

# Safeguarding Cultural Property in Armed Conflict: An analysis of International and National Legal Frameworks

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## 1. Introduction

Armed conflict always results in damaging the enemy property, cultural or others. No war has been fought without damaging private or public property at least. Belligerent seek psychological advantage by directly attacking the enemy's cultural heritages. In any armed conflict including former Yugoslavia, cultural heritage has been targeted even though such attack does not justify the military necessity. As the Cultural heritages and historic monuments are considered to be the symbol of civilization and the identity of the people, such objects must be spared from target. The basic objective of damaging the cultural heritage is to destroy the identity of the people. The destruction and pillage of the adversary's non-renewable cultural resources became a tool to erase the manifestation of adversary's identity. Thus, damaging of cultural property equally is taken as the form of "ethnic cleansing" similar as to the rape. From World War I to Yugoslavian war, destruction of cultural heritages has been instrumental in uprooting the identity of the particular group of people. E.g. during Yugoslavian war numbers of ancient and medieval sites like; eighteenth century Eltz Castle, which contained a museum, complex of Roman villas, sixteenth-century Fortress of Stara Gradiška, Renaissance arboreta, St. Ann Church, and the old city center, which were listed in the world heritage, were vandalized by Serb controlled Federal troops.<sup>1</sup>

Such events took place in the armed conflict in Yugoslavia and other armed conflict apparently expresses the psychology behind the systematic

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<sup>1</sup> <http://www.law.harvard.edu/students/orgs/hrj/iss14/abthai.shtml#fn4>

destruction of cultural property. By inflicting cultural damage on present generations, the enemy seeks to orphan future generations and destroys their understanding of who they are and from where they come. History has witnessed the poignant fate of many nations and peoples following brutal and intensive cultural mutilation. Some have ceased to exist while others have had their identity deeply and irreversibly altered.<sup>2</sup> Particularly in ethnic and religious conflicts, international or non-international in nature, cultural property relating to education religion are found severely targeted. As the religious and cultural psychology is instrumental in defeating the enemy, armed forces usually attempt to destroy the religious property of the enemy territory. Thus, this is the very fact that adversary always targets the cultural heritage to defeat the enemy psychologically.

## 2. Development of the concept of Protection of cultural property

The basic concept of protection of cultural property lies in the concept that target should be justified by military necessity. Religious concepts and the philosophical ideas have sufficient contribution in the development of international humanitarian law. Some accounts of war waged by Alexander the Great against Persians spared temples, embassies, priests and envoys of opposite side.<sup>3</sup> Concept of the Protection of cultural property although started with the concept of development of international humanitarian law, it took a firm shape in 18<sup>th</sup> century as the wanton destruction or the looting of cultural property was regarded as a violation of civilized manner and reasonable behavior.<sup>4</sup> The systematic destruction of Palatinate by Louis XIV and terrible incursion by Napoleon was disapproved and the Congress of Vienna decided that works of art had to be restored by Paris to their lawful owners.<sup>5</sup> Wanton destruction, looting of cultural property however taken as an uncivilized or unreasonable behavior, it took several decades to create legally binding rules. The Earliest regulations were contained in the Lieber Code 1863<sup>6</sup> and Brussels Declaration 1874.<sup>7</sup>

The Lieber Code provided that, not only hospitals, but also works of classical arts and similar objects had to be secured against all avoidable injury.<sup>8</sup> It

<sup>2</sup> *ibid*

<sup>3</sup> DIETER FLECK, *THE HANDBOOK OF HUMANITARIAN LAW*, Oxford University Press, New York, 13-14, (1995).

<sup>4</sup> *Ibid*, 377

<sup>5</sup> *Id.* 377

<sup>6</sup> Lieber Code, Sec.116, (1963)

<sup>7</sup> *Ibid*, Sec.120

<sup>8</sup> *Ibid*, Sec. 35

was generally forbidden to destroy or seize the enemy's property unless imperatively demanded by the necessity of the war. In sieges and bombardment hospitals and buildings dedicated to art and science had to be spared as far as possible, provided that they were not used for military purpose.<sup>9</sup> Since 1907 'historic monuments' have also been protected. Similar provisions were introduced in the Hague Regulations concerning the bombardments by naval forces.<sup>10</sup> For the protection of the cultural property, inhabitants of the affected area have to take necessary actions such as, marking the cultural property with a visible sign and communicate such measures to the opponents. In case of enemy occupation, any intentional destruction of cultural property was prohibited and liable to proceedings<sup>11</sup> However, these provisions are regarded as the binding customary international law for those states which are not bound by the convention for the protection of cultural property concluded later.

Cultural heritage and/or cultural property are simultaneously used terminologies. While defining, cultural heritage often is defined in the same context of cultural property. Thus, Cultural heritage is defined as the legacy of cultural property along generations in order to maintain and exploit it and to further deliver it to future generations. More precisely, the definition of cultural heritage is trifold: Cultural Heritage is composed of Tangible Cultural Heritage, Intangible Cultural Heritage and Natural Heritage. Tangible Cultural Heritage includes all tangible cultural goods including (i) movable cultural heritage, e.g., paintings, sculptures, coins, manuscripts, etc., (ii) immovable cultural heritage, e.g., monuments, archaeological sites, etc. and (iii) underwater cultural heritage, e.g., shipwrecks, underwater ruins and cities, etc. Intangible Cultural Heritage includes knowledge and techniques as well as tools, crafts and cultural places associated with them, representations, expressions and practices which can be recognized by communities, groups and, in some cases, individuals as part of their cultural heritage. More specifically, intangible cultural heritage includes oral traditions and expressions, linguistic and artistic cultural heritage, social practices, rituals and festivities, knowledge and practices concerning nature and the universe as well as know-how linked to traditional crafts. Natural Heritage includes all-natural monuments which may consist of various physical and biological formations. It further includes geological and physiographic formations and

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<sup>9</sup> Hague Reg. Art. 23

<sup>10</sup> HAGUE CONVENTION IX, Art. 5

<sup>11</sup> Hague Reg. Art. 56

areas where biodiversity (flora and fauna) develops. Finally, it refers to all-natural landscapes of global scientific value or of particular natural beauty.<sup>12</sup>

Protection of cultural property is not a new concept. The idea of Protection of cultural property always remains in the center of the armed conflict because it is instrumental to defeat the adversary psychologically. Thus, most of the international instruments relating to armed conflict refer to the components of cultural property. Various conventions have given the list of historical monuments and cultural properties to be protected in the time of armed conflict. For example, The Hague Convention (IV) Respecting the Laws and Customs of War on Land of 18 October 1907 and the Regulations annexed thereto (Hague Regulations) provides;

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.<sup>13</sup> All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.<sup>14</sup> In the same manner Convention for the protection of cultural property in the event of armed conflict 1954 provides no definition of cultural property rather it mentions what the objects are covered under the term of cultural property<sup>15</sup>. According to the Convention, the term cultural property Covers;

- a. "Moveable or immovable property" of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular, archaeological sites, groups of buildings which, as a whole, are of historical or artistic interest, works of arts, manuscripts, books and other objects of artistic, historical or archaeological interest, as well as scientific collection of and important collection of books or archives or reproduction of such property;
- b. Buildings with the purpose to preserve or exhibit the movable cultural property as (a) museum, large libraries, and depository of the archives, refuge intended to shelter in the event of armed conflict, and the movable cultural property defined above;

<sup>12</sup> Katerina Papaioannon, "The International Law on the Protection of Cultural Heritage, INTERNATIONAL E-JOURNAL OF ADVANCE S IN SOCIAL SCIENCE, Vol.III, Issue 7, (April 2017), retrieved from <http://www.dergipark.org.tr>.

<sup>13</sup> Hague Regulations, Art. 56

<sup>14</sup> Ibid Art. 56, para.2

<sup>15</sup> Ibid, Art. 1

- c. Centers containing the large amount of cultural property as defined in sub-paragraph (a) and (b) of the Article 1, to be known as centers containing monuments,

The definition given in Art 1 of the convention distinguishes between direct and indirect cultural property. Monuments of architecture, art or history, archaeological sites, groups of buildings of historical or artistic interest, works of arts, manuscripts, books and other objects of artistic, historical or archaeological interest and scientific collection, important collection of books or archives or reproduction of the property are taken as the direct cultural property whereas, buildings for the propose of preservation or exhibition of movable cultural property defined such as museum, large libraries, and depository of the archives may be regarded as an indirect cultural property.

The Hague Regulations provides for the protection of “buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected” as long as they are not used for military purposes.<sup>16</sup> The reference to cultural property together with places where the sick and wounded is collected represents an early recognition of the significance of cultural property. ICTY Statute enumerates identical components for cultural property<sup>17</sup>

### **Cultural property or Cultural Heritage**

In many international treaties the terminologies cultural property and cultural heritage are used to signify the ancient works of art and other objects and both terminologies have been used simultaneously in various international cultural property related instruments.<sup>18</sup> This practice has been asserted since the codification of the Hague Convention respecting the Laws and Customs of War on Land, adopted and revised respectively by the First and Second Peace Conferences of 1899 and 1907 and the 1907 Hague Convention concerning Bombardment by Naval Forces in Time of War as well. The concept of the “cultural property” or the broader concept of “cultural heritage” has been emphasized by various authors. The term cultural property first time used in an international legal context brought in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. The

<sup>16</sup> Ibid, Art. 27

<sup>17</sup> Ibid, Art. 3(d).

<sup>18</sup> AP I Art. 53, AP II Article 16 impose prohibition on any act of hostility directed against the historic monuments, works of art or place which constitute cultural or spiritual heritage of peoples.

same terminology was used in United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970. The same approach is taken in the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, of 26 March 1999, which applies to both international and non-international armed conflicts. But Unidroit Convention of 24 June 1995 used the term “cultural objects.”<sup>19</sup> Other legal instruments expressly used the term “heritage” particularly some international agreements executed under the auspices of the Council of Europe, such as European Convention on the Protection of the Archaeological Heritage 1969 and the Convention for the Protection of the Architectural Heritage of Europe 1985.

UNESCO in the later days, itself has frequently been using the term “heritage” in other international instruments such as Convention concerning the Protection of the World Cultural and Natural Heritage 1972, UNESCO Convention for the Protection of Underwater Cultural Heritage 2001, the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage and the UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, both of 17 October 2003. Concept of cultural heritage, if compared to that of cultural property, is broader in scope, as it expresses a “form of inheritance to be kept in safekeeping and handed down to future generations”<sup>20</sup> The concept of cultural property is considered to be “inadequate and inappropriate for the range of matters covered by the concept of the cultural heritage”, which includes, inter alia, the non-material cultural elements (like dance, folklore, etc.<sup>21</sup> Convention for the Safeguarding of the Intangible Cultural Heritage of 17 October 2002 includes “intangible cultural heritage” the practices, expressions, knowledge, skills as well as the instruments, objects, artefacts and cultural spaces associated therewith that communities, groups and in some cases, individuals recognize as part of their cultural heritage in its definition.<sup>22</sup> . Whatever the relevant legal regime of public or private ownership under domestic legislation may be, the protection of cultural property i.e. works of art and objects of artistic, historic and archaeological interest is clearly governed by the rules laid down in the

<sup>19</sup> <https://www.unidroit.org/instruments/cultural-property/1995-conventio>

<sup>20</sup> Manilio Freigo, “Cultural property v. cultural heritage: A “battle of concepts” in international law? IRRC, Vol. 86, No. 854, (June 2004).

<sup>21</sup> Ibid

<sup>22</sup> CONVENTION FOR SAFEGUARDING OF THE INTANGIBLE CULTURAL HERITAGE, Article 2

above-mentioned international agreements and such property can and conceived as a sub-group within the notion of cultural heritage.<sup>23</sup>

### 3. Major International Treaties on Protection of Cultural Property

Cultural heritages/property have continuously been the object of concern at the time of armed conflict in every age. As destruction of cultural properties has been instrumental in defeating the enemy psychologically, most of the wars are found to be centered to the destruction of cultural heritage of the enemy. However, various global and regional treaties regarding protection of cultural properties have been adopted and many provisions could be found in customary international humanitarian law. The customary Rules of IHL has addressed various issues relating to the conduct of hostilities. Customary IHL provides for principles of distinction such as; civilian and combatants, distinction between civilian objects and military objectives, indiscriminate attack, proportionality in attack, and precaution in attack.

Customary IHL provides for respect of cultural property by each party to the conflict both in International and non-international armed conflicts. It states that, special care must be taken in military operations to avoid the damage to buildings dedicated to religion, art, science, education or charitable purpose and historic monuments unless they are military objectives<sup>24</sup> Property of great importance to the cultural heritage of every people must not be objects of attack unless imperatively required by military necessity<sup>25</sup> Unless military necessity requires, cultural heritage of great importance exposing cultural heritage to destruction or damage is prohibited.<sup>26</sup> Whatever the rules found in the customary international law, were not sufficient for the protection of cultural property. In the context many international or regional level treaties have been developed. Such of the treaties can be summarized as follows;

#### 3.1 Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments 1935

The treaty was concluded by Pan- American Union in 1935. The treaty which is also known as the **Roerich Pact**, initiated and named after the Roerich Museum of USA. The treaty was approved by the 7<sup>th</sup> international conference of American States on 16<sup>th</sup> December 1933 held at Montevideo, was signed

<sup>23</sup> Ibid

<sup>24</sup> Rule 38 A

<sup>25</sup> Rule 38 B

<sup>26</sup> Rule 39, Jean- Marie Henckaerts, Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict, International Review of Red Cross, Vol.87, No.857, March 2005

by 21 American States and ratified by eleven states aimed exclusively to protect cultural property. The Pact provides for the neutrality and protection of “historic monuments, museums, scientific, artistic, educational and cultural institutions.”<sup>27</sup> The treaty was concluded for obtaining the following objectives;

- Universal adoption of the Flag
- To preserve in any time of danger all nationally or privately-owned immovable monuments which form the treasures of people
- Respect and protect the treasures of culture in time of war and peace

The treaty contains many important provisions for the protection of cultural property, which could be summed up as follows:

**Neutrality of cultural property:** The treaty provides for historic monuments, museum, and scientific, artistic, educational and cultural institution as neutral and respected and protected from belligerency. Personnel engaged in the service of such institutions are also regarded as neutral. In the same way respect and protection is to be accorded to the historic monuments, museum, and scientific, artistic, educational and cultural institution in time of peace as well as in war.<sup>28</sup>

**Non-Discrimination:** The neutrality of and protection and respect of such monuments and institution shall be recognized without any discrimination on the basis of sovereignty.<sup>29</sup>

**Ensuring respect and protection by an internal Legislation:** The ratifying states of the convention have obligation to adopt national legislation for the protection of cultural property and are in the obligation to ensure respect and adopt measures of protection.<sup>30</sup>

**Use of Distinctive Flag:** In order to identify the monuments mentioned in Article 1, distinctive flag (red circle with a triple red sphere in the circle on a white ground) may be used.

**Deprivation of the privileges:** Historic monuments and the institutions mentioned in Article 1 if used for military purpose shall lose the privilege recognized by the treaty.<sup>31</sup> The treaty provides that the signatory governments

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<sup>27</sup> TREATY ON THE PROTECTION OF ARTISTIC AND SCIENTIFICA INSTITUTION AND HISTORIC MONUMENTS, Article 1 (1935),

<sup>28</sup> Ibid

<sup>29</sup> Ibid, Art. 2

<sup>30</sup> Ibid Article 2

<sup>31</sup> Ibid Art. 5



and the acceding states have to send the list of historic monuments to the Pan American Union at the time of signature or accession or at any other time. Similarly Pan American Union is also responsible to send the list of historical monuments and institutions to the countries while notifying for signature and accession and inform other governments for the change<sup>32</sup> Besides, there are other formal provisions in the treaty dealing with the date and time of signature.<sup>33</sup> deposit of instruments of accession and ratification and denunciation.<sup>34</sup> The treaty may be denounced by any signatory and the acceding state. Such denunciation shall go effective after three months of the notice<sup>35</sup> The treaty although having only 8 Articles and regional in nature, considerably influenced further development in this field and proved an inspiration in further agreement. The treaty of 1935 was also discussed in the International Museum Council of League of Nations, which aimed to introduce similar binding obligations on all members of League of Nations. In this regard Netherlands' role was remarkable. She supported the attempt of League and furnished suggestion to organize a diplomatic conference. Consequently, following the suggestion of Netherlands, UNESCO called on a diplomatic conference at The Hague in 1954, where 45 states concluded Cultural Property Convention together with Regulations and Protocol.<sup>36</sup>

### **3.2 Hague Convention for the Protection of Cultural Property in the event of armed conflict, 14 May 1954**

Convention for the protection of cultural property in the event of armed conflict 1954 has been the major event in this regard. With development in the modern technique of warfare, cultural property has suffered grave damage during recent armed conflict. Damage to the cultural property belonging to any people is supposed to be the damage to the cultural heritage of mankind, because it is regarded that each people makes contribution in the creation of culture of the world. What the norm universally established that cultural property whoever they belong to, should be protected and preserved as they are regarded as the common heritage of mankind.

Preservation of Cultural heritage is a prime objective of the convention. For this preservation of cultural property is considered to be of great importance

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<sup>32</sup> Ibid Art. 4

<sup>33</sup> Ibid Art. 6

<sup>34</sup> Ibid Art. 7

<sup>35</sup> Ibid Art. 8

<sup>36</sup> Dieter fleck (ed), *The Hand Book of Humanitarian Law*, (2nd ed) Oxford University Press, New York 2008 p.434

for all people of the world and such heritage should receive international protection. Protection of cultural property may only be ensured by taking national and international measures. Thus, the convention has been adopted as a determination for taking possible steps for the protection of the cultural heritages.<sup>37</sup>

### **Protection Measures under the Hague Convention of 1954:**

The Hague Convention of 1954 provides for measures of protection of cultural property in the event of armed conflict. Such measures are discussed as follows:

#### **General and special protection**

The Hague Convention for the protection of cultural property in the event of armed conflict 1954 distinguishes the cultural property under general and special protection. All cultural properties must be afforded minimum general protection under the convention. The protection comprises two fundamental elements, 1) safeguard and 2) respect.<sup>38</sup>

**General Protection:** Hague Convention of 1954 provides that the parties to the Convention have to undertake to respect cultural property situated within their own territory as well as within the territory of other contracting states by refraining from any use of property and its immediate surrounding or appliances in use for its protection for the purpose likely to expose it to destruction or damage in the event of armed conflict, by refraining from any act of hostility directed against such property.<sup>39</sup> The Convention on protection of Cultural Property in the event of Armed Conflict 1954 prohibits attack against cultural property unless it becomes a military objective and there is no feasible alternative for obtaining a similar military advantage<sup>40</sup> in the course of attack. The parties to the conflict have to do everything feasible to verify that objectives to be attacked are not cultural property. If it becomes clear that the objectives to be attacked are cultural property, the parties to the conflict must suspend the attack.<sup>41</sup> The state obligation to respect and protect cultural property can be waived only in case where military necessity imperatively requires such a

<sup>37</sup> Preamble of THE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT 1954

<sup>38</sup> HAGUE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT Art. 2, 1954

<sup>39</sup> Ibid Art. 4)

<sup>40</sup> Ibid Art. 4 (1), and 2, Article 6 (a) Protocol 2 of HAGUE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT 1954, Article 53 (a), and Art. 52 AP I, Art. 16 AP II

<sup>41</sup> AP, I Art. 57 (1) and (2)

waiver.<sup>42</sup> State parties to the Convention are in the obligation to prohibit, prevent, and if necessary, put a stop to any form of theft, pillage, or misappropriation, or any act of vandalism directed against cultural property situate in their or other state's territory.<sup>43</sup>

Similarly, the Convention also directs to refrain any way of reprisal against the cultural property.<sup>44</sup> In case of the occupation, the occupying power has to provide possible support to the competent authority of occupied country in preserving and safeguarding the cultural property.<sup>45</sup> If the competent authority of the occupied country be unable to take necessary measures to preserve the cultural property situated in occupied territory, the occupying power as far as possible an in close cooperation with such authority, has to take necessary measures.<sup>46</sup> For the safeguarding of the cultural property, Hague Convention for the protection of cultural property provides for the Blue Shield as the Emblem of the convention.<sup>47</sup> Such emblem be marked over the space where the cultural property is refuge. The distinctive emblem three times may be used only as a means of identification:<sup>48</sup>

- a) immovable cultural property under special protection
- b) the transport of the cultural property under the condition provided for in Article 12 and 13,
- c) improvised refuges, under the condition provided for in the regulation for the execution of the convention.

The distinctive emblem may be used alone as a means of identification of:

- a) cultural property not under the special protection
- b) the person responsible for the duties of control
- c) the personnel engaged in the protection of cultural property
- d) the identity cards mentioned in the regulation for the execution of the Convention

The use of distinctive emblem during armed conflict for other purpose except in the condition mentioned above is forbidden.<sup>49</sup>

<sup>42</sup> Article 4(2) Hague Convention for the Protection of Cultural property in the Event of Armed Conflict 1954

<sup>43</sup> Ibid Article 4(3)

<sup>44</sup> Ibid Article 4(4)

<sup>45</sup> Ibid Article 5(1)

<sup>46</sup> Ibid Article 5(2)

<sup>47</sup> Ibid Article 16)

<sup>48</sup> Ibid Article 17 (1)

<sup>49</sup> Ibid Article 17 (3)

**Special Protection:** Hague Convention on the Protection of Cultural Property in armed conflict, from Article 8-11 provides for special protection of cultural property. This is a supplementary region which provides higher standard of protection in respect of narrower range of property. Such higher standard of protection relates specifically to twin obligation of conflicting parties; a) to refrain from using cultural property and its surrounding for military purpose and b) to refrain from directing acts of hostility against it. Special protection is available only in respect of refuges intended to shelter movable cultural property, centres containing monuments and other immovable cultural property. It is not available for movable cultural property as such. Moreover, refuges, centres containing the monuments and other immovable cultural property are entitled to special protection only if they satisfy the following criteria:

- the cultural property must be situated in adequate distance from any large industrial centre, important military objectives constituting a vulnerable point such as; aerodrome, broadcasting station, major port, or railway station or main line of communication.<sup>50</sup> or whenever activity directly connected,
- Cultural Property not situated in an adequate distance may be placed under the special protection if the requesting contracting parties for such protection undertakes, to make no use of military objective in question and, in the case of port, railway station and aerodrome to divert all traffic therefrom in the vent of the armed conflict.<sup>51</sup> A refuge for movable cultural property not so situated may however be placed under special protection if it is designed in such a way that it will not, in all probability, be damaged in the event of attack.<sup>52</sup>
- The cultural property must not be used for the military purpose<sup>53</sup> A centre containing monuments shall be deemed to be used for military purpose whenever it is used for the movement of military forces or material, even by way of transit, or whenever activities directly connected with military operation, the stationing of military forces or the production of military materials take place within the centre<sup>54</sup>. The guarding of cultural property by specially authorized armed custodians or the presence in the vicinity

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<sup>50</sup> Ibid Art. 8

<sup>51</sup> Ibid Art. 8 (5)

<sup>52</sup> Ibid Art. 8 (2)

<sup>53</sup> Ibid Art. 8 (1)

<sup>54</sup> Ibid Art. 8 (3)

of police force responsible for maintenance of public order shall not be deemed to use for military purpose<sup>55</sup>

Special protection is granted to the cultural property by its entry into the International Register of the Cultural Property under Special Protection<sup>56</sup> maintained by the Director General of UNESCO.<sup>57</sup> Contracting parties have to ensure the immunity of the cultural property under special protection by refraining from any act of hostility against such property, except in cases of unavoidable military necessity.<sup>58</sup>

It is up to the commander of a division of higher-ranking officer to establish Unavoidable military necessity. When circumstances permit, the opposing party must be notified the decision in advance in a reasonable time.<sup>59</sup> The contracting parties taking the decision, has to inform the Commissioner General for Cultural Property accredited to as soon as possible in writing.<sup>60</sup> If a contracting party violates one of its obligation towards the cultural property under special protection, the opposing party, for as long as the violation persists, be released from its obligation to ensure the immunity of its property concerned.<sup>61</sup> In the situation the cultural property in question remains protected by the general rules on respect for cultural property.

**Enhanced Protection:** The view predominantly expressed during review of cultural property convention that the regime of special protection has been failed and instead of two different level of protection, special protection should be replaced by the new regime of enhanced protection.<sup>62</sup> Enhanced protection unlike special protection, is available for immovable and movable cultural property. Contracting parties may request that the cultural property be place under enhanced protection.<sup>63</sup> Enhanced protection is subjected to certain criteria, which are as follows;

- The cultural Property must be cultural heritage of the greatest importance for humanity,<sup>64</sup>

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<sup>55</sup> Ibid Art. 8 (4)

<sup>56</sup> Ibid Art. 8(6)

<sup>57</sup> Ibid Art. 12-16

<sup>58</sup> Ibid Art. 9, and 11 (2)

<sup>59</sup> Ibid Art. 11 (2)

<sup>60</sup> Ibid Art. 11(3)

<sup>61</sup> Ibid Art. 11(1)

<sup>62</sup> Deter Fleck (ed), Hand Book of International Humanitarian Law, second Edition, Oxford, 2008, 456

<sup>63</sup> HAGUE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT Art. 10, 1954

<sup>64</sup> Ibid Art. 10.

- The cultural property must be protected by adequate domestic legal administrative measures recognizing its exceptional and historic value and ensuring the highest level of protection<sup>65</sup>
- The cultural property must not be used for military purpose or to shield military sites, and the party having control over the cultural property must make a declaration that it will not be so used<sup>66</sup>
- Enhanced protection to the cultural property is granted only by its entry in the international list of cultural property under enhanced protection<sup>67</sup> maintained by the Committee for the Protection of cultural property in the event of armed conflict.<sup>68</sup>

**Respect for cultural property:** State parties to the convention have to undertake respect for cultural property situated and within their own territory and other state parties. They refrain from any use of property or its immediate surroundings or the appliances in use for its protection, which may expose it to destruction or damage in the event of armed conflict. Such obligation may be waived only in cases where military necessity imperatively requires so. State parties assume to prohibit, prevent and if necessary put a stop to any form of theft, pillage, or misappropriation, any acts of vandalism directed against cultural property. They shall refrain requisitioning of a movable cultural property situated in territory of another high contracting party. They shall refrain any act directed by way of reprisal against cultural property<sup>69</sup>

### 3.3 Convention on the Protection of the Underwater Cultural Heritage 2001

The war is not limited to particular place. Everywhere within the state territory land, water and air, the war can take place. cultural property though they exist under water or over the water entitled to the protection. Specifically, for the protection of cultural heritage under the water, the Underwater Cultural Heritage Convention was adopted in 3 October 2001 by the 31st session of the General Conference of United Nations Educational, Scientific, and Cultural Heritage Organization (UNESCO). The Convention defines the underwater cultural heritage in its Article 1:( a) “Underwater cultural heritage” means all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as:

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<sup>65</sup> Ibid

<sup>66</sup> Ibid

<sup>67</sup> Ibid Art. 11.10

<sup>68</sup> Ibid Art. 11. 24 and 27

<sup>69</sup> Ibid Art. 4

- (i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context; (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and (iii) objects of prehistoric character.
- (b) Pipelines and cables placed on the seabed shall not be considered as underwater cultural heritage.
- (c) Installations other than pipelines and cables, placed on the seabed and still in use, shall not be considered as underwater cultural heritage. (Article 1(a))

The Convention aims to ensure and strengthen the protection of underwater cultural heritage as its sole objective and lays down some principles.<sup>70</sup> The major principles are:

- 1) cooperate in the protection of underwater cultural heritage,
- 2) preserve underwater cultural heritage for the benefit of humanity,
- 3) taking joint and separate measures as appropriate,
- 4) conservation and management of Recovered underwater cultural heritage,
- 5) commercial exploitation of Underwater cultural heritage, and
- 6) proper respect to all human remains located in maritime waters.

Beside these principles, the Convention provides that the state parties exercise their exclusive sovereignty over the Underwater cultural heritage in internal waters, archipelagic waters and territorial sea.<sup>71</sup> Besides, the Convention provides for responsibility for the states to protect underwater cultural heritage in the EEZ and continental shelf.<sup>72</sup>

### **3.4 Convention for the Safeguarding of the Intangible Cultural Heritage 2003**

There is another international treaty dealing with the Intangible cultural heritage adopted in 2003. The Convention primarily provides for meaning and measures of safeguards. Article 1 of the Convention describes for the purpose as follows:<sup>73</sup>

- (a) to safeguard the intangible cultural heritage;
- (b) to ensure respect for the intangible cultural heritage of the communities, groups and individuals concerned;

<sup>70</sup> CONVENTION FOR THE PROTECTION OF UNDERWATER CULTURAL HERITAGE, Art. 2, (2001).

<sup>71</sup> Ibid Art. 7 (1)

<sup>72</sup> Ibid Art. 9(1)

<sup>73</sup> CONVENTION FOR THE SAFEGUARDING OF INTANGIBLE HERITAGE, Art.1, (2003)

- (c) to raise awareness at the local, national and international levels of the importance of the intangible cultural heritage, and of ensuring mutual appreciation thereof;
- (d) to provide for international cooperation and assistance.

Article 2 of the Convention provides for definition of the term intangible cultural heritage. intangible cultural heritage” means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development. The “intangible cultural heritage”, as defined in Article 1 of the convention, is manifested inter alia in the following domains as follows : (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; (b) performing arts; (c) social practices, rituals and festive events;

- (d) knowledge and practices concerning nature and the universe;
- (e) traditional craftsmanship.

The Convention describes the role of the state parties for safeguarding the intangible cultural heritage at national level.<sup>74</sup> As the state obligation each State Party to the convention has to,

- a) take the necessary measures to ensure the safeguarding of the intangible cultural heritage present in its territory;
- b) identify and define the various elements of the intangible cultural heritage present in its territory, with the participation of communities, groups and relevant non-governmental organizations.

The Convention provides for other measures for safeguarding.<sup>75</sup> To ensure safeguarding, development and promotion of the intangible cultural heritage present in its territory the state parties have to:

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<sup>74</sup> Ibid, Art. 11

<sup>75</sup> Ibid Art. 13



- (a) adopt a general policy aimed at promoting the function of the intangible cultural heritage in society, and at integrating the safeguarding of such heritage into planning and programmes;
  - (b) designate or establish one or more competent bodies for the safeguarding of the intangible cultural heritage present in its territory;
  - (c) foster scientific, technical and artistic studies, as well as research methodologies, with a view to effective safeguarding of the intangible cultural heritage, in particular the intangible cultural heritage in danger;
  - (d) adopt appropriate legal, technical, administrative and financial measures aimed at (i) fostering the creation or strengthening of institutions for training in the engagement of the intangible cultural heritage and the transmission of such heritage through forums and spaces intended for the performance or expression thereof; (ii) ensuring access to the intangible cultural heritage while respecting customary practices governing access to specific aspects of such heritage;
- (iii) establishing documentation institutions for the intangible cultural heritage and facilitating access to them.

Besides, the State party is in the obligation for Education, awareness-raising and capacity-building.<sup>76</sup> Each State Party has to attempt, by all appropriate means to ensure recognition of, respect for, and enhancement of the intangible cultural heritage in society. Similarly, the Convention also provides for the responsibility to safeguard intangible cultural heritage at international level. State parties to the convention have to establish, keep up to date and publish a list of intangible cultural heritage in order to ensure better visibility, significance, of intangible cultural property.<sup>77</sup>

### **3.5 The Cairo Declaration on the Protection of Cultural Property 2004**

The declaration which is regional in nature, was adopted by consensus at a regional conference convened from 14 to 16 February 2004 in order to mark the 50th anniversary of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict. The meeting was organized jointly by the Egyptian national IHL Committee, the ICRC, the Egyptian Red Crescent and UNESCO. In particular, the Declaration recommends to the States to accede to the 1954 Convention and its two Protocols of 1954 and 1999 and

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<sup>76</sup> Ibid, Art. 14

<sup>77</sup> Ibid Art. 16

adopt measures in order to implement these instruments at national level. The Declaration adopted following recommendation at the close of the conference, which are as follows;

To call upon States not yet party to the 1954 Convention and its 1954 First and the 1999 Second Protocol (came into force on 9 March 2004) to proceed to the accession to these instruments. Besides, the Declaration urges states to harmonize their national legislations and regulations with the provisions of the 1954 Hague Convention and its two Protocols guaranteeing the suppression of all violations of the rules concerning the protection of cultural property in the event of armed conflict, the punishment of offenders or persons ordering the commission of offences and the protection of the distinctive sign of the protection of cultural property from all abuses. exchange information and cooperation with the relevant national commissions in this field; give a priority to the inclusion of the subject of the protection of cultural property in educational and training programs for the military forces and the persons responsible for the enforcement of laws, as well to including it in the international humanitarian law programs taught at schools and universities.

#### 4. Nepalese Law on the Protection of Cultural Property

Nepal as one of the oldest countries and because of its multiethnic, multicultural, multi-lingual, multi religious nature has been the very rich country for its cultural, monumental, and religious sites. Many architectural, religious and monumental site have secured their place in the UNESCO Heritage sites. Although there is no any specific law having objectives to protect cultural property in the event armed conflict, Nepal consists of Ancient Monuments Preservation Act 2013, which defines the terms “ancient monuments”, “archeological objects”, and “protection”. The Act defines ancient monuments as “ history, arts, science, architect, or any temple, monuments, house, *Devalaya*, *Shivalaya*, monastery, and Stupa. The term also includes, any place where monuments refuge, and any human settlement, or place jointly or separately established in one place or in a separate place and remnants of such human settlement, or any fossils of ancient monuments which have crossed one hundred years, or cave.<sup>78</sup>

Similarly the Act defines archeological objects as “any object which is built and used from ancient time, or any hand written epic, *Vamshawali* Rock inscription, Gold inscription, Copper inscription, documents written in bark and birch tree leaf (*Bhoj-Patra*), document written on Palm leaves, Paper,

<sup>78</sup> Ancient Monuments Preservation Act, Sec 2 (a), (2013)

Coin, any house relevant to historical incidents, or used by highly important personality, or any object such as, stone, wood, clay, tusk, bone, clothes, paper or metal, used by such person or carved building or its part, Buddhist cenotaph, statue, or *Paubha chitra*.<sup>79</sup> The Act criminalizes any act of destruction, demolition, theft, changing, disfiguring, of ancient monuments.<sup>80</sup> Newly introduced Criminal Code 2074 which contains some provisions on criminalization for encroachment of public or national property.<sup>81</sup> But all laws relating to destruction of public cultural property do not comply with provision of Hague Convention for protection of cultural property in the Event of Armed Conflict 1954 and Additional Protocols to the Geneva Conventions as such laws are not promulgated to that effect.

## 5. Conclusion

Different types of discussion have been initiated in Nepal as she encountered the destruction of some ancient monuments, religious places, Libraries, and other things of cultural importance during insurgency period. Nepal is not a party to Additional Protocols to the Geneva Conventions of 1949 and Hague Convention for the Protection of Cultural Property 1954. Although Nepal is not in obligation to comply with the treaty provisions, she has to follow the customary international law rules. Cultural Properties which represent the history, cultural and civilization of certain period, need to be protected in order to handover it to the future generation. Unless the future generation are handed over their cultural heritage, they might lose their roots and segregated from their ancestry. With the past experience of insurgency and possible belligerency, in Nepal, she is in need to ensure safeguarding the cultural property, cultural heritage and other ancient monuments. For such a purpose Nepal can make domestic law dealing with destruction of cultural property during armed conflict. Moreover, being rich in cultural heritage and ancient monument and numerous archeological sites, Nepal can accede to the Hague Convention of 1954 and its protocols.




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<sup>79</sup> Ibid, Sec 2(b)

<sup>80</sup> Ibid, Sec 12

<sup>81</sup> Criminal Code, Sec 174, (2074 B.S)