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**“INTENTIONAL DESTRUCTION OF CULTURAL HERITAGE SITES DURING
ARMED CONFLICTS – A WAR CRIME?”**

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ABSTRACT

Cultural heritages are the treasure from the past that we seek to carry forward to the future. They are the symbol of spiritual and cultural identity of a community. This is also the focal reason why cultural heritage sites are targeted by enemy forces during a conflict. They seek to uproot the core values cherished by the opposing faction by destroying their cultural heritage. Various legal instruments concerning its protection have attempted to define the term, but as the notion is ever expanding, formulation of a strict definition inclusive of all ideas associated with the term is nearly impossible. This article seeks to review the debate over the classification of obliteration of cultural heritage sites during conflicts as war crime. The article first provides a detailed analysis of attempts to define the term and the value carried by them; then proceeds to the fundamental principles governing the conduct of parties to a combat. The article further provides a detailed explanation of different types of harms caused to the cultural heritage sites during conflict and gives an overview of various legal instruments framed aiming to prohibit any kind of destruction to sites along with various obligations cast on the states irrespective of whether it is party to the conflict or not. The article later proceeds to the concept of war crime, analyses each of the requirements provided for a conduct to be classified as war crime, and

then evaluates if the act of destruction of cultural heritage sites during conflicts satisfies those requirements.

INTRODUCTION

The very aim of war is destruction of the opposing faction in every possible manner, whether it is the person, property or values. This has been undoubtedly proved by each instance of armed conflict that has taken place in the history of humanity. Since time immemorial, cultural heritage sites have been the victims of armed conflicts. The obliteration of Carthage by the Roman troops around 146 BC, the ransack of Constantinople by the Crusaders in the 13th century, the dismantling of the statuary ornamenting the cathedrals during the wars of the Reformation and more recently the destruction of synagogues during Second World War and annihilation of the World Heritage site of Timbuktu in Mali after the Battle of Gao in 2012 are various traces of steering the conflict towards heritage sites. Although the threat to cultural heritage has been subsisting since the earliest known time, this has proved even more destructive since the discovery of modern means of warfare like aerial bombing and long distance weapons. Cultural heritage sites are targeted with various aims, as a form of cultural genocide, to demoralize the opposing belligerent people and to profit from the pillage and plunder of their wealth being few of the foremost ones.¹

It is worth probing into the question as to why cultural heritage sites often become targets of the belligerents during an armed conflict, whether it is of international or internal character. The importance of cultural heritage lies not only in itself, but also with respect to the human dimensions associated with it.² Owing to their purpose and symbolism, cultural heritage sites are unique and of sentimental value and as a consequence, are irreplaceable.³ The destruction of cultural heritage sites thus “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.”⁴

Aiming at the curtailment of this practice, the international community has collaborated multiple times to come up with effective legal instruments. As a result, beginning from the

¹ CRAIG FOREST, *INTERNATIONAL LAW AND THE PROTECTION OF CULTURAL HERITAGE* 56 (Routledge 2010) [hereinafter Craig Forest].

² *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, Reparations Order, ¶ 16 (Aug. 17) [hereinafter Reparations].

³ *Id.* ¶ 44.

⁴ *Id.* ¶ 45.

Lieber Code of 1863 through the Hague Convention, 1907⁵ and culminating with the most recent Resolution 2347 adopted by the UN Security Council, there have been many international conventions, regulations and protocols formulated for this purpose.

One of the most important developments in this field is the conviction of Ahmad Al Faqi Al Mahdi of war crime for the intentional destruction of cultural heritage. Even though the destruction of cultural heritage has been deemed to be a war crime since the Rome Statute,⁶ It is the first time that the International Criminal Court has recognized and convicted a person under this offence.

It is undoubtedly agreed upon that destruction of cultural heritage is a horrendous act. But the questions that arose in the minds of academicians and international law scholars following this conviction was that, whether this crime against property qualifies to be considered a war crime and if it is necessary to be given the attention that it receives now, when other heinous crimes against person like genocide, rape, etc. during a war is being overlooked. This essay attempts to provide an answer to this question by first delving into the concept of cultural heritage sites by examining its definition and value, principles governing the armed conflicts and the kinds of harms caused, in detail; then proceeding to analyze the international legal framework in this field and detailing the obligations cast on the states during conflicts; and further scrutinizing the concept of war crimes and discovering whether the conduct of directing attack against cultural heritage sites during conflicts meets the requirements to be classified as a war crime.

DEFINITION AND VALUE

Cultural heritage is an ever expanding idea. It grows rapidly day by day, as any common place might attain the status of cultural heritage if discovered to be of any cultural or historic significance.⁷ This rapid scope of expansion defies an easy definition or description. ‘Cultural heritage’ is a term profusely used but elusive of definition. The usage of this term itself has gathered criticisms from various respects.

The attempts to define this term so as to elevate certain things to a higher realm of protection have been made by the national statutes for over the past 2 centuries.⁸ According to Prott and

⁵ Hague Convention (IV) Respecting the Laws and Customs of War on Land, Jan.26, 1910, [hereinafter 1907 Convention].

⁶ Statute of the International Criminal Court, Rome, Nov. 10, 1998, 37 I.L.M. 999 [hereinafter Rome Statute].

⁷ Craig Forest, *supra* note 1, at 1.

⁸ *Id.*

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O’Keefe, cultural heritage consists of “manifestations of human life which represent a particular view of life and witness the history and validity of that view.”⁹ When Prott later described cultural heritage as “those things and traditions which express the way of life and thought of a particular society, which are evidences of its intellectual and spiritual achievements,”¹⁰ Loulanski defined the notion as “culture and landscape that are cared for by the community and passed on to the future to serve people’s need for a sense of identity and belonging.”¹¹ Moreover, cultural heritages have been described in the preamble of an initial UNESCO recommendation as “the product[s] and witness[es] of the different traditions and of the spiritual achievements of the past and thus [are] essential element[s] in the personality of the peoples of the world.”¹²

Cultural heritage has been categorized into movable and immovable heritage; and tangible and intangible heritage. Movable heritage includes almost all the objects bearing some cultural significance from works of art and science to ancient daily utensils. Immovable heritage include ancient sacred sites, prehistoric caves, rock paintings, ancient cities and monuments; and those natural sites, that were and may continue to be of specific significance to a particular cultural or ethnic group.¹³ Probably the most problematic distinction of cultural heritage is that between tangible and intangible, as most of the definitions of tangible cultural heritage contained in the UNESCO Conventions depend on an intangible element to provide cultural context for the tangible.

The term ‘cultural heritage’ was first coined in the World Heritage Convention of 1972.¹⁴ As the convention was limited to protection of immovables, such as monuments, sites, etc, this definition of the term was also in turn narrowed to immovable heritage. Usage of this term also led to the recognition of a collective and public interest in the heritage, rather than private and economic interests.

Cultural heritage is thus more correlated with the value that it bears in the minds of people with regard to the historic, religious or cultural significance. It is known by the value that it carries with it. Each cultural heritage site embodies an inherent value. It may be religious or moral

⁹ L. V. Prott & P.J. O’Keefe, *Cultural Heritage or Cultural Property*, 1 Int. J. Cult. Prop. 307 (1992).

¹⁰ L.V. Prott, *Problems of Private International Law for the Protection of the Cultural Heritage*, Recueil Des Cours 219, 224 (1989).

¹¹ T. Loulanski, *Revising the Concept of Cultural Heritage: The Argument for a Functional Approach*, (2006) 13 Int. J. Cul. Prop. 207, 209.

¹² Preamble to the 1968 UNESCO Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works.

¹³ Craig Forest, *supra* note 1, at 3.

¹⁴ UNESCO, Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972.

attitudes or non religious objects like nostalgia, ingenuity that attribute significance to cultural heritages. They point towards the common heritage of mankind and inculcate a sense of community and identity to the people. It is this sense of oneness that is aimed to be destroyed when a cultural heritage site is targeted for attack. And it is the very same reason why the international community is keen on ensuring utmost protection to these sites.

CULTURAL HERITAGE SITES AND ARMED CONFLICTS

Cultural heritage sites have always been victims of armed conflicts, whether of international or internal character. The reason why the assailants target the cultural heritage sites is mainly because of the sentimental value associated with them. By demolishing a site which possesses a significant emotional relationship with the community, the assailants thereby attempt to demoralize them. There have been many instances in the history of war where cultural heritage sites of importance to the enemy were attacked by the aggressors. But, the history also shows various attempts to humanize wars, by setting restrictions and boundaries to minimize the sufferings and destructions as far as possible. The unparalleled damages caused during the First World War and the exceptional destruction and looting of cultural heritage sites during Second World War ruined the misconception that the existing international law instruments guaranteed an effective protection and created the compulsion in the international community to formulate an International regime that would ensure protection to cultural heritage during armed conflicts. This resulted in the 1954 UNESCO Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.¹⁵

The 1954 Convention embodies the eternal message that “damage to [the] cultural property belonging to any [community] whatsoever means damage to the cultural heritage of all mankind, since each [community] makes it[s] contribution to the culture of the world.”¹⁶ However, the protective power of the 1954 Convention has undergone severe scrutiny as the adoption of the convention failed to prevent the destruction in the armed conflicts that followed.

THE CARDINAL PRINCIPLES

The law of armed conflict, although failed to be unquestionably successful in bringing an end to the destruction of cultural heritage, being the only body of law that regulates the conduct of

¹⁵ UNESCO, Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, CLT.2010/WS/5 [hereinafter 1954 Convention].

¹⁶ *Id.*

belligerents during hostilities, undoubtedly forms the *lex specialis* in this area. This prescribes the precise forms in which the assailants are forbidden or consented to act during these circumstances. The law of armed conflict is built around the four fundamental principles, described as “cardinal principles” by the International Court of Justice in its jurisprudence.¹⁷

Principle of military necessity

The law of armed conflict casts an inevitable constraint on the sovereign capacity of the States in defending an aggression. But it would clearly be unreasonable to tie down the states to this limitation even when their vital interests and possibly the very existence are at stake. In these circumstances, it would be the rational and practical step to permit the states to relax this restriction and curtail the conduct of the aggressors. The principle of military necessity is of fundamental importance in the definition of the requisite balance between the realities of forceful action and the aspirations of legal limitations.¹⁸ It is a restrictive principle aimed at limiting the right of belligerent to conduct an all-out war.¹⁹ The notion of military necessity is stemmed from the sovereign right of states to take forceful measures to protect its fundamental interests. It highlights both *jus ad bellum*, the legal justification for going to war and *jus in bello*, the manner in which the war is waged.²⁰ *Jus ad bellum* centers on the conduct of the states during an armed conflict and the principle of military necessity decides whether the circumstances demand usage of force. Modern concept of principle of military necessity is constrained to the use of force in self defense or with respect to the collective security system established under Chapter VII of the United Nations Charter.²¹ The extent of force permissible would depend on the necessity of defense and in this respect, the *jus ad bellum* and *jus in bello* interact directly with each other. The exception of military necessity indeed relaxes the prohibition against usage of force during conflicts, but at the same time, this exception should not be utilized for the benefit of the State.

In the earlier legal instruments embodying this principle, like the 1907 Hague Regulations and the 1954 Convention, the application of this exception was largely left to the discretion of the belligerents.²² But the Balkan conflict in the 1990s indicated the nuances in the present scheme of protection and led to the adoption of the 1999 Protocol (second protocol) to the 1954

¹⁷ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July. 8).

¹⁸ H. McCoubrey, *The Nature of the Modern Doctrine of Military Necessity*, 30 Mil. L. & L. War Rev. 215 (1991).

¹⁹ Christiane Johannot – Gradis, *Protecting the past for the future: How does law protect tangible and intangible cultural heritage in armed conflict?*, 2015 ICRC 1253-1275 [hereinafter Red Cross].

²⁰ Craig Forest, *supra* note 1, at 76.

²¹ *Id.*

²² Red Cross, *supra* note 19, at 1261.

convention. This protocol, by providing clarity in the application of the principle, reduced the discretionary power of the belligerents in assessing its legitimacy and made it necessary to comply with certain clearly defined conditions before its invocation.

Principle of distinction

The basic notion underlying the general principle of distinction is that in any armed conflict, the only acceptable aim is the destabilization of the military potential of the opposite party, and no other element. With respect to cultural heritage, this principle assumes the form whereby belligerents should always distinguish cultural heritage sites from other property. This principle aims to protect the cultural heritage sites in two aspects, through (1) prohibition of acts of hostility against these sites and (2) prohibition of usage of these sites for military purposes.

The element, prohibition of acts of hostility, has been analyzed and clarified by the regulations in Additional Protocol I in the 1999 Protocol, whereby additional obligations of verification, assessment and precautions are imposed on the parties to make a valid distinction. Additionally, the protocol dictates that an act of hostility would be lawful only if the property in question has also been turned into a military objective. The second element forbids usage of cultural heritage sites for military purposes. In many circumstances, such usage can cause harm to the property in question and sometimes can also form the reason and motive for the subsequent attacks. The adoption of 1999 protocol has introduced stringent obligations under this element as well, like the obligation on the belligerents to make sure that there is “no feasible alternative available to obtain a similar military advantage.”²³

Principle of proportionality

The third principle of proportionality seeks for reconciliation between military necessity and requirements of humanity. This principle dictates that, in association with the conduct of hostilities, belligerents must constantly engage in a quest for equilibrium between the military considerations and respect for fundamental values. As a general rule, this principle is embodied in the Article 57(2)(a)(iii) and (b) of Additional Protocol I and with respect to the protection of cultural heritage, in the Article 7(c) and (d)(ii) of the 1999 Protocol.

As per this principle, for determining whether a proposed military action is lawful or not, the party to the conflict must evaluate the proportion between “the direct and concrete advantage” derived from carrying out the attack and “the excessive damage” that might be resulted from

²³ UNESCO, Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, art. 6, Mar. 26, 1999, 2253 U.N.T.S. 172.

the attack.²⁴ Even though it is comparatively easier to evaluate the first aspect, assessing the gravity of harm likely to be caused to a cultural heritage is complex as a detailed knowledge of the site and its value is required to be known by the belligerents before the evaluation.

Principle of precaution

The final principle, of precaution, is aimed to limit the harm caused to the cultural heritage sites from the conduct of hostilities. This principle seeks to strengthen the compliance with the principles of distinction and proportionality and thereby minimize the damages. It focuses primarily on the implementation of the other principles and derives results from their effective implementation. The conduct prescribed by obligation on the parties with respect to this fourth principle defers according to whether it applies to the attacking or the defending party. The protection through this principle is ensured through Additional Protocol I and 1999 Protocol over a series of measures to be followed by the belligerents, which includes their choice of means and methods of warfare.

During the hostilities phase of an armed conflict, more harm is caused to the cultural heritage sites due to the disregard of these principles by the aggressors. Compliances with these four principles by the armed forces therefore form an effective defense against such harm.

TYPES OF HARM CAUSED

Since ancient times, destruction and plunder of cultural heritage proclaimed as “spoils of war” has been carried out by the winning party. Destroying the cultural heritage sites that are of sentimental value to the people of the opposing faction gives the sense of victory to the aggressors. A military occupation can have a tremendous impact on the social and economic circumstances of the societies concerned. The armed conflicts may also contribute to endangering not the cultural heritage site alone, but also the cultural and spiritual feelings associated with it.

During and after an armed conflict, the cultural heritage sites may suffer from different types of harm, few of which are discussed hereunder.

Due to destruction of components of cultural heritage.

This destruction differs from that which occurs as a result of combat during an armed conflict. Here the destruction is caused due to the demolition, disintegration and the following depreciation of the property.²⁵ A recent incident of this destruction was the ruining of the Hatra

²⁴ Red Cross, *supra* note 19, at 1263.

²⁵ *Id.* at 1267.

archaeological remnants in Iraq by the Islamic State militants. The law governing this harm differs depending on whether the conflict is international or internal.

Due to changes in function of components.

The second kind of harm involves a change in the function of components of the cultural heritage by the aggressors. There is no express prohibition for this harm contained in any legal instrument. But the prohibition can be inferred implicitly or indirectly from certain provisions of the law of armed conflict. Another factor to be considered is that this type of harm not only damages the cultural heritage sites, but also the intangible heritages associated with it. The recent illustrations of this type of harm can be found in the episodes of Iraq War of 2003, during which the Babylon archaeological site was converted into a military base initially by the US forces and later continued so by the Polish force.²⁶

Due to removal of components of cultural heritage.

The cultural heritage sites can also be harmed by the removal of its existing valuable components. This takes place mostly when the authorities responsible for the management of the cultural heritage are disorganized. Such a situation provides a good ground for pillage, plunder and all other kinds of looting of the components. These acts may also be followed by the illegal transport of the components to other states where they would be sold illegally. The 1954 Convention and the Protocols of 1954 and 1999 are the legal instruments which embody prohibition against this harm.²⁷

Consequential economic loss.

This is not a direct harm caused by the destruction of cultural heritages, but an indirect one by which even the individuals associated with them are primarily affected. With respect to many of the cultural heritage sites, a large number of peoples' livelihoods are exclusively dependent on the sites. This is one of the reasons why the assailants target these sites, because of their extensive community role.

LEGAL FRAMEWORK

Even before the discussion on instruments for protection of cultural heritage surfaced the international law, there have been measures imposed for the same. This obligation to safeguard

²⁶ *Id.* at 1268.

²⁷ *Id.* at 1269.

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the cultural heritage in events of armed conflict stemmed from commands of rulers, who were driven by religious or other holy considerations. For instance, in ancient Greece, the sites like Delphi, Delos and Mount Olympus were considered to be sacred and hence inviolable during armed conflicts.²⁸ Even the escaping enemies could take asylum in those sites and no hostile acts were permitted within them.

By the middle ages, these obligations to protect started being formalized. However, these rules were not reduced into universally binding regulations till the late nineteenth century. The earliest known protection offered to the cultural heritage in the modern era was the Lieber Code of 1863, which regulated the Union Army's operations during the American Civil War. By then, many conferences in this topic were held, such as in Saint Petersburg in 1868 and in Brussels in 1874, wherein the Lieber Code and its prohibition of seizure and destruction of cultural property were incorporated into the Brussels Declaration of 1874 and later in the Hague Conventions of 1899 and 1907. The regulations of 1907 Convention contained specific safeguard measures for the 'buildings dedicated to religion, art, science, or charitable purposes, historic monuments.'²⁹ The convention and its regulations have been recognized as customary international law by the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Court of Justice.³⁰

Germany's widespread pillage during the Second World War alarmed that the international law requires modification. Inspired by the Nuremberg Trial conviction of Alfred Rosenberg for organizing the Nazi looting operation, the 1954 Convention was formulated, which forms the skeleton for the current understanding of cultural heritage destruction as a war crime.³¹

Much later, in the 1990s, extensive damage and demolition of cultural heritage took place during the Yugoslavia wars. This incited the international community to establish the ICTY under the auspices of the United Nations to investigate and convict those responsible for these hostilities, among others. Article 3(d) of the ICTY Statute,³² relating to prohibition of destruction of cultural property, replicates the Article 56 of the 1907 Convention, thereby including, "[S]eizure, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and

²⁸ Red Cross, *supra* note 19, at 1257; Pierre Ducrey, *Guerres et guerriers dans la Grèce antique* 243 (1969).

²⁹ 1907 Convention, *supra* note 5, art. 27.

³⁰ Ana Filipa Vrdoljak, *Intentional Destruction of Cultural Heritage and International Law* (2007).

³¹ Brian I. Daniels & Helen Walasek, *Is the destruction of cultural property a war crime?* APOLLO (Feb. 29, 2020, 11:03 AM), <https://www.apollo-magazine.com/is-the-destruction-of-cultural-property-a-war-crime/>.

³² Statute of the International Criminal Tribunal for the Former Yugoslavia, May. 25, 1993, U.N. Doc. S/RES/827 [hereinafter ICTY Statute].

science”³³ among violations of laws or customs of war. The armed conflicts of internal character are also included by the statute within its purview. Among the many legal instruments that followed in the field of armed conflicts, the Article 53 of 1977 Additional Protocol I and Article 16 of the Additional Protocol II to the 1949 Geneva Convention represent provisions relating to the protection of cultural heritage sites.

Article 20(e)(iv) of the 1996 International Law Commission Draft Code of Crimes against the Peace and Security of Mankind³⁴ (1996 ILC Draft Code) and the subsequent 1999 Rome Statute of the International Criminal Court³⁵ (Rome Statute) also guarantees protection to cultural heritage sites restating the principles under the International Criminal Law. Articles 8(2)(b)(ix) and 8(2)(e)(iv) of the Rome Statute recognize the act of “intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments” during armed conflicts of international and internal characters respectively to be war crimes.

The 2003 UNESCO Declaration³⁶ refers to the articles of the 1907 Hague regulations, preamble to the 1954 Hague Convention, relevant provisions of Rome Statute and ICTY Statute and notes that hostile acts not expressly dealt with by the existing legal instruments are guided by the principles of international law, humanity and public conscience. The declaration also confers an obligation on the states involved in an armed conflict to take all the appropriate measures to carry out their activities in consonance with the customary international law, international agreements and UNESCO recommendations to ensure protection of cultural heritage.³⁷

Recently in the case of *The Prosecutor v. Ahmad Al Faqi Al Mahdi*,³⁸ the ICC has for the first time convicted an individual under war crime for the offence of intentionally directing attacks against 10 cultural heritage sites in Mali after the Battle of Gao. By this conviction, the ICC has reiterated the provision under Rome Statute and has recognized the act of destruction of cultural heritage during armed conflict as a war crime. Following this conviction, the UN

³³ *Id.* at art.3(d).

³⁴ International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind, UN Doc. A/48/10, and Y.B. ILC, (1996), vol. II(2).

³⁵ Rome Statute, *supra* note 6.

³⁶ UNESCO, Declaration Concerning Intentional Destruction of Cultural Heritage, Oct. 17, 2003 [hereinafter 2003 Declaration].

³⁷ *Id.* art. V.

³⁸ *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Case No. ICC-01/12-01/15, Judgment and Sentence (Sep. 27, 2016).

Security Council adopted Resolution 2347,³⁹ the first ever resolution focusing on cultural heritage.

OBLIGATION OF STATES

Almost all the legal instruments for the protection of cultural heritage refer to the sovereign states as its primary subject. The conventions and regulations adopted in this regard impose certain obligations to be followed by the states during and after an armed conflict. The 1954 Convention makes it mandatory for the States to refrain from directing any hostile act towards cultural property situated in their own territory or the territories of other contracting parties⁴⁰ and resort to all requisite steps for the preservation of the sites in the territories occupied by them.⁴¹ Article 4(3) of the convention further casts a duty on the states to prohibit, prevent, and if the situation demands, suppress any theft, pillage or misappropriation and any acts of vandalism directed against cultural property. Additionally, the convention urges the States to take all measures necessary for the prosecution and conviction of those persons who breach the dictates of the convention in any manner.⁴² The 2016 ICC Conviction and the following UNSC Resolution, states have been put under notice, ‘that the destruction of cultural property has become a very real approach during conflicts, and that the efforts to curb the same would require the will and cooperation of all the states.’

A WAR CRIME?

War crimes, crimes against humanity and genocide are considered to the most grievous crimes in international law. But, contrary to the latter two, which are recognized as independent crimes, the concept of war crimes is acknowledged to be partnered with the primary rules dealing with prohibited acts under international humanitarian law and the secondary rules governing their punishments.⁴³ The term and concept of ‘war crime’ is not employed uniformly. A broader approach to definition regards war crimes as “all acts constituting a

³⁹ UN Security Council adopts historic resolution for the protection of heritage, UNESCO (Feb. 29, 2020, 9:23 AM), <https://en.unesco.org/news/security-council-adopts-historic-resolution-protection-heritage>.

⁴⁰ 1954 Convention, *supra* note 15, at art. 4(1).

⁴¹ *Id.* at art. 5.

⁴² *Id.* at art. 28.

⁴³ ALEXANDER SCHWARZ, WAR CRIMES ¶ 2 (2014), *available at* ResearchGate [hereinafter WAR CRIMES].

violation of the laws or customs of war, irrespective of whether the conduct is criminal.”⁴⁴ According to the strict definition, “a war crime is any act, or omission, committed in an armed conflict that constitutes a serious violation of the laws and customs of international humanitarian law and has been criminalized by international treaty or customary law.”⁴⁵

WHETHER ANNIHILATION OF CULTURAL HERITAGE SITES QUALIFIES TO BE A WAR CRIME?

On perusal of the aforementioned strict definition of the term war crime, it is evident that it requires at least two conditions to qualify an act to be a war crime. First, violation of international humanitarian law, and second, criminalization of conduct under any treaty or customary international law.

Violation of international humanitarian law

Contravention of international humanitarian law forms the primary requirement for an act to be a war crime. Even though all war crimes need to be violations of international humanitarian law, all violations of international humanitarian law do not amount to war crimes. In the case of *Dusko Tadic*,⁴⁶ the ICTY Appeals Chamber has defined certain preconditions following Article 3 of ICTY Statute, that are to be complied with for a conduct to be a war crime:

- a) The violation should be an infringement of rule of international humanitarian law;
- b) The violation must be customary or embodied in a treaty;
- c) The violation should be grave;
- d) The violation should give rise to individual criminal responsibility to the perpetrator.

On evaluating each of the conditions individually, it can be condensed that an alleged act can be regarded as war crime only if the act constitutes a contravention of an applicable norm of international humanitarian law. Further, it must be a breach of rule safeguarding important values and must involve grave implications for the victims.⁴⁷ In the case of cultural heritage sites, protecting them is urged by international humanitarian law through many treaties and their destruction constitutes a breach of rule of the same. Also, owing to the cultural or religious significance of these sites to the international community along with the respective religious or ethnic group, their destruction is considered to be of grave consequences to the victim faction.

⁴⁴ *Id.* at ¶1.

⁴⁵ *Id.*

⁴⁶ *Prosecutor v. Tadic*, Case No.IT-94-1-ID, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 94 (Int'l Crim.Trib. for the Former Yugoslavia Oct. 2,1995).

⁴⁷ *Id.*

Therefore, it is apparent that the act of destruction of cultural heritage during conflict satisfies each of the preconditions required to be met with in order to be a violation of international humanitarian law, the primary rule.

Criminalization of violation under any treaty or customary international law

The alleged act constituting a violation of international humanitarian law is only the primary rule. And this breach would be of no consequence if the act does not meet the secondary rule of it being criminalized by treaty or customary international law. Only if this rule is satisfied, a conduct can entail individual criminal responsibility and be classified as a war crime. The 51 war crimes enlisted in Article 8(2) of the Rome Statute are exhaustively criminalized under the statute. Consequently, all the contraventions of international humanitarian law that are penalized as war crimes by the statute may be rightly regarded as war crimes under the jurisdiction of the court. Therefore, by virtue of being enlisted in Articles 8(2)(b)(ix) and 8(2)(e)(iv), the attacks during armed conflicts of international and non-international character respectively, intentionally directed against building dedicated to religion, historical monuments, etc. can be justifiably classified as war crimes.

Thus, by a detailed evaluation of the strict definition of the term, it can be established that the damage intentionally caused to sites of cultural, religious or historical significance during an armed conflict can be regarded as a war crime. But this inference has invited condemnation from various academicians and scholars in the past. The foremost and main criticism stems from the question that how a crime against cultural property can be placed on the same degree with crimes against people. The response to this can be derived from the significance of the cultural heritage sites and the motive of the assailants behind targeting these sites. The rationale is very evident to victims, observers and perpetrators, being the purposeful deprivation of identity and memory of a community and disruption of the social fabric of societies.⁴⁸ Such conducts seem to manifest the intention of the belligerents not only to expunge these remnants of the past, but also to eradicate all the traces of the cultural and spiritual character of the communities.

The significance of cultural heritage sites and rationale behind designation of its destruction as war crime can be illustrated by the fact that even when human lives are at risk, communities often request the prioritization of the protection of their cultural landmarks.⁴⁹ As explained by a former Director for Legal Protection of Cultural Heritage, “We are often asked the question,

⁴⁸ Reparations, *supra* note 2, at ¶14.

⁴⁹ *Id.* at ¶18.

‘Why protect monuments when people are dying?’ the reason is, the people who are dying say, ‘Please protect our monuments.’ If people feel strongly about their heritage, we don’t feel [that] the international community can simply stand back and say, ‘It’s not important. As long as you’re not dying, that’s all that counts.’⁵⁰

CONCLUSION

The protection of cultural heritage has been the center of concern of the international community since ancient times. Protection of cultural heritage is a multifaceted issue which involves not only states but also individuals. Therefore, greater care is to be given to the protection of such sites. The ICTY had observed during the trial of a case that, since the attack of civilian buildings is a serious violation of international humanitarian law, it is even a severe crime to direct an attack towards a protected site of cultural significance.

Any cultural heritage is of multidimensional character, and this fact is being illustrated by each of the armed conflicts targeting them. Therefore, the protection ensured cannot be limited to merely one or few of those components. Even though the international community is conscious about this factor, it is often noticeable that the legal framework created to safeguard the protection of the cultural heritage does not offer an absolute and extensive coverage of all the components.

The international community has been striving to formulate an effective legal instrument for the absolute prohibition of militants directing attack against cultural heritage sites. Even though the existing conventions, protocols and regulations offer an extensive protection theoretically, it has been evident from the situation after their promulgation that these instruments do not prove to be very successful in limiting the attacks. It is thus the need of the hour to equip our existing legal instruments to provide a more effective control mechanism competent to produce a deterrent effect on the belligerents during an armed conflict.

⁵⁰ *Id.*