

## **Complexities In The Protection of Cultural Heritage In Non-International Armed Conflicts.**

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### **Abstract**

This paper elaborated about the applicability of the 1954 Hague Convention and its Second Protocol in protecting cultural heritage in armed conflicts of non-international character in Northern Mali. The two main critical applicability issues that hamper its enforcement will be discussed in referring to international humanitarian law. By using the Malian war, where the cultural heritage of Timbuktu was intentionally destroyed, the author will consider the extent to which these laws apply and create obligations in a national war context. The significance cultural heritage has requires ensuring the international law to be applied as broadly as possible, all belligerent groups and types of wars are compelled.

**Keywords:** Cultural Heritage; Non-International Armed Conflict; Mali; Timbuktu

### **Introduction**

The protection of common cultural heritage has become subject of different branches of international law because of the relevance it has for humanity. The main legal instruments protecting cultural heritage during armed conflict are the 1954 Hague Convention and its two Additional Protocols. Furthermore, international humanitarian law (IHL) and international criminal law, have established some developments in the area. However, international law, as a form of soft law, generally lacks binding nature and enforcement mechanisms. This constitutes a great limitation for the protection of common cultural heritage during armed conflict, which is under threat nowadays. Trending events, such as the deliberate attack on the heritage in Timbuktu (Mali) during the ‘internal war’ that started in 2012, evidence the threat.

Moreover, the yet weak applicability of such international legislation becomes even more ambiguous when it comes to armed conflicts of non-international character. Contemporary wars, particularly space and actors involved, are considerably different from the international conflicts taking place when the Conventions were formed.

Ultimately, States are the ones expected to commit with the compliance of the Conventions, throughout investigations and prosecutions within their

jurisdictions. Despite all these challenges, the ground-breaking Al Mahdi case, prosecuted by the ICC for destroying cultural property in Timbuktu, brings new avenues for fighting against impunity in the destruction of cultural heritage. Finally, the current ‘new wars’ context demonstrates the immediate need for the Convention to truly bind non-state actors and to apply to non-international armed conflicts (NIACs).

Subsequently, by means of a socio-political and legal analysis, this paper will argue that ‘the applicability of the 1954 Hague Convention and its Second Protocol in protecting cultural heritage in armed conflicts of non-international character is minimal and has significant weaknesses, as suggested in the case of the ‘internal war’ of Northern Mali and the destruction of Timbuktu.

The paper will start by giving a brief historical contextualization of the protection of cultural heritage under international law during armed conflict. After having introduced some international instruments, it will focus on the specific provisions of the 1954 Convention (Articles 18 and 19) and its Second Protocol (Article 22 and 3) that are relevant for NIACs. The two main critical applicability issues that hamper its enforcement will be discussed in referring to IHL. By using the Malian war, where the cultural heritage of Timbuktu was intentionally destroyed, the author will consider the extent to which these laws apply and create obligations in a national war context.

### **International Protection of Cultural Heritage**

Since the Second World War, some international legal instruments that include the protection of cultural heritage during armed conflicts have been introduced. However, there is a clear lack of emphasis on conflicts of non-international character. The Convention for the Protection of Cultural Property in the Event of Armed Conflict (hereinafter the 1954 Hague Convention) and its two Additional Protocols (1954, 1999) represent the keystone regulations. United Nations Educational, Scientific and Cultural Organization (UNESCO) is the international organization involved in the implementation and monitoring of such instruments.

Nonetheless, the historical context has shifted dramatically since the Conventions were drafted, leaving them outdated and scarcely effective. The key factor is the upsurge of new types of that break the old patterns of warfare upon which the law of armed conflict is constructed. Today, nearly every conflict worldwide is a NIAC, with non-state actors involved, as for instance the cases of Mali and Syria (Henckaerts, 1999). Nevertheless, the author does not ignore that the debate goes further, as these conflicts ‘while internal in nature, are highly ‘internationalised’’. This represents a considerable threat to cultural heritage

protection as such conflicts potentially fall outside the scope of the Conventions regulations, which are mainly applicable to international conflicts.

The destruction resulting from the Second World War was the trigger for the 1954 Hague Convention and increased awareness of the relevance of cultural heritage for humankind. Nonetheless, there were previous historical developments starting with the Lieber Code (1863) and its Articles 35, 36 and 45, as well as the 1907 Hague Convention Concerning the Laws and Customs of War on Land in its Articles 27 and 56 and the 1907 Hague Convention IX in its Article 5 (Craig Forrest, 2011: 67).

The 1954 Hague Convention is the first international multilateral treaty exclusively directed to the protection of cultural property in times of armed conflict. Up to date, this most relevant instrument is only legally binding on the current 128 ratifying States.

Article 4 addresses the respect of cultural property in the event of armed conflict. The limitation of this Article is the determination of 'event of armed conflict' and the level of unrest or violence required. Moreover, the use of the term 'respect', despite the likely vague obligation, must be understood as a 'legal restraint' that requires positive and negative duties. (Forrest, 2011: 79, 84). Scholars have argued that the terminology used often suggests 'responsibilities' rather than 'duties' (Brenner, 2006:262).

Through Article 18, the Convention initially extended the protection of cultural property during all armed conflicts by stating 'declared war or any other armed conflict' (Brenner, 2006: 242). Thus, the Article addresses the applicability in 'any other armed conflict' increasing the protection further than the traditional Clausewitzian understanding of declared wars, but lacks elucidating what an 'armed conflict' is (Odermatt, 2013: 19).

Whilst such expansion was an improvement at the time the Convention entered into force, it is not adequate for the current context. The Convention anticipated applicability issues as evidenced by the content of Article 19, which applies the Convention's content 'in the event of an armed conflict 'not of an international character'' (Howe, 2012: 414). The notion of 'not of an international character' is not spelled out in the Convention and vaguely addressed in the Second Protocol.

This Article most likely applies to events described as 'civil war', or internal conflicts involving liberation movements, which remain imprecisely defined under international law and depend on political deliberations. While some scholars understand 'civil wars' as 'armed conflicts arising within states', others consider a requirement 'the level of a full-scale war' (Carrillo-Suárez, 1999:80). The attempt to define 'conflict' was abandoned during negotiations. The Second Protocol emerged in light of the events of Iran, Iraq, Kuwait and the Balkans wars. This led

the International community to acknowledged the necessity of a Convention update, resulting in its Second Protocol (1999).

NIACs content is further developed in Article 22 of the Second Protocol. The Protocol's intention of elucidating the Convention was not the desired panacea. Events such as banditry, rebellions or certain forms of anarchy, would not fall under the regulations as Article 22(1) excluded 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature' (Forrest, 2011: 84).

Moreover, the shortcoming of cultural heritage damaged in countries not party to the Convention remains, as 22(1) still requires events 'occurring within the territory of one of the Parties'. For instance, the Bamiyan Buddhas' destruction applicability is questionable since Afghanistan is not a party to the Convention.

Consequently, in defining the Protocol's scope of application, Article three extended its applicability to Article 18 (1)(2) of the Convention and Article 22(1) of the Protocol. Nonetheless, while 129 countries are High Contracting Parties of the Convention, only 73 have signed the Second Protocol. This means that only signatories of the Second Protocol are bound by Article 22.

Subsequently, there are two areas of concern about the applicability of the regulations, mainly caused by its vagueness. Firstly, the issue of internal conflicts as the war in Northern Mali. 'New wars' do not certainly fit in the international-internal dichotomy, and even if this was the case, internal wars are weakly regulated.

As a party to the Second Protocol, NIACs scope of applicability is limited to some internal conflicts. It does not apply to internal disturbances that do not meet the definition of 'armed conflict'. It makes susceptible to different interpretation when an internal disturbance or liberation movement evolves into an armed conflict, such as it occurred in Syria. Jean Pictet's commentary to common Article III to the Geneva Convention contributed with a useful rubric for distinguishing 'armed conflicts' from internal disturbances (Howe, 2012: 419).

Under international case-law of the International Criminal Court for Former Yugoslavia (ICCFY), armed conflicts 'are protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State'. See *Prosecutor v. Dusko Tadic (Judgement on Sentencing Appeal)*, (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) [70]. The armed confrontation must reach a minimum level of intensity and the parties involved must show a minimum level of organisation. It was also required by the ICCFY for both elements to be independently satisfied. Such requirement resulted in delaying almost a year the recognition of the situation in Syria as a NIAC and thus, the trigger of IHL protection with all the drawbacks that would entail. 'Low-intensity' and asymmetric warfare, such as the cases of Mexico

and Colombia, may not fall within the threshold of ‘conflicts of a certain degree of intensity’ despite the gravity of such conflicts (Odermatt, 2013: 20).

According to the ICRC, the fulfilment of the criteria must ‘determined on a case-by-case basis by weighing up a number of factual indicators’ (ICRC, 2012: 10). In practice, the lack of specific provisions concerning the intensity has allowed countries to refuse regulations applicability for not achieving the required ‘armed conflict’ level of intensity. Also, it has been argued that States are unwilling to apply IHL to internal conflicts because it may contribute to ‘legitimise’ rebels, and other armed groups. (Odermatt, 2013: 26).

The IRCC Commentary to the Geneva Conventions, which provided a list of proposals to identify a conflict situation, claimed for common Article 3 to be applied as widely as possible (Jiří Toman, 2009: 412). This is relevant as the scope of application of Article 22 and common Article 3 to the Geneva Conventions are identical. Whilst the four Geneva Conventions apply to IACs, common Article 3 is the only provision applicable to NIACs, which is still not defined.

The 1954 Hague Convention is part of the post Second World War IHL developments and thus, the 1949 Geneva Conventions suffer from similar applicability issues. Both bodies of international law are strictly entangled. Article 18 (1) was almost entirely copied from common Article 2 to 1949 Geneva Conventions. Article 22 (1) was taken from of Article 1(1) of Additional Protocol II to the Geneva Conventions. However, this article’s applicability to NIACs has been under debate since it is not implicitly prescribed. Legal literature has mostly agreed that its contemporary interpretation requires a ‘civil war’ intensity standard. Sceptics of Protocol II consider that many states involved in internal conflicts would not admit a fulfilment of the ‘civil war’ standard (Quénive, 2014: 35). The Geneva Conventions problems of applicability to NIACs are therefore, the complexity to determine the circumstances under which treaty rules regulating NIACs become operable and the minimum level of protection when rules apply.

Finally, whether a situation is an ‘armed conflict’ would considerably depend on whether it is contemplated as international or non-international. As opposed to internal conflicts, the magnitude of the use of force between sovereign states is irrelevant for IHL. The most appropriate interpretation should pursue giving cultural heritage the highest level of protection. According to Kevin Chamberlain, even Article 4 should be applicable in NIACs (Chamberlain, 2013: 54).

### **Mali’s Cultural Heritage**

The second issue is whether the Convention provisions apply to non-state actors since current conflicts involve actors such as private security military companies or rebel groups. The parties to the NIAC in Northern Mali in 2014 were

Mali and its armed forces, France, AFISMA and MINUSMA, against AQIM, Andar Dine, MOJWA and the MNLA (Annysa Bellal, 2014: 206-209; Marina Lostal, 2017: 128).

Treaties are generally only binding on signatory parties and the Convention was not open for non-state actors. Then, the possibility depends on whether it can be legally binding on third parties (Howe, 2012: 420). This can be examined by considering the conditions envisaged in Article 34 of the Vienna Convention on the Law of Treaties. Firstly, the High Contracting Parties must have intended the provisions to apply to third parties (non-state actors in this case). By using *lowercase p* in the term 'parties to the conflict', Article 19(1) is likely to include also third parties. On the contrary, Article 22 of the Second Protocol, when expanding the scope of application concerning NIACs uses *capital P*, in referring to State Parties, as well as its Article 1. This reverses the interpretation of extending the applicability to non-state actors.

Then, the concept 'Parties' has been subject of misunderstanding. According to the Chairman of the Drafting Committee comments', 'Party' referred to 'Party to the conflict', which then includes rebel groups or any other non-state actors of States parties that have ratified Second Protocol. According to Jean-Marie Henckaerts, the Protocol applies to all parties to NIACs whether governmental or insurgent forces (Howe, 2012: 409-421). The term 'party to the conflict' was considered by the Drafting Committee to apply to non-State Parties by virtue of Article 22. An ICRC delegate during the plenary session suggested the word 'party' to be written throughout the Protocol with *lowercase 'p'*. Then, it could mean non-State party, whilst if written with a capital 'P' would refer to a State Party to the Protocol (Toman: 1999: 53).

On the other hand, it has been claimed that IHL directly becomes part of national law once accepted by governments. Thus, the content is binding also in national citizens, including insurrectional movements. According to Jiří Toman, it is also a duty of the leaders of insurrectional movements to ensure knowledge of the protection of cultural property (Toman: 1999: 418). Conversely, it has been argued that in practical terms 'cultural property law does not provide protection against the lawless, such as the Taliban' (Brenner, 2006: 257). In practice, prosecutions are the optimal deterrent for terrorist groups attacking cultural heritage, as for instance the Al Mahdi case.

Some other issues that complicate the implementation are the lack of effective enforcement mechanisms and sanctions for non-compliance, thus relying on internal jurisdictions. Whilst many countries have ratified the Convention, still few have implemented it under domestic law. Moreover, many of the 'new wars', as the Malian case, or the old wars in Yugoslavia and Ruanda, are due to ethnical, cultural or religious confrontations. Often one side of the conflict intends to destroy



the opposing ethnic group's cultural heritage, facilitated simplified by the geographical proximity and familiarity of the cultural sites and property.

The Malian war will be used as a case study to apply the previous examination, where a destruction of cultural heritage in Timbuktu took place in 2012. Timbuktu was inscribed on the List of World Heritage in danger as requested by the Malian government. However, it was not included in the Enhanced Protection List, incorporated in the Second Protocol. Mali became a party to The Hague Convention on the 18 May of 1961 and to the Second Protocol on November 15<sup>th</sup> of 2012, shortly after the conflict started. Mali is also party to the four 1949 Geneva Conventions and the II Additional Protocol.

Since 2006, there were low-intensity hostilities in the north of the country between Governmental forces and ethnic *Touareg* non-state armed actors. On March 2012 a military coup occurred after numerous defeats by Malian forces in the face of the *Touareg*, likely evidencing the transition from internal disturbances to a 'conflict' and thus, triggering IHL application. On April, a group of rebels, under the National Movement for the Liberation of Azawad (MLNA), proclaimed the independence of Azawad.

Subsequently, the MNLA along with Ansar Dine proclaimed an Islamic state in Azawad and aggressively imposed Islamic law in Timbuktu. Despite their initial secular aspirations, rebel groups eventually join forces with Islamist organizations.

Among the comprehensive heritage, Timbuktu is believed to contain buried the 333 Sufi Saints. The Salafist fundamentalist group consider Sufism as irreligious and thus, Ansar Dine and AQIM 'began to destroy Timbuktu's shrines in May 2012, as well as attacking some of its other historic monuments' (Lostal, 2017:130). This indicates the ethnical and religious character of the conflict and the use of cultural heritage destruction as a mean of warfare, particularly in Islamic countries.

The complexity of characterizing this war is shown by the high number of actors involved and the numerous international interventions. ECOWAS intervened in May 2012 and was backed by the UN and the African Union in November. France got involved in January 2013 and was followed by a UN Security Council Resolution in April, in a moment when Timbuktu was yet very damaged.

There are many concerns under international law and the conflict in Mali. However, the main setback for this paper is whether there is an 'armed conflict' of non-international character in Mali. According to the aforementioned ICTFY definition, it is clear there is no conflict 'between States'. However, the 'internationalization' of the war should not be disregarded and it proves that it is impossible to rely on the traditional binary of internal and international conflicts.

The term 'protracted' could be understood as having established a requirement of high-intensity violence level, which according to international

observers, was met (ICC Report ICC-OTP-20130116-PR869, 2013). Human Rights Watch has highlighted that Islamist groups committed severe sectarian violence and abuses against the local population while enforcing their interpretation of Sharia (Human Rights Watch, 2014: 51). Furthermore, a formal investigation in the ICC has been opened concerning ‘the possible perpetration of international crimes’ in Mali (International Criminal Court, 2013, <https://www.icc-cpi.int/legalAidConsultations?name=pr869>).

Secondly, the actors undertaking the violence were ‘between governmental authorities and organized armed groups. Different non-state actors were fighting against the Malian armed forces when Timbuktu’s heritage was attacked prior to the French intervention. Consequently, this suggests that the criteria for an armed conflict, of non-international character in this case, is met.

The other issue is whether the different factions of non-state actors are bound by the Convention. Assuming they are obliged, there would be no protection for Timbuktu’s cultural heritage against destruction by the Ansar Dine and AQIM. Since they are not parties to the Convention, no obligations to protect cultural property during the conflict would arise. The opposite would occur if the Convention was construed as applicable to all parties to the conflict. This is reinforced by the fact that many provisions of the Convention have been established as customary international law. Thus, rebels and Islamic groups could be compelled despite not being formal Parties.

Finally, it is not the intention of this paper to consider the ICC jurisdiction over cultural heritage protection. However, the landmark of the Al Mahdi judgement deserves to be mentioned since it is the first case the ICC opened concerning the destruction of cultural heritage.

Al Mahdi was accused of being ‘criminally responsible for the war crime of intentionally directing attacks against historic monuments and buildings dedicated to religion in Timbuktu in June and July of 2012’ under Article 8 (2)(e)(iv). The Court stressed that crimes against property are generally of lesser gravity than crimes against persons, but still very relevant (Foka Taffo, 2017).

Intentional attacks against buildings dedicated to religion, art or historic monuments constitute a war crime under Article 8 (2)(e)(iv), applicable to NIACs as in the present case. This shows the ICC consideration of the Mali conflict as a NIAC. The Rome Statute also excludes application to ‘riots and sporadic acts of violence of a similar situation’ (Odermatt, 2013: 21).

In relation to the protection of cultural property during armed conflict, the verdict briefly referred to Articles 27 and 56 of the 1907 Hague Regulations, the Geneva Conventions and its two Additional Protocols and the Second Protocol to 1954 Hague Convention. When referring to the sites, the Court highlighted that some of the sites were; firstly, not military objectives, and secondly, protected by



UNESCO with World Heritage site status (International Criminal Court, Trial Chamber VIII, Case No ICC-01/12-01/15, 27 September 2016) [14- 29]).

The case sets a highly significant precedent for the protection of cultural heritage under international criminal law and moreover, it can serve as deterrent. Then, notwithstanding all the complexities of cultural property law and the limited national execution, other bodies of international law as the ICC, can serve as a form of complementary safeguard, as evidenced by The Al Mahdi case.

## **Conclusion**

The 1954 Hague Convention and its Second Protocol suffer from numerous complexities that weaken its enforcement and effectivity, posing under considerable threat cultural heritage in countries under internal armed conflicts, such as Mali. The vagueness of the regulations, particularly due to the lack of well-defined definitions of ‘armed conflict’ and ‘NIAC’, allows countries to evade its applicability adjusting the law to their best realizable interest.

As a shared problem of international law, implementation of the 1954 Hague Convention and IHL has no central authority, it is mainly on a voluntary basis since enforcement or sanctions mechanisms are inexistent. Then, the primacy of jurisdiction to investigate and prosecute cultural property crimes rests in the first instance with the national authorities.

Furthermore, sharp dichotomies no longer apply for ‘new wars’, posing a big challenge for international law that evolves at slow pace as opposed to contemporary armed conflicts. Given the complex blurred forms of such conflicts, which often include numerous non-State actors, cultural heritage law must elucidate these applicability issues to effectively bind non-state actors and apply to NIACs.

Finally, the significance cultural heritage has for the past, present and future of humanity requires ensuring the Convention to be applied as broadly as possible, thus, all belligerent groups and types of wars are compelled. In such a complex and violent world, where International Law is considerably restricted, the ground-breaking Al Mahdi case brings hope for the implementation of cultural property laws and cultural heritage international protection. \*\*\*

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