian Arab Republic. The six properties inscribed on the World Heritage List are the Ancient City of Aleppo (1986), the Ancient City of Bosra (1980), the Ancient City of Damascus (1979), the Ancient Villages of Northern Syria (2011), Crac des Chevaliers and Qal'at Salah El-Din (2006), and Palmyra (1980).

50 UNESCO World Heritage Centre, Syrian Arab Republic, Tentative List.

51 J.-M. Henckaerts, above note 17. For an updated International Register list, see: [www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/protection/enhanced-protection/](http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/protection/enhanced-protection/).

52 Secretariat of the 1954 Hague Convention, “List of Cultural Property under Enhanced Protection”, UNESCO, 2017.

53 Established by the Convention concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972 (entered into force 17 December 1975) (1972 UNESCO Convention).

54 The *Jokić* case involved the shelling of the Old Town of Dubrovnik. The Trial Chamber noted that the Old Town's belonging to the World Heritage List granted it a special status that had “been taken into consideration in the definition and evaluation of the gravity of the crime”, and thus also in the sentencing of the defendant.

55 ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Judgment and Sentence, 27 September 2016, para. 80.

of a lawful attack. Thus, the advantage of listing property is that an adversary will be made aware of it and any attack on the property would thus incur serious consequences for the perpetrator.

While the 1954 Hague Convention did not contain a duty to give effective advance warning for cultural property under general protection, it did envision this for cultural property under special protection, meaning that the loss of immunity from attack is not immediate. Special protection may cease “only in exceptional cases of unavoidable military necessity, and only for such time as that necessity continues”, and “whenever circumstances permit”, the opposing party must be notified, a reasonable time in advance, of the decision to withdraw immunity.<sup>56</sup> In addition, an attack can only be ordered at a high level of operational command, as only “an officer commanding a force the equivalent of a division in size or larger” can establish whether an attack on cultural property under special protection is militarily necessary and unavoidable.<sup>57</sup> The Second Protocol to the 1954 Hague Convention tightened these conditions with respect to cultural property under enhanced protection by imposing an obligation that an attack be ordered at the highest operational level of command.<sup>58</sup>

In situations where special protection has been lost, the general protections of Article 4 of the 1954 Hague Convention continue to hold. For example, when special immunity is lost due to a violation by the opposing party under Article 11 (1), the protection standard of “imperative military necessity” contained in Article 4(2) will apply instead of the “unavoidable military necessity” standard in Article 11(2), acting as a safety net. And indeed, even when general protection ceases, the rules of IHL continue to apply, with customary international law supplementing the rules set out in the 1954 Convention.

In customary law there is an obligation by parties to an armed conflict to respect and ensure respect for IHL. This is established through State practice as a norm of customary international law applicable in both international and non-international armed conflicts.<sup>59</sup> Moreover, the High Contracting Parties to the Geneva Conventions undertake, “whether or not they are themselves party to an armed conflict, to ensure respect for the Conventions by other High Contracting Parties and non-State Parties to an armed conflict”.<sup>60</sup> This obligation contains both an external and internal prong. Both States involved and States not involved in the conflict in Syria have a legal interest in the observance of IHL through doing everything reasonably in their power to ensure that the rules are respected by all the parties to the armed conflict, and to stop violations from happening.<sup>61</sup> The obligations of IHL, as articulated in the Geneva Conventions and other

56 1954 Hague Convention, Art. 11(2).

57 *Ibid.*

58 Second Protocol to the 1954 Hague Convention, Art. 13(i).

59 ICRC Customary Law Study, above note 6, Rule 139.

60 ICRC Commentary on GC I, above note 26, paras. 119–120.

61 See ICRC Customary Law Study, above note 6, Rule 144. This rule, on “Ensuring Respect for International Humanitarian Law”, stipulates that States may not encourage violations of IHL by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law.

instruments, are thus *erga omnes partes*, obligations toward all other States Parties.<sup>62</sup> This supplements the internal obligation, as articulated in Articles 4(1) and 7(1) of the 1954 Hague Convention, which stipulates that the High Contracting Parties undertake to respect cultural property in their own territory and in the territory of other High Contracting Parties where they exercise control. Considering the potential scope of the external prong of this obligation for States not party to the conflict in Syria, it is important to examine what it practically entails.

The ICRC study on customary rules of IHL identifies diplomatic protest and collective measures as the two most often used measures employed by States to try and stop violations of international law.<sup>63</sup> For violations against cultural property, the Second Protocol to the 1954 Hague Convention explicitly addresses the *erga omnes* obligation to ensure respect for its rules. Article 31 of the Second Protocol states that “in situations of serious violations of this Protocol, the Parties undertake to act, jointly through the Committee, or individually, in cooperation with UNESCO and the United Nations and in conformity with the Charter of the United Nations”.<sup>64</sup> This supplements the possibility, envisioned in the 1972 World Heritage Convention, of a State submitting a request for international assistance to protect cultural property at risk.<sup>65</sup> The Second Protocol now has about seventy States Parties,<sup>66</sup> for whom it also establishes an obligation to extradite or prosecute individuals responsible for violations of the Second Protocol, and for States to afford one another mutual legal assistance toward this end.<sup>67</sup> Beyond this, there has been little articulation of the type of measures States not involved in an armed conflict could undertake in line with their obligation to “ensure respect for the [rules of IHL] in all circumstances” under customary law,<sup>68</sup> contained in Article 1 common to the four Geneva Conventions and echoed in the 1954 Hague Convention<sup>69</sup>.

## Transnational law enforcement

In addition to obligations imposed on the parties to the conflict, Syrian cultural property is protected under the 1970 Convention on the Means of Prohibiting

62 ICRC Commentary on GC I, above note 26, Art. 1, para. 119, citing International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, para. 157 (“In the Court’s view, these rules [of humanitarian law applicable in armed conflict] incorporate obligations which are essentially of an *erga omnes* character”); ICTY, *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-T, Trial Judgment, 14 January 2000, para. 519 (“norms of international humanitarian law do not pose synallagmatic obligations, i.e. obligations of a State *vis-à-vis* another State. Rather ... they lay down obligations towards the international community as a whole”); and Jean Pictet (ed.), *Commentary on the First Geneva Convention*, ICRC, Geneva, 1952, p. 25 (“[Geneva Convention I] is not an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties”).

63 ICRC Customary Law Study, above note 6, Rule 144.

64 Second Protocol to the 1954 Hague Convention, Art. 31.

65 1972 UNESCO Convention, Arts 19–21.

66 M. Frulli, above note 36, pp. 203, 205.

67 Second Protocol to the 1954 Hague Convention, Ch. 4.

68 ICRC Customary Law Study, above note 6, Rule 144.

69 1954 Hague Convention, Art. 7(1).

and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention). This is a key instrument that allows States to share in the responsibility of protecting cultural property. Syria has ratified the 1970 UNESCO Convention, but has not implemented it in national legislation.<sup>70</sup> The Convention focuses primarily on conduct during times of peace<sup>71</sup> and envisions preventative measures (such as the taking of inventories and monitoring of trade), restitution provisions and a framework for international cooperation necessary to give the Convention's provisions their effect. In cases where cultural property is in jeopardy from pillage, Article 9 of the Convention provides for more specific action such as a call for import and export controls.<sup>72</sup> It further solidifies the rule against pillage of cultural property, anchored in the prohibitions contained in the 1907 Hague Regulations (which have reached customary status) and in the 1954 Convention, by creating an actionable mechanism for protection against such acts.<sup>73</sup>

The 1970 UNESCO Convention appears at first glance to be particularly well suited to protecting Syrian cultural property, considering the scale of looting of museums and illegal excavations of archaeological sites taking place in that country.<sup>74</sup> Given the organized approach that the armed group Islamic State of Iraq and Syria (ISIS) has taken to looting archaeological sites in Syria and Iraq through its "Antiquities Division", the Convention's provisions take on an added significance in stemming the flow of financial support to terrorism.<sup>75</sup> Through exercising vigilance and undertaking positive measures within their own jurisdictions, third-party States not involved in the Syrian conflict can contribute to the protection of cultural property and ensure compliance with the rules of international law. With Syria, Iraq and neighbouring States Jordan, Turkey and Lebanon all States party to the Convention, third-party State involvement could form a solid basis for preventing the transnational transfer of looted cultural property from Syria.

70 The Syrian Arab Republic deposited its instrument of acceptance for the 1970 UNESCO Convention on 21 February 1975.

71 Zsuzsanna Veres, "The Fight Against Illicit Trafficking of Cultural Property: The 1970 UNESCO Convention and the 1995 UNIDROIT Convention", *Santa Clara Journal of International Law*, Vol. 12, No. 2, 2014.

72 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970 (1970 UNESCO Convention), Art. 9.

73 Hague Convention IV, Arts 28, 47; Emma Cunliffe, Nibal Muhesen and Marina Lostal, "The Destruction of Cultural Property in the Syrian Conflict: Legal Implications and Obligations", *International Journal of Cultural Property*, Vol. 23, No. 1, 2016, p. 7.

74 UNITAR, above note 23.

75 US Government Accountability Office (GAO), *Cultural Property: Protection of Iraqi and Syrian Antiquities*, Doc. GAO-16-673, Report to Congressional Requesters, August 2016, p. 9, available at: [www.gao.gov/products/GAO-16-673](http://www.gao.gov/products/GAO-16-673). For the relevance of this finding to further international efforts, see the statement of Ambassador Michele J. Sison, who, when explaining the US vote in favour of Resolution 2347 at the UN Security Council, singled out Abu Sayyaf, a now deceased high-ranking ISIS official, for illicitly trading in antiquities to finance terrorism. Ambassador Michele J. Sison, US Deputy Permanent Representative to the UN, US Mission to the UN, "Explanation of Vote at the Adoption of UN Security Council Resolution 2347 on the Destruction and Trafficking of Cultural Heritage by Terrorist Groups and in Situations of Armed Conflict", New York, 24 March 2017, available at: <https://usun.state.gov/remarks/7721>.

The UNESCO Convention was drafted against the backdrop of increasing thefts from museums and archaeological sites in the global South in the late 1960s and early 1970s, with objects often fraudulently imported with unidentified provenance and ending up in private collections and official institutions in Western countries.<sup>76</sup> The Convention is based on the idea that all States must participate in the fight against illicit trafficking, both through increased monitoring of what comes into their countries and by helping to return stolen objects. In the case of Syria, however, there are a number of obstacles to the Convention reaching its full potential. As some commentators have highlighted, it will be extremely difficult to trace illicitly exported objects since many have been illegally excavated from sites and were thus previously unknown, while others come from museums whose collections have not been properly inventoried. Furthermore, broken diplomatic relations between Syria and countries such as the United States and United Kingdom will make any international cooperation in this field that much more unlikely.<sup>77</sup> While these efforts were bolstered with the adoption of UN Security Council Resolution 2199 in February 2015, as will be discussed below, many obstacles remain to stemming the trafficking of Syrian artefacts.

Neither Syria nor any of its neighbours are party to the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, which strengthens the provisions of the 1970 UNESCO Convention and complements them with minimal rules on restitution and return which aim at harmonizing various existing pieces of legislation. It is nonetheless of interest since it could apply in importation States and could be utilized in the future. The UNIDROIT Convention provides direct tools to make a claim for recovery of stolen property and illegally exported cultural objects, and is self-executing into national law. A recent effort by Council of Europe States to stem the antiquities black market has resulted in the Nicosia Convention on Offences relating to Cultural Property (also known as the “Blood Antiquities Convention”), recently negotiated and opened for signature to States worldwide.<sup>78</sup> Seeking to facilitate better prevention, investigation and prosecution of cultural property crimes, it addresses the complex web of smugglers, handlers, restorers and sellers who aid the destruction and trafficking of cultural property. The new Nicosia Convention seeks to close the existing gaps in the system, which were identified by the UN Security Council in its repeated calls for States to introduce effective national measures to prevent and combat trafficking in cultural property and related offences in Resolutions 2199 (12 February 2015), 2253 (17 December 2015), 2322 (12 December 2016) and 2347 (24 March 2017). These resolutions are explored in more detail below.

76 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/](http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/).

77 E. Cunliffe, N. Muhsen and M. Lostal, above note 73.

78 Council of Europe Convention on Offences relating to Cultural Property, 2017, available at: [www.coe.int/web/conventions/full-list/-/conventions/rms/0900001680710435](http://www.coe.int/web/conventions/full-list/-/conventions/rms/0900001680710435).

## International human rights law

The protection of cultural heritage is firmly underpinned by international human rights law, which sets out the right of access to and enjoyment of cultural heritage, the right to take part in cultural life, the right of members of minorities to enjoy their own culture, and the right of indigenous peoples to self-determination and to maintain, control, protect and develop cultural heritage in peacetime and in war.<sup>79</sup> The Special Rapporteur in the field of cultural rights has stated that this also includes the

right of individuals and collectivities to *inter alia* know, understand, enter, visit, make use of, maintain, exchange and develop cultural heritage, as well as to benefit from the cultural heritage and the creation of others. It also includes the right to participate in the identification, interpretation and development of cultural heritage, as well as in the design and implementation of preservation and safeguard policies and programmes.<sup>80</sup>

The Special Rapporteur argues that cultural heritage is fundamentally linked to other human rights as well, as a resource for the rights to freedom of opinion and expression, freedom of thought, conscience and religion, as well as economic rights, the right to education and the right to development. This perspective imbues cultural property with a “human dimension”, emphasizing its significance for individuals and groups and their identity.<sup>81</sup>

International human rights law, in taking this perspective, sets out clear protections for cultural property. In its General Comment No. 21, the Committee on Economic, Social and Cultural Rights recalled that States’ obligation to ensure the right to participate in cultural life under Article 15 of the International Covenant on Economic, Social and Cultural Rights includes the obligation to respect and protect cultural heritage in all its forms and of all groups.<sup>82</sup> Specifying that this obligation applies in times of armed conflict, General Comment No. 21 outlines that the obligation to respect and protect cultural heritage includes “the care, preservation and restoration of historical sites, monuments, works of art and literary works, among others”,<sup>83</sup> and notes that “the obligations to respect and to protect freedoms, cultural heritage and cultural diversity are interconnected”, making it impossible to separate a people’s cultural heritage from the people

79 *Report of the Independent Expert in the Field of Cultural Rights*, UN. Doc. A/HRC/17/38 and Corr.1, 21 March 2011, para. 79.

80 *Ibid.*

81 *Report of the Special Rapporteur in the Field of Cultural Rights*, UN Doc. A/HRC/31/59, 3 February 2016, para. 47; *Report of the Independent Expert in the Field of Cultural Rights*, above note 79, para. 77. For example, in 2012, the independent expert in the field of cultural rights, Ms Shaheed, noted that “the destruction of tombs of ancient Muslim saints in Timbuktu, a common heritage of humanity, is a loss for us all, but for the local population it also means the denial of their identity, their beliefs, their history and their dignity”.

82 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 21, “Right of Everyone to Take Part in Cultural Life (Art. 15, Para. 1a of the Covenant on Economic, Social and Cultural Rights)”, E/C.12/GC/21, 21 December 2009, para. 50.”

83 *Ibid.*, para. 50(a).

themselves and their rights.<sup>84</sup> Beyond preserving and safeguarding an object or a cultural manifestation in itself, the human rights approach to cultural heritage “obliges one to take into account the rights of individuals and communities in relation to such object or manifestation and, in particular, to connect cultural heritage with its source of production”.<sup>85</sup>

The Special Rapporteur in the Field of Cultural Rights takes the view that the human rights and human dimension-focused protections of cultural heritage have influenced the international treaties that protect cultural property as such. Noting the widespread support for the Convention concerning the Protection of the World Cultural and Natural Heritage (1972) and the Convention for the Safeguarding of the Intangible Cultural Heritage (2003), the Special Rapporteur has observed that in recent years a shift has taken place from the preservation and safeguarding of cultural heritage as such to the protection of cultural heritage as being of crucial value for human beings in relation to their cultural identity.<sup>86</sup>

### Applicable UN Security Council resolutions

Four UN Security Council resolutions address the cultural property crisis in Syria and Iraq, across whose territories ISIS carried out its campaign of cultural property destruction<sup>87</sup> and where years of armed conflict have endangered a rich cultural heritage. In May 2003, following the US-led invasion of Iraq and public condemnation of its failure to protect Iraq’s museums and cultural institutions from looting in the early days of the occupation, the UN Security Council adopted Resolution 1483. It called on member States to take a number of measures to assist in the post-conflict reconstruction in Iraq, including “appropriate steps to facilitate the safe return of Iraqi cultural property” such as by “establishing a prohibition on trade in or transfer of such items”.<sup>88</sup> In many ways, this resolution has laid the foundation for the Security Council’s response to the decimation of Iraq’s cultural property over the span of almost fifteen years since. Critically, with the Security Council finding that the situation in Iraq in 2003 still constituted a threat to international peace and security, the resolution was adopted under Chapter VII of the UN Charter, making it binding on all UN member States. It also positioned the return of Iraqi cultural property and prohibition on further transfers as part of the post-conflict reconstruction of Iraq, and connected to the maintenance of international peace and security.

Resolution 2139, primarily calling on all parties to the conflict in Syria to permit access to humanitarian aid and adopted unanimously in February 2014,

84 *Ibid.*, para. 50.

85 *Report of the Independent Expert in the Field of Cultural Rights*, above note 79, para. 2.

86 *Report of the Special Rapporteur in the Field of Cultural Rights*, above note 81, para. 53.

87 For further analysis of ISIS’ destruction of cultural heritage, see Ömür Harmanşah, “ISIS, Heritage, and the Spectacles of Destruction in the Global Media”, *Near Eastern Archaeology*, Vol. 78, No. 3, 2015; Sofya Shahab and Benjamin Isakhan, “The Ritualization of Heritage Destruction under the Islamic State”, *Journal of Social Archaeology*, Vol. 18, No. 2, 2018.

88 UNSC Res. 1483, 22 May 2003, para. 7.

also called on the parties to “save Syria’s rich societal mosaic and cultural heritage, and take appropriate steps to ensure the protection of Syria’s World Heritage Sites”.<sup>89</sup> 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.

A year later, in February 2015, the Security Council unanimously passed Resolution 2199 under Chapter VII of the UN Charter, particularly addressing ISIS’ destruction of cultural property. It “condemn[ed] the destruction of cultural heritage in Iraq and Syria” by ISIS and required that all UN member States “take appropriate steps to prevent the trade in [illegally obtained] Iraqi and Syrian cultural property and other items of archaeological, historical, rare scientific, and religious importance”,<sup>90</sup> echoing the language of Resolution 1483. Resolution 2199 sets out concrete steps including “prohibiting cross-border trade in such items”, and mandates UNESCO, Interpol and other organizations to assist in the implementation of such steps.<sup>91</sup>

Resolution 2199 marked a turning point for the international community in addressing the destruction of cultural property. By 2015, ongoing conflicts in the Middle East, notably in Iraq and Syria, as well as Mali, had brought considerable attention to the issue of the destruction of cultural heritage by armed groups. After several years of pressure, the UN Security Council condemned the destruction of Syria’s heritage and reaffirmed the significance of preventing the illicit trafficking of Syrian artefacts, as it did in Iraq in 2003 through Resolution 1483. Addressing the linkage with counterterrorism and trafficking of cultural property by terrorist organizations, the Security Council adopted the resolution aiming to disrupt financing of terrorist organizations, notably ISIS and the Al-Nusra Front, whose operational capacities benefited from the illegal trafficking of cultural heritage.<sup>92</sup>

It is important to note that a similar prohibition targeting the assault on Iraq’s cultural heritage in 2003 was effective in reducing the amount of illicit objects on the international market.<sup>93</sup> Resolution 2199 laid the foundation for strengthening the protection response to cultural property destruction.

Both States and international organizations have since built upon Resolution 2199 to put cultural protection onto the Security Council agenda. For instance, on 27 April 2016, as a follow-up to Resolution 2199, France and then-Security Council

89 UNSC Res. 2139, 22 February 2014, Preamble.

90 UNSC Res. 2199, UN Doc S/RES/2199, 12 February 2015, para. 15. On this resolution and, more generally, on cultural heritage in prior resolutions and the link between cultural heritage and terrorism, see 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](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Study_Negri_RES2199_01.pdf).

91 UNSC Res. 2199, 12 February 2015.

92 UNSC Res. 2199, 12 February 2015, Preamble.

93 Neil Brodie, “The Market Background to the April 2003 Plunder of the Iraq National Museum”, in Peter G. Stone and Joanne Farchakh Bajjaly (eds), *The Destruction of Cultural Heritage in Iraq*, Boydell Press, Woodbridge, 2008; compare Sam Hardy, “Syria/Lebanon: Syrian-Lebanese Antiquities-for-Arms Trade”, *Conflict Antiquities Blog*, 12 May 2013, cited in E. Cunliffe, N. Muhesen and M. Lostal, above note 73.

member Jordan organized an Arria-formula meeting, a confidential and informal session on combating the destruction, smuggling and theft of cultural heritage as well as accountability for these actions. On 20 January 2017, the Security Council adopted a press statement on the destruction of cultural heritage and executions in Palmyra, Syria.<sup>94</sup> Following the adoption of Resolution 2199, UNESCO developed a strategy to strengthen its capacity to respond urgently to cultural emergencies. This strategy explicitly refers to human rights and cultural rights and develops actions to be taken to reduce the vulnerability of cultural heritage before, during and after conflict. It also includes rehabilitation of cultural heritage, recognizing its role in strengthening intercultural dialogue, humanitarian action, security strategies and peacebuilding.<sup>95</sup> The strategy was followed up with the adoption of Operational Guidelines for the Implementation of the UNESCO Convention, which strives to improve existing efforts at repatriating illicitly trafficked objects to Syria.<sup>96</sup>

All these efforts culminated in the unanimous adoption of Resolution 2347 in March 2017, as the first ever Security Council resolution to focus on cultural heritage. While it was not adopted under Chapter VII, UNESCO heralded the unanimous support for the resolution as reflecting a new recognition of the importance of heritage protection for peace and security.<sup>97</sup>

The negotiations around Resolution 2347 are instructive, in that they reveal a range of diverging views on how to address specific aspects of protecting cultural heritage in armed conflict. The initial draft text drew on elements from several prior Security Council outcomes pertaining to counterterrorism, most notably Resolution 2199. In addition, the penholders – France and Italy – incorporated relevant language used in the outcomes of other UN bodies and agencies as well as international conventions and other sources of international law. At its basis, Resolution 2347 aimed to take Resolution 2199 and expand it beyond dealing exclusively with the threat to cultural property posed by terrorism to include the protection of cultural heritage internationally in the event of armed conflict more generally. Some Security Council members, most notably Russia and Egypt, were uncomfortable with this wider scope, arguing that the draft would be too diffuse and vague as a result.<sup>98</sup>

The initial draft text also included references to the two main outcomes of the 2016 Abu Dhabi Conference on Safeguarding Endangered Cultural Heritage,

94 UN Security Council, “Press Statement on Destruction of Cultural Heritage, Executions in Palmyra”, UN Doc. SC/12690, 20 January 2017.

95 UNESCO, *Reinforcement of UNESCO’s Action for the Protection of Culture and the Promotion of Cultural Pluralism in the Event of Armed Conflict*, UNESCO Docs 38 C/49 and 197/EX/10, 2 November 2015 and 17 August 2015.

96 UNESCO, *Operational Guidelines for the Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, Paris, 1970, cited in E. Cunliffe, N. Muhsen and M. Lostal, above note 73, 2016.

97 UNESCO, “UN Security Council Adopts Historic Resolution for the Protection of Heritage”, 24 March 2017.

98 “Briefing and Draft Resolution on Protection of Cultural Heritage in Armed Conflict”, *What’s in Blue*, 23 March 2017, available at: <http://www.whatsinblue.org/2017/03/briefing-and-draft-resolution-on-protection-of-cultural-heritage-in-armed-conflicts.php>; UN Security Council, *Protection of Cultural Heritage in Armed Conflict*, 31 October 2017.

welcoming the intention to create an international fund for the protection of cultural heritage, as well as encouraging the creation of a network of safe havens in the country of origin and, as a last resort, in another country.<sup>99</sup> The concept of the creation of a network of safe havens for cultural heritage outside the country of origin was particularly troubling for members who place emphasis on the importance of respecting sovereignty and who questioned the concept's universal applicability, as only two countries in the world, France and Switzerland, have enacted legislation that allows for the creation of such safe havens. Other States opposed reference to the creation of an international fund for the protection of endangered cultural heritage, and as a compromise, the draft emphasized that member States have the primary responsibility for protecting their cultural heritage, and if appropriate can create safe havens in their own territory rather than internationally.<sup>100</sup>

Aside from these more contentious issues, Security Council members seem to have been in broad agreement on the proposed list of measures to be implemented by member States. These include creating and improving national inventory lists of cultural heritage and sharing this data with relevant authorities; adopting regulations on export/import of cultural property in line with international standards; information sharing with Interpol, UNESCO, the UN Office on Drugs and Crime and other agencies; and taking steps to ensure safe return of cultural property that has been displaced or removed due to armed conflict. Resolution 2347 also recognized that UN peacekeeping operations could encompass the protection of cultural heritage.<sup>101</sup> While it remains to be seen whether the relevant authorities on the ground will request such assistance, as stipulated in the resolution, this signals that the UN Security Council is building on the experience of the Multidimensional Integrated Stabilization Mission in Mali (MINUSMA). MINUSMA assists the transitional authorities in Mali with the protection of cultural and historic sites in collaboration with UNESCO, and is currently the only active UN peacekeeping mission that has this provision in its mandate.<sup>102</sup>

The principles established in these resolutions have also been anchored into more recent decisions of the Security Council, such as Resolution 2379, which creates an independent team to assist in holding ISIS accountable for its crimes in Iraq. This resolution, in condemning the crimes committed by ISIS, explicitly refers to the destruction of cultural heritage, including archaeological sites, and trafficking of cultural property.<sup>103</sup> This demonstrates that the

99 Note that France reported having designated a safe haven on its territory not only for its own cultural objects but also for those from other countries "upon request": see *Report of the Secretary-General on the Implementation of Security Council Resolution 2347 (2017)*, UN Doc. S/2017/969, 17 November 2017, para. 84.

100 UNSC Res. 2347, 24 March 2017, para. 5, taking note of the Abu Dhabi outcomes in paras 15 and 16.

101 *Ibid.*, para. 19.

102 UNSC Res. 2100, 25 April 2013, para. 16(f): "Support for cultural preservation – To assist the transitional authorities of Mali, as necessary and feasible, in protecting from attack the cultural and historical sites in Mali, in collaboration with UNESCO."

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

protection of cultural property, in the eyes of the Security Council, includes accountability measures.

## Cultural property as a battleground in Syria

The damage caused to cultural property in Syria is reflective of the manner in which the war has been fought. A large number of heritage sites and museums have had their infrastructure damaged as a result of being caught in the middle of hostilities, such as the Ancient Cities of Bosra and Aleppo.<sup>104</sup> Sites such as Krak des Chevaliers and the Aleppo Citadel have been used for military purposes.<sup>105</sup> Looting and illegal trafficking have emerged as sources of funding that contribute to the proliferation of arms, with groups that are well-organized and often armed systematically targeting numerous archaeological sites in Syria for clandestine excavations.<sup>106</sup> Museums in Syria are also a cause for concern, and there have been many instances of looting of valuable cultural property. Armed groups, including ISIS, have deliberately targeted cultural property such as the sites at Palmyra.<sup>107</sup>

The destruction of heritage in Syria has also been politicized, with the government army and armed groups exchanging accusations about the destruction of Syria's heritage sites and using these accusations for propaganda purposes. The government blames armed Islamist groups for looting, while the armed groups emphasize the government's indiscriminate use of heavy artillery against historic sites.<sup>108</sup> Both sides have been accused of embedding military positions in heritage sites.<sup>109</sup> Control over cultural property has also become highly politicized, notably with Palmyra's Roman Theatre being used as a site for a concert by the Mariinsky Symphony Orchestra from St. Petersburg, Russia<sup>110</sup> and subsequently severely damaged through a deliberate detonation by ISIS.<sup>111</sup>

Cultural property is thus at the front lines of the war in Syria. It is the battleground and target for new actors in the conflict and is being destroyed for propaganda purposes. All of this has put existing international law rules to the test.

104 Directorate-General of Antiquities and Museums (DGAM), *State Party Report: On the State of Conservation of the Syrian Cultural Heritage Sites (Syrian Arab Republic)*, Ministry of Culture, Syrian Arab Republic, 1 February 2017.

105 *Oral Update of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/29/CRP.3, 23 June 2015.

106 US GAO, above note 75.

107 UNESCO, "UNESCO Director-General Condemns the Destruction of the Arch of Triumph in Palmyra – 'Extremists are Terrified of History'", 5 October 2015; UNESCO, "Director-General Irina Bokova Expresses Consternation at the Destruction of the Temple of Bel in Palmyra", 1 September 2015; UNESCO, "Director-General of UNESCO Irina Bokova Firmly Condemns the Destruction of Palmyra's Ancient Temple of Baalshamin, Syria", 24 August 2015.

108 "Syria Urges International Community to Work to Stop Looting Syrian Cultural Heritage", SANA, 9 March 2016, available at: <https://sana.sy/en/?p=71579>.

109 Oral Update, above note 105.

110 "Russia's Valery Gergiev Conducts Concert in Palmyra Ruins", *BBC News*, 5 May 2016, available at: [www.bbc.co.uk/news/world-middle-east-36211449](http://www.bbc.co.uk/news/world-middle-east-36211449).

111 UNESCO, "UNESCO Director-General Condemns Destruction of the Tetracylon and Severe Damage to the Theatre in Palmyra, a UNESCO World Heritage Site", UNESCO, 20 January 2017.

Some commentators have warned that the vocal condemnation of the destruction of cultural property in Syria in the media is considered by many ordinary Syrians as indifference to the losses of thousands of lives, and that the destruction of ancient sites and artefacts cannot compare to the degree of human suffering.<sup>112</sup>

This is a concern that deserves attention. It is also a concern that has found its way into the deliberations of judges at the ICC. In the *Al Mahdi* case, judges made it clear that “[i]n the view of the Chamber, even if inherently grave, crimes against property are generally of lesser gravity than crimes against persons”.<sup>113</sup>

This division – between crimes against property and crimes against persons – may, however, be an artificial one. The Special Rapporteur in the field of cultural rights, in reflecting on many of the submissions she has received, argues that the tangible and intangible dimensions of cultural heritage are closely interconnected. She posits that the protection of cultural heritage is part of the protection of human life. The destruction of tangible cultural property – broadly defined by the 1954 Hague Convention as including movable or immovable property<sup>114</sup> – leads to the destruction of the intangible, such as religious and cultural practices, traditions, customs, forms of artistic expression and folklore, a sense of history and memory, and the identity of a society or community. The Special Rapporteur highlights that “combined attacks on cultural heritage and people and their cultural rights”, as have been the case in Syria and Iraq, “spread terror, fear, and despair”.<sup>115</sup>

An alternate perspective positions cultural heritage as an “international public good” that inherently deserves the attention and concern of the international community. Cultural internationalism and the opposing approach of cultural nationalism have both left their imprint on international legal instruments regarding cultural property.<sup>116</sup> Cultural internationalism sees cultural property as belonging to the cultural heritage of all people and creates a global interest in cultural property. This idea can be traced back to the Napoleonic era’s notion of a “common heritage of mankind”,<sup>117</sup> which was for the first time formally reflected in the Preamble to the 1954 Hague Convention, stating that “damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the

112 Sir Derek Plumbly, “Cultural Heritage in Times of War and the Present Crisis in the Middle East”, Gresham College, 19 May 2016.

113 ICC, *Al Mahdi*, above note 13, para. 77. See also ICC, *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07-3484-ENG, Sentencing Decision (Trial Chamber), 23 May 2014, paras 42, 43; ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Case No. ICC-01/12-01/15-141-Corr-Red, Defence Sentencing Observations, 20 September 2016, paras 121–123, 127–128.

114 1954 Hague Convention, Art. 1.

115 *Report of the Special Rapporteur in the Field of Cultural Rights*, UN Doc. A/71/317, 9 August 2016, para. 7, referencing the submission of Patrice Meyer-Bisch.

116 Jane Warring, “Underground Debates: The Fundamental Differences of Opinion that Thwart UNESCO’s Progress in Fighting the Illicit Trade in Cultural Property”, *Emory International Law Review*, Vol. 19, No. 1, 2005, pp. 246–247.

117 ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Case No. ICC-01/12-01/15, Annex II, Confidential Expert Report – Reparations Phase (Dr Marina Lostal), 28 April 2017 (amended 3 May 2017).

culture of the world”.<sup>118</sup> Cultural nationalism, in contrast, is focused on the notion that cultural property should remain in its country of origin, accessible to the society and community to which it belongs. Rooted in the principle of State sovereignty, cultural nationalism emphasizes that a people’s cultural heritage is linked to cultural objects and thus demands their repatriation. This idea lies at the core of the 1970 UNESCO Convention. But the UNESCO Convention also demonstrates that these two notions are not incompatible. Cultural internationalism can encompass cultural nationalism.<sup>119</sup> Cultural objects can “belong” to humanity at large – and their destruction concern the entirety of mankind – but still be best preserved and appreciated within their own place, history, origin and setting.<sup>120</sup> This idea is upheld by the UNESCO Convention, which considers that “cultural property constitutes one of the basic elements of civilization and national culture”.<sup>121</sup>

From this perspective, there are striking parallels between the way in which the protection of cultural property and heritage has been conceptualized in international law, and the thinking behind the concept of crimes against humanity. The concept of crimes against humanity is generally seen as having two broad features. First, that the crime is so heinous that it is viewed as an attack on the very quality of being human.<sup>122</sup> Second, that the crime is so grave that it is an attack not just upon the immediate victims but also against all humanity, meaning that the entire community of humankind has an interest in its punishment. It has been noted that while rules proscribing war crimes address the criminal conduct of a perpetrator towards an immediate protected object, rules proscribing crimes against humanity address the perpetrator’s conduct not only towards the immediate victim but also towards the whole of humankind, as they constitute egregious attacks on human dignity and on the very notion of humaneness. They consequently affect, or should affect, each and every member of mankind, whatever his or her nationality, ethnic group and location.<sup>123</sup> It is this second element that bears striking similarity to the idea that an attack on the cultural property of any one people harms the cultural heritage of all humankind.

This idea has been upheld in international jurisprudence. At the ICTY, in assessing the seriousness of the offence of damage to cultural property in the *Strugar*

118 1954 Hague Convention, Preamble.

119 Zsuzsanna Veres, “The Fight Against Illicit Trafficking of Cultural Property: The 1970 UNESCO Convention and the 1995 UNIDROIT Convention”, *Santa Clara Journal of International Law*, Vol. 12, No. 2, 2014.

120 David N. Chang, “Stealing Beauty: Stopping the Madness of Illicit Art Trafficking”, *Houston Journal of International Law*, Vol. 28, No. 3, 2006, p. 847.

121 1970 UNESCO Convention, Preamble, third recital.

122 Hannah Arendt characterized the Holocaust as a “new crime, the crime against humanity – in the sense of a crime ‘against human status,’ or against the very nature of mankind”. Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, Viking Press, New York, 1965, p. 268.

123 ICTY, *The Prosecutor v. Erdemović*, Case No. IT-96-22-A, Judgment (Appeals Chamber), Joint Separate Opinion of Judges McDonald and Judge Vohrah, 7 October 1997, para. 21. See also David Luban, “A Theory of Crimes against Humanity”, *Yale Journal of International Law*, Vol. 29, No. 1, 2004, para. 90; Richard Vernon, “What is Crime against Humanity?”, *Journal of Political Philosophy*, Vol. 10, No. 3, 2002; Christopher Macleod, “Towards a Philosophical Account of Crimes against Humanity”, *European Journal of International Law*, Vol. 21, No. 2, 2010.

case, the Trial Chamber observed that such property is, by definition, of “great importance to the cultural heritage of every people”.<sup>124</sup> The consequence of such an approach is that the victim of the offence of damage to cultural property is thus broadly understood as a “people” rather than any particular individual. And despite this abstraction, the Chamber held that the offence involves grave consequences for the victim, meeting the same criteria of gravity as other grave breaches prosecuted at the ICTY.<sup>125</sup> In the *Jokić* case, for instance, the Trial Chamber noted that the destruction and damage inflicted on the Old Town of Dubrovnik were very serious crimes, finding that “since it is a serious violation of international humanitarian law to attack civilian buildings, it is a crime of even greater seriousness to direct an attack on an especially protected site, such as the Old Town”.<sup>126</sup> In the *Kordic and Cerkez* case, the Trial Chamber described attacks on ancient mosques in Bosnia and Herzegovina as “an attack on the very religious identity of a people” and stated that as such, the attacks “manifest[ed] a nearly pure expression of the notion of ‘crimes against humanity’, for all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects”.<sup>127</sup> As Judge Cançado Trindade explained in his opinion related to the 2011 order of the International Court of Justice (ICJ) regarding the case of the Temple of Preah Vihear in Cambodia, “the ultimate *titulaires* of the right to the safeguard and preservation of their cultural and spiritual heritage are the collectivities of human beings concerned, or else humankind as a whole”.<sup>128</sup>

And indeed, underlying the *Al Mahdi* conviction is the prosecution’s emphasis on the human impact of his crimes, arguing that human suffering is an essential part of the destruction of cultural property. At the reparations stage of proceedings, judges identified the “international community” as among the victims of the crimes committed.<sup>129</sup> In the judgment, the Trial Chamber noted that due to the UNESCO World Heritage status of the sites, “their attack appears to be of particular gravity as their destruction does not only affect the direct victims of the crimes, namely the faithful and inhabitants of Timbuktu, but also people throughout Mali and the international community”.<sup>130</sup> In support, the judges refer to the testimony of a witness who described how the entire international community, in the belief that heritage is part of cultural life, is suffering as a result of the destruction of the protected sites.<sup>131</sup> While clearly building on the jurisprudence of the ICTY, the *Al Mahdi* case at the ICC marks

124 ICTY, *Strugar*, above note 48, para. 232, citing the 1954 Hague Convention, Art. 1(a).

125 *Ibid.*, paras 218, 232.

126 ICTY, *The Prosecutor v. Miodrag Jokić*, Case No. IT-01-42/1-S, Judgment (Trial Chamber), 18 March 2004, paras 45, 53.

127 ICTY, *The Prosecutor v. Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2-T, Judgment (Trial Chamber), 26 February 2001, para. 207.

128 ICJ, *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Request for Interpretation of the Judgment of 15 June 1962, Separate Opinion of Judge Cançado Trindade, *ICJ Reports 2013*, 11 November 2013, p. 606, para. 114.

129 ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Case No. ICC-01/12-01/15, First Transmission and Report on Applications for Reparations (Trial Chamber), 16 December 2016, para. 9.

130 ICC, *Al Mahdi* (Judgment and Sentence), above note 55, para. 80.

131 *Ibid.*

the first time that the international community as such has been identified as a victim during reparations proceedings. This extends the right to reparations to the international community at large. This is a bold and notable move, as traditionally the prohibition against attacking cultural property has not been associated with any human impact – and none of the articles of the cultural heritage conventions establish a link between damage to cultural property and harm caused to human beings, their social structure or religious practices. While they are founded on the idea that “damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind”,<sup>132</sup> it is the human rights movement and international criminal jurisprudence that have made the link between monuments and human identity explicit.

Another approach argues that crimes against property and crimes against people should not compete for our attention; that these are not issues subject to prioritization, as the protection of cultural property should be an integral element of any humanitarian effort. In August 2013, then-UNESCO director-general Irina Bokova emphasized:

I am keenly aware that in the context of a tragic humanitarian crisis, the state of Syria’s cultural heritage may seem secondary. However, I am convinced that each dimension of this crisis must be addressed on its own terms and in its own right. There is no choice between protecting human lives and safeguarding the dignity of a people through its culture. Both must be protected, as the one and same thing. There is no culture without people and no society without culture.<sup>133</sup>

This approach strongly echoes that of the Special Rapporteur in the field of cultural rights, equating the protection of cultural property with the protection of a fundamental tenet of human life.<sup>134</sup>

In practice, this has meant that the protection of cultural heritage has acquired a role in humanitarian response. The November 2015 strategy for the reinforcement of UNESCO’s actions for the protection of culture and the promotion of cultural pluralism,<sup>135</sup> adopted by the organization’s 38th General Conference, identifies one objective as being to “[i]ncorporate the protection of culture into humanitarian action, security strategies and peacebuilding processes by engaging with relevant stakeholders outside the culture domain”, citing “humanitarian, security and peace-building actors” in particular.<sup>136</sup> In February 2016, UNESCO signed a Memorandum of Understanding with the ICRC that envisions the sharing of information on cultural property at risk in situations of

132 1954 Hague Convention, Preamble.

133 UNESCO, “Discours de la Directrice générale de l’UNESCO Irina Bokova, à l’occasion de la Réunion de haut niveau pour la protection du patrimoine culturel syrien”, 29 August 2013.

134 *Report of the Special Rapporteur in the Field of Cultural Rights*, above note 115, para 7, referencing the submission of Patrice Meyer-Bisch.

135 UNESCO, *Reinforcement of UNESCO’s Action for the Protection of Culture and the Promotion of Cultural Pluralism in the Event of Armed Conflict*, UN Doc. 197 EX/10, 17 August 2015.

136 *Ibid.*, paras 32, 48.

armed conflict, and the ICRC assisting in rescuing, evacuating or undertaking emergency safeguarding measures to protect specific cultural property at imminent risk.<sup>137</sup> Then-UNESCO director-general Irina Bokova presented the partnership as testimony to the “growing global awareness that protecting cultural heritage is not just a cultural emergency but indeed a humanitarian imperative”.<sup>138</sup> A discussion has branched out from this view as to whether the destruction of cultural property should trigger early-warning alarms as an indicator in the prevention of atrocities, and whether it can in and of itself trigger the “responsibility to protect”. In 2014, the UN Office on Genocide Prevention and the Responsibility to Protect developed a new Framework of Analysis for Atrocity Crimes, a tool for assessing the risk of genocide, war crimes and crimes against humanity, in which destruction of property of cultural and religious significance is considered a significant indicator in the prevention of atrocity crimes.<sup>139</sup> This is upheld by historical example, with the restoration of cultural property contributing to the restoration of social and economic life. For instance, following the Spanish Civil War and, later, the Balkan Wars, “refugees and displaced people did not return to their former towns and villages until rebuilding of significant heritage sites occurred, even if this was many years later”.<sup>140</sup>

In 2015, UNESCO convened a group of experts to explore whether the notion of the “responsibility to protect”, as found in paragraphs 138–140 of Resolution 60/1 (in which the UN General Assembly adopted the 2005 World Summit Outcome), could be applied in the context of cultural heritage. The expert group recognized that the intentional destruction and misappropriation of cultural heritage can constitute war crimes and crimes against humanity and can indicate genocidal intent, and thus may fall within the scope of the “responsibility to protect”.<sup>141</sup> As Raphael Lemkin, the jurist responsible for articulating the crime of genocide, recognized: “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.”<sup>142</sup>

In many ways, the responsibility to protect is already part of the framework protecting cultural property and heritage. This is a testament to cultural property being an integral element of human life, an international public good and a humanitarian imperative, as set out above. For instance, the 1972 World Heritage Convention establishes a mechanism by which States can trigger international protective measures that can prevent damage to cultural property at risk, in the form of assistance in securing sensitive areas with fences, establishing surveillance

137 Memorandum of Understanding between UNESCO and the ICRC, 29 February 2016, Art. 1(v–vi).

138 UNESCO, “UNESCO and ICRC Partner on the Protection of Culture Heritage in the Event of Armed Conflict”, 29 February 2016.

139 UN, *Framework of Analysis for Atrocity Crimes: A Tool for Prevention*, July 2014.

140 Marina Lostal and Emma Cunliffe, “Cultural Heritage that Heals: Factoring in Cultural Heritage Discourses in the Syrian Peacebuilding Process”, *The Historic Environment: Policy and Practice*, Vol. 7, No. 2–3, 2016, p. 250.

141 International Expert Meeting on the Responsibility to Protect as Applied to the Protection of Cultural Heritage, Recommendations, Paris, 26–27 November 2015.

142 Robert Bevan, *The Destruction of Memory: Architecture at War*, Reaktion Books, London, 2016, Preface.

and patrols, and issuing of warnings.<sup>143</sup> The transnational nature of the legal obligations on trafficking of cultural property, as set out in the 1970 UNESCO Convention, involves all States Parties in protection activities. This means that should enforcement fail at the national level, there are mechanisms available that can assist the return of illicitly exported cultural property to a country like Syria.<sup>144</sup> In a practical and concrete way, the UNESCO Convention obliges third States to undertake positive steps to protect cultural property at risk, in line with the common Article 1 obligation to “respect and ensure respect” for the provisions of the Geneva Conventions “in all circumstances”.<sup>145</sup> This is an example of a practical measure that States can undertake within their own jurisdictions and in their relationships with the forces they support, in order to provide real and tangible protection in the context of the armed conflict in Syria; it demonstrates the unique nature of the international legal protections afforded to cultural property, and positions cultural property protections as a true international law enforcement effort.

## **Innovations in protection that have emerged in response to the destruction of cultural property in Syria**

The protection of cultural heritage has emerged as one of the few areas in which the international community has galvanized and come up with innovative responses in Syria. The response has not been comprehensive or uniformly effective, but it has broadened horizons at a time and in a conflict marked by a lack of compliance with, and a general disregard for, international law. Starting from the ground, individuals and cultural institutions have taken on the role of first responders and filled the vacuum through mounting an effective civil society response. States have, perhaps most significantly, adopted concrete measures that have contributed to the protection of Syrian cultural property – and have laid the foundation for further protective interventions. Finally, international organizations have expanded their own actions to prevent the destruction of cultural heritage, stretching their mandates in response.

Non-State actors such as local volunteers and cultural institutions, both in affected countries and foreign States, have been the first to respond to threats to cultural property. Volunteer networks in local communities in Syria provide security and protect archaeological sites from illegal excavations, and safeguard museums from looters. They have also helped to recover looted items of cultural significance and collect information about objects at risk.<sup>146</sup> Museums in foreign

143 Marina Lostal, *International Cultural Heritage Law in Armed Conflict: Case Studies of Syria, Libya, Mali, the Invasion of Iraq and the Buddhas of Bamiyan*, Cambridge University Press, Cambridge, 2017, p. 110.

144 Marina Lostal, “Syria’s World Cultural Heritage and Individual Criminal Responsibility”, *International Review of Law*, Vol. 2015, No. 3, 2015.

145 Knut Dörmann and Jose Serralvo, “Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations”, *International Review of the Red Cross*, Vol. 96, No. 895–896, 2015, p. 707.

146 UNESCO, “Syrian Citizens Protect Their Cultural Heritage”, available at: [www.unesco.org/new/en/safeguarding-syrian-cultural-heritage/national-initiatives/syrians-protect-their-heritage/](http://www.unesco.org/new/en/safeguarding-syrian-cultural-heritage/national-initiatives/syrians-protect-their-heritage/).

States, including in the United States and United Kingdom,<sup>147</sup> have established capacity-building programmes to train Syrian and Iraqi antiquities professionals to protect museum collections against the effects of explosives, looting and other threats. For instance, the Smithsonian Institution's Cultural Rescue Initiative, through its Safeguarding the Heritage of Syria and Iraq Project,<sup>148</sup> has trained Syrian museum workers on the use of sandbags and other materials and techniques that they employed to protect immovable ancient mosaics in Ma'arra Museum in Idlib.<sup>149</sup> While these actions are commendable, it should be noted that they have been largely responsive and could have been avoided through better preventative action. For instance, under the 1972 World Heritage Convention, to which Syria is a party, Syria could have submitted a request for international assistance to protect cultural property at risk.<sup>150</sup> Such assistance, in the form of securing sensitive areas with fences, establishing surveillance and patrols, and the issuing of warnings, could have been used as "preventative measures against looting ... as soon as the outbreak of an armed conflict [became] inevitable, while the major channels of communication such as airports and roads remain[ed] open or safe".<sup>151</sup>

Most notably, third-party States have adopted measures that have demonstrated their ability to take on responsibility for the protection of cultural property in Syria. Through these measures, States – whether or not they are themselves party to the armed conflict in Syria – have contributed to ensuring respect for international law in Syria in line with their obligations under Articles 4(1) and 7(1) of the 1954 Hague Convention and common Article 1 of the Geneva Conventions. They have also developed innovative and effective protection mechanisms that have broadened the horizon beyond military assistance and intervention for States seeking to contribute to improving compliance with international law in Syria. While none of these measures protecting cultural property has been proclaimed as fulfilling States' obligations to ensure respect for IHL, some of them have been articulated as a response to the widespread assault on cultural heritage in contemporary conflicts and as an imperative for peace. For instance, when presenting the new European Union (EU) policy on cultural heritage protection to the UN General Assembly in September 2017, EU high representative Federica Mogherini emphasized that the protection of cultural heritage is "a security and foreign policy matter".<sup>152</sup> In adopting a revised Act to Protect Cultural Property, which implements the 1970 UNESCO Convention, Germany's federal government commissioner for culture and the media, Monika Grutters, said that the new piece of legislation

147 British Museum, "The Iraqi Archaeologists Saving Their Heritage", 3 March 2017.

148 Smithsonian Global, "Safeguarding Cultural Heritage in Syria and Iraq", available at: <https://global.si.edu/success-stories/safeguarding-cultural-heritage-syria-and-iraq>.

149 US GAO, above note 75.

150 1972 UNESCO Convention, Arts 19–21.

151 M. Lostal, above note 143, p. 110.

152 Remarks by High Representative/Vice-President Federica Mogherini at the Event on "Protecting Cultural Heritage from Terrorism and Mass Atrocities: Links and Common Responsibilities", New York, 21 September 2017.

would help “protect [the] cultural property ... of other States more effectively against clandestine excavations and illicit trafficking ... especially [in] crisis-ridden or war-torn countries, such as Syria and Iraq”.<sup>153</sup> Such statements highlight these measures as a model for future action.

States, including the US, have adopted the practice of taking information from lists of cultural property sites in Iraq and Syria into consideration when planning military action.<sup>154</sup> The UK has followed suit, by giving cultural institutions a role in engaging with arms bearers on their IHL obligations.<sup>155</sup> The EU, in turn, has developed its first (and indeed the world’s first) policy on international cultural relations, integrating cultural property protection experts into all fifteen EU military and civilian missions.<sup>156</sup> Announced in September 2017 at the UN General Assembly, the new EU policy also commits to restoring damaged and destroyed cultural sites, and prohibits the import of all illicit cultural goods. This builds on several similar initiatives, such as the Victoria & Albert Museum Culture in Crisis Programme, through which the museum works closely to support law enforcement, nationally and internationally, and the British armed forces to develop strategies to prevent the illicit trade of cultural goods.<sup>157</sup> Such developments appear to be part of a broader trend: in 2013, UNESCO developed a plan of action stemming from a regional training on Syrian cultural heritage, which proposed that the Syrian Directorate-General of Antiquities and Museums (DGAM) address the issue of illicit trafficking in Syria through “advocat[ing] with the military, in line with the 1954 Hague Convention, to avoid using major heritage sites for military purposes, based on the information collected on the ground on those sites”.<sup>158</sup>

Other States, with no military involvement in the region, have taken other measures. These measures include steps to preserve digital copies of documents that have become endangered due to the war; Finland has become one of the first countries in the world to serve as a haven for endangered documents from Syria, carrying out extensive digitization efforts in Damascus and storing the archives in Helsinki. This measure stemmed from a recommendation adopted by the 38th General Conference of UNESCO in 2015 that urged member States to take digitized cultural property into safekeeping. Only a few member States have so far seized the opportunity to participate in such safeguarding, but Finland serves as an encouraging example.<sup>159</sup>

153 Federal Government Commissioner for Culture and Media, “Key Aspects of the New Act on the Protection of Cultural Property in Germany”, Berlin, September 2016.

154 Peter Stone, “War and Heritage: Using Inventories to Protect Cultural Property”, *Heritage Inventories*, Getty Conversation Institute, Summer 2013.

155 Mark Brown, “British Museum and Army Team Up in Move to Rescue Iraq’s Heritage”, *The Guardian*, 26 February 2008.

156 Remarks Federica Mogherini, above note 152.

157 Victoria & Albert Museum, “The V&A’s Culture in Crisis Programme”, available at: [www.vam.ac.uk/content/articles/v/the-v-and-as-culture-in-crisis-programme/](http://www.vam.ac.uk/content/articles/v/the-v-and-as-culture-in-crisis-programme/).

158 UNESCO, *Regional Training on Syrian Cultural Heritage: Addressing the Issue of Illicit Trafficking*, Final Report and Recommendations, Amman, 10–13 February 2013.

159 Ministry of Education and Culture, “Endangered Syrian Documents Taken into Safekeeping at the National Archives of Finland”, Finland, 2 December 2016.

Several other States have begun to operationalize Article 3 of the 1954 Hague Convention, which obliges States parties to safeguard cultural property. They have done this both through passing national legislation restricting the transfer of cultural property, such as in Germany,<sup>160</sup> and through echoing the notion contained in Article 8 of the Convention, which envisions specially protected movable cultural property being placed in “a limited number of refuges intended to shelter movable cultural property in the event of armed conflict”, away from any military objectives and removed from any risk of damage. This operationalizing of the concept of refuges is one of the most exciting innovations in the area of cultural property protection.<sup>161</sup>

The establishment of “safe havens” and “refuges” as an effective way to safeguard movable cultural property in time of conflict also builds on Switzerland’s experience organizing the “Afghanistan Museum-in-Exile”. The Museum-in-Exile opened in 2001 and constituted a depository for the protection of Afghan cultural artefacts during the conflict in Afghanistan. The museum received more than 1,400 Afghan cultural objects from private donors and established a complete inventory created by dedicated volunteer specialists. The success of this initiative was secured by the successful restitution of the 1,400 objects to the National Museum of Afghanistan in Kabul in 2006, under the umbrella of UNESCO.<sup>162</sup> This notion of cultural property “safe havens” and “refuges”, while having long been envisioned under the 1954 Hague Convention, is now being revisited and is enjoying widespread support from States and cultural institutions. The Association of Art Museum Directors, representing the leadership of major art museums in the United States, Canada and Mexico, has even issued protocols for safe havens for works of cultural significance from countries in crisis.<sup>163</sup>

Building on this momentum, France and the United Arab Emirates have laid the groundwork for the creation of other similar “safe havens” for cultural property, to be responsible for the safekeeping and preserving of entrusted cultural heritage, for its inventorying, and for returning it to its owner or established source when requested. These broad principles were put down on paper in December 2016 in the Abu Dhabi Declaration<sup>164</sup> as an outcome from a conference on “Safeguarding Endangered Cultural Heritage” attended by forty countries. The declaration set out to pursue two ambitious, long term, goals to guarantee the further mobilization of the international community for the safeguarding of heritage:

The creation of an international fund for the protection of endangered cultural heritage in armed conflict, which would help finance preventive

160 Federal Government Commissioner for Culture and Media, above note 153.

161 1954 Hague Convention, Art. 8.

162 UNESCO, “Museum-in-Exile: Swiss Foundation Safeguards over 1,400 Afghan Artefacts”, 7 October 2000.

163 Association of Art Museum Directors, *Protocols for Safe Havens for Works of Cultural Significance from Countries in Crisis*, 28 September 2015.

164 International Council on Monuments and Sites (ICOMOS), “Abu Dhabi Declaration on Heritage at Risk in the Context of Armed Conflicts”, 3 December 2016, available at: <https://tinyurl.com/ybodfemx>.

and emergency operations, fight against the illicit trafficking of cultural artefacts, as well as contribute to the restoration of damaged cultural property; and

The creation of an international network of safe havens to temporarily safeguard cultural property endangered by armed conflicts or terrorism on their own territory, or if they cannot be secured at a national level, in a neighbouring country, or as a last resort, in another country, in accordance with international law at the request of the governments concerned, and taking into account the national and regional characteristics and contexts of cultural property to be protected.

In addition to emphasizing the role of UN institutions, particularly UNESCO, the declaration called for the support of the Security Council in achieving the aforementioned objectives. Following the Abu Dhabi Declaration, France, together with the United Arab Emirates, launched a fund, the International Alliance for the Protection of Cultural Heritage in Conflict Areas (ALIPH), based in Geneva, that will take urgent action in emergency cases and contribute to the evacuation and reconstruction of endangered or damaged cultural heritage.<sup>165</sup> Seven countries – France, Saudi Arabia, Kuwait, the United Arab Emirates, Luxembourg, Morocco and Switzerland – have pledged contributions, and six others – Italy, the UK, Germany, China, the Republic of Korea and Mexico – have expressed political support for the initiative.<sup>166</sup> With UNESCO acting as a member of the ALIPH board, this effort demonstrates the widespread interest among States in taking active measures to safeguard cultural property and ensure its protection from damage and destruction in armed conflict.

In turn, international organizations have stepped up their own efforts, stretching their activities, programmes and mandates to respond to the destruction of cultural property in armed conflict. The UNESCO 2013 Plan of Action addressed the issue of illicit trafficking by recommending to “train the Red Cross and Red Crescent staff in Syria, as well as the UN personnel in Syria to use site and monument evaluation forms, so that they could report on the condition of cultural heritage to DGAM and UNESCO when possible”.<sup>167</sup> This suggests that humanitarian actors could take on the role of monitoring and documenting the destruction of cultural property, which would further integrate the protection of cultural property into the humanitarian response, beyond the potential role for the ICRC in assisting in rescuing, evacuating or undertaking emergency safeguarding measures to protect specific cultural property at imminent risk, as envisioned in the February 2016 UNESCO–ICRC Memorandum of Understanding.<sup>168</sup> In 2014,

165 Embassy of France in Abu Dhabi, “UAE–French International Conference on Endangered Cultural Heritage to Take Place on December 2nd and 3rd 2016”, 1 December 2016.

166 UNESCO, “UNESCO, France and the Emirates Launch an International Alliance for the Protection of Heritage”, 20 March 2017.

167 UNESCO, above note 158, p. 18.

168 Memorandum of Understanding, above note 137, Art. 1(v–vi).

UNESCO created an Observatory for the Safeguarding of Syria's Cultural Heritage, to monitor the state of buildings, artefacts and intangible cultural heritage, to combat illicit trafficking and to collect information in order to restore the country's cultural heritage once the fighting is over.<sup>169</sup> The UNESCO director-general has called for the creation of "protected cultural zones" around heritage sites in Syria and Iraq; while this idea has so far not gained any traction, as a proposal it echoes the concept of neutralized, hospital and safety zones in IHL, marking a further potential innovation in the field of cultural property protection.<sup>170</sup>

## Remaining gaps

Despite these innovations, significant gaps in cultural property protection response persist, leaving Syrian cultural heritage at risk from the acts of negligence, recklessness and deliberate targeting that have marked the waging of the war. Broadly speaking, these gaps fall into two categories – gaps in the normative framework and in implementation.

The most fundamental normative gap in the protection of cultural property stems from the 1954 Hague Convention and its Second Protocol, both of which endorse the concept of military necessity, which permits favouring military advantage over the protection of cultural property. While both the 1954 Hague Convention and its Second Protocol limit the circumstances in which cultural property can be lawfully targeted, restricting exceptions and misuse, this fundamental gap remains.<sup>171</sup> The Special Rapporteur in the field of cultural rights has taken aim at this gap, calling attention to the fact that the prohibitions on theft, pillage, vandalism, and misappropriation and requisition of cultural property are not subject to a military necessity exception and are absolute, and stating that "the military necessity exception is undoubtedly subject to abuse", advocating for States to adopt the narrowest possible interpretation that would make any targeting or military use of cultural property "highly exceptional".<sup>172</sup> Indeed, emerging norms reveal a move to a more protective approach in practice, signalling an increased desire on the part of States to preserve, for posterity, the cultural heritage of mankind, despite the possible exigencies of war.<sup>173</sup> There are several indicative and encouraging examples. When the United States announced its intent to take whatever steps necessary to stop Axis traffic through Rome in 1943, there was a concerted effort

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.

171 Lostal notes that the "gist of all cultural property regulation is that these objects deserve a treatment sitting over and above that of civilian objects." Despite this being widely accepted, the language of the 1907 Hague Regulations, which includes historic monuments together with hospitals and places where the sick and wounded are collected and does not require a threshold of importance for the cultural site in question, was deemed "over-inclusive" by the end of the Second World War. M. Lostal, above note 144.

172 *Report of the Special Rapporteur in the Field of Cultural Rights*, above note 115, paras. 63-64.

173 For further discussion on this, see J. Toman, above note 33, p. 177.

to avoid sites of religious and cultural value. Airfields located in the suburbs were bombed, but the Axis military headquarters – undeniably a legitimate target – was left untouched as it was situated in the historic city centre.<sup>174</sup> During the First Gulf War, Saddam Hussein had placed Iraqi aircraft next to invaluable archaeological monuments at the ancient Sumerian site of Ur. Yet, despite the legitimacy of this as a military target, the United States refrained from ordering its destruction.<sup>175</sup> These examples are encouraging in that they reveal the ability and willingness of States to calibrate their targeting decisions in the course of hostilities to prioritize the protection of cultural property, even in cases where such targeting would be lawful under the existing legal framework.

Another gap in the normative framework protecting cultural property stems from its State-centric approach, which some have argued is ineffective. Cultural property protection, for instance as implemented in Syria since 2011, has been structured around the standards and practices enshrined within the 1954 Hague Convention and the 1970 UNESCO Convention. The policy emphasis of both is on the *in situ* protection of cultural sites and the recovery and return of stolen or looted cultural objects. Both have failed to stop the plunder and illegal trade of cultural objects from Syria. Thus, some have argued that instead of policy initiatives aimed at site protection and object recovery, a market-reduction approach could succeed by subduing demand.<sup>176</sup> Representatives from auction houses have also argued, from the perspective of the art market, that there has been insufficient engagement with the art market on the part of stakeholders, and that auction houses should be seen not as adversaries but as partners in the fight against the illicit trafficking of cultural property.<sup>177</sup>

Finally, there is a lack of effective special protection under IHL for the employees or defenders of cultural property, and limited protection for transports and appliances used for cultural property.<sup>178</sup> This problem is particularly stark in Syria, where by mid-2015, the Directorate-General of Antiquities and Museums had lost fourteen staff members who were protecting the country's heritage.<sup>179</sup> Some were killed during shelling of the buildings they worked in, others by snipers on their way to work. Some were threatened to get them to cease their activities, and when they refused, they were killed. The case of Khaled al-Assad, a retired member of the DGAM and world expert on the site of Palmyra, who was killed by ISIS in August 2015, gained worldwide attention.<sup>180</sup> DGAM field

174 Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict*, Cambridge University Press, Cambridge, 2006, pp. 70–73.

175 Mary Ellen O'Connell, *Occupation Failures and the Legality of Armed Conflict: The Case of Iraqi Cultural Property*, Working Paper No. 6, Ohio State University Moritz College of Law, 2004.

176 Neil Brodie, "Syria and Its Regional Neighbors: A Case of Cultural Property Protection Policy Failure?", *International Journal of Cultural Property*, Vol. 22, No. 2–3, 2015.

177 UNESCO, above note 158.

178 The lack of protection under IHL for transports and appliances used for cultural property is particularly notable in comparison to that attached to the medical function.

179 DGAM, "The French Parliament Delegation: Offering Solidarity and Support to DGAM Is One Important Reason for Our Visit to Syria", Ministry of Culture, Syrian Arab Republic, 29 September 2015.

180 Jeremy Bowen, "The Men Saving Syria's Treasures from Isis", *New Statesman*, 22 September 2015.

personnel regularly risk their lives to protect their cultural heritage by collecting and passing on information on archaeological sites, yet they enjoy no additional protection beyond their civilian status under international law. The Special Rapporteur in the field of cultural rights has highlighted the protection of the defenders of cultural heritage who are at risk as a “critical” question, citing the example of employees of the National Museum of Afghanistan, ordinary people in Northern Mali who hid manuscripts beneath the floorboards of their homes to protect them during the 2012 assault by Islamist armed groups, or those who peacefully protested the destruction of Sufi sites in Libya.<sup>181</sup> A human rights perspective on the protection of cultural heritage should emphasize the human rights of cultural first responders – those on the front lines in the struggle to protect it. They are the guardians of the cultural heritage of local groups, and indeed of all humankind, and thus critical players in the defence of cultural rights. The Special Rapporteur recommends that States respect their rights and ensure their safety and security, but also provide them, including through international cooperation, with the conditions necessary to complete their work, including all needed material and technical assistance, and offer them asylum when that work becomes too dangerous. In many circumstances, defenders of cultural heritage should be recognized as cultural rights defenders and therefore as human rights defenders. As human rights defenders, defenders of cultural heritage should be afforded the rights and protections that status entails, including protection by the State, legal assistance and effective remedy.<sup>182</sup> As the Office of the UN High Commissioner for Human Rights (OHCHR) has noted, a human rights defender is a person who acts to address any human right (or rights) on behalf of individuals or groups, including cultural rights.<sup>183</sup>

In the area of implementation, most critically, there has been a lack of compliance with legal protections for cultural property by armed groups. This has been aggravated by a lack of engagement with armed groups on this issue. Beyond appeals and statements of condemnation since the start of the Syrian conflict, organizations like UNESCO, the International Council on Monuments and Sites, and the International Council of Museums have held several meetings and organized training for employees of the DGAM, but no reported efforts have been made by international organizations to reach out to areas beyond government control, where the DGAM no longer has any operations or reach. Regions under the control of armed groups contain a great number of significant heritage sites and museums, which are at particular and increasing risk for looting and destruction. Indeed, the 1954 Hague Convention envisages that UNESCO should offer its services to all parties to a non-international armed conflict, including armed groups (and that any such contact “shall not affect the[ir]

181 “‘When Cultural Heritage Is Under Attack, Human Rights Are Under Attack’ – UN Expert”, *UN News*, 4 March 2016.

182 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, 1998.

183 See OHCHR, “Who Is a Defender”, available at: [www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Defender.aspx](http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Defender.aspx).

legal status”).<sup>184</sup> Moreover, while the Convention only provides that States Parties, and not armed groups, can call on UNESCO “for technical assistance in organizing the protection of their cultural property”,<sup>185</sup> the Secretariat to the 1954 Hague Convention developed an action plan that entails the possibility of establishing “contacts with the warring parties (including States and [armed] non-State actors as applicable) and send[ing] letters to them signed by the Director-General regarding the protection of cultural property in the event of armed conflict”.<sup>186</sup> Nonetheless, UNESCO is prohibited by its Constitution from intervening in the internal affairs of member States,<sup>187</sup> and there is no information available to suggest that UNESCO has taken steps to reach out to any of the armed groups operating in Syria or Iraq in order to further cultural property protection.<sup>188</sup>

There is also no publicly available information about the engagement of the ICRC, UN humanitarian agencies, or the UN Special Representative for Syria with any actors – whether armed group representatives in the context of political processes, or influential States – on the issue of cultural property protection. Some commentators have pointed out that any political opposition should develop a “cultural property protection” plan.<sup>189</sup> Others have suggested using the few UN mechanisms granted access to both government- and armed group-controlled areas of Syria – for instance, expanding the UN chemical weapons mission (OPCW-UN Joint Investigative Mechanism in Syria) to include a small group of cultural experts, in order to put into effect the obligation of Syrian armed groups to abide by international treaty and customary law and protect cultural property.<sup>190</sup> Another route could entail neutral non-governmental organizations such as Geneva Call, through its Deeds of Commitment mechanism, addressing the protection of cultural property as a standalone issue of focus. UNESCO has noted that “the nature of contemporary conflicts ... presents a challenge, as they often involve armed non-State actors, with whom intergovernmental organizations cannot establish relations”, and has acknowledged that it has sought to close this gap through cooperating with Geneva Call.<sup>191</sup> In turn, Geneva Call has conducted

184 1954 Hague Convention, Art. 19(3–4).

185 *Ibid.*, Art. 23.

186 UNESCO, Standard Plan of Action to Protect Cultural Property in the Event of Armed Conflict, UNESCO Doc. CLT-11-CONF-209-INF1, 2011, Annex. The plan was revised in 2013 to reflect developments in Syria and Mali (see UNESCO Doc. CLT-13/10HCP/CONF.201/INF.3).

187 UNESCO Constitution, Art. 1(3).

188 Geneva Call has undertaken a scoping study to understand the existing dynamics between armed non-state actors and cultural heritage in Syria, Iraq, and Mali, including through interviews with armed group members. The study issued recommendations to enhance respect for cultural heritage by armed groups in non-international armed conflicts, and its findings are presented in Marina Lostal, Kristin Hausler and Pascal Bongard, “Armed Non-State Actors and Cultural Heritage in Armed Conflict”, *International Journal of Cultural Property*, Vol. 24, No. 4, 2017.

189 Salam Al Quntar, “Syrian Cultural Property in the Crossfire: Reality and Effectiveness of Protection Efforts”, *Journal of Eastern Mediterranean Archaeology & Heritage Studies*, Vol. 1, No. 4, 2013.

190 Joris D. Kila, “Inactive, Reactive, or Pro-Active? Cultural Property Crimes in the Context of Contemporary Armed Conflicts”, *Journal of Eastern Mediterranean Archaeology and Heritage Studies*, Vol. 1, No. 4, 2013.

191 ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Case No. ICC-01/12-01/15, UNESCO Amicus Curiae Observations, 2 December 2016.

specialized trainings on the protection of cultural heritage for top military commanders from the Free Syrian Army.<sup>192</sup>

Any protection response, and particularly one that involves the deployment of peacekeeping forces, could cover cultural property. The mandate of MINUSMA, since it was established in 2013, has included assisting the transitional authorities in the country with the protection of cultural and historic sites in collaboration with UNESCO. While Security Council Resolution 2347 goes a long way in recognizing that UN peacekeeping operations may encompass the protection of cultural heritage from destruction, illicit excavation, looting and smuggling in the context of armed conflicts, it remains to be seen whether the relevant authorities on the ground will request such assistance, as stipulated in the resolution.<sup>193</sup> The EU's policy integrating cultural property protection experts into all of its military and civilian missions further bolsters this approach.<sup>194</sup>

It is important to note that the protection response has not yet entailed accountability efforts. In general, cultural property destruction has been rarely prosecuted, especially at the national level. The Special Rapporteur in the field of cultural rights highlighted this fact in her most recent report, expressing dismay at learning from cultural heritage professionals that, despite the many examples of destruction of cultural heritage contrary to international treaties, there have reportedly not been any national prosecutions on the basis of the 1954 Hague Convention.<sup>195</sup>

## Concluding remarks and ways forward

To ensure effective protection of cultural property in times of armed conflict, States, civil society and international organizations must have a comprehensive toolkit at their disposal. Recent developments, culminating in UN Security Council Resolution 2347, go a long way in expanding the horizon of the types of measures that such a toolkit could contain.

As elaborated above, a variety of legal instruments, normative advances, jurisprudence and recent practice have added the following measures into the toolkit that can be used by third-party States to ensure the protection of cultural property, beyond the diplomatic protest and collective measures most commonly seen in State practice: the prosecution of perpetrators and support through

192 Geneva Call, "Syria: Top Military Commanders from eight Free Syrian Army Brigades Receive Training on Humanitarian Norms in Geneva", 10 February 2016.

193 UNSC Res. 2347, 24 March 2017, para. 19: "... *Affirms* that the mandate of United Nations peacekeeping operations, when specifically mandated by the Security Council and in accordance with their rules of engagement, may encompass, as appropriate, assisting relevant authorities, upon their request, in the protection of cultural heritage from destruction, illicit excavation, looting and smuggling in the context of armed conflicts, in collaboration with UNESCO, and that such operations should operate carefully when in the vicinity of cultural and historical sites."

194 Remarks by Federica Mogherini, above note 152. For more information on the integration of cultural property protection into military missions, see Major Yvette Foliant, "Cultural Property Protection Makes Sense: A Way to Improve Your Mission", Civil-Military Cooperation Centre of Excellence, 2015.

195 *Report of the Special Rapporteur in the Field of Cultural Rights*, above note 81, para. 58.

mutual legal assistance; the identification of and return of illegally exported cultural objects; where the situation on the ground does not permit their return, the temporary storage of at-risk cultural objects in refuges; the evacuation of movable cultural property by humanitarian actors and dedicated institutions; international assistance in securing areas, surveillance and patrols, and issuing warnings; the taking of emergency safeguarding measures by international humanitarian actors; monitoring by on-the-ground humanitarian and other international presences; building the capacity of local first responders; the protection of cultural property defenders; embedding cultural property protection into multilateral peacekeeping, civilian and military missions; integrating cultural property protection into targeting and operational procedures; and the safeguarding of archives and documents through digitization. These measures are all, in part, both preventative and protective. As will be discussed below, the toolkit also contains remedial measures that States can take following the damage or destruction of cultural property, including repair, restoration and memorialization, as part of post-conflict reconstruction and peacebuilding efforts.

Prior to engaging in a protection response, however, it is crucial to understand why deliberate destruction of cultural heritage takes place. It is sometimes difficult to distinguish between ideological destruction and looting for economic reasons. Both overlapping sets of practices must be tackled, including in countries where the markets for looted artefacts are located. Deliberate destruction may happen for a variety of reasons, including as a strategy to destroy the morale of the enemy and terrorize local populations or as a means to eradicate other cultures, in particular of the vanquished so as to facilitate conquest.<sup>196</sup> In some cases, the destruction of cultural heritage can indicate more devastating motives, including genocidal intent. The ICJ, in examining the case of *Bosnia and Herzegovina v. Serbia and Montenegro*, noted 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”,<sup>197</sup> even though the destruction of historical, cultural and religious heritage does not, as such, fall within the definition of the crime as set out in the Genocide Convention.<sup>198</sup>

In many recent examples, including in Syria, Iraq and Mali, destruction is part of the “cultural engineering” or “cultural cleansing” sought by diverse extremist armed groups who, rather than preserving tradition as some claim, seek to radically transform it, erasing what does not concur with their vision. They seek to end traditions and erase memory, in order to create new historical narratives affording no alternative vision to their own. Ending these forms of destruction requires tackling the fundamentalist ideology motivating them, in accordance

196 Patty Gerstenblith, “Protecting Cultural Heritage in Armed Conflict: Looking Back, Looking Forward”, *Cardozo Public Law, Policy and Ethics Journal*, Vol. 7, No. 3, 2009.

197 See ICTY, *The Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Judgment (Trial Chamber), 2 April 2001, para. 580.

198 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.

with international standards, in particular through education about cultural rights, cultural diversity and heritage. As journalist Mustapha Hammouche, in assessing recent extremist attacks on cultural spaces, has noted: “In this global war, it is not our differences which motivate ... hatred, but what we share: humanity and humanism itself.”<sup>199</sup>

Indeed, the notion of the relationship between cultural property and identity is of particular importance because the destruction of cultural objects and sites during wartime may have a severe impact on the identity of those people, communities and societies that survive. International criminal jurisprudence has reflected this notion, finding that acts committed against property which is part of the cultural heritage of a community attain an “especially qualified degree of gravity”, transcending the physical and economic value assigned to civilian property and emphasizing the symbolic and spiritual significance of cultural property. This makes the wilful destruction or damage of cultural property particularly serious, as it mutilates the very cultural and spiritual identity of the group that finds its expression through that cultural property. This approach, applied by the ICTY with respect to the shelling of the Old Town of Dubrovnik (a site included in the World Heritage List set up under the 1972 UNESCO World Heritage Convention), resulted in finding the destruction of institutions dedicated to religion, charity, education or the arts and sciences, as well as historic monuments and works of art and science, to affect the “existence of [the Old Town’s] population”, which “was intimately intertwined with its ancient heritage”.<sup>200</sup> In the *Strugar* case, the Chamber transcended the traditional vision of human rights as enforceable and justiciable only when their breach affects one or more individuals specifically, and found that the right to preserve and enjoy one’s own culture exists also to the extent that it is exercised in community with other members of one’s group, resulting in a collective right. It is the exercise of this collective right that affects the identity of the group – and the protection of cultural property must have this notion at its core.<sup>201</sup> Echoing this perspective, in welcoming Al Mahdi’s transfer to The Hague, the prosecutor, Fatou Bensouda, said that the people of Mali “deserve justice for the attacks against their cities, their beliefs and their communities”, explaining:

The charges we have brought against Ahmad al-Faqi al-Mahdi involve most serious crimes. They are about the destruction of irreplaceable historic monuments, and they are about a callous assault on the dignity and identity of entire populations, and their religious and historical roots.<sup>202</sup>

In the historical consciousness of Syrians, close relationships between all the various ethnic and religious groups are embedded in the communality of religious and

199 Mustapha Hammouche, “Guerre contre l’humanité”, *Liberté*, 15 November 2015.

200 ICTY, *Jokić*, above note 126, para. 51.

201 ICTY, *Strugar*, above note 48, paras 218, 232.

202 Fatou Bensouda, “Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the Opening of the Confirmation of Charges Hearing in the Case against Mr Ahmad Al-Faqi Al Mahdi”, ICC, 1 March 2016.

historic buildings, the sharing of material culture, and social ethics.<sup>203</sup> Cultural identity is associated with monuments and artefacts of ancestors from different periods of history. Among the starkest examples is the Umayyad Mosque in Damascus, which has been shared and identified as a place of worship by more than one religious group.<sup>204</sup>

As discussed above, acts of deliberate destruction of cultural property are often accompanied by other large-scale or grave assaults on human dignity and human rights. As such, they have to be addressed in tandem, as part of the promotion of human rights and peacebuilding. The right to access and enjoy cultural heritage is critical in post-conflict situations; being denied such access can deepen wounds and divisions between communities.<sup>205</sup> Thus, peacemaking and peacebuilding processes should include the protection, repair and memorialization of cultural heritage. This must include the participation of those concerned, and the promotion of intercultural dialogue regarding cultural heritage,<sup>206</sup> to allow the memorialization of the past as places of memory or *lieux de memoires*,<sup>207</sup> or so-called “traumascape”<sup>208</sup> (such as Ground Zero in New York). Intangible heritage that includes traditions or living expressions inherited from our ancestors and passed on to our descendants, such as oral traditions, performing arts, social practices, rituals, festive events, and skills for producing traditional crafts, must also be protected, restored, and if lost, memorialized.<sup>209</sup> There is some indication that international criminal justice recognizes this issue and has proposed a way forward. In the *Katanga* case, the judges of the ICC explained that symbolic reparations can offer a collective benefit in allowing the transmission of a larger memory.<sup>210</sup> The judges issuing the reparations order in the *Al Mahdi* case followed suit and awarded collective reparations to the victims in Timbuktu, noting that “cultural heritage plays a central role in the way communities define themselves and bond together, and how they identify with their past and contemplate their future”.<sup>211</sup> The decision further quoted UNESCO, emphasizing that “the loss of heritage during times of conflict can deprive a community of its identity and memory, as

203 Kanishk Tharoor, “Life Among the Ruins”, *New York Times Sunday Review*, 19 March 2016.

204 Rafi Grafman and Myriam Rosen-Ayalon, “The Two Great Syrian Umayyad Mosques: Jerusalem and Damascus”, *Muqarnas*, Vol. 16, 1999.

205 *Report of the Special Rapporteur in the Field of Cultural Rights*, “Addendum: Mission to Bosnia and Herzegovina (13–24 May 2013)”, UN Doc. A/HRC/25/49/Add.1, 3 March 2014.

206 Report of the Independent Expert in the Field of Cultural Rights, above note 79, para. 12.

207 Pierre Nora, *Les lieux de mémoire*, 7 vols, Gallimard, Paris, 1984–1992.

208 Maria Tumarkin, *Traumascape? The Power and Fate of Places Transformed by Tragedy*, Melbourne University Publishing, Carlton, 2005.

209 UNESCO, “What Is Intangible Cultural Heritage?”, 2012, available at: [www.unesco.org/culture/ich/index.php?lg=en&pg=00002](http://www.unesco.org/culture/ich/index.php?lg=en&pg=00002). For more information on intangible cultural heritage, see: Christiane Johannot-Gradis, “Protecting the past for the future: How does law protect tangible and intangible cultural heritage in armed conflict?”, *International Review of the Red Cross*, Vol. 97, No. 900, 2015, available at: [www.icrc.org/en/international-review/article/protecting-past-future-how-does-law-protect-tangible-and-intangible](http://www.icrc.org/en/international-review/article/protecting-past-future-how-does-law-protect-tangible-and-intangible).

210 ICC, *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Reparations Order, 24 March 2017, para. 279.

211 ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Case No. ICC-01/12-01/15-236, Reparations Order, 17 August 2017, para. 14.

well as the physical testimony of its past”, and that the “destruction of international cultural heritage ... carries a message of terror and helplessness; it destroys part of humanity’s shared memory and collective consciousness; and it renders humanity unable to transmit its values and knowledge to future generations”.<sup>212</sup>

Understanding this impact is critical, for it reveals a more varied and complex relationship between communities and their cultural heritage. The efforts of Syria’s DGAM, archaeologists and local volunteers to protect cultural property from the Syrian military and armed groups, including ISIS, are indicative of the value that Syrians place on the monuments to their history. Monuments that international law views as belonging to humankind are part of the daily lives and realities of people living in Syria and part of the memories of those who have left. A Syrian archaeologist currently based in the United States, Salam Al Kuntar, told the *New York Times*: “I have a special love for Palmyra because the Temple of Baal is where my mother was born.”<sup>213</sup> This tangible connection between people and their cultural heritage is what makes its damage and destruction so devastating – and measures to ensure its protection so critical.

After all, the protection of cultural heritage from assault – whether through evacuation, archiving, restoration or memorialization – is necessary as a pushback against the message of the perpetrators. Archaeologists have made this point:

Every time we resurrect from the rubble one of these monuments, it undercuts the message of fear and ignorance that these people are trying to spread. ... If they knock it down, we will rebuild it. If they knock it down again, we will rebuild it again.<sup>214</sup>

The same attitude is often expressed by Syrians, creating an entry point for post-war reconstruction.

It is encouraging that the protection of cultural property is seen as being critical for reconciliation and post-war reconstruction of society, and is also increasingly recognized by States. – The Abu Dhabi Declaration starts by stating that cultural property is “a mirror of mankind, a guardian of our collective memory and a witness to the extraordinary creative spirit of humanity, [and that] world cultural heritage represents the foundation of our common future”.<sup>215</sup> With the bold and innovative measures that have emerged in response to the destruction of Syria’s cultural heritage, when viewed as part of States’ obligation to “respect and ensure respect” for IHL in all circumstances, States increasingly have the tools to contribute to that foundation.

212 *Ibid.*, para. 22. Given that the impact of the destruction of cultural property was widely felt by the community in Timbuktu as an assault on their cultural and religious identity, and is recognized to have had a broader affect, the judges also awarded nominal damages to the Malian State and the international community through UNESCO as symbolic reparations. *Ibid.*, para. 106.

213 K. Tharoor, above note 203.

214 Stephen Farrell, “If All Else Fails, 3D Models and Robots Might Rebuild Palmyra”, *New York Times*, 28 March 2016.

215 ICOMOS, above note 164.