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Cover photo: *© AP news – A mortar shell is seen in the foreground of the heavily damaged Umayyad Mosque while the Aleppo citadel is seen in the background.*

ACRONYMS

ABC	ABBREVIATION	DEFINITION
A	AQIM	Al-Qaeda in the Islamic Maghreb
	ANSA	Armed Non-State Actor
D	DGAM	Directorate-General of Antiquities and Museums
F	FSA	Free Syrian Army
H	HPG/PKK	People's Defence Forces/Kurdistan Workers' Party
I	ICC	International Criminal Court
	ICRC	International Committee of the Red Cross
	ICTY	International Criminal Tribunal for the former Yugoslavia
	IHL	International Humanitarian Law
	ICESCR	International Covenant on Economic, Social and Cultural Rights
K	KRG	Kurdistan Regional Government
M	MINUSMA	United Nations Multidimensional Integrated Stabilization Mission in Mali
	MNLA	National Movement for the Liberation of Azawad
	MUJAO	Movement for Unicity and Jihad in West Africa
P	PMF	Popular Mobilization Forces
U	UNESCO	United Nations Educational, Scientific and Cultural Organization
Y	YBS	Sinjar Resistance Units
	YPG/YPJ	People's Protection Units/Women's Protection Units

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ABOUT GENEVA CALL

Geneva Call is a neutral and impartial humanitarian organization aiming to promote respect by armed non-state actors (ANSAs) for international humanitarian norms in armed conflict and other situations of violence.

The key tool of engagement that Geneva Call uses is an innovative instrument known as the *Deed of Commitment*, which allows ANSAs — as they cannot sign international treaties — to commit to abide by specific humanitarian norms and to be held accountable for complying with these norms. Three such *Deeds of Commitment* have been developed to date: the *Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Actio*n in 2000, the *Deed of Commitment for the Protection of Children from the Effects of Armed Conflict* in 2010 and the *Deed of Commitment for the Prohibition of Sexual Violence in Situations of Armed Conflict and towards the Elimination of Gender Discrimination* in 2012. A fourth *Deed of Commitment for the Protection of Medical Care in Armed Conflict* is in the process of being developed. Geneva Call also provides training to ANSAs on international humanitarian norms and encourages them to integrate these provisions into their codes of conduct and other internal regulations.

Since its creation in 2000, Geneva Call has engaged in dialogue with more than 120 ANSAs worldwide. More than half of them have signed one or several *Deeds of Commitment* or made similar commitments. Geneva Call monitors and supports the implementation of these humanitarian commitments.

EXECUTIVE SUMMARY

This report presents the findings of a pioneering, two-year study conducted by Geneva Call on cultural heritage and armed non-State actors (ANSAs). It represents the most comprehensive research available on this topic to date. The report centres around three case studies—Iraq, Mali and Syria—and is based on information obtained through desk and field research, as well as interviews with leading specialized organizations. The study also incorporates the perspectives of ten selected ANSAs operating in these three countries.

The report commences with a thorough analysis of the current international legal framework protecting cultural heritage in armed conflict and its applicability to ANSAs (Chapter 1). It notes that the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention) foresees the application of its core obligations (those related to the respect of cultural property) to all parties to non-international armed conflicts, whether States or ANSAs. However, the 1954 Hague Convention presents a number of structural gaps in relation to ANSAs. For example, under Article 23, only States parties may call upon the United Nations Educational, Scientific and Cultural Organization (UNESCO) *"for technical assistance in organizing the protection of their cultural property, or in connection with any other problem arising out of the application of the […] Convention."* This asymmetry is reproduced in the 1999 Second Protocol, even though this instrument was drafted to supplement and clarify the 1954 regime and is meant to apply, in its entirety, to both international and non-international armed conflicts. The analysis of the international legal framework also considers the relevance to the actions of ANSAs of both the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transport of Ownership of Cultural Property

and the 1972 Convention Concerning the Protection of Cultural and Natural Heritage, as well as the regime specifically developed to safeguard intangible cultural heritage. The latter is of interest as most of the ANSAs interviewed for this study had an intuitive understanding of cultural heritage that encompass both its tangible and intangible dimensions, though they were unaware of its definition under international law.

In addition, the report analyses the various attitudes of ANSAs towards cultural heritage (Chapter 2). It finds that, despite deliberate attacks against cultural heritage, such as the destruction of 14 mausoleums conducted by radical Islamist groups in Mali, or the various actions conducted by the Islamic State group in Iraq and Syria over recent years, ANSAs cannot be considered as a monolithic entity, all with similar attitudes towards cultural heritage. In fact, the approach of ANSAs towards cultural heritage in armed conflict can be broadly divided into two main categories: "a destructive trend" according to which ANSAs engage in deliberate attacks against cultural heritage as a policy or method of warfare, and "a non-destructive trend" whereby ANSAs do not seek to intentionally destroy cultural heritage and may recognize the importance of ensuring its protection, even though their military tactics and/or ignorance of international humanitarian law (IHL) may still expose it to incidental, collateral damage. The study identified first-hand accounts of both negative and positive practices in Iraq, Mali and Syria, where some ANSAs have destroyed and/or looted cultural sites and objects, including World Heritage sites, while others have taken concrete measures to respect and safeguard them. Such measures include: establishing special departments of antiquities; adopting legislation and other regulations that prohibit the excavation of archaeological sites and the destruction, damage and trafficking of antiquities; posting guards to protect archaeological sites and religious temples; storing cultural artifacts, such as ancient manuscripts or statues, seized from traffickers in safe places; and securing cultural sites with sandbags and other *in situ* means of risk mitigation.

The report then maps the responses of specialized organizations to the impact of ANSAs on cultural heritage and their level of engagement with these actors (Chapter 3). The survey conducted as part of this study found a paradoxical situation. On the one hand, well-established institutions such as UNESCO, whose mandate encompasses the protection of cultural heritage, including in armed conflict, appear not to engage directly with ANSAs on this issue at present, because of restrictions within their mandate or political limitations. On the other hand, a number of newly established organizations, some of which were created as an *ad hoc* response to protect cultural heritage in current armed conflicts (in particular Iraq and Syria), are willing to engage with ANSAs, but lack the funding and capacity to do so. In both cases, direct interactions with ANSAs have been a rare practice.

The conclusion offers some recommendations and ways forward to enhance the protection of cultural heritage in non-international armed conflicts. In particular, it makes the case for an engagement-based approach. To date, the response of the international community has been mostly repressive, perhaps best exemplified by the International Criminal Court (ICC) prosecution of Ahmad Al Faqi Al Mahdi for the destruction of heritage in Mali. Yet, such an approach has limitations and complementary ways to address the issue should be considered. This study demonstrates that there is room for humanitarian engagement with ANSAs, at least in some contexts. A number of ANSAs have expressed willingness to cooperate with specialized organizations and interest in receiving training on the matter. A number of important heritage sites are located in areas under the control of ANSAs and engaging with them is thus critical to ensuring effective protection. There are certainly challenges associated with such an effort but, as the report shows an engagement-based approach is sometimes possible and can yield positive outcomes for the preservation of cultural heritage in current armed conflicts.

GLOSSARY OF DEFINITIONS

Armed non-State actors (ANSAs) refer in this study to organized armed entities that are not under effective state control and lack the legal capacity to become party to relevant international treaties. They encompass a variety of actors, including opposition and insurgent movements, dissident armed forces, paramilitary groups, self-defence militia, warlords, armed gangs and national liberation movements, as well as *de facto* authorities and non-recognized States. They usually operate in the context of non-international armed conflicts.

Cultural heritage is the generic term used in this study to encompass both tangible (material) and intangible (immaterial) manifestations of heritage that hold particular importance to a people. This includes objects falling under the term "cultural property", such as works of art and places of worship (see below), as well as intangible manifestations of culture such as oral traditions and expressions (including languages), performing arts, social practices (including rituals and festive events), traditional knowledge and practices (concerning nature and the universe), and traditional craftsmanship. International Humanitarian Law (IHL) has developed a specific framework for the protection of cultural property in armed conflict, which thus forms the focus of this study. However, all forms of cultural heritage deserve protection in armed conflict and the study therefore considers both tangible and intangible cultural heritage, where applicable.[2]

Cultural property is defined in Article 1 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention) as *"movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above"*. The definition thus includes buildings such as museums or large libraries, the purpose of which is to preserve or exhibit movable cultural property, as well as centres or refuges that contain a significant amount of cultural property. The term "cultural property" only includes tangible manifestations of culture and not intangible forms of cultural heritage.

Non-international armed conflicts refer to situations of *"protracted armed violence between governmental authorities and organized armed groups or between such groups within a State"*.[3] The level of armed violence must reach a certain level of intensity and the groups must have a certain degree of internal organization, including a chain of command.[4] These situations do not encompass *"internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature."*[5]

[1] 2003 Convention for the Safeguarding of the Intangible Cultural Heritage, art. 2(2).

[2] Furthermore, while the term "cultural property" remains in use with regard to the protection of cultural objects in armed conflict, following its adoption with the 1954 Hague Convention, it is now considered as embodying an obsolete sense of ownership, as such objects transcend not only current borders but also generations who may consider themselves as 'custodians' rather than 'owners', a concept better reflected by the term "cultural heritage".

[3] ICTY, *The Prosecutor v. Dusko Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), para. 70.

[4] In order for the provisions of the 1977 Additional Protocol II to the 1949 Geneva Conventions to apply, ANSAs must be under responsible command and exercise control over a portion of the territory of the State in question, so as *"to enable them to carry out sustained and concerted military operations and to implement"* the Protocol. "1977 Additional Protocol to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts, art. 1(1).

[5] Ibid, art. 1(2).

1. Background

Since time immemorial, armed conflicts have led to the damage, destruction or looting of cultural heritage. Wars were historically governed by the idea that "to the victor go the spoils", an adage that served as a blanket permission to treat an enemy's cultural treasures as booty. As the distinction between civilian objects and military objectives gained recognition, so did the obligation to spare, to the extent possible, buildings dedicated to religion, art, science or charitable purposes during sieges and bombardments in armed conflicts. This obligation, formally adopted at the international level at the end of the 19th century,[6] was reiterated in the 1907 IV Hague Regulations concerning the Laws and Customs of War on Land (1907 IV Hague Regulations).[7] The 1907 IV Hague Regulations also prohibit the attack, bombardment and pillage of *"towns, villages, habitations or buildings which are not defended"*, including cultural buildings or cultural objects situated in such places.[8]

Over the past century, these basic rules for the protection of cultural heritage have been expanded and supplemented by various international treaties: the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention) and its 1954 First and 1999 Second Protocols; the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention); the 1972 Convention Concerning the Protection of Cultural and Natural Heritage (1972 World Heritage Convention); the two 1977 Additional Protocols to the 1949 Geneva Conventions relating to the Protection of Victims of Armed Conflict (1977 Additional Protocol I and Additional Protocol II), applicable in international and non-international armed conflicts, respectively; the International Criminal Court (ICC) Statute; and the 2003 UNESCO Convention for the Safeguarding of Intangible Cultural Heritage (2003 UNESCO Convention on Intangible Cultural Heritage). In addition, a number of relevant soft-law (non-binding) instruments have also been adopted, such as the 2003 UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage (2003 UNESCO Declaration).

Despite these legal developments, cultural heritage continues to suffer from destruction, damage and plunder in modern armed conflicts. The increase of intra-state conflicts in past decades has raised new challenges. First, it appears that cultural heritage has increasingly become the direct target of systematic and deliberate attacks since the 1990s, particularly on the part of armed non-State actors (ANSAs).[9] Examples in recent years include the destruction in 2012 of 14 ancient mausoleums in the World Heritage town of Timbuktu in Mali. This incident prompted the first case focused on the destruction of cultural heritage to be brought to trial at the ICC in 2016, leading to the conviction of Ahmad Al Faqi Al Mahdi (Al Mahdi), a member of the Islamist group Ansar Dine (which means "defenders of the faith" in Arabic), who was sentenced to nine years of imprisonment. Such sectarian attacks have also been witnessed in Iraq and Syria, where the Islamic State group has destroyed, among others, Jonah's Tomb and the Al Nuri mosque in Mosul, the Mosul Museum, several components of the World Heritage site of Palmyra, and a number of Christian, Shia and Yezidi religious sites.

In addition, changes in the dynamics of warfare brought about by intra-state conflicts between ANSAs and State armed forces have increasingly transformed urban areas into battlegrounds. As a result, historical monuments, religious buildings and other cultural sites have suffered important collateral damage. For example, in Syria, the old city of Aleppo—a World Heritage site—has been on the frontline of fighting between government forces and Free Syrian Army (FSA) brigades. The city's medieval market, the Al-Madina Souk, was burnt to the ground; the outer wall of the Citadel of Aleppo was extensively damaged; the minaret of the Umayyad Mosque (also known as the Great Mosque of Aleppo) was destroyed.[10] Likewise, in 2014, the medieval castle of Crac des Chevaliers—also a listed World Heritage site situated

[6] 1899 Hague Convention II with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, art. 27.

[7] 1907 Hague Convention IV Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, arts. 27 and 56.

[8] Ibid, arts. 25 and 28.

[9] ICC, UNESCO Amicus Curiae Observations, *The Prosecutor v. Al Mahdi*, Case No. ICC-01/12-01/15, para. 7.

[10] Syrian Directorate General of Museums and Antiquities, *State Party Report. State of Conservation of the Syrian Cultural Heritage Sites*, 2014, pp. 1-28. See also G. Fangi and W. Wahbeh, "The Destroyed Minaret of the Umayyad Mosque of Aleppo, The Survey of the Original State", *European Scientific Journal*, December 2013 vol.4 and S. Perini and E. Cunliffe, "Towards a protection of the Syrian cultural heritage: A summary of the international responses (March 2011-March 2014)", *Heritage for Peace*, April 2014. One recent examination of 210 locations in the World Heritage Site of Aleppo found that *"22 had been destroyed, 48 were severely damaged, 33 were moderately damaged, and a further 32 had sustained possible damage"*. See E. Cunliffe, "Archaeological site damage in the cycle of war and peace: A Syrian case study", *Journal of Eastern Mediterranean Archaeology and Heritage Studies*, 2014, 3(2), pp. 229-247.

near Homs—suffered extensive damage following an airstrike by the Syrian army which targeted ANSAs, who allegedly used it as a base.[11] Cultural heritage has been further affected by the illegal excavation of archaeological sites, the widespread looting of sites and museums, and the illicit trafficking of cultural objects, which is sometimes organized by ANSAs themselves to finance their operations.[12]

Another challenge relates to the fact that the legal framework for the protection of cultural heritage consists of a complicated web of international treaties with overlapping definitions and regimes of protection. As these treaties were first and foremost developed by and for States, their provisions regarding the obligations of ANSAs are not straightforward. For example, the 1954 Hague Convention—the landmark treaty in the field—was drafted with inter-State armed conflicts in mind, and thus its scope of application is limited with respect to conflicts not of an international character, with only some of its rules applying to such situations and thus to ANSAs.[13] This excludes for example the opportunity to request technical assistance from UNESCO. This asymmetry exists despite to the fact that the basic rules of protection apply equally to all parties to a conflict, and that damage to or destruction of such heritage constitutes a loss for all humanity. The 1999 Second Protocol to the 1954 Hague Convention (1999 Second Protocol) is the only instrument specifically drafted for the protection of cultural heritage that applies in its entirety to non-international armed conflicts (Art. 22(1)). However, from the perspective of ANSAs, the Protocol incorporates many of the structural shortcomings that characterize the State-centric focus underpinning the 1954 Hague Convention.

2. Study rationale, literature review and methodology

Against this background, Geneva Call embarked on a two-year scoping study to better understand the role and stance of ANSAs in relation to cultural heritage and to identify possible ways to engage them to enhance its protection. The study first analyses the international legal framework relating to cultural heritage and the extent to which it applies to situations of non-international armed conflict and ANSAs. It then maps some general trends that can be observed from the attitudes of ANSAs toward cultural heritage in armed conflict, highlighting both positive and negative examples from current practices, with a focus on three countries: Iraq, Mali and Syria. Finally, it considers the current responses of specialized organizations to the impact of ANSAs on cultural heritage in armed conflicts, as well as their level of interaction with these actors, before offering some recommendations.

Since the majority of treaties that address the protection of cultural heritage in armed conflict were drafted with inter-State wars as a model, little attention has been paid to their application in non-international armed conflicts or to the obligations and role of ANSAs.[14] The protection of cultural heritage in armed conflict has gained momentum in the legal literature as a subject of academic concern since the early 2000s, following the Yugoslav wars. Most reference publications have focused on the following areas: (i) interpreting international provisions adopted for the protection of cultural property in armed conflict; (ii) debates held at international conferences that led to their adoption; (iii) case law analysis concerning the destruction of cultural property in wartime, in particular regarding the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Al-Mahdi case at the ICC; and to some extent, (iv) experiences related to the protection and destruction of cultural heritage in past wars.[15]

[11] For a lengthier description, see M. Lostal, *International Cultural Heritage Law in Armed Conflict: Case-Studies of Syria, Libya, Mali, the Invasion of Iraq, and the Buddhas of Bamiyan*, Cambridge University Press, 2017, pp. 95-96.

[12] See, e.g., United States Government Accountability Office, "Protection of Iraqi and Syrian Antiquities" (August 2016), p. 9.

[13] 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, art. 19(1).

[14] With the following exceptions: K. Hausler, "Culture under attack: The destruction of cultural heritage by non-State armed groups", *Santander Art and Cultural Law Review*, 2015, 2; pp, 117-146, J-M. Henckaerts, "The protection of cultural property in non-international armed conflicts", in N. Woudenberg and L. Lijnzaad (eds.), *An Insight into the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, Martinus Nijhoff, 2010, pp. 81-93; and Z. Howe, "Can the 1954 Hague Convention apply to non-State actors?: A study of Iraq and Libya", *Texas International Law Journal*, 2012, 47(2), pp. 403-425.

[15] J. Toman, *The Protection of Cultural Property in the Event of Armed Conflict: Commentary on the Convention for the Protection of Cultural Property in the Event of Armed Conflict and Its Protocol, Signed on 14 May 1954 in The Hague, and on Other Instruments of International Law Concerning Such Protection*, Darmouth/UNESCO, 1996; J. Toman, *Cultural Property in War: Improvement in Protection: Commentary on the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, UNESCO, 2009; R. O'Keefe, *The Protection of Cultural Property in Armed Conflict*, Cambridge University Press, 2006; K. Chamberlain, *War and Cultural Heritage: A Commentary of the Hague Convention 1954 and Its Two Protocols*, 2nd Edition, Institute of Art and Law, 2013; C. Forrest, *International Law and the Protection of Cultural Heritage*, Routledge, 2010; J. Petrovic, *The Old Bridge of Mostar and Increasing Respect for Cultural Property in Armed Conflict*, Martinus Nijhoff, 2012; C. Ehlert, *Prosecuting the Destruction of Cultural Property in International Criminal Law: With a Case Study on the Khmer Rouge's Destruction of Cambodia's Heritage*. Martinus Nijhoff, 2013; and M. Lostal, *supra* note 11. A significant number of journal articles have also been published on similar topics.

Many scholarly discussions have revolved around terminology questions (i.e. the use of the terms "cultural heritage" or "cultural property"),[16] or criteria for invoking the waiver based on "imperative military necessity".[17] In the archaeological field, heritage professionals have recently devoted considerable attention to the assessment of damage or loss of cultural heritage (especially World Heritage sites) in conflict-affected areas through both satellite imagery analysis and field missions.[18] Their work has resulted in a number of publications[19] including in the *Journal of Eastern Mediterranean Archaeology and Heritage Studies*[20] which contains an article dedicated to the effect of the Syrian armed conflict on the country's archaeological resources,[21] and in the 2015 special issue of the journal of *Near Eastern Archaeology*, which focused on the destruction of cultural heritage in Iraq, Libya, and Syria.[22]

In short, studies concerning cultural heritage have so far overlooked the non-international nature of armed conflicts. This runs counter to the current state of affairs where non-international armed conflicts are the norm and to the trend in general academic literature (outside the scope of cultural heritage) that has in recent years seen the appearance of a number of publications that centre on ANSAs and non-international armed conflicts.[23] None of such publications tackle cultural heritage specifically, however. The present study aims to bridge this gap by providing a comprehensive analysis of the current international legal framework protecting cultural heritage in armed conflict and its applicability to ANSAs; by identifying the attitudes (both negative and positive) of ANSAs towards cultural heritage through selected case studies (Iraq, Mali and Syria); and by assessing the current status, risks and opportunities of engaging ANSAs towards better protection of cultural heritage.

In terms of methodology, the study employed several ways to gather and analyse information: desk research, case studies, interviews and field visits. Desk research was used mostly to analyse the legal framework applicable to ANSAs (Chapter 1) through both the primary sources (e.g. treaties, case law and resolutions) and secondary sources (literature). The case studies (Chapter 2) provide an insight into how and why cultural heritage is threatened in the selected conflict-affected countries (Iraq, Mali and Syria), and revealed the various attitudes of the ANSAs involved, as well as those of the international organizations and local NGOs concerned with the preservation of cultural heritage in these contexts. The armed conflicts in Iraq, Mali and Syria were selected as case studies because they share the following common characteristics: a sectarian dimension, at least to some extent; the involvement of ANSAs; and a significant level of destruction, damage and looting of cultural heritage. Lastly, the study draws on interviews and field visits. Interviews were conducted in a semi-structured manner, either in person or through written questionnaires with representatives of selected ANSAs (ten in total) active in the selected countries,[24] as well as

[16] J.H. Merryman, "Two ways of thinking about cultural property", *American Journal of International Law*, 1986, 80(4); L.V. Prott and P.J. O'Keefe, "'Cultural heritage' or 'cultural property'?", *International Journal of Cultural Property*, 1992, 1(2), pp. 307-320; M. Frigo, "Cultural property v. cultural heritage: A "battle of concepts" in international law?", *International Review of the Red Cross*, 2004, 86(854), pp. 367-378.

[17] C. Forrest, "The doctrine of military necessity and the protection of cultural property during armed conflict", *California Western International Law Journal*, 2007, 37, pp. 177-219; N. Hayashi, "Requirements of military necessity in international humanitarian law and international criminal law", *Boston University International Law Journal*, 2010, 28, pp. 39-140.

[18] See, for instance, Blue Shield and IMCuRWG, "Civil-military assessment mission for Libyan heritage" (12-16 November, 2011) available at http://blueshield.de/libya2-report.html; and American Association for the Advancement of Sciences, "Ancient History, Modern Destruction: Assessing the Current Status of Syria's World Heritage Sites Using High-Resolution Satellite Imagery", 2014, available at www.aaas.org/page/ancient-history-modern-destruction-assessing-current-status-syria-s-world-heritage-sites-using; and UNITAR/UNOSAT, "Satellite-based Damage Assessment to Cultural Heritage Sites in Syria" (22 December 2014) available at http://unosat.web.cern.ch/unosat/unitar/downloads/chs/FINAL_Syria_WHS.pdf.

[19] J. Kila, "Cultural property protection in the event of armed conflict: Deploying military experts or Can white men sing the blues?", in L. Rush (ed.), *Archaeology, Cultural Property, and the Military*, Boydell & Brewer, 2010, pp. 41-59.

[20] See S. Al Quntar, "Syrian cultural property in the crossfire: Reality and effectiveness of protection efforts", *Journal of Eastern Mediterranean Archaeology and Heritage Studies*, 2014, 1(4), pp. 348-351.

[21] See J. Casana and M. Panahipour, "Satellite-based monitoring of looting and damage to archaeological sites in Syria", *Journal of Eastern Mediterranean Archaeology and Heritage Studies*, 2014, 2(2), pp. 128-151.

[22] S. Kane, "Archaeology and cultural heritage in post-revolutionary Libya", *Near Eastern Archaeology*, 2015, 78(3), pp. 204-211; M. Danti, "Ground-based observations of cultural heritage incidents in Syria and Iraq", *Near Eastern Archaeology*, 2015, 78(3), pp. 132-141; and Ö. Harmanşah, "Isis, heritage, and the spectacles of destruction in global media", *Near Eastern Archaeology*, 2015, 78(3), pp. 170-177.

[23] Such publications include, among many others, Geneva Academy of International Humanitarian Law and Human Rights, *Rules of Engagement: Protecting Civilians through Dialogue with Armed Non-State Actors*, 2011 and *Reactions to Norms: Armed Groups and the Protection of Civilians*, Policy Briefing No. 1, 2014; International Review of the Red Cross, *Understanding Armed Groups and the Applicable Law*, 2011, 93(882) and *Engaging Armed Groups*, 2011, 93(883); S. Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, 2012; H. Jo, *Compliant Rebels: Rebel Groups and International Law in World Politics*, Cambridge University Press, 2015; D. Murray, *Human Rights of Non-State Armed Groups*, Hart, 2016; K. Fortin, *The Accountability of Armed Groups under Human Rights Law*, Oxford University Press, 2017; and Z. Mampilly, *Rebel Rulers: Insurgent Governance and Civilian Life During War*, Cornell University Press, 2011.

[24] One ANSA submitted its response in written form. For the nine other ANSAs, consultations took the form of face-to-face interviews or group discussions with relevant representatives (chairperson or member of the leadership, military commander, police commander, person in charge of the antiquities department, etc.). It should be noted that the ANSAs consulted are diverse in terms of their status, size, goals, structure, territorial control, etc. Geneva Call has been in dialogue with most of them on other issues relating to international humanitarian law (IHL).

with representatives of leading specialized organizations that deal with the protection of cultural heritage globally or locally (eight in total).[25] Field visits were undertaken in Iraq (Erbil, Mount Sinjar and Najaf) in November 2015 and February 2017, and Syria (Ain Issa, Qamishli and Amude) in November 2015 and July 2017, and enabled Geneva Call to make first hand-hand observations.[26] The interviews and field visits informed the content of the case studies and served as the basis for Chapter 3 on the engagement of ANSAs in the protection of cultural heritage in armed conflict. In addition, pilot training on the protection of cultural heritage was conducted on two occasions with Free Syrian Army (FSA) brigades, allowing Geneva Call to assess further the possibility of engaging with ANSAs through training on international legal standards.

© Geneva Call
Geneva Call's team visits Urkesh archaeological site with members of the local "Authority of Tourism and Protection of Antiquities", near Amude, northeast Syria.

[25] See their responses in Chapter 3.

[26] A field visit to northern Mali was unfortunately not possible due to funding and security reasons.

CHAPTER 1

INTERNATIONAL LEGAL FRAMEWORK

© Geneva Call
HPG/PKK Fighter posting in front of Chermera temple in Sinjar, northwest Iraq

This chapter provides an overview of the international legal framework related to the protection of cultural heritage which is (or may be) applicable to ANSAs, including treaty law (namely international humanitarian law, international criminal law, international cultural heritage law and international human rights law) and customary international humanitarian law, as well as other relevant instruments. It considers the extent to which each source addresses ANSAs and identifies some shortcomings of the existing framework.

1. INTERNATIONAL HUMANITARIAN LAW (IHL)

Under IHL, cultural objects are generally protected as civilian objects in accordance with the principle of distinction. Moreover, specific rules have been developed in several treaties to provide additional protection for cultural objects in situations of armed conflict. Some of these rules have attained the status of customary international law. This section examines IHL provisions concerned with cultural heritage that are applicable specifically to non-international armed conflicts and therefore to ANSAs. It also highlights areas within this legal framework that remain unclear.

1.1. Treaty Law

The main treaties of IHL on the protection of cultural property are the 1954 Hague Convention and its 1954 and 1999 Protocols. The 1954 Hague Convention was designed principally for international armed conflicts, its First Protocol applies exclusively in situations of occupation and the 1999 Protocol applies in its entirety to both international and non-international armed conflicts. The 1977 Additional Protocol (II) to the 1949 Geneva Conventions, also applicable in non international armed conflicts, contains specific rules relating to the protection of cultural objects.

1.1.1. The 1954 Hague Convention

There are currently 131 States parties to the Convention, including the majority of countries currently involved in armed conflicts in which cultural heritage has been affected by ANSAs, such as Iraq, Mali and Syria. However, given that the Convention was adopted in an era when international armed conflicts were the norm, the scope of application to non-international armed conflicts and ANSAs remains uncertain in some respects.

1.1.1.1. Obligations of ANSAs under the 1954 Hague Convention

The text of the Convention uses the term "High Contracting Parties" to refer to States parties to the Convention, and the term "party to the conflict" to refer to all parties involved in an armed conflict, including ANSAs. According to Article 19(1):

"[i]n the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property."

As a result, the core obligations of the 1954 Hague Convention (those related to the respect for cultural property) are applicable in non-international armed conflicts, binding all parties, whether State armed forces or ANSAs.[27] This provision expressly mentions the heading of Article 4 (respect for cultural property) and, under a literal interpretation, an argument can be made that Article 19(1) makes an explicit *renvoi* to Article 4 only. Under a broad interpretation, it could be argued that any rule concerned with the respect of cultural property falls under the scope of Article 19(1).[28] Be that as it may, the provision under Article 4 lays out four basic obligations: (i) a prohibition on

[27] Article 19 of the 1954 Hague Convention adopts the same reference to non-international armed conflicts as Common Article 3 to the 1949 Geneva Conventions ("armed conflict not of an international character occurring in the territory of one of the High Contracting Parties"), without adding any specificities with regard to the threshold of applicability. In accordance with a widely accepted interpretation of Common Article 3, the threshold for the applicability of Article 19 of the 1954 Hague Convention entails, therefore, protracted armed confrontations between one (or more) organized ANSAs and governmental armed forces, or solely between the former on the territory of a State party to the Hague Convention. The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organization. Situations such as internal disturbances, tensions or riots fall below this threshold. See ICRC, 2016 *Commentary on the Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, available at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC, paras. 422-423; ICRC, *How is the Term "Armed Conflict" Defined in International Humanitarian Law?*, Opinion Paper, March 2008, available at www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf; and ICTY, *The Prosecutor v. Dusko Tadić*, *supra* note 3. See also para. 98 where the Tribunal affirmed the customary status of Article 19 of the 1954 Hague Convention.

[28] See J. Toman, *The Protection of Cultural Property in the Event of Armed Conflict*, supra note 15, pp. 213-215; K. Chamberlain, *War and Cultural Heritage*, 2nd Edition, *supra* note 15, pp. 54 and 72; and C. Forrest, *supra* note 15, p. 84.

"any use of cultural property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict", except in cases of imperative military necessity;[29] (ii) a prohibition on any act of hostility directed against cultural property, subject again to imperative military necessity; (ii) the obligation to take measures *"to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against cultural property"*;[30] and (iv) an absolute prohibition on acts of reprisal directed against cultural property. Under a broad interpretation, other provisions such as those concerning transport of cultural property or the special protection regime[31] would also be applicable in situations of non-international armed conflict.

Article 19(2) also encourages all parties to a non-international armed conflict "to bring into force, by means of special agreements, all or part of the other provisions of the present Convention".[32] This may include the possibility of requesting technical assistance from UNESCO, among other measures. So far, there is no record of an agreement concerning cultural property having been concluded explicitly under Article 19(2).

1.1.1.2. Limitations of the 1954 Hague Convention *vis-à-vis* ANSAs

There are clear structural deficits in the 1954 Hague Convention in relation to ANSAs. In particular, there is a lack of safeguarding measures and risk preparedness mechanisms, tools to identify cultural property, general technical assistance, channels of communication with UNESCO and sanctions for violations of the Convention.

Article 7(1) of the 1954 Hague Convention requires States parties to introduce into their military regulations or instructions *"such provisions as may ensure observance of the present Convention"*, and to foster an atmosphere of respect for cultural property among members of their armed forces. Article 7(2) instructs States to introduce services or specialist personnel to secure respect for cultural property, and to ensure cooperation between the civilian authorities responsible for safeguarding cultural property and the armed forces.[33] As Article 7 is applicable in peacetime, it is not applicable to ANSAs. Training on the rules pertaining to cultural property or dedicated specialist personnel are not yet provided in most ANSAs.[34] In addition, lists of protected heritage or maps indicating their location usually remain in the hands of the State's central administration. This has been the case in Syria

[29] Imperative military necessity is not defined under the 1954 Hague Convention. Although the 1999 Second Protocol lists conditions for invoking imperative military necessity, these are not automatically transferrable to the 1954 Hague Convention because the Protocol supplements the Convention in relations between its parties. 1999 Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, art. 2.

[30] It is unclear whether the obligation to stop "any form of theft, pillage", etc., extends only to the members of one's armed forces, or if it encompasses the civilian population as well. See P. Gerstenblith, "Protecting cultural heritage in armed conflict: Looking back, looking forward", *Cardozo Public Law, Policy & Ethics Journal*, 2009, 7, p. 693. See *contra* R. O'Keefe, *supra* note 15, p. 131.

[31] The 1954 Hague Convention devised a special protection regime for *"a limited number of refuges intended to shelter movable cultural property in the event of armed conflict, of centers containing monuments and other immovable cultural property of very great importance"* (Article 8(1)), the immunity of which could only be withdrawn "in exceptional cases of unavoidable military necessity" (Article 11(2)). However, given the stringent conditions for listing properties under the special protection regime, it has barely been used and has now been largely abandoned. The 1999 Second Protocol addresses this failure through the enhanced protection system, as explained later in this report.

[32] A similar provision can be found in Common Article 3 to the 1949 Geneva Conventions. Article 19(2) of the Hague Convention must be read together with Article 24(2) of the 1954 Hague Convention, according to which "[n]o special agreement may be concluded which would diminish the protection afforded by the present Convention to cultural property and to the personnel engaged in its protection". For the legal nature of these agreements, see E. Heffes and M. Kotlik, "Special agreements as a means of enhancing compliance with IHL in non-international armed conflicts: An inquiry into the governing legal regime", *International Review of the Red Cross*, 2014, 96(895/896), pp. 1195-1224.

[33] For example, the San Remo International Institute of Humanitarian Law conducts regularly training courses for military experts to provide them with an understanding of the rules concerned with the protection of cultural property. In 2016, UNESCO published a Military Manual on the Protection of Cultural Property, available at http://iihl.org/wp-content/uploads/2017/11/Military-Manual-EN-FINALE_17NOV-1.pdf. In terms of specialized units, many States do not yet benefit from dedicated personnel. The United States (US) army instituted an *ad hoc* group called the "Combatant Command Cultural Heritage Action Group" following the international outrage provoked by a series of incidents during the armed conflict in Iraq, such as the construction of a military base on the ancient site of Babylon. UNESCO, *Final Report on Damage Assessment in Babylon, International Coordination Committee for the Safeguarding of the Cultural Heritage of Iraq* (26 June 2009), UNESCO Doc. CLT/EO/CIP/2009/RP/114, p. 3. In addition, the US army is in the process of forming a unit of reservists, the 38G programme, which would include professionals with a background in archaeology or other forms of cultural property. The US Marines have also begun to train their civil affairs officers in matters relating to cultural property protection. Information retrieved from a communication exchange with Dr. Laurie Rush, *Cultural Resources Manager of the US Army*. Following the enactment of the Cultural Property (Armed Conflicts) Act 2017, the United Kingdom armed forces are constituting a *Cultural Property Protection Unit* consisting of arts and heritage professionals to train armed forces personnel on this matter.

[34] Only a few ANSAs interviewed as part of this study have reported some level of internal capacity and expertise. For example, the autonomous self-administration of Rojava in Syria comprises an "Authority of Tourism and Protection of Antiquities" composed of archaeologists and historians.

where, at least during the early years of the conflict, inventories of movable and immovable cultural property were housed in archives controlled by the Ministry of Culture.[35] Knowing the location of cultural property is a prerequisite to ensuring respect for its integrity among all parties to a conflict. However, the 1954 Hague Convention does not envisage any mechanism for the exchange of relevant information between warring parties.[36] ANSAs are thus at a disadvantage when it comes to accessing available information and risk-preparedness protocols which the State armed forces may have put in place.

The 1954 Hague Convention devised the Blue Shield as a distinctive emblem to facilitate recognition of cultural property (Art. 6). Its deployment is not mandatory for objects under general protection, but its placement on immovable cultural property must be authorized by the competent national authority (Art. 17(4)). State practice in this regard varies; some States never affix the emblem, while others do so systematically or irregularly.[37] The lack of uniform practice of States in relation to the use of the Blue Shield has an impact on ANSAs which must thus determine themselves whether a particular object is protected under the Convention or not. This is even more problematic as many ANSAs are unaware of both the Blue Shield and the definition of cultural property under the Convention.[38] This places them at risk of inadvertently committing an offence against cultural property. In addition, the emblem cannot, in principle, be placed on moveable cultural property, such as artworks or archaeological objects, further complicating assessment of the protection due by ANSAs on the ground.

In accordance with Article 19(3), UNESCO may offer its services to all parties to a non-international armed conflict, including ANSAs. Yet, while States parties may directly call upon UNESCO *"for technical assistance in organizing the protection of their cultural property, or in connexion with any other problem arising out of the application of the […] Convention"* (Art. 23), the 1954 Hague Convention does not envisage the same possibility for ANSAs. The available means of communication between UNESCO and ANSAs is thus unidirectional. This poses a problem in situations where ANSAs need specialized advice or assistance with regard to the protection of cultural heritage, as was the case for instance in Mali (see Chapter 2).

Finally, Article 28 requires States parties to take all necessary steps to prosecute and impose penal or disciplinary sanctions upon individuals, regardless of their nationality, who have committed (or been ordered to commit) a breach of the Convention. As Article 28 does not make a direct reference to Article 4, it is unclear whether this provision applies to members of ANSAs for violations committed during non-international armed conflicts. However, it could be argued that it does, as it foresees sanctions for violations of the Convention in general, thus including Article 4, which applies to ANSAs in accordance with Article 19(1).[39] Also, Article 28 does not specify whether it covers breaches committed by individuals outside the territory of the State party.[40] While States do not have to prosecute the alleged perpetrator of a violation of the Convention outside of their territories, they may allow their courts to do so by exercising universal jurisdiction over those breaches. To date, no single prosecution at the domestic or international level has been directly based on Article 28.[40]

[35] Syrian Directorate General of Museums and Antiquities, *Periodic Report on Implementation of the 1954 Hague Convention*, 2010, p. 5.

[36] It should be noted that some parties could view such exchanges of information as providing a list of targets, rather than sites requiring protection.

[37] UNESCO, "2011-2012 Periodic Reports concerning the 1954 Hague Convention and additional protocols", available at www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/2011-2012-periodic-reports/#c1369634.

[38] See Chapter 2 for concrete examples.

[39] O'Keefe, in fact, notes that "*the legal consequence of Article 19 is that failure to observe Article 4 in the course of non-international armed conflict is a breach of the Convention, and Article 28 obliges the Parties to prosecute and impose penal and disciplinary sanctions on those persons who commit or who order to be committed a breach of the Convention*". R. O'Keefe, *supra* note 15, p. 192. See also R. O'Keefe, *"Protection of cultural property under international criminal law"*, Melbourne Journal of International Law, 2010,11, p. 360.

[40] Ibid. The ICRC has nonetheless noted that the 1954 Hague Convention was intended to establish universal criminal jurisdiction. J-M. Henckaerts, "New rules for the protection of cultural property in armed conflict: The significance of the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict", International Review of the Red Cross, 835, 1999, p. 52, available at www.icrc.org/eng/resources/documents/article/other/57jq37.htm.

[41] However, in general, prosecutions will be based on a domestic law implementing this Article without referring to it directly. In some instances, a direct reference may be found, such as in Article 7 of the Law on the Establishment of the Extraordinary Chambers of Cambodia (as amended on on 27 October 2004) which states that "*[t]he Extraordinary Chambers shall have the power to bring to trial all Suspects most responsible for the destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict, and which were committed during the period from 17 April 1975 to 6 January 1979*". So far, no cases have been heard at these Extraordinary Chambers involving cultural property. See also C. Ehlert, *supra* note 15.

In addition, the 1954 Hague Convention has not established an institutional enforcement mechanism to encourage (or compel) State parties to incorporate this provision into their domestic systems.

1.1.2. The 1999 Second Protocol

The 1999 Second Protocol was drafted to supplement and clarify the provisions of the 1954 Hague Convention. According to Article 22 of the Protocol, it *"shall apply in the event of an armed conflict not of an international character, occurring within the territory of one of the Parties"*. The Protocol *"applies to all parties to a non-international armed conflict, whether governmental or insurgent forces"*.[42] It sheds light on the concept of imperative military necessity and individual criminal responsibility, and is gradually replacing the special protection regime (which has practically fallen into desuetude) with the "enhanced protection" system.[43] Among the Protocol's substantive obligations, five are of direct relevance to the protection of cultural heritage by ANSAs: (i) precautionary measures against the effect of hostilities; (ii) precautions in attack; (iii) the respect for cultural property and the requirements for invoking a waiver in case of imperative military necessity (which is narrowly defined); (iv) the enhanced protection regime; and (v) a set of sanctions in case of violations.[44] In addition, the provision regarding safeguarding measures may also be relevant for ANSAs to some extent.

1.1.2.1. Precautions against the effects of hostilities

While only States parties are required to implement safeguarding measures in time of peace, following the outbreak of a conflict, all parties to the conflict are obliged to *"remove movable cultural property from the vicinity of military objectives or provide for adequate in situ protection"* to the maximum extent feasible (Art. 8(a)). If cultural property was situated in the vicinity of a military objective prior to hostilities, it means that ANSAs have a positive duty to remove it as far as possible to avoid incidental damage. If this is not possible, ANSAs are requested to take measures to protect the cultural property *in situ* to the maximum of their capacity. Furthermore, parties to the conflict are obliged to *"avoid locating military objectives near cultural property"* (Art. 8(b)).

In order to implement these measures, parties must also disseminate the 1999 Second Protocol *"as widely as possible"* (Art. 30(2)). The Protocol further stipulates that any *"military or civilian authorities who, in time of armed conflict, assume responsibilities with respect to the application of this Protocol, shall be fully acquainted with the text thereof"*, and that the parties shall therefore, as appropriate (Art.30(3)):

(a) incorporate guidelines and instructions on the protection of cultural property in their military regulations;
(b) develop and implement, in cooperation with UNESCO and relevant governmental and non-governmental organizations, peacetime training and educational programmes;
(c) communicate to one another, through the Director-General, information on the laws, administrative provisions and measures taken under sub-paragraphs (a) and (b);
(d) communicate to one another, as soon as possible, through the Director-General, the laws and administrative provisions which they may adopt to ensure the application of this Protocol.

The maximum extent feasible to which ANSAs may implement these precautions against the effects of hostilities may, however, be compromised by the structural deficit mentioned above, as only States parties may call upon UNESCO for technical assistance. The 1999 Second Protocol (Arts. 33 and 1(a)) reproduces the asymmetry described above under the 1954 Hague Convention.

The 1999 Second Protocol also established a Fund for the Protection of Cultural Property in the Event of Armed Conflict (Art. 29) *"to provide financial or other assistance in support of preparatory or other measures to*

[42] J-M. Henckaerts, *supra* note 40. For an opposing view, see Z. Howe, *supra* note 14, pp. 420-421.
[43] The Second Protocol, like the 1954 Hague Convention, only applies on the territory of States parties. Therefore, it may not apply to all non-international armed conflicts. Nevertheless, its provisions are highlighted here as they consist largely of provisions adopted to clarify the meaning of the 1954 Hague Convention, without departing from it. As a consequence, ANSAs should be informed of the standards contained in the 1999 Second Protocol, as by clarifying the application of certain provisions contained in the 1954 Hague Convention, it renders its application more straightforward to all parties to a conflict. This is true in particular with regard to the test of imperative military necessity, the breaches of which must be sanctioned, as well as the regime of enhanced protection, which aims to provide a heightened regime of protection for cultural property of the greatest importance to humanity (see Article 10 of the 1999 Second Protocol and section 1.1.2.4 of this study).
[44] The rest of the provisions, such as the granting of the enhanced protection regime, issues of jurisdiction, prosecution and extradition, and meetings of the parties, are applicable only to States, as they are the only ones with the legal capacity to engage with those matters.

be taken in peacetime" and *"in relation to emergency, provisional or other measures to be taken in order to protect cultural property during periods of armed conflict or of immediate recovery after the end of hostilities"*. However, ANSAs parties to armed conflicts do not have access to this Fund (Art. 32).[45]

1.1.2.2. Precautions in attack

While conducting military operations, parties to the conflict are required to:

(a) do everything feasible to verify that the objectives to be attacked are not cultural property protected under Article 4 of the 1954 Convention;
(b) take all feasible precautions in the choice of means and methods of attack, with a view to avoiding, and in any event to minimizing, incidental damage to cultural property protected under Article 4 of the 1954 Convention;
(c) refrain from deciding to launch any attack which may be expected to cause incidental damage to cultural property protected under Article 4 of the 1954 Convention which would be excessive in relation to the concrete and direct military advantage anticipated;
(d) cancel or suspend an attack if it becomes apparent: (i) that the objective is cultural property protected under Article 4 of the Convention; (ii) that the attack may be expected to cause incidental damage to cultural property protected under Article 4 of the Convention which would be excessive in relation to the concrete and direct military advantage anticipated (Art. 7).

As explained below, these rules are also part of customary IHL, which forbids direct attacks against civilian objects (unless and for such a time as they are military objectives) and provides for precautionary measures and the respect of proportionality when conducting an attack. In addition, when dealing with cultural property, the assessment of proportionality includes both qualitative and quantitative factors, as *"[t]he extent of incidental loss likely to be occasioned by damage to or destruction of such property is a question not just of square or cubic meters but also of the cultural value represented thereby."*[46]

1.1.2.3. Respect for cultural property and the test of "imperative military necessity"

The 1999 Second Protocol narrowly defines the scope of imperative military necessity by providing that an act of hostility against cultural property is lawful if two requirements are met: *"the cultural property has, by its function, been made into a military objective;"*[47] and *"there is no other feasible alternative to obtain a similar military advantage"* (Art. 6(a)). Furthermore, the obligation to refrain from using cultural property and its surroundings for purposes which are likely to expose it to destruction or damage may only be waived on the basis of imperative military necessity *"when and for as long as no choice is possible between such use of the cultural property and another feasible method for obtaining a similar military advantage (Art. 6(b))*. The decision to attack or use cultural property on the basis of "imperative military necessity" shall only be taken by *"an officer commanding a force the equivalent of a battalion in size or larger, or a force smaller in size where circumstances do not permit otherwise"* (Art. 6(c)). Although State armed forces battalions usually comprise 500-600 soldiers, this number is rarely found in ANSAs. The determination of what constitutes a battalion therefore needs to be made in accordance with the command structure of ANSAs. In the event of an attack based on a decision taken in accordance with Article 6(a), an effective advance warning must be given whenever circumstances permit (Art. 6(d)).[48]

1.1.2.4. The enhanced protection regime

The 1999 Second Protocol created an enhanced regime of protection (Art. 10) intended to replace the special protection regime of the 1954 Hague Convention, as

[45] Interview with UNESCO, Paris, France, 15 November 2016.
[46] R. O'Keefe, *supra* note 15, pp. 15-16.
[47] The 1999 Second Protocol specifies in its in Article 1(f) that its understanding of the notion of "military objective" coincides with that of Article 52(2) of the 1977 Additional Protocol I to the 1949 Geneva Conventions. As O'Keefe has identified, there is a terminological disjuncture as Article 6(a)(i) refers to cultural property becoming a military objective by its "function", whereas Article 1(f) speaks of its *"nature, location, purpose or use"*. This was explained by some delegates at the diplomatic conference on the Second Protocol as favouring the higher standard of protection under Article 53 of the 1977 Additional Protocol I and Article 16 of the 1977 Additional Protocol II, while others preferred *"endorsing the emergent customary standard of protection conferred on cultural property as a species of civilian object by the rule encapsulated in Article 52(2) of Protocol I"*. While the adopted terminology leaves room for interpretation (and adoption by States of the lower or higher standard of protection). O'Keefe emphasizes, however, that the difference between the two levels of protection *"is unlikely to be great, given that, in practice, by far the most common ground on which cultural property will be made a military objective is its use. Indeed, today it is extremely hard to envisage a Party citing the nature, location or purpose of given cultural property to justify an attack against it"*. O'Keefe, *supra* note 15, pp. 253-254.
[48] See also J-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law. Volume I: Rules*, Cambridge University Press, 2005, Rule 20, p. 62, which concerns advance warning.

the latter did not garner much support given the stringent criteria that had to be met for a property to be listed.[49] As with the special protection regime, the nomination of cultural property for enhanced protection can only be requested by States parties, which need to make an application to the Committee for the Protection of Cultural Property in the Event of Armed Conflict.[50] The property under enhanced protection is then inscribed on the List of Cultural Property under Enhanced Protection, which includes 13 properties to date.[51] All of these are World Heritage sites and only one (Tomb of Askia in Mali) is located in a country recently affected by armed conflict.[52] These properties may bear the distinctive Blue Shield emblem, designed specifically for objects under the enhanced protection regime, but its deployment is not mandatory.[53]

The qualitative difference is that immunity of cultural property under the enhanced regime must be ensured *"by refraining from making such property the object of attack or from any use of the property or its immediate surroundings in support of military action"* and admits no exception (Art. 12). Loss of immunity can occur in two circumstances: "*a) if such protection is suspended or cancelled […]; or b) if, and for as long as, the property has, by its use, become a military objective"* (Art. 13(1)).[54]

1.1.2.5. Sanctions

While the 1954 Hague Convention requires States parties to prosecute and impose sanctions on persons who violate the Convention (Art. 28), it does not describe the exact nature of those breaches. Article 15(1) of the 1999 Second Protocol clearly identifies five types of intentional conduct which constitute serious violations of the Protocol requiring a criminal sanction:

a) *making cultural property under enhanced protection the object of attack;*
b) *using cultural property under enhanced protection or its immediate surroundings in support of military action;*
c) *extensive destruction or appropriation of cultural property protected under the [1954 Hague] Convention and this Protocol;*
d) *making cultural property protected under the [1954 Hague] Convention and this Protocol the object of an attack;*
e) *theft, pillage or misappropriation of, or acts of vandalism directed against cultural property under the Convention.*

Furthermore, conduct falling under the first three breaches gives rise to universal criminal jurisdiction. This means that a member of an ANSA that has allegedly committed one of those breaches can be prosecuted (or extradited) by the State party on the territory of which the individual in question is situated, even if the offence was committed in another State or if that individual is not one of its nationals (Art. 16(1)(c)). However, Article 16(2)(b) introduces a restriction on the application of the principle of universal jurisdiction in such instances, stipulating that *"members of the armed forces and nationals of a State which is not Party to this Protocol, except for those nationals serving in the armed forces of a*

[49] Two cumulative requirements exist for special protection to be granted. First, the property in question must not be used for military purposes; and second, it must be located at an "adequate distance" from any large industrial centre or from any potential military objective, such as an airport, a railway station or a radio station; unless the state party requesting protection guarantees not to use such property for military purposes. In addition, cultural property under special protection must also be entered on the "International Register of Cultural Property under Special Protection", administered by UNESCO (Art. 8(6) of the 1954 Hague Convention). Only a few States have inscribed sites on the Register. See *inter alia* K. Hausler, "The protection of cultural heritage in armed conflict", in S. Casey-Maslen (ed.), *The War Report*, Oxford University Press, 2014, pp. 371-373. See also UNESCO, "International Register of Cultural Property under Special Protection", available at www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Register2015EN.pdf.

[50] Art. 11(3) of the 1999 Second Protocol foresees that: *"[o]ther Parties, the International Committee of the Blue Shield and other non-governmental organizations with relevant expertise may recommend specific cultural property to the Committee. In such cases, the Committee may decide to invite a Party to request inclusion of that cultural property in the List"*. For property to be eligible for enhanced protection, it must meet three cumulative criteria: (i) it must constitute *"cultural heritage of the greatest importance* for humanity" as opposed to cultural property of great importance to the cultural heritage of every people; (ii) it must be *"protected by adequate domestic measures recognizing its exceptional cultural and historic value and ensuring the highest level of protection"*; and (iii) it must not be *"used for military purposes or to shield military sites and a declaration must have been made by the Party which has control over the cultural property, confirming that it will not be used in such a way"* (Art. 10).

[51] The list of objects under enhanced protection is available at: http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/protection/enhanced-protection.

[52] UNESCO, "International List of Cultural Property under Enhanced Protection", available at www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/images/Enhanced-Protection-List-Dec2017_EN.pdf, which is current as of December 2017.

[53] UNESCO, "Adopted Decisions", 6th meeting of the Parties to the 1999 Second Protocol (9 December 2015), UNESCO Doc. CLT-15/6.SP/CONF.202/Decisions.

[54] In such a case, the prohibition on making cultural property the object of an attack may only be lifted if the following cumulative criteria are met: *"if, and for as long as, the property has, by its use, become a military objective"*; *"if the attack is the only feasible means of terminating the use of the property"* that has rendered it a military objective; and *"if all feasible precautions are taken in the choice of means and methods of attack, with a view to terminating such use and avoiding, or in any event minimizing, damage to the cultural property"* (Art. 13(1) and (2)). Additional formal guarantees must be observed unless circumstances do not permit to do so (i.e. in circumstances of immediate self-defence), namely: (i) the attack must be ordered at the highest operational level of command, meaning that only the equivalent of the highest level of military command of an ANSA can take such decision; (ii) an effective advance warning must be issued to the opposing force(s) requiring the termination of the military use of the property when possible; and (iii) reasonable time must be given to the opponent to give it an opportunity to redress the situation (Art. 13(2)(c)).

State which is a Party to this Protocol, do not incur individual criminal responsibility by virtue of this Protocol, nor does this Protocol impose an obligation to establish jurisdiction over such persons or to extradite them."[55] Nevertheless, a State may decide, on the basis of Article 28 of the Convention, to allow its courts to prosecute such individuals on the basis of universal jurisdiction.

In addition to sanctioning serious violations under Article 15(1), States parties must also adopt the necessary legislative, administrative or disciplinary measures to suppress any intentional use of cultural property jn violation of the Convention or the Protocol (Art. 21).

With regard to the obligation of States to criminalize and make offences punishable, the 1999 Second Protocol recalls the obligation to comply with general principles of law and international law (Art. 15(2)), such as the rule on individual criminal responsibility according to which not only direct perpetrators but also individuals effectively placed higher in the structure of command can be held criminally responsible, even if they did not commit the offence themselves. ANSA commanders can thus be held criminally responsible for failure to exercise control over crimes that they knew or had reason to know were being committed by forces under their command.

1.1.3. The 1977 Additional Protocol II to the Geneva Conventions of 1949

The Additional 1977 Protocol II applies to non-international armed conflicts that *"take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement [the] Protocol"* (Art. 1(1)). The application of the Additional 1977 Protocol II is more restrictive than the 1954 Hague Convention or its 1999 Second Protocol, as both these latter instruments apply to all situations of non-international armed conflicts, even if the ANSA involved does not control a portion of the State party's territory or if the conflict in question only involves ANSAs. However, although the 1977 Protocol II has more States parties than the 1954 Hague Convention (168 as opposed to 131), it must be noted that in cases where both Additional Protocol II and the 1954 Hague Convention are applicable, the latter's rules prevail.

Article 16 of Additional 1977 Protocol II prohibits in particular committing: *"any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort"*. Although there is no explicit waiver for imperative military necessity, this prohibition is commonly understood to cease if the property has been transformed into a military objective.[56]

1.2. Customary International Humanitarian Law

A series of IHL rules govern the conduct of hostilities relevant to the protection of cultural heritage. These are considered customary in character and are thus applicable even with regards to conflicts that are not governed by treaty law.[57] The core rules are the principle of distinction, the principle of precaution and the principle of proportionality. They apply to all parties to an armed conflict, both States and ANSAs. Furthermore, the International Committee of the Red Cross (ICRC) has contended that a number of key

[55] This limitation needs to be contrasted with the ICC Statute which foresee jurisdiction over persons who commit offences in the territory of States bound by the ICC Statute, regardless of nationality.

[56] Military objectives have been defined as *"those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage"*. Article 52(2) of the 1977 Additional Protocol I to the 1949 Geneva Conventions. See also J-M. Henckaerts and L. Doswald-Beck, *supra* note 48, p. 29, Rule 8. As noted above, while the definition lists various reasons why an object may be made a military objective (nature, location, purpose or use), it is its use that defines it as such. For example, a historical fortress from the 12th century located on top of a hill to protect a town could support the military effort because of its nature or location. This is not sufficient for a site to be considered a military objective, however. The fortress would need to be used in a way that would make an effective contribution to the military effort of the party using it, even if the use results from its location only. In addition, the contribution that the object in question makes to the military effort has to be of a certain importance, in order for its partial or total destruction, capture or neutralization to offer a definite military advantage to the attacking party at the time. See O'Keefe, *supra* note 15, pp. 216 and 231; and J-M. Henckaerts, *supra* note 40, p. 38.

[57] Customary international law refers to "a general practice accepted as law". This is established through consideration of both State practice and *opinio juris*, which is the belief that the practice in question is legally binding. Unless a state has persistently objected to a norm of customary international law, it is bound by it.

provisions contained in the 1954 Hague Convention and its Protocols, in addition to those of the 1899 and 1907 Hague Regulations, also reflect custom.

1.2.1. The principle of distinction

The principle of distinction requires parties to a conflict to distinguish between civilian objects and military objectives at all times. Attacks may only be directed against military objectives. They must not be directed against civilian objects.[58]

While cultural heritage qualifies as "civilian objects", the former enjoys an additional level of protection due to its distinct nature. This means that the principle of distinction carries an additional layer whereby parties must be aware of the heightened protected status of cultural heritage.[59]

1.2.2. The principle of precaution

The principle of precaution against the effects of attacks requires that the *"parties to the conflict must take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks."*[60]

The principle of precaution in attack provides that: *"[i]n the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects."*[61] This principle entails, for example, target selection and verification, assessment of damage, choice of means and methods of warfare, and issuing advance warnings prior to an attack.[62] It also implies that parties to armed conflicts should not place military objectives near the civilian population and civilian objects, including cultural heritage, as this could increase their likelihood of being damaged.

1.2.3. The principle of proportionality

The principle of proportionality establishes that: *"[l]aunching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited."*[63]

The assessment of what constitutes excessive damage in this context must necessarily take into account qualitative criteria, as well as quantitative factors, as the consequences of destroying an inhabited building, for example, obviously differ to those of bombarding a museum holding a rich collection of art.[64]

1.2.4. Specific customary rules on the protection of cultural heritage

As mentioned above, according to the ICRC, certain rules related to the protection of cultural heritage also have a customary character.[65]

Rule 38 of its study on customary IHL states that:

Each party to the conflict must respect cultural property:

A. *Special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives.*
B. *Property of great importance to the cultural heritage of every people must not be the object of attack unless imperatively required by military necessity.*

In addition, Rule 39 states that the use of property "of great importance to the cultural heritage of every people for purposes which are likely to expose it to destruction or damage is prohibited, unless imperatively required by military necessity".

[58] J-M. Henckaerts and L. Doswald-Beck, *supra* note 48, p. 25, Rule 7.
[59] M. Lostal, *supra* note 11, p. 64.
[60] J-M. Henckaerts and L. Doswald Beck, *supra* note 48, p. 68, Rule 22. See also the principle of precautions against the effects of attacks, Rules 23-24; and Art. 58 of the 1977 Additional Protocol I to the 1949 Geneva Conventions. This principle is also explicitly incorporated into Art. 7 of the 1999 Second Protocol to the 1954 Hague Convention.
[61] J-M. Henckaerts and L. Doswald-Beck, *supra* note 48, p. 51, Rule 15. See also Art. 57 of 1977 Additional Protocol I to the 1949 Geneva Conventions.
[62] Ibid., pp. 51-67, Rules 16-21.
[63] Ibid., p. 46, Rule 14.
[64] R. O'Keefe, *supra* note 15, p. 15. With regard to qualitative criteria, it could be assumed that, for example, World Heritage sites are considered of utmost importance given that, by definition, they are of outstanding universal value.
[65] It should be noted that an assessment of whether a norm has reached the status of customary international law is largely based on *"attempting to gauge an unspoken consensus"*. See O'Keefe, *supra* note 15, p. 317, who states that conclusions as to the customary character of these norms can only be regarded as "tentative". ICRC selection of customary rules has not been endorsed by any tribunal and it is not yet widely accepted by scholars. Nevertheless, it is worth noting that the practice in the field is growing and that some additional examples have been added in 2017 to the ICRC Customary IHL database, including with regards to Rules 38, 39 and 40.

Finally, Rule 40 establishes that

Each party to the conflict must protect cultural property:

A. *All seizure of or destruction or wilful damage done to institutions dedicated to religion, charity, education, the arts and sciences, historic monuments and works of art and science is prohibited.*
B. *Any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, property of great importance to the cultural heritage of every people is prohibited.*

1.2.5. The Hague Regulations

The Hague Regulations concerning the Laws and Customs of War on Land,[66] although adopted for application to international armed conflicts, contain rules that concern the protection of cultural objects which have been found to reflect customary international law and being applicable to non-international armed conflicts.[67]

According to Article 27 of the 1907 Hague Regulations annexed to Convention (IV) respecting the Laws and Customs of War on Land (1907 IV Hague Regulations), which superseded the similar rule contained in the 1899 Hague Regulations:

In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments […] provided they are not being used at the time for military purposes. It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand. [68]

Lack of display of visible signs to mark the presence of cultural property does not relieve the enemy from its obligation to respect cultural objects.[69] While Article 27 is limited to sieges and bombardments, it is now generally accepted that this rule applies to all military operations, and that the obligation of care only ceases if the buildings in question have been transformed into military objectives.[70] Article 28 is also relevant for the protection of cultural heritage as it prohibits pillage in general.

Whilst the standards of protection that the 1899 and 1907 Hague Regulations afford to cultural heritage have been surpassed by the 1954 Hague Convention and subsequent treaties, their rules are still relevant with regard to those few States that are party to them but not to a subsequent treaty. In addition, they have served as inspiration to the Statute of the ICTY and the ICC.[71]

2. INTERNATIONAL CRIMINAL LAW

International criminal law seeks to establish individual criminal responsibility for the most serious crimes of concern to the international community as a whole, including war crimes, crimes against humanity and genocide.[72] Attacks against cultural heritage may constitute a war crime in the context of both international and non-international armed conflict. A necessary condition for the qualification of a war crime is the existence of a nexus with an armed conflict.[73]

Such attacks may also be considered a crime against humanity when they amount to persecution, defined as an *"intentional and severe deprivation of fundamental rights contrary to international law"*, which may occur in either peace or wartime.[74] They must be *"committed as*

[66] The Hague Regulations concerning the Laws and Customs of War on Land were first adopted in 1899 and largely re-affirmed in 1907 (as annexes to the Conventions respecting the Laws and Customs of War on Land).
[67] See ICTY, *The Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T, Judgment (Trial Chamber), para. 362, which referred to "the custom codified in Article 27 of the Hague Regulations".
[68] There are earlier examples of similar rules, but these were non-binding at the international level. The Lieber Code of 1863, a manual on the laws of war applicable to the US troops in the American Civil War, contained a provision affording special protection to art works and buildings with a cultural purpose: *"classical works of art, libraries, scientific collections or precious instruments … must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded"* (Art. 35). Thereafter, an international effort to codify the laws of armed conflict took place, leading to the adoption of the 1874 Brussels Declaration, which stated that *"all necessary steps must be taken to spare as far as possible buildings dedicated to art, science or charitable purposes … provided they are not being used for military purposes"* (Art. 17). These normative developments were subsequently crystallized in the 1899 Hague Convention with respect to the Laws and Customs of War on Land and its Annexed Regulations. The 1899 Hague Convention and Regulations were of crucial importance as they established for the first time a binding obligation to spare, as far as possible, buildings dedicated to religion, art, science or charitable purposes.
[69] ICTY, *The Prosecutor v. Prlić*, Case No. IT-04-74-T, Judgment Vol. I (Trial Chamber), para. 177.
[70] J-M. Henckaerts and L. Doswald Beck, *supra* note 48, p. 127, Rule 38(A).
[71] ICTY Statute, Art. 3(d); ICC Statute, Art. 8(2)(e)(iv).
[72] The ICC has material jurisdiction over these crimes and so had the ICTY which ceased to exist at the end of 2017.
[73] In relation to the destruction of the Buddhas of Bamiyan, it has been argued that it was not directly connected to an armed conflict. See O'Keefe, *supra* note 39, p. 4. With respect to the destruction of cultural heritage in Timbuktu, the same criticism was again raised by Schabas. See W. Schabas, "Al Mahdi has been convicted of a crime he did not commit", *Case Western Reserve Journal of International Law*, 2017, 49(1).
[74] ICC Statute, Art. 7(2)(g).

part of a widespread or systematic attack […] against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender […], or other grounds that are universally recognized as impermissible under international law."[75] Under the Statute of the ICC, persecution must occur in connection to either another form of crime against humanity (e.g. forcible transfer, rape, murder) or another crime within the jurisdiction of the Court.[76]

In accordance with the jurisprudence of the ICTY,[77] attacks against cultural heritage may also demonstrate intent to conduct genocide,[78] but may never amount to genocide *per se*.[79]

2.1. Individual criminal responsibility

Alleged perpetrators of war crimes and crimes against humanity may be prosecuted before international courts and tribunals. The ICTY has prosecuted around 25 individuals on the basis of Article 3(d), which gives jurisdiction to the tribunal over war crimes consisting of the *"seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science."*[80] For example, Miodrag Jokić and Pavle Strugar were convicted for the shelling of the Old City of Dubrovnik, the inscription of which on the World Heritage List was considered to be an aggravating factor. It must also be noted that the conviction against Slobodan Praljak for his involvement in the heavy weapons bombardment of the Mostar Bridge (which was later inscribed on the World Heritage List) was reversed on appeals on the basis that, at the time of its destruction, the bridge was a military objective which offered a definitive military advantage at the time of the attack.[81]

As mentioned above, the ICC has jurisdiction over persecution, as well as war crimes against cultural objects. Under Article 8(2)(e)(iv) of the Rome Statute, which applies in non-international armed conflicts, it is a war crime to intentionally direct: *"attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives."*[82]

This provision does not encompass looting because movable cultural property, such as archaeological items or works of art, falls outside its scope. There are, however, two generic provisions concerning war crimes in non-international armed conflict: Article 8(2)(e)(v) prohibits *"[p]illaging a town or place, even when taken by assault"* and Article 8(2)(e)(xii) prohibits the destruction or seizure of *"the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict"*. These two provisions may apply to cultural objects.

© ICC-CPI – ICC judges find Mr Al Mahdi guilty of the war crime of attacking historic and religious buildings in Timbuktu, Mali

In September 2016, the ICC Trial Chamber VIII found Al Mahdi guilty of a war crime against cultural heritage under Article 8(2)(e)(iv), because of his involvement in the intentional destruction of nine mausoleums and

[75] ICC Statute, Art. 7(1)(h).
[76] Ibid.
[77] ICTY, *The Prosecutor v. Krstić*, Case No. IT- 98- 33- T, Judgment (Trial Chamber), para. 580.
[78] See also E. van Sliedregt, ' The Prosecutor v. Krstić - Commentary', in A. Klip, *The International Criminal Tribunal for the Former Yugoslavia 2001* (Intersentia, 2005), pp. 767-772.
[79] It should be noted that the concept of "cultural genocide" appeared in the early preparatory works of the Convention for the Prevention and Punishment of Genocide of 1948. UN General Assembly Resolution 96(1) of 11 December of 1946 on the crime of genocide, an instrument that served as a basis for the 1948 Genocide Convention, extended protection to racial, religious, political and other groups. It also notes that genocide *"results in great losses to humanity in the form of cultural and other contributions represented by these human groups"*. See also Y. Shany, "The road to the Genocide Convention and beyond", in P. Gaeta (ed.), *The UN Genocide Convention. A Commentary*, Oxford University Press, 2009, p. 9; and E. Novic, *The Concept of Cultural Genocide: An International Law Perspective*, Oxford University Press, 2016.
[80] ICTY, Art. 3(d), through which it is recognized that the Tribunal has jurisdiction over war crimes consisting of the *"seizure of, destruction or wilful damage done to institutions dedicated to religion"*. See ICTY, *The Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Judgment (Trial Chamber), paras. 296 and 312; *The Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-T, Judgment (Trial Chamber), para. 605; *The Prosecutor v. Vladimir Đorđević*, Case No. IT-05-87/1-T, Judgment (Trial Chamber), para. 1773; *The Prosecutor v. Hadžihasanović and Kubur*a, Case No. IT-01-47-T, Judgment (Trial Chamber), para. 59; *The Prosecutor v. Martić*, Case No. IT-95-11-T, Judgment (Trial Chamber), para. 96; and *The Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Judgment (Appeals Chamber), para. 278.
[81] ICTY, *The Prosecutor v. Prlić et al.*, Case No. IT-04-74, Summary of Appeals Chamber Judgment, p. 5; and *The Prosecutor v. Prlić*, Case No. IT-04-74, Judgment Vol. I (Appeals Chamber), para. 426.
[82] The ICC Statute contains an identical provision applicable to international armed conflicts in Article 8(2)(b)(ix).

the door of the Sidi Yahia mosque in Timbuktu (Mali) during mid-2012. Al Mahdi pleaded guilty and was sentenced to nine years' imprisonment. He was also ordered to pay €2.7 million in reparations.[83] Al Mahdi was the head of the "Hesbah", a morality police brigade established by the group Ansar Dine to combat all practices considered contrary to the precepts of Islam.[84] Al Mahdi's trial was deemed a landmark case, as it was the first to be concerned solely with attacks against cultural heritage before the ICC. Another alleged leader of the Hesbah, Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (Al Hassan) is currently detained in The Hague for charges that include the destruction of protected buildings.[85]

In November 2017, the ICC and UNESCO signed a letter of intent to enhance cooperation to hold the perpetrators of crimes against cultural heritage accountable.[86] However, the ICC should not be regarded as a safety net for international prosecutions. First of all, the ICC does not possess universal compulsory jurisdiction: only individuals that are nationals of a State over which the Court has jurisdiction, or that have allegedly committed the act on the territory of such a State, may be prosecuted at The Hague. Iraq and Syria, for example, are not parties to the ICC Statute, and other avenues by which the ICC may gain jurisdiction over their situations seem unlikely at the moment.[87] Second, the Court works on the basis of the principle of complementarity, according to which the ICC can only exercise its jurisdiction when domestic legal systems fail to do so. Third, the Court exercises jurisdiction over the *"most serious crimes of international concern"*.[88] The chapeau of Article 8 on war crimes mentions that the ICC has jurisdiction over these crimes *"in particular when [they are] committed as part of a plan or policy or as part of a large-scale commission of such crimes"*. This could perhaps be applicable to members of the Islamic State group over which the Court could have jurisdiction by reason of their nationality, but this jurisdictional qualification could exclude members of ANSAs where the destruction of cultural heritage did not take place over a large scale or include World Heritage sites, for example. Lastly, the ICC Statute does not capture the full range of breaches against cultural heritage. For instance, it does not specifically criminalize the use of cultural heritage for military purposes.[89]

In addition to being prosecuted at the international level, alleged perpetrators of crimes against cultural heritage may also be prosecuted at the domestic level. As explained above, both the 1954 Hague Convention and its 1999 Second Protocol require the introduction of legislative measures in the domestic legal systems of States parties, in order to establish their jurisdiction over offences against cultural heritage in armed conflict.

2.2. The doctrine of command responsibility

In addition to criminal responsibility for direct perpetration, international criminal law also holds individuals liable in the case of superior (or command) responsibility. The doctrine of command responsibility extends to non-international armed conflicts,[90] and thus affects ANSAs that have a command structure with subordinates and superiors. The mode of liability makes a superior criminally responsible for the offences committed by the forces under his or her effective command and control if:

(i) that military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) that military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[91]

[83] ICC, *The Prosecutor v. Al Mahdi*, Case No. ICC-01/12-01/15, Reparations Order (Trial Chamber), para. 134.

[84] ICC, *The Prosecutor v. Al Mahdi*, Case No. ICC-01/12-01/15, Judgment (Trial Chamber).

[85] The confirmation of the charges, which will take place in May 2019, include the war crime of directing attacks against religious and historical buildings in Timbuktu between June and July 2012. ICC, *Mandat d'arrêt à l'encontre d'Al Hassan Ag Abdoul Aziz ag Mohamed ag Mahmoud*, Case No. ICC-01/12-01/18 (27 March 2018), p.9.

[86] Joint Communication of the ICC Office of the Prosecutor with UNESCO, "The ICC Office of the Prosecutor and UNESCO sign Letter of Intent to strengthen Cooperation on the Protection of Cultural Heritage" (6 November 2017).

[87] This includes a referral by the UN Security Council (an initiative that was already vetoed by China and the Russian Federation in May 2013 with regard to Syria), or a decision on the part of the State concerned to lodge a declaration where it accepts the exercise of jurisdiction by the Court. ICC Statute, arts. 12(2)(b), 12(3) and 13(b).

[88] ICC Statute, Preamble.

[89] See M. Frulli, "The criminalization of offences against cultural heritage in times of armed conflict: The quest for consistency", *European Journal of International Law*, 2010, 22(1), pp. 203-217.

[90] ICTY, *The Prosecutor v. Hadžihasanović and Kabura*, Case No IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility (Appeals Chamber), para. 31. See also J-M. Henckaerts and L. Doswald-Beck, *supra* note 48, p. 558, Rule 153.

[91] ICC Statute, art. 28(1). See also ICTY Statute, art. 7(3), and J-M. Henckaerts and L. Doswald-Beck, *supra* note 48, p. 558, Rule 153.

This doctrine was applied to Pavle Strugar, a general in the Yugoslav People's Army, for not issuing orders *"explicitly prohibiting an attack on the Old Town [of Dubrovnik], as well as tak[ing] other measures to ensure compliance with such orders and to secure that the Old Town would not be attacked by shelling, or that an existing attack be immediately terminated"*,[92] and for having failed to *"initiate an effective investigation and to initiate or take administrative and disciplinary action against the officers responsible for the shelling of the Old Town."*[93]

© Pavo Urban
Mushroom of fire from an 1991 explosion on the main street of Dubrovnik

3. OTHER SOURCES OF CULTURAL HERITAGE LAW

In addition to the aforementioned IHL provisions, there are a number of other treaties that concern cultural heritage which, unlike those above, were not developed for situations of armed conflict and do not place any direct obligations on ANSAs but are nevertheless worth considering.[94]

3.1. The 1970 UNESCO Convention

The 1970 UNESCO Convention requires States parties to protect cultural objects on their territory against looting and illicit export through preventive measures (Arts. 3-7). When there is a particular risk of pillage, such as the outbreak of armed conflict, this treaty foresees specific import and export controls (Art. 9). While the Convention is aimed at States, it may also be relevant for ANSAs, as they may be willing to implement controls on illicit exports from territories under their control through parallel agreements. The Convention covers any object that belongs to one of the categories listed in its Article 1 and which has been specifically designated by the relevant State *"as being of importance for archaeology, prehistory, history, literature, art or science"*.[95] This includes, for example, engravings, antiquities more than 100 years old, products of archaeological excavations and rare manuscripts.

3.2. The 1972 World Heritage Convention

The World Heritage Convention established a listing system to identify and protect cultural heritage considered to be of Outstanding Universal Value. This designation refers to monuments, groups of buildings and sites that possess a quality so exceptional it transcends national boundaries.[96] Following nomination by the State on whose territory the site is situated, the property is inscribed on the World Heritage List.[97] The list is not exhaustive and new sites are added regularly to it. Therefore, the fact that a property is not on the list does not indicate that it does not possess an Outstanding Universal Value and it may well be added to the list at a later stage.[98] The World Heritage Centre also maintains a tentative list which contains those sites that States are considering for nomination on the list.

[92] ICTY, *The Prosecutor v. Pavle Strugar*, Judgment (Trial Chamber), *supra* note 80, para. 414.
[93] Ibid.
[94] Safeguarding measures, as provided under Article 3 of the 1954 Hague Convention and Article 5 of the 1999 Second Protocol to this treaty, must be taken before the armed conflict begins (i.e. in time of peace). Under international law, however, ANSAs as such do not exist in peacetime and therefore these measures would only be applicable to States. In places where ANSAs have sustained control over a territory, they may nonetheless consider implementing those measures (which may include the preparation of inventories or the designation of a competent authority responsible for the safeguarding of cultural property), in addition to precautionary measures to be taken during hostilities in accordance with IHL.
[95] In order to overcome the limitation associated with the requirement of States to designate objects falling under the Convention and the fact that most objects which fuel trafficking have been illegally excavated, the Operational Guidelines for the Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO, 1970) recommend States to *"make a clear assertion of State ownership of undiscovered objects, so that the State Party can request its return"* (para. 12).
[96] World Heritage Committee, *Operational Guidelines for the Implementation of the World Heritage Convention* (12 July 2017) WHC. 17/01, para. 49. Possessing an "outstanding universal value" is a higher threshold than the concept of *"great importance to the cultural heritage of every people"*, which defines cultural property under the 1954 Hague Convention. However, it is unclear whether it embodies a higher threshold than the concept of *"greatest importance for humanity"* adopted in relation to the enhanced protection regime of the 1999 Second Protocol.
[97] As of September 2018, there are 1,092 properties inscribed on the World Heritage List, 845 of which are cultural sites. Among the 1,092 properties, 54 sites have been put on the List of World Heritage in Danger, including 38 cultural sites.
[98] For example, the Buddhas of Bamiyan were not inscribed on the list at the time of their destruction by the Taliban, nor was the Mostar Bridge, which was destroyed during the conflict in former Yugoslavia.

States parties to the World Heritage Convention are required to protect any listed cultural sites situated on their territory and not take any deliberate measures that might damage listed cultural sites situated on the territory of another State party. While primarily designed for times of peace, the Convention also applies during armed conflict,[99] and properties inscribed on the List of World Heritage in Danger include those threatened by the outbreak of hostilities. In relation to the Syrian conflict, the World Heritage Committee, the body responsible for monitoring implementation of the Convention, specifically urged all parties to the conflict (both States and ANSAs) *"to fulfil their obligations under international law by taking all possible measures to protect such heritage, in particular the safeguarding of World Heritage properties and those included in the Tentative List"* and to evacuate *"World Heritage properties being used for military purposes"*.[100] Likewise, during its 2016 session in Istanbul, the World Heritage Committee urged *"all parties [to the conflict in Syria] to pursue all possible cooperation for ensuring the respect of a ceasefire within the property [of the Ancient City of Bosra]"*.[101] The Committee later took a similar decision and requested more concrete action, urging *"all parties associated with the situation in Syria to refrain from any action that could cause further damage to the Ancient City of Damascus, including preventing the use of cultural property and prominent architectural elements, in particular the Suleymaniye and Omayyad Mosque Minarets, for military purposes"*.[102]

There are three aspects of the World Heritage Convention relevant to ANSAs. First, the inscription of a property on one of its various lists (the World Heritage List, the List of World Heritage in Danger or even the national Tentative Lists submitted by States parties) may be taken into consideration during a trial to determine whether the accused had knowledge (or had reasonable grounds to know) of its special status.[103] Second, the fact that World Heritage properties are of Outstanding Universal Value can be considered a factor in the decision to initiate a criminal investigation, as well as an aggravating factor at the time of sentencing.[104] Third, due to their universal renown, attacks against World Heritage sites are more likely to be prosecuted before the ICC, as this body exercises jurisdiction over the most serious crimes of international concern, as illustrated in the Al Mahdi case.[105]

3.3. The 2003 Intangible Cultural Heritage Convention

The international legal framework protecting cultural heritage in armed conflict focuses on its tangible manifestations, such as monuments, archaeological sites or works of art. Non-international armed conflicts, however, also pose a risk to intangible heritage. The 2003 UNESCO Convention defines intangible cultural heritage in Article 2 as: *"[T]he 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 definition includes oral traditions, performing arts (songs and dances), social practices, religious rituals and festive events, languages, knowledge and practices concerning nature and the universe, and craftsmanship (Art. 2(2)).

According to the 2003 UNESCO Convention, States parties must *"take the necessary measures to ensure the safeguarding of the intangible cultural heritage present in its territory"* (Art. 11). Although the obligations enshrined in this Convention are directed at States, they can provide guidelines for ANSAs willing to take safeguarding measures. These measures may include, among others, to *"adopt a general policy aimed at promoting the function of intangible cultural heritage in society, and at integrating the safeguarding of such heritage into planning programmes"*; to *"foster scientific, technical and artistic studies […] with a view to effective*

[99] M. Lostal, *supra* note 11, p. 80. See also the Military Manual on the Protection of Cultural Property, *supra* note 33, p. 7, para. 24.
[100] UNESCO, Decision: 38 COM 7A.12, available at https://whc.unesco.org/en/decisions/5954, para. 7.
[101] UNESCO, Decision: 40 COM 7A.17, available at https://whc.unesco.org/en/decisions/6632, para. 6.
[101] UNESCO, Decision: 40 COM 7A.18, available at https://whc.unesco.org/en/decisions/6633, para 7.
[102] UNESCO, Decision: 40 COM 7A.18, available at https://whc.unesco.org/en/decisions/6633, para 7.
[103] ICTY, *The Prosecutor v. Pavle Strugar*, Judgment (Trial Chamber), *supra* note 80, para. 329.
[104] ICTY, *The Prosecutor v. Miodrag Jokić*, Case No. IT-01-42/1-S, Judgment (Trial Chamber), para. 66.
[105] The Office of the Prosecutor took into consideration the World Heritage status of the city of Timbuktu when arguing that the attacks met the gravity threshold required by the Rome Statute. ICC, Office of the Prosecutor, "Situation in Mali: Article 53(1) Report" (January 2013), paras. 110, pp. 154-160. When considering the gravity of the crime, the Trial Chamber also took into account the fact that *"all the sites but one (the Sheikh Mohamed Mahmoud Al Arawani Mausoleum) were UNESCO World Heritage sites and, as such, their attack appears to be of particular gravity as their destruction does not only affect the direct victims of the crimes, namely the faithful and inhabitants of Timbuktu, but also people throughout Mali and the international community"*. ICC, *The Prosecutor v. Al Mahdi*, Case No. ICC-01/12-01/15, Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi (Pre-Trial Chamber), para. 80. See also ICC, *Situation in the Republic of Mali – Arrest Warrant Against Ahmad Al Faqi Al Mahdi* (18 September 2015), para. 6.

safeguarding of the intangible cultural heritage"; and to ensure *"access to the intangible cultural heritage while respecting customary practices governing access to specific aspects of such heritage"* (Art. 13).

3.4. The 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions

The 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (UNESCO Convention on Cultural Diversity) encourages States parties to enact policies and measures that promote cultural diversity (Art. 5), an obligation that ANSAs should respect with regard to the communities living in areas under their control. It defines cultural diversity as the *"manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies"* (Art. 4(1)). Cultural expressions are defined as *"expressions that result from the creativity of individuals, groups and societies, and that have cultural content"* (Art. 4(3)). In the event that cultural expressions fall under threat on the territory of a State party, for example, because of the actions of ANSAs, that State must take *"all appropriate measures"* to protect and preserve those cultural expressions, and inform the Intergovernmental Committee established under the Convention of the measures taken (Art. 8).

4. INTERNATIONAL HUMAN RIGHTS LAW

It is widely accepted that human rights law continues to apply in armed conflict.[106] While this body of law imposes obligations on States only, there is a growing consensus that ANSAs that exercise government-like functions and control over a territory are also obliged to respect human rights norms.[107] The underlying rationale is that individuals located on the territory of a State which is not capable of enforcing domestic legal order in the presence of ANSAs would be left without any human rights protection if the ANSA in question is not held responsible for its actions in relation to them.[108]

4.1 The human right to participate in cultural life

The access to and enjoyment of all forms of cultural heritage, both tangible and intangible, is protected through the human right to participate in cultural life.[109] The link between cultural heritage and human rights has been affirmed on numerous occasions. The Special Rapporteur in the field of cultural rights noted that cultural heritage should be understood as *"living and in an organic relationship with human beings"*, a perspective which *"encourages its preservation and discourages its destruction"*.[110]

Enshrined in Article 15 of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR),[111] the right to participate (or take part) in cultural life includes the right *"to benefit from the cultural heritage [...] of other individuals and communities,"*[112] thus requiring the preservation of all cultural heritage in both its tangible and intangible forms.[113] The protection of cultural heritage was also recognized as a human rights issue by the United Nations General Assembly,[114] as well as the (now defunct) United Nations Commission on Human Rights and by the Human Rights Council,[115] in relation to the destruction of cultural heritage in Afghanistan, for example.

[106] ICJ, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, para. 105; and ICJ, *Case Concerning Armed Activities in the Territory of the Congo (Congo v. Uganda)*, 19 December 2005, Judgment, para. 216.

[107] See among others, D. Murray, *supra* note 23, pp. 120-154; K. Fortin, *supra* note 23, pp. 27-68; and Geneva Call, The Garance Series: Issue 1, available at www.genevacall.org/wp-content/uploads/dlm_uploads/2016/08/GaranceTalks_Issue01_Report.pdf.

[108] D. Murray, *supra* note 23, p. 10.

[109] Report of the independent expert in the field of cultural rights, Farida Shaheed, UN Doc.A/HRC/17/38, 2011, available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/122/04/PDF/G1112204.pdf?OpenElement, para. 2.

[110] Cultural Rights, Note by the UN Secretary General sharing the Report of the Special Rapporteur in the field of cultural rights, UN A/71/317, 2016, available at http://undocs.org/A/71/317, para. 6.

[111] The Covenant came into force in 1976. Iraq, Mali and Syria are among its 164 States parties.

[112] UN Committee on Economic, Social and Cultural Rights, General Comment No. 21 on the Right of everyone to take part in cultural life (art. 15), UN Doc. E/C.12/GC/21, 2009, available at www.refworld.org/docid/4ed35bae2.html, para. 15(b).

[113] Ibid, para 50. The Special Rapporteur in the field of cultural rights also noted in 2016 with regard to tangible and intangible forms of heritage, that *"attacks on one form of heritage are often accompanied on assaults on the other"* (para. 6). She added that *"ancient languages and religious practices tied to sacred spaces and structures and cultural landscapes of northern Iraq and the Syrian Arab Republic are being lost as populations are displaced and objects, texts and historic structures are destroyed."* (para. 7), A/71/317 (9 August 2016), available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/254/44/PDF/N1625444.pdf?OpenElement.

[114] UN General Assembly Resolution 52/145, 12 December 1997. See also R. O'Keefe, *supra* note 15, p. 305, fn. 22.

[115] UN Commission on Human Rights Resolution 1998/70, UN Doc. E/CN.4/1998/70, 21 April 1998, available at http://hrlibrary.umn.edu/UN/1998/Res070.html, para. 2. See also UN Human Rights Council Resolution 6/1 Protection of Cultural Rights and Property in situations of armed conflict, 2007, available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_6_1.pdf and Resolution 6/11 Protection of cultural heritage as an important component of the promotion and protection of cultural rights, 2007, available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_6_11.pdf. See also R. O'Keefe, *supra* note 15, p. 305, fn. 23.

Human rights law provides States that have ratified its treaties with the obligation to respect, protect and fulfil the rights contained in those treaties.[116]

According to the ICESCR, *"the obligation to respect [the right to take part in cultural life] includes the adoption of specific measures aimed at achieving respect for the right of everyone, individually or in association with others or within a community or group... [T]o have access to their own cultural and linguistic heritage and to that of others."*[117] Indeed, representations of cultural heritage other than cultural monuments, sites and objects may also be threatened during armed conflict. Military actions, in this sense, may violate various tenets of the right to participate in cultural life, such as the rights to cultural identity, to cultural survival, to use one's own language, to be educated in one's own language and in a culturally appropriate way, and to develop in a manner consistent with customs and traditions.[118]

The ICESCR added that, in times of armed conflict, States parties must

[r]espect and protect cultural heritage in all its forms [...] Cultural heritage must be preserved, developed, enriched and transmitted to future generations as a record of human experience and aspirations, in order to encourage creativity in all its diversity and to inspire a genuine dialogue between cultures. Such obligations include the care, preservation and restoration of historical sites, monuments, works of art and literary works, among others.[119]

The obligation to respect and protect the right to take part in cultural life includes protecting cultural heritage from vandalism and theft, and prohibits its wilful destruction.[120] In particular, the obligation to protect means that States parties to the ICESCR must apply due diligence and take measures to prevent third parties, including ANSAs, from interfering with the exercise of this right and from damaging or destroying cultural heritage.[121]

4.2. Cultural heritage within other human rights

As human rights are interrelated and interdependent, other rights are necessary to fulfil the right to take part in cultural life, such as the right to an adequate start of living, for example. This means that a violation of other rights may negatively affect the realisation of the right to take part in cultural life. In addition, the right to cultural life may also be considered a component of other rights, such as the right to life; that is, the right to live according to one's cultural identity.

A number of other human rights provisions may be relevant to the protection of cultural heritage in armed conflict, such as Article 27 of the International Covenant on Civil and Political Rights (ICCPR) which provides for the right of minorities to *"enjoy their own culture, to profess and practice their own religion."* Article 2(2) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) requires States to take measures in the cultural field to ensure the development of certain racial groups or individuals belonging to them. Finally, Article 5(e)(vi) of this Convention may also be relevant as it establishes the right to equal participation in cultural activities.

5. OTHER RELEVANT INSTRUMENTS

5.1. UN Security Council Resolutions

UN Security Council Resolutions concerning cultural heritage can be divided into three categories. The first (and most common) category requires the cooperation of UN Member States to put a stop to the illicit trade of antiquities coming from areas affected by armed conflict. This is the case, for example, of Resolution 2199 (2015) according to which: *"[A]ll Member States shall take appropriate steps to prevent the trade in Iraqi and Syrian cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from Iraq since*

[116] UN Committee on Economic, Social and Cultural Rights, General Comment No. 3 on the Nature of States Parties' Obligations (Art. 2, para. 1 of the Covenant), UN Doc. E/1991/23, 1990, available at www.refworld.org/pdfid/4538838e10.pdf

[117] UN Committee on Economic, Social and Cultural Rights, *supra* note 112, para. 49(d).

[118] K. Hausler, *supra* note 49, p. 363.

[119] UN Committee on Economic, Social and Cultural Rights, *supra* note 112, para. 50(a). See also 2001 UNESCO Universal Declaration on Cultural Diversity, art. 7, which adopts the same language.

[120] R. O'Keefe, *supra* note 15, p. 305.

[121] UN Committee on Economic, Social and Cultural Rights, *supra* note 112, para. 50.

6 August 1990 and from Syria since 15 March 2011."[122] Another example is Resolution 2322 (2016) which urged Member States to introduce national measures and develop *"broad law enforcement and judicial cooperation in preventing and combating all forms and aspects of trafficking in cultural property and related offences that benefit or may benefit terrorist or terrorist groups."*[123]

The second set of Security Council resolutions concerned with cultural heritage address ANSAs directly, as they request the parties involved in a non-international armed conflict to put a stop to the damage and destruction of cultural heritage. For example, in the context of Mali, the Security Council passed Resolution 2056 of 5 July 2012, which urged *"all parties […] to immediately take appropriate steps to ensure the protection of Mali's World Heritage sites"*. While the text of the World Heritage Convention addresses only States, this Resolution calls upon all parties, including ANSAs, to ensure the preservation and transmission to future generations of World Heritage sites.[124] In relation to Syria, the Security Council went a step further and required the parties to the conflict to take proactive steps to protect cultural heritage: *"Calling on all parties to immediately end all violence which has led to human suffering in Syria, save Syria's rich societal mosaic and cultural heritage, and take appropriate steps to ensure the protection of Syria's World Heritage Sites."*[125]

The third type of resolution pertaining to cultural heritage concerns UN peacekeeping forces. In 2014, the Security Council included the protection of cultural heritage in the mandate of the the UN Multidimensional Integrated Stabilization Mission in Mali (MINUSMA):

Support for cultural preservation
To assist the Malian authorities, as necessary and feasible, in protecting from attack the cultural and historical sites in Mali, in collaboration with UNESCO.[126]

Finally, it is worth noting that, in March 2017, the Security Council adopted its first resolution dedicated entirely to cultural heritage.[127] Resolution 2347 affirms the protection of cultural heritage as a key means for the maintenance of international peace and security. It also emphasizes that addressing the trafficking in cultural objects is a legitimate part of the UN counter-terrorism regime, strengthening the role of the Security Council with regard to the prevention of terrorism and extremism. The Security Council also affirmed the protection of cultural heritage not only as a means to enhance counter-terrorism, but also as a means to protect a *"priceless inheritance for future generations"*.[128] Despite this trend, the Security Council removed MINUSMA's duties in relation to cultural heritage when it extended its mandate in 2018.[129]

5.2. The 2003 UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage

The 2003 UNESCO Declaration was adopted in response to the Taliban's destruction of the Buddhas of Bamiyan in 2001. At the international level, declarations such as this are *"resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected."*[130] Interestingly, Article I notes that the international community—not just States—*"recognizes the importance of the protection of cultural heritage and reaffirms its commitment to fight against its intentional destruction in any form so that such cultural heritage may be transmitted to the succeeding generations."* The

[122] UN Security Council Resolution 2199 (2015), para. 17. See also Resolution 1483 (2003), para. 7, and Resolution 2322 (2016), para. 12, where the Council urged Member States to introduce national measures and develop *"broad law enforcement and judicial cooperation in preventing and combating all forms and aspects of trafficking in cultural property and related offences that benefit or may benefit terrorist or terrorist groups."*
[123] UN Security Council Resolution 2322 (2016), para. 12.
[124] Additionally, in 2013, the Security Council condemned *"abuses and violations of human rights and violations of international humanitarian law, including […] destruction of cultural and historical heritage, committed in Mali by any group or individuals […] and called upon "all parties to bring an end to such violations and abuses and to comply with their obligations under applicable international law."* See UN Security Council Resolution 2100 (2013), p. 2.
[125] UN Security Council Resolution 2139 (2014).
[126] UN Security Council Resolution 2164 (2014), para. 14(b).
[127] UN Security Council Resolution 2347 (2017).
[128] Ambassador M. Sison, United States Deputy Permanent Representative to the UN, United States Mission to the UN, New York City, "Explanation of Vote at the Adoption of UN Security Council Resolution 2347 on the Destruction and Trafficking of Cultural Heritage by Terrorist Groups and in Situations of Armed Conflict", 24 March 2017, available at https://usun.state.gov/remarks/7721. See also K. Hausler, "Cultural heritage and the Security Council. Why Resolution 2347 matters", Questions of International Law, available at www.qil-qdi.org/cultural-heritage-security-council-resolution-2347-matters.
[129] UN Security Resolution 2423 (2018).
[130] UN Commission on Human Rights, Report of the Eighteenth Session (19 March–14 April 1962), UN Doc E/3616/Rev.1, available at https://digitallibrary.un.org/record/220223/files/E_3616_Rev.1_E_CN.4_832_Rev.1-EN.pdf, p. 15, para. 105.

2003 Declaration encompasses the protection of cultural heritage in times of peace and armed conflict, but in terms of measures to combat the intentional destruction of cultural heritage it refers only to States.[131] Furthermore, Article VII of the Declaration directs States to *"establish jurisdiction over, and provide effective criminal sanctions against, those persons who commit, or order to be committed, acts of intentional destruction of cultural heritage of great importance for humanity"*, a provision pertinent to members of ANSAs.

5.3. Abu Dhabi Declaration on heritage at risk in the context of armed conflicts

The Abu Dhabi Declaration was adopted in December 2016 by representatives of more than 40 States as well as private and international organizations, including UNESCO. The Abu Dhabi Declaration reaffirms the commitment to safeguard endangered cultural heritage and establishes two long-term goals: (i) the *"creation of an international fund for the protection of endangered cultural heritage in armed conflict"*[132] to finance preventive needs and emergency responses; and (ii) the *"creation of an international network of safe havens to temporarily safeguard cultural property endangered by armed conflicts"*.[133] These safe heavens would ideally be located in the source country unless circumstances permit otherwise. In the latter case, preference would be given to neighbouring countries.

As explained in this chapter, the international legal framework contains several key provisions that are directly applicable to ANSAs, some of them imposing obligations on them, such as those regarding the respect of cultural property in armed conflict. A number of those provisions that are not directly applicable to them may nevertheless be of use to ANSAs as they may serve as guidelines to adopt safeguarding measures in relation to cultural heritage. However, as the next two chapters demonstrate, ANSAs are largely unaware of the international legal framework protecting cultural heritage, including their obligations.

[131] 2003 UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage, art. III. These include, among others, the adoption of preventive measures and legislative, administrative, educational and technical measures to protect cultural heritage.

[132] International Council on Monuments and Sites (ICOMOS), "Abu Dhabi Declaration on heritage at risk in the context of armed conflicts", available at www.icomos.org/en/what-we-do/image-what-we-do/401-heritage-at-risk/8262-icomos-adopts-the-abu-dhabi-declaration-on-heritage-at-risk-in-the-context-of-armed-conflicts.

[133] Ibid. On increased cooperation at the global level for the protection of cultural heritage in conflict, see A. Jakubowski, "Resolution 2347: Mainstreaming the protection of cultural heritage at the global level", Questions of International Law, available at http://www.qil-qdi.org/resolution-2347-mainstreaming-protection-cultural-heritage-global-level/

CHAPTER 2

ANSAs ATTITUDES TOWARDS CULTURAL HERITAGE

© UN/Marco Dormino
A manuscript from the 14th century, part of Mali's invaluable collection of ancients manuscripts

1. DESTRUCTIVE AND NON-DESTRUCTIVE TRENDS

The attitudes of ANSAs towards cultural heritage during armed conflict can be broadly divided into two main categories. The first consists of ANSAs that, as a matter of policy or method of warfare, engage in deliberate attacks and plunder of cultural heritage (the "destructive trend"). The second consists of ANSAs that do not seek to intentionally destroy cultural heritage but, rather tend to respect it, with some taking concrete safeguarding measures, even though their military tactics and ignorance of legal standards may expose it to incidental, collateral damage ("non-destructive trend").

1.1. The destructive trend

In recent years, cultural heritage has increasingly become the direct target of systematic and deliberate attacks, notably by ANSAs. A notorious example is the Islamic State group, which has, since 2014, intentionally damaged or destroyed cultural heritage in the territory under its control between Iraq and Syria. Its targets have included artifacts, religious sites and ancient monuments, such as ancient Assyrian statues, churches, mosques, Sufi and Shia shrines, and World Heritage sites.[134] The Islamic State group has justified this destruction on religious grounds, stating that the targeted statues and shrines were idolatrous ("false idols")[135] and thus heretical to Islam.[136] In a video depicting the attacks within the Mosul Museum which went viral in February 2015, a representative of the group recalled how the Prophet Muhammad destroyed idols in Mecca, adding: *"[t]hese statues and idols, these artifacts, if God has ordered [their] removal, they [are] worthless to us even if they are worth billions of dollars."*[137] However, attacks on cultural heritage by the Islamic State group have not been limited to objects that bear a religious significance. For example, shortly after the raid on the Mosul Museum, the group destroyed the walls of Nimrud, the second capital of the ancient Assyrian empire, and its Northwest Palace.[138] The group also dynamited several temples of the ancient city of Palmyra, as well as the Arch of Triumph, the tetrapylon and part of the Roman theatre.[139]

Members of the Islamic State group destroying ancient artefacts in the Mosul museum in Iraq

Similarly, the radical Islamist ANSAs that took control of northern Mali in 2012–13, destroyed the mausoleums of Sufi saints and the door of the Sidi Yahia mosque in the World Heritage site of Timbuktu,[140] along with more than 4,000 ancient manuscripts. The use of mausoleums of Sufi saints by the local population for prayers and as places of worship was regarded as impious by Ansar Dine and Al-Qaeda in the Islamic Maghreb (AQIM). Moreover, Al Mahdi affirmed at the time that, under Islamic law, there should not be any construction over a tomb.[141] Having announced Ansar Dine intention to destroy all mausoleums, one spokesperson of the group reportedly said: *there is no such thing as world heritage, it does not exist. The infidels must not get involved in our business…*

[134] See Ö. Harmanşah, *supra* note 22; P. Cockburn, "The destruction of the idols: Syria's patrimony at risk from extremists", The Independent, 11 February 2014, available at www.independent.co.uk/news/science/archaeology/news/the-destruction-of-the-idols-syria-s-patrimony-at-risk-from-extremists-9122275.html; and G. Bowley, "Antiquities lost, casualties of war", New York Times, 3 October 2014, available at www.nytimes.com/2014/10/05/arts/design/in-syria-and-iraq-trying-to-protect-a-heritage-at-risk.html. See also M. Lostal, "The systematic destruction of cultural heritage at the hands of the Islamic State", Global Policy Forum, 9 March 2015, available at www.globalpolicy.org/component/content/article/144-bibliographies/52745-the-systematic-destruction-of-cultural-heritage-at-the-hands-of-the-islamic-state.html.

[135] G. Gestoso Singer, "ISIS's War on Cultural Heritage and Memory", UK Blue Shield, 2015, available at http://ukblueshield.org.uk/wp-content/uploads/2015/06/Singer-Isis_Against_World_Heritage.pdf, p. 2.

[136] Ibid.

[137] Cited in K. Shaheen, "Isis fighters destroy ancient artefacts at Mosul museum", *The Guardian*, 26 February 2015, available at www.theguardian.com/world/2015/feb/26/isis-fighters-destroy-ancient-artefacts-mosul-museum-iraq.

[138] M. Danti et al. "Report on the Destruction of the Northwest Palace at Nimrud", ASOR Cultural Heritage Initiatives, 2015, available at www.asor-syrianheritage.org/report-on-the-destruction-of-the-northwest-palace-at-nimrud.

[139] See, for example, B. Quinn and agencies, "ISIS destruction of Palmyra's temple of Bel revealed in satellite images", *The Guardian*, 1 September 2015, www.theguardian.com/world/2015/sep/01/satellite-images-reveal-isis-destruction-of-palmyras-temple-of-bel; K. Shaheen, "Isis destroys tetrapylon monument in Palmyra", *The Guardian*, 20 January 2017, available at www.theguardian.com/world/2017/jan/20/isis-destroys-tetrapylon-monument-palmyra-syria.

[140] UNESCO, "Damage to Timbuktu's cultural heritage worse than first estimated reports UNESCO mission", 7 June 2013, available at https://en.unesco.org/news/damage-timbuktu%E2%80%99s-cultural-heritage-worse-first-estimated-reports-unesco-mission.

[141] ICC, *The Prosecutor v. Al Mahdi*, *supra* note 83, para. 36. See also his interview with the UNESCO Courier, "Ahmad Al Faqi Al Mahdi: 'I plead guilty'", October–December 2017, available at *https://en.unesco.org/courier/2017-october-december/ahmad-al-faqi-al-mahdi-i-plead-guilty.*

It's forbidden by Islam to pray on tombs and ask for blessings… we will not let the younger generation believe in shrines as God, regardless of what the UN, UNESCO, ICC or ECOWAS have to say. We do not recognize these organizations. The only thing we recognize is the court of God, Sharia.[142]

Such deliberate attacks against cultural heritage by ANSAs are not new. In Afghanistan, in 2001, the Taliban destroyed the Buddhas of Bamiyan following a fatwa proclaimed by their Supreme Court according to which the *"idols had been gods of the infidels … [t]he real God is only Allah, and all other false gods should be removed."*[143] The Taliban also sought to crack down on "un-Islamic" segments of Afghan society and banned all forms of imagery, music and sports, including television, in accordance with what they considered a strict interpretation of Sharia law.

It has also been reported that, in 2008, al-Shabaab *"destroyed Sufi […] graves and shrines in Kismayo, Somalia's third-largest city. Previously, they had destroyed an old church. It did not seem to matter that not a single Christian lived in the city at the time."*[144] Somali popular music and traditional dances and songs, form of intangible cultural heritage, were also forbidden in the areas controlled by al-Shabaab at the time.[145]

In Libya, the country's cultural heritage was largely spared during the 2011 armed conflict;[146] however, the situation reportedly changed afterwards with instances of theft and damage recorded[147] mainly in the region of Tripolitania:

Sufi tombs and mosques have been seriously damaged or completely destroyed throughout the country. In the city of Tripoli there has been both pillaging and the outright destruction of a number of important Islamic shrines, including the Karamanli mosque […] An Ottoman-era castle in the southern city of Sabha was struck by a missile and damaged in 2014 during fighting between Tebu and Arab militias. Prehistoric rock art at the UNESCO World Heritage site of Tadrart Acacus is being vandalized. Museums remain closed country-wide due to security concerns. Public sculptures of the Italian colonial era have been destroyed by extremists in both Tripoli and Derna and are currently being threatened in Sirte. Since Department of Antiquities archaeologists remain hesitant to do site inspections in areas deemed unsafe, there has been a notable increase in illicit trafficking of cultural materials in the past two years.[148]

In 2016, the World Heritage Committee placed Libya's five World Heritage sites on its List of World Heritage in Danger as a result of the *"high level of instability affecting the country and the fact that armed groups are present on these sites or in their immediate surroundings."*[149] In September 2017, it was reported that military action was intensifying around the World Heritage site of Sabratha, which prompted the UNESCO Director-General to call on all parties to cease violence and protect the site.[150]

The common denominator linking ANSAs (mainly radical Islamist groups) involved directly in the intentional destruction of cultural heritage is the attempt to deny existing beliefs and impose their own interpretation of religion. According to Al Mahdi, *"the aim of these groups [he is referring to Ansar Dine and al-Qaeda in the Islamic Maghreb (AQIM)] is to impose their ideology on the people, which is derived from Wahhabi doctrine."*[151] In the words of Karima Bennoune, the UN Special Rapporteur in the field of cultural rights, *"fundamentalists often seek to erase the culture of others and the syncretic nature of culture and religion*

[142] S. Green Martínez, "Destruction of cultural heritage in Northern Mali, a crime against humanity?", *Journal of International Criminal Justice*, 2016, 13(5), pp. 1094-1095. Part of this paragraph has also been cited in I. Bokova, "Culture in the cross hairs", *New York Times*, 2 December 2012, available at www.nytimes.com/2012/12/03/opinion/global/cultural-sites-must-be-protected.html.

[143] Cited in F. Francioni and F. Lenzerini, "The destruction of the Buddhas of Bamiyan and international law", *European Journal of International Law*, 2003, 14(4), p. 626.

[144] G. Gestoso Singer, *supra* note 135, p. 8.

[145] S. Mire, "The knowledge-centred approach to the Somali cultural emergency and heritage development assistance in Somaliland", *African Archaeological Review,* 2011, 28(1), p. 80.

[146] The US Committee of the Blue Shield, in partnership with the International Council of Museums (ICOM) and the International Military Cultural Resources Work Group, had prepared a no-strike list indicating the coordinates of Libya's main heritage sites and museums, which it distributed to the defence departments of all countries participating in the NATO operation a few days before the mission was deployed. This no-strike list proved to be crucial as NATO was able to carry out its air campaign without destroying or causing serious damage to Libya's cultural property. Blue Shield International Military Cultural Heritage Working Group, The 2nd Libyan Heritage Mission: November 12 to 16, 2011, available at: http://blueshield.de/libya2-report.html.

[147] Associated Press in Paris, "Libya's cultural heritage 'being destroyed and plundered by Isis'", *The Guardian*, 15 December 2015, available at www.theguardian.com/world/2015/dec/15/libyas-cultural-heritage-being-destroyed-and-plundered-by-isis.

[148] S. Kane, *supra* note 22, pp. 204-205.

[149] World Heritage Centre, "Libya's five World Heritage sites put on List of World Heritage in Danger", 14 July 2016, available at https://whc.unesco.org/en/news/1523.

[150] World Heritage Centre, "UNESCO's Director General calls on all parties to cease violence and to protect the World Heritage Site of Sabratha in Libya", 22 September 2017, available at https://whc.unesco.org/en/news/1714.

[151] UNESCO Courier, *supra* note 141.

and stamp out cultural diversity. Such efforts represent the misuse of what is claimed to be culture against cultural rights."[152] The denial of cultural identity, through the deliberate destruction of manuscripts and places of worship or memory, combined with the prohibition of traditional practices, for example, may be referred to as a strategy of "cultural cleansing". The former UNESCO Director-General, Irina Bokova, used this term in relation to the situation in Iraq in 2014, to describe widespread attempts to erase unwanted traces of the past, along with the identity of its people, through the obliteration of cultural heritage, in particular its physical evidence.[153] A strategy of "cultural cleansing" thus aims to eradicate cultural diversity and replace it with a single, homogenous cultural and religious perspective.

This ideological motivation seems nevertheless to be at odds with the economic profit that some above-mentioned ANSAs have obtained through the looting and trade of antiquities in the black market. For example, the Islamic State group reportedly established an organized system of illicit trafficking, which was uncovered during a 2015 US-led raid against Abu Sayyaf, a mid-level leader within the organization. His records revealed that he was the head of an "Antiquities Division" within the *Diwan al Rikaz* (the "ministry for natural resources" of the group). The "Antiquities Division" encompassed units dedicated to excavating and looting known archaeological sites.[154] It issued licenses permitting excavations,[155] and imposed taxes for the sale of antiquities, which varied from 20 to 50 per cent of their estimated value depending on the area. In this context, Khaled al-Assad, the head of antiquities in Palmyra, was assassinated in 2015 after refusing to cooperate with the Islamic State group and disclose the whereabouts of some of the site's antiquities.[157] Economic gain was also allegedly the main motivation of Somali warlords who have, over the past 20 years, repeatedly commissioned illicit excavations of archaeological sites to finance the war.[158] It should be noted that, even when ANSAs do not destroy cultural objects, conducting illegal excavations to fuel the illicit market also constitutes a form of heritage destruction, as it annihilates the contextual background associated with the location of an archaeological object, which forms an important part of its cultural and scientific value.

Lastly, the theatrical destruction of cultural heritage witnessed in Bamiyan, Mosul, Palmyra and Timbuktu may also represent a display of power and an act of defiance against the rest of the world, designed to attract support and fuel sectarian violence. According to Al Mahdi, *"in strategic terms, al Qaeda seeks to increase its visibility through spectacular actions in order to attract new adherents and provide the parties that support it with proof of its zeal and efficacy."*[159] The Islamic State group *"commits cultural heritage atrocities to shock the world, allowing [it] to demonstrate its ability to act with impunity and illustrating the impotence of the international community to prevent them."*[160] It may be argued that World Heritage sites have been specifically targeted in order to defy the international community, which is bound to respond to the destruction of such exceptional sites.

1.2. The non-destructive trend

In contrast with the above trend, many ANSAs do not follow a destructive policy and appreciate the value of protecting cultural heritage. A number have even adopted measures on a policy and/or practical level to respect and safeguard it. This is the case of the Libyan National Transition Council, the political face of the Free Libyan Army that waged a war of opposition against the Gaddafi regime in 2011. The Council's internal rules on targeting contained instructions not to *"harm cultural, educational and religious buildings and historic sites unless Qadhafi [sic] forces are using them for hostile purposes, and such harm is absolutely necessary."*[161] In line with this policy, the Misrata

[152] Report of the Special Rapporteur in the field of cultural rights, UN Doc. A/HRC/34/56, 16 January 2017, para. 5.
[153] G. Gestoso Singer, *supra* note 135, p. 2.
[154] D. Kohn, "ISIS's looting campaign", *New Yorker*, 14 October 2014, available at www.newyorker.com/tech/elements/isis-looting-campaign-iraq-syria; and United States House of Representatives, Committee on Financial Services. Memorandum to the Members of the Committee of Financial Services, "Task Force to Investigate Terrorism Financing hearing titled 'Preventing Cultural Genocide: Countering the Plunder and Sale of Priceless Cultural Antiquities by ISIS'", 15 April 2016, available at https://financialservices.house.gov/uploadedfiles/041916_tf_supplemental_hearing_memo.pdf, pp. 7-9.
[155] Y. Fanusie and A. Joffe, "Monumental fight: Countering the Islamic State's antiquities trafficking", *Center on Sanctions and Illicit Finance*, November 2015, available at www.defenddemocracy.org/content/uploads/documents/Monumental_Fight.pdf, p. 9.
[156] A. Al-Azm, S. Al-Kuntar and B. I. Daniels, "ISIS' antiquities sideline", *New York Times*, 2 September 2014, available at www.nytimes.com/2014/09/03/opinion/isis-antiquities-sideline.html.
[157] K. Shaheen and I. Black, "Beheaded Syrian scholar refused to lead ISIS to hidden Palmyra antiquities", *The Guardian*, 19 August 2015, available at www.theguardian.com/world/2015/aug/18/isis-beheads-archaeologist-syria.
[158] S. Mire, *supra* note 145, p.74.
[159] UNESCO Courier, *supra* note 141.
[160] A. Al-Azm, "Why ISIS wants to destroy Syria's cultural heritage", *Time*, 8 October 2015, available at http://time.com/4065290/syria-cultural-heritage.
[161] Libyan Opposition Forces, Frontline Manual, 2011, available at http://theirwords.org/media/transfer/doc/1_ly_ntc_2011_03-ef921ee4a9e2826b1ad8c267b8254c97.pdf, p. 4. See also K. Hausler, *supra* note 14, pp. 134-135.

brigade, formed in 2011, took on the task of guarding the National Museum of Tripoli, as well as the Arch of Marcus Aurelius in Martyr's Square,[162] to prevent them from being vandalized by members of the local population.

Geneva Call has identified additional examples of "protective" attitudes exhibited by ANSAs towards cultural heritage in the context of this study. For example, in the predominantly Kurdish populated areas of northeast Syria controlled by the People's Protection Units (YPG)/Women's Protection Units (YPJ), the autonomous self-administration of Rojava adopted a law, in 2015, on the protection of cultural heritage that prohibits the illicit excavation of archaeological sites, and the destruction, damage and trafficking of antiquities.[163] Implementation of this law by the local police force, the Asayish, which deployed mobile patrols to inspect the main archaeological sites, has reportedly resulted in the arrest of 122 persons and the confiscation of a large number of cultural artifacts (e.g. ancient statues, tablets and coins, some dating back to 3000 BC).[164] Geneva Call was allowed to see the artifacts guarded by the Asayish in a special storage area built for conservation purposes. In addition, FSA brigade commanders claim to have deployed guards to safeguard archaeological sites from plunder, and to have arrested a gang involved in the theft of manuscripts in Aleppo.[165] Moreover, one FSA brigade reportedly established measures to protect the Umayyad mosque of Aleppo, especially its sundial, as well as Zachariah's mausoleum, through the use of sandbags and bricks, while another withdrew its presence from a castle in Aleppo.[166]

Similarly, in Iraq, the various militia groups active in Mount Sinjar have posted guards to protect Yezidi temples from attacks by Islamic State groups.[167] Several fighters of the Sinjar Resistance Units (YBS) were reportedly killed in 2015 while defending the shrine of Sheikh Hassan in Gabara.[168] The Popular Mobilization Forces (PMF) have claimed to have cleared

© Saad Ismail
Cultural artifacts guarded by the Asayish police force in a special storage in northeast Syria

[162] Blue Shield & IMCuRWG, Mission Report: Civil-Military Assessment Mission for Libyan Heritage, 2011), available at: https://www.temehu.com/imazighen/berberdownloads/blueshield-mission-report-libya-2011.pdf
[163] Copy in file with Geneva Call.
[164] Interview with Luqman Ahme, Director of the "Authority of Tourism and Protection of Antiquities", Qamishli, Syria, 7 November 2015; and Interview with Mihemmad Omar, Asayish police commander, Qamishli, Syria, 8 November 2015.
[165] Meeting with FSA brigade commanders, Geneva, Switzerland, 18 December 2015.
[166] Meeting with FSA brigade commanders, Geneva, Switzerland, 29 June 2017. See also D. Darke, "Saving Syria's Cultural Heritage: How to Help", 14 July 2014, available at https://dianadarke.com/tag/zachariahs-tomb.
[167] Geneva Call's trip to Mount Sinjar, Iraq, 9–10 February 2017.
[168] Interview with Zeki Shengal, YBS, Sinjar, Iraq, 9 February 2017. See also "Islamic State destroyed Yezidi shrine, Gabara, Sinjar, Iraq, 12 July 2015", available at https://conflictantiquities.wordpress.com/2015/07/14/iraq-sinjar-gabara-yezidi-shrine-islamic-state-destruction.

an archaeological site near Tal Abta of booby traps planted by the Islamic State group and have reported archaeological finds to the antiquities authorities.[169] In fact, several PMF commanders interviewed by Geneva Call referred to the "Advice and Guidance to Fighters in the Battlefield" promulgated by Grand Ayatollah Ali al-Sistani, in particular rule 9 which states *"[d]o not violate the sanctity of all things sacred."*[170]

In Mali during clashes with Islamist fighters near Tessalit on 23 February 2013, the National Movement for the Liberation of Azawad (MNLA) intercepted three boxes containing more than 1,000 ancient manuscripts.[171] In a letter dated 22 March 2013, Ambéïry Ag Rhissa, who at that time was in charge of culture, handicrafts and tourism within the MNLA, informed UNESCO about the seizure, providing a comprehensive list of the manuscripts (with names of the author, subjects, etc.) and requesting support to return them to their owner (assumed to be the *Institut des Hautes Etudes et de Recherches Islamiques Ahmed Baba* in Timbuktu).[172] In the interim, according to Ag Rhissa, the manuscripts were stored in Kidal by the MNLA but were ultimately seized and destroyed by Islamist groups when they captured the town.[173] The case studies contained in this chapter offer more insights into these protective attitudes of ANSAs towards cultural heritage in Mali, Iraq and Syria, and the motivations behind them.

A number of ANSAs active in other countries have also bound themselves to respect cultural objects. For example, the Sudan People's Liberation Movement/Army (SPLM/A), when it was a rebel group, stated in its 1983 manifesto and later reiterated in a resolution issued by its politico-military high command that *"cultural objects which include religious monuments, buildings such as mosques and churches, and various icons are respected by the SPLM/A".*[174] As another example, the Alliance of Patriots for Free and Sovereign Congo (APCLS) have adopted "Règles de la guerre" (rules of war) for their combatants which state that *"[j]e respecterai tous les objets ou toutes places culturelles" ["I will respect all cultural objects and places"].* The code of war of the Colombian National Liberation Army (ELN) includes a clause "not to attack religious sites or cultural objects."[176] Also in Colombia, a military commander of the Revolutionary Armed Forces of Colombia—People's Army (FARC-EP) established a museum in the mountains of the department of Cauca to protect cultural heritage from looters. The museum called "La Cristalina" houses more than 3,000 artifacts.[177] In the Philippines, the National Democratic Front of the Philippines (NDFP) came to an agreement with the government to be bound by generally accepted principles and standards of IHL, including those regarding the protection of "*historic monuments, cultural objects and places of worship*".[178] In Sri Lanka, in the context of the 2002 ceasefire agreement with the government, the Liberation Tigers of Tamil Eelam (LTTE) agreed to vacate armed personnel from places of worship (temples, churches, mosques and other holy sites) and make them accessible to the public.[179]

The above examples demonstrate that many ANSAs worldwide have willingly bound themselves to respect cultural heritage and to take protective measures to ensure its safeguarding. This does not imply that cultural heritage situated in areas where these ANSAs

[169] Interview with PMF commanders Hasan Fadham, Abdullah Al Guborri and Hussein Al-Assadi, Najaf, Iraq, 6 February 2017. An archaeologist working for a local NGO confirmed that the PMF had discovered cultural artifacts in December 2016 in the Ancient City of Nineveh (a tentative World Heritage site) and had reported the findings to the authorities. Interview with Faisal Jeber, Gilgamesh Center, Erbil, Iraq, 10 February 2017.

[170] Ayatollah Ali al-Sistani, "Advice and Guidance to the Fighters on the Battlefields", available at www.sistani.org/english/archive/25036.

[171] Phone conversation with Ambéïry Ag Rhissa, MNLA, 5 January 2017.

[172] Letter from Ambéïry Ag Rhissa, in charge of culture, handicrafts and tourism within the MLNA, to the General Director of UNESCO, 22 March 2013. Copy on file with Geneva Call. UNESCO confirmed to Geneva Call that they had received the letter. Interview with UNESCO, Paris, France, 6 November 2017.

[173] Phone conversation with Ambéïry Ag Rhissa, MNLA, 24 March 2017.

[174] J-M. Henckaerts and L. Doswald-Beck, *supra* note 48, *Vol. II, Practice*, p. 778 citing the "Report of SPLM/A Practice" of 1998, Chapter 4.2.

[175] APCLS, *Règles de la guerre dans le mouvement Alliance du Peuple pour un Congo Libre et Souverain*, Mautu, 15 November 2015, available at http://theirwords.org/media/transfer/doc/apcls_regle_de_la_guerre_2015-de43f439e7bb54263caec76dcbf0a2bd.pdf.

[176] Ejército de Liberación Nacional (ELN), El Código de Guerra, 15 July 1995, available at http://theirwords.org/media/transfer/doc/ut_co_eln_1995_01_eng-07e5677b22c4cf06bdfc9f02eff206ef.pdf. See also ELN, Acuerdo de Puerta de Cielo, 15 July 1998, available at http://theirwords.org/media/transfer/doc/co_eln_1998_04-f277facf64795188e716a03ba1bc2f02.pdf, para. 14, where the document lists cultural centres as protected objects under IHL.

[177] See TeleSur, "Comandante de FARC crea museo arqueológico en medio de la guerra", 16 February 2017, available at www.youtube.com/watch?v=b30sFC2k0XQ.

[178] Government of the Republic of the Philippines and the National Democratic Front of the Philippines, "Comprehensive Agreement on the Respect for Human Rights and International Humanitarian Law between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines", 1998, available at http://theirwords.org/media/transfer/doc/ph_ndfp_1998_17-ef3249df335f48cd378d1c5082457be4.pdf, Part IV, art. 4.

[179] Government of the Democratic Socialist Republic of Sri Lanka and the Liberation Tigers of Tamil Eelam, "Agreement on a Ceasefire between the Government of the Democratic Socialist Republic of Sri Lanka and the Liberation Tigers of Tamil Eealam", 2002, available at http://theirwords.org/media/transfer/doc/lk_ltte_2002_02-54acd791099f655a1b6cda13bdfb4b9c.pdf, art. 2(2). For more examples, see K. Hausler, *supra* note 14; and www.theirwords.org, Geneva Call's online directory of humanitarian commitments made by ANSAs.

operate is never the object of destruction. However, cases of destruction are generally not due to an intentional targeting policy, but rather the result of collateral damage during the course of fighting in areas where cultural sites occupy strategic military locations, of the misuse of cultural sites, and/or neglect leading to degradation, collapse and/or looting. Sometimes, ignorance of IHL rules, including the obligation to take precaution in attack and the concept of imperative military necessity, may expose cultural heritage to destruction. For example, in Syria in 2013, FSA fighters established their headquarters near Aleppo's old souk, thereby turning the old town into a battleground.[180] In 2014, the Umayyad Mosque in Aleppo was reportedly used by FSA snipers, which led to its shelling and eventual collapse.[181] Several ANSAs interviewed in the context of this study admitted not knowing the circumstances under which they could use cultural sites for military purposes or even admitted having attacked cultural sites used by enemy forces. While more details are presented in the following case studies, caution must be applied in qualifying such use or attack as a violation of IHL, because in some circumstances these acts may be justified by imperative military necessity.

2. CASE STUDIES

This section presents three case studies from Iraq, Mali and Syria. Each study explains the context in which the non-international armed conflict broke out and the fate of cultural heritage therein, the ANSAs involved in the conflict and their respective attitudes towards cultural heritage, as well as the applicable international and domestic legal frameworks.

2.1 MALI

2.1.1. Context

In January 2012, the MNLA, an armed Tuareg group, launched a campaign against government forces, demanding independence for the Azawad territory in northern Mali. The MNLA was emboldened by the addition of well-armed fighters returning from Libya after the collapse of the Gadhafi regime. Alongside Ansar Dine, it gained control of virtually all of northern Mali, including the cities of Gao, Kidal and Timbuktu. By July 2012, however, the MNLA and the allied forces of Ansar Dine, AQIM and the Movement for Unicity and Jihad in West Africa (MUJAO) had turned to fighting each other, in part as a result of ideological differences. The goal of the MNLA—to establish a secular and independent state of Azawad—contrasted sharply with the aims of the radical Islamist groups, who wanted a united Mali under Sharia law.

Unable to control the situation, which had escalated into a non-international armed conflict, the Malian government asked France to intervene militarily. France deployed around 4,000 soldiers who, alongside troops from Chad and Mali, re-captured Gao, Kidal and Timbuktu at the end of January 2013. As the Chadian and French troops gradually left the territory, the Security Council established MINUSMA, which remains active today. The Malian government and Tuareg rebels signed a peace agreement in 2015, but the situation in parts of the country remains tense, with Islamist militants carrying out sporadic attacks.

2.1.2. ANSAs and cultural heritage in Mali

While they controlled northern Mali, Islamist ANSAs committed attacks against the World Heritage town of Timbuktu and attempted (but failed) to attack the Tomb of Askia, the other World Heritage site located in Gao. Sometimes referred to as the city of 333 (Sufi) saints, which are believed to lie buried in its 16 mausoleums, Timbuktu also hosts thousands of manuscripts, many dating back to the 13th century, as well as three ancient mosques—Djingrayber, Sankoré and Sidi Yahia.[182] Sufism, which is one of the many different currents within Islam, is accused by followers of Salafism (the creed espoused by the radical Islamist groups

[180] A. Barnard and H. Saad, "In Syria's largest city, fire ravages ancient market", *New York Times*, 29 September 2012, available at www.nytimes.com/2012/09/30/world/middleeast/fire-sweeps-through-ancient-souk-of-aleppo-citys-soul.html.

[181] K. Hausler, *supra* note 14, p. 119.

[182] Direction Nationale du Patrimoine Culture, *Rapport sur l'état actuel de conservation du Bien Culturel Tombouctou*, Bamako, Ministère de la Culture, République du Mali, 2014, p. 2.

active in Mali) of being impious, even polytheist, not least because of the important role played by its saints.[183] In the course of the armed conflict, 14 of the mausoleums listed as part of the World Heritage site of Timbuktu, as well as the door of the Sidi Yahia mosque, were destroyed, along with more than 4,000 ancient manuscripts, which were burnt or smuggled.[184]

In line with their stringent interpretation of Sharia law, the ANSAs involved in the destruction considered worshipping any deity other than God to be forbidden and deemed that such worship amounts to an attack on Islam itself.[185] According to Al Mahdi, who has been involved in the destruction of ten of these sites, this is how events unfolded:

At the time, I was head of Hesba, one of the four command structures of the Ansar Dine group, which was linked to al Qaeda in the Islamic Maghreb (AQIM) and had occupied northern Mali in 2012. It had set up its headquarters in Timbuktu in April that year, having routed fighters of the National Movement for the Liberation of Azawad (known by its French acronym, MNLA). It fell to Hesba—whose mission was to "promote virtue and prevent vice"—to combat all acts that, in its eyes, contravened the precepts of Islam. Hesba considered the mausoleums of Timbuktu to be the incarnation of such acts for two reasons—first, because the way that the faithful prayed was judged to be impious; and second, because of the buildings that had been constructed over the tombs. Once the leadership took the decision to destroy the mausoleums, I received the order to carry out the task, using troops placed under my command. I applied myself to the task rigorously, as with everything I do.[186]

In addition to the destruction of these sites, the Office of the Prosecutor of the ICC noted, in 2013, that *"[t]he destruction of religious and historic monuments (not UNESCO World Heritage sites) … has also been reported"* [187] although it is unclear to which properties they were referring. UNESCO has reported that 90 per cent of Gao Saneye, an archaeological site close to the Tomb of Askia, has also been looted, and that the Sahel Museum was used as a military base by Islamist groups for over a year.[188]

The Tomb of Askia in Gao, which was built in 1495 when the city *"became the capital of the Songhai Empire"* [189] with Islam as its official religion, was spared during the conflict despite facing constant

© MINUSMA/Sophie Ravier
The mausoleum of Mohamed Mahmoud at the Cemetery of the Three Saints, destroyed in 2012

[183] A. Zajac, "Between Sufism and Salafism: The rise of Salafi tendencies after the Arab Spring and its implications", Hemispheres, 2014, 29(2), pp. 97-98.
[184] M. Lostal, *supra* note 11, pp. 127-130.
[185] S. Green Martínez, *supra* note 142, pp. 1092-1093.
[186] *UNESCO Courier*, *supra* note 141.
[187] Office of the Prosecutor of the ICC, *supra* note 105, para. 112. The International List of Cultural Property under Enhanced Protection now includes the Tomb of Askia (belonging to Mali).
[188] Office of the Prosecutor of the ICC, *supra* note 105, para. 112.
[189] World Heritage Centre, "Tomb of Askia: Description", available at http://whc.unesco.org/en/list/1139.

threats of destruction. Apparently, the intervention of the local population was instrumental in its safeguarding: *"The population [in Gao], most notably the young … (jeunes patriotes) organized themselves to protect the town's monuments. They arranged various 'sit ins', human chains and patrols around the Tomb."*[190]

Concerned by the attacks perpetrated by their former allies on civilians and protected monuments, the MNLA declared in October 2012 that they considered themselves to be bound by IHL and were willing to cooperate with the ICC in its investigations.[191] As noted above, the group established an *ad hoc* commission to inventory ancient manuscripts seized during a clash with Islamist fighters. The commission, led by Ambeyri Ag Rhissa, worked to raise awareness of the importance of protecting cultural heritage among MNLA fighters.[192] The MNLA was also reportedly involved in the protection of the Tomb of Askia in 2012 when it was in control of Gao.[193]

The MNLA representative in Europe interviewed by Geneva Call claimed that, despite the military use of schools and other buildings of cultural relevance by enemy forces, the group had taken the decision not to attack these places.[194] However, he stated that the MNLA had used a colonial fortress built by the French that dominated a hill near Kidal because its location gave it a privileged military position and because it was unsure whether buildings belonging to the colonial past qualified as cultural heritage under international law.[195] He also admitted that the MNLA would attack cultural sites if there was no military alternative, or if it was ignorant of its protected status.[196]

2.1.3. International legal framework

Mali is a party to all the major international legal instruments concerning the protection of cultural heritage relevant to the context described above: the 1954 Hague Convention, the 1977 Additional Protocol II, the World Heritage Convention and the 1999 Second Protocol. However, the 1999 Second Protocol was only ratified by Mali in November 2012—a few months after the attacks against Timbuktu. As a result, these actions are not governed by the 1999 Second Protocol in accordance with the principle of non-retroactivity. If Mali had ratified this instrument earlier, its World Heritage sites, in particular those of Timbuktu, could have been inscribed on the List of Cultural Property under Enhanced Protection. One of the consequences of inscription on the List is that attacking such an object or using it in support of military action must be prosecuted by States parties to the Second Protocol on the basis of universal criminal jurisdiction. Such an approach could have helped the judicial administration of Mali which, as stated in its referral letter to the ICC,[197] has encountered difficulties since the beginning of the crisis in 2012 and is thus unable to prosecute alleged perpetrators.

Mali has been a party to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property since 1987 but is not a party to the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.

Mali ratified the Rome Statute in 2000. As explained in Chapter 1, the Rome Statute recognizes intentional attacks against buildings dedicated to religion and historic monuments to be war crimes. Following referral of the situation by the Government of Mali to the ICC in July 2012, the ICC Prosecutor opened an investigation into the crimes committed on its territory since January 2012. This was the legal basis for the prosecution of Al Mahdi and would also be for Al Hassan should his charges be confirmed.

[190] Direction Nationale du Patrimoine Culturel. *Rapport: Etat actuel de conservation du site du "Tombeau des Askia"*, Bamako, Ministère de la Culture, République du Mali, 2014, p. 2 (own translation).
[191] See "Action Plan: Respecting the Laws of the War submitted by the *Mouvement National de Libération d'Azawad* to the United Nations Security Council", 12 October 2012, available at http://theirwords.org/media/transfer/doc/1_ml_mnla_2012_04 70db343c912fd1aa11a348984c3153a0.pdf.
[192] Interview with Moussa Ag Assarid, MNLA, Paris, France, 11 December 2015; and phone interviews with Ambéiry Ag Rhissa, MNLA, 5 January and 24 March 2017.
[193] Ibid.
[194] Interview with Moussa Ag Assarid, *supra* note 192.
[195] Ibid.
[196] Ibid.
[197] See referral letter sent by the then Malian Minister of Justice, Malick Coulibaly, to the ICC Chief Prosecutor, available at www.icc-cpi.int/NR/rdonlyres/A245A47F-BFD1-45B6-891C-3BCB5B173F57/0/ReferralLetterMali130712.pdf.

2.1.4. Domestic legal framework

The Preamble of the Malian Constitution (1992) declares that the *"Sovereign People of Mali commit themselves to ensuring the improvement of quality of life, protection of the environment and cultural heritage."*[198] The Malian Criminal Code (2001) includes in its list of war crimes *"intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not used for military purposes."*[199]

Mali passed Law no. 85-40/AN-RM of 26 July 1985 on the protection of national cultural heritage, amended by Law no. 10-061 of 30 December 2010, which defines cultural heritage as *"all tangible and intangible cultural property which, on religious or secular grounds, are for the State, local authorities, communities, groups and individuals, important for history, art, thought, science and technology. The material cultural objects are composed of movable and immovable property."*[200] It contains specific provisions for protecting cultural heritage against destruction, and illicit transformation, excavation, alienation, exploitation and export.[201] The 2010 amendment includes an updated list of sanctions that range from one to ten years of imprisonment, and fines, depending on the violation.[202]

In addition, the Malian 1979 Military Regulations state that combatants must *"spare buildings dedicated to religion, art, science or charitable purposes, and historic monuments, provided they are not being used for military purposes."*[203] However, although the 1954 Hague Convention obliges States to disseminate the text of the Convention, introduce specialist personnel and provide training to armed forces, former UNESCO Director-General Irina Bokova declared in relation to Mali that *"[m]ost soldiers have never heard of the cultural conventions — they need training; they need simple and accurate information."*[204] Against this backdrop, UNESCO in collaboration with the Malian National Directorate of Cultural Heritage published a *Passeport pour le Patrimoine* (Heritage Passport) containing descriptions and exact locations for the most important sites and museums in the northern cities of Gao, Kidal and Timbuktu.[205] An interview with the MNLA representative in Europe revealed that the international normative framework for the protection of cultural property in armed conflict was unknown to him, even in the most basic tenets such as the definition of "cultural property" and the basic rules of protection which apply in non-international armed conflicts. He was also unfamiliar with the Heritage Passport produced by UNESCO and the Blue Shield emblem. The MNLA representative recalled seeing the World Heritage emblem but was unaware of the additional protection potentially owed to cultural sites. He nevertheless noted that MNLA members who had been trained by Libyan national forces before joining the movement were likely to have a better understanding of these rules.[206]

[198] Constitution of the Republic of Mali, February 1992, available at www.wipo.int/edocs/lexdocs/laws/fr/ml/ml004fr.pdf, Preamble (own translation).
[199] Criminal Code, Law 01-079 of 20 August 2001, art. 31(7).
[200] Law no. 10-061 of 30 of December 2010, art. 2.
[201] Law no. 85-40/AN-RM of 26 July of 1985, arts. 5, 12, 17-28.
[202] Law no. 10-061 of 30 of December 2010, arts. 38-42. In case of recidivism, the foreseen penalties would be doubled.
[203] Cited in the "Blue Shield Statement on Mali", 29 May 2012, available at www.ifla.org/news/blue-shield-statement-on-mali.
[204] I. Bokova, *supra* note 142.
[205] The document, which is meant to be pocket sized, can be found at https://whc.unesco.org/document/121553.
[206] Interview with Moussa Ag Assarid, *supra* note 192.

2.2 IRAQ

2.2.1. Context

Political tensions between Iraq's Sunni minority and the Shia-dominated government led to the eruption of anti-government protests across the country in 2011. Following a violent crackdown in the Anbar province at the end of 2013, the Islamic State group took advantage of the situation and established control of large swathes of Iraq, where it proclaimed the creation of a "caliphate" in June 2014.

The rapid advance of Islamic State across its newly claimed territory led the Iraqi government to permit a US-led international coalition to conduct air strikes against the group. In August 2014, the Islamic State group commenced a brutal ethnic-cleansing campaign against Iraq's Yezidi minority around Sinjar in north-western Iraq. The US-led coalition intensified air strikes throughout 2015 and 2016. Iraqi government forces with Shia and Kurdish allies made significant gains, retaking control of Falluja, Mosul and Ramadi. At the end of 2017, the Iraqi government announced that its war against Islamic State was over.

In late 2017, an army offensive drove back Kurdish Peshmerga from Kirkuk in a move aimed at halting the regional government's moves towards an independent Kurdistan.

2.2.2. ANSAs and cultural heritage in Iraq

The Islamic State group has intentionally looted, damaged or destroyed the cultural heritage of Iraq, directly targeting religious sites as well as ancient monuments and artifacts. Targets have included the World Heritage sites of Ashur, Hatra and Samarra Archaeological City.

In a state of conservation report submitted to the World Heritage Centre,[207] Iraq identified the Islamic State group as responsible for destruction at Hatra, which had also served as a storage and training centre for military purposes.[208] Following the site's recapture by the PMF in April 2017, it has been reported that the damage caused at Hatra is not as significant as that at other Iraqi sites.[209] A recent assessment carried out by Iraq noted, however, that the walls of the Sanctuary of the Sun underwent major damage in April 2017, and that some sculptures on the arches belonging to the Temple of the Triad were intentionally destroyed.[210] With regard to the site of Ashur, Iraq reported that prior to its recapture in December 2016, the site was looted and some of its components bulldozed during the two years of occupation by the Islamic State group.[211] The Tabira Gate and the Royal Cemetery were among the most heavily affected parts of the site. The archaeological city of Samarra *"became the first line of defense to Iraqi forces confronted the terrorist forces of the Islamic State when occupied Salahuddin province [sic]."*[212] Iraq also acknowledges in its reporting that national forces built fortifications, barricades and dug trenches in the Sur Ishnas, one of the components of the archaeological city notable for its height. It also states that the monument of Qubbat al Salybyya was occupied by warring parties and was damaged in the course of hostilities.[213]

Aside from World Heritage sites, the Islamic State group also destroyed several Christian monasteries (e.g. St Elijah's Monastery, also known as Deir Mar Elia),[214] and Yezidi, Sufi and Shia shrines and tombs, notably in Nineveh province.[215] Video footage was

[207] Republic of Iraq Ministry of Culture, State Board of Antiquities and Heritage, "World Heritage Sites in Iraq, Hatra-Ashur-Samarra, State of Conservation Reports 2017", January 2018, available at https://whc.unesco.org/document/165520.

[208] Republic of Iraq Ministry of Culture, State Board of Antiquities and Heritage, "World Heritage Sites in Iraq, Hatra-Ashur-Samarra, State of Conservation Reports 2016", January 2017, available at https://whc.unesco.org/document/156098.

[209] "Hatra: IS damage to ancient Iraqi city less than feared", BBC News, 1 May 2017, available at www.bbc.co.uk/news/world-middle-east-39770395.

[210] World Heritage Committee, "State of conservation of the properties inscribed on the List of World Heritage in Danger" (provisional agenda), UNESCO Doc. WHC/18/42.COM/7A, 14 May 2018, available at http://whc.unesco.org/archive/2018/whc18-42com-7A-en.pdf, p. 53.

[211] Republic of Iraq Ministry of Culture, State Board of Antiquities and Heritage, *supra* note 207.

[212] Republic of Iraq Ministry of Culture, State Board of Antiquities and Heritage, *supra* note 208.

[213] Ibid, pp. 14-17.

[214] "Iraq's oldest Christian monastery destroyed by Islamic State", BBC News, 20 January 2016, available at www.bbc.co.uk/news/world-middle-east-35360415.

[215] D. Ford and M. Tawfeeq, "Extremists destroy Jonah's tomb, official say", CNN, 25 July 2014, available at https://edition.cnn.com/2014/07/24/world/iraq-violence/index.html. See also G. Bowley, *supra* note 134.

released showing fighters destroying artefacts in Mosul Museum in February 2015, Jonah's tomb in July 2014 and the Al Nuri mosque in Mosul in June 2017, as well as in the ancient cities of Hatra and Nimrud in, respectively, March 2015 and November 2016.[216]

A number of other ANSAs have been operating in Iraq, notably Kurdish and Shia forces, most of whom have been fighting against the Islamic State group. As mentioned above, some of these have taken measures to respect and safeguard cultural heritage. The Yezidi militia deployed guards to protect Yezidi shrines in the Mount Sinjar area from attacks by Islamic State.[217] Several YBS fighters were reportedly killed in 2015 while defending Sheikh Hasan shrine in Gabara.[218] Similarly, Qasim Sesho, the leader of the Yezidi Peshmerga Forces, explained that these forces had protected Sheikh Sherefeddin, the second-most sacred site for Yezidis, on several occasions from attacks by Islamic State in August 2014.[219] In relation to the recapture of Sinjar town from Islamic State in November 2015, all Yezidi militia interviewed by Geneva Call claimed to have instructed their forces to spare religious buildings and to avoid damage.[220] Representatives of the YBS and Yezidi Peshmerga Forces affirmed that they did not attack mosques, even though they were occupied by members of the Islamic State group.

In August 2014, the People's Defence Force/ Kurdistan Workers' Party (HPG/PKK), together with YPG/YPJ forces, established a safe corridor to evacuate thousands of Yezidi civilians fleeing Mount Sinjar in the face of attacks by the Islamic State group.[221] HPG/PKK internal regulations state that

© Geneva Call
Yezidi Peshmerga Forces guarding Sheikh Sherefeddin shrine in Sinjar, Iraq.

[216] K. Shaheen, *supra* note 137. See also K. Shaheen, "Isis video confirms destruction at UNESCO world heritage site in Hatra", The Guardian, 5 April 2015, available at www.theguardian.com/world/2015/apr/05/isis-video-confirms-destruction-at-unesco-world-heritage-site-on-hatra.

[217] The Yezidi minority has been the target of serious crimes (mass killings, enslavement, persecution through forced conversion, etc) by the Islamic State group due its religious beliefs.

[218] Interview with Zeki Shengal, *supra* note 168.

[219] Interview with Qasim Sesho, Yezidi Peshmerga Forces, Sinjar, 9 February 2017.

[220] Ibid; interview with Zeki Shengal, *supra* note 168; interview with Haidar Sesho, the Protection Force of Ezidxan (HPE), Sinjar, Iraq, 9 February 2017.

[221] See I. Tharoor, "A U.S.-designated terrorist group is saving Yazidis and battling the Islamic State", *Washington Post*, 11 August 2004, available at www.washingtonpost.com/news/worldviews/wp/2014/08/11/a-u-s-designated-terrorist-group-is-saving-yazidis-and-battling-the-islamic-state/?noredirect=on&utm_term=.ad161d88e968.
See also REACH overview, "Displacement from Sinjar, 3-14 August 2014", available at www.reach-initiative.org/wp-content/uploads/2014/08/REACH_IRQ_InternalDisplacement_Briefing_August2014_Sinjar.pdf, p. 1.

they will abide by the Geneva Conventions, and make explicit reference to cultural rights, and the protection of historical heritage and the environment.[222] However, in a written response to Geneva Call, HPG/PKK admitted to not being fully aware of the international rules concerning the protection of cultural property in armed conflict.[223] In practice, HPG/PKK claimed that it tried, as much as possible, to position its forces away from cultural sites and to refrain from conducting military operations in such locations. The group also claimed to preserve cultural objects found on the ground or seized from traffickers in its strongholds in the Iraqi Kurdistan mountains.[225]

Likewise, military commanders of the PMF interviewed by Geneva Call recognized that their forces are not aware of IHL rules concerning cultural heritage, although they value and respect religious and historical places as a matter of internal policy, and claimed not to use them for military purposes.[226] They referred in particular to the "Advice and Guidance to Fighters in the Battlefield" promulgated by Grand Ayatollah Ali al-Sistani, rule 9 of which says *"[d]o not violate the sanctity of all things sacred."*[227] In terms of protective measures, as outlined above, PMF have allegedly cleared an archaeological site near Tal Abta of booby traps planted by the Islamic State group and reported archaeological finds to the antiquities authorities.[228]

According to the Kurdistan Regional Government's Directorate General of Antiquities, Kurdish Peshmergas have been sensitized about the need to protect cultural heritage and received the "Guide to Mosul Heritage"[229] before military operations. However, they are not familiar with IHL rules concerning cultural heritage and have not received specific training on this matter. Although not considered a top priority, the KRG has made efforts to protect cultural heritage, for example, by rehabilitating sites destroyed by Saddam Hussein's regime.[230] The Directorate also has an action plan to educate the general public about the relevance of cultural heritage, with programmes due to be disseminated in the media and in schools.[231]

2.2.3. International legal framework

Iraq has been a party to the 1954 Hague Convention and its First Protocol since 1967 but is not a party to the 1999 Second Protocol. It has also been a party to the 1977 Additional Protocol I to the Geneva Conventions since 2010, but not to Additional Protocol II, which applies in non-international armed conflicts. Since 1973, Iraq has been a party to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the illicit import, Export and Transfer of Ownership of Cultural Property, but has not become a party to the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. Iraq is also not a party to the ICC Statute.

In 2003, the UN Security Council adopted Resolution 1483 regarding post-war arrangements in Iraq, specifically prohibiting the trade in cultural property of Iraq.[232] The need to respect the cultural heritage of Iraq was again mentioned in a Security Council resolution on the transitional measures endorsing the Interim Government in Iraq in 2004, without specifying particular measures to be taken with regard to cultural heritage.[233] The mandate of the Analytical Support and Sanctions Monitoring Team, which supports the ISIL and Al-Qaida Sanctions Committee, was expanded in 2015 by the Security Council.[234] This mandate includes the submission of

[222] Kurdistan Workers' Party/People's Defence Forces (PKK/HPG), *Document concerning the rules to be obeyed by HPG forces in war*, 2010, available at http://theirwords.org/media/transfer/doc/ut_tr_pkk_hpg_2010_15-ee0e8142b5729731202a63103eba1a9a.pdf.
[223] Response from HPG/PKK to Geneva Call, January 2016.
[224] Ibid.
[225] Interview with Cemil Bayik, HPG/PKK, Qandil, Iraq, 8 November 2014.
[226] Interview with PMF commanders Hasan Fadham, Abdullah Al Guborri and Hussein Al-Assadi, *supra* note 169.
[227] Ayatollah Ali al-Sistani, *supra* note 170.
[228] Interview with PMF commanders Hasan Fadham, Abdullah Al Guborri and Hussein Al-Assadi, *supra* note 169.
[229] Interview with Abubakir O. Zendin, Director, General Directorate of Antiquities, Kurdistan Regional Government, Erbil, 4 November 2015. For more information on the "Guide to Mosul Heritage", see Museum Conservation Institute, Smithsonian Institution. "Saving Iraqi Cultural Heritage", available at www.si.edu/mci/english/research/conservation/IraqiCulturalHeritage.html. See also Chapter 3.
[230] Ibid. As part of its Anfal campaign against the Kurdish people (and other non-Arab populations), Saddam Hussein's regime destroyed several cultural sites in the late 1980s. See G. Black, "Genocide in Iraq: The Anfal Campaign Against the Kurds", in *Middle East Watch Report*, 1993, Human Rights Watch, p. 32. According to Abubakir O. Zendin, both the Patriotic Union of Kurdistan (PUK) and the Kurdistan Democratic Party (KDP), while in armed opposition against Saddam Hussein's regime, raised awareness among the local population about the importance of protecting cultural sites.
[231] Ibid.
[232] UN Security Council Resolution 1483 (2003), para. 7. UN Security Council Resolutions 2199 (2015), 2322 (2016) and 2347 (2017) request States to put in place legally binding measures to stop the trafficking of antiquities and cultural objects. Trade sanctions with regard to all Iraqi goods, and thus including cultural goods, had already been imposed by UN Security Council Resolution 661 (1990).
[234] UN Security Council Resolution 1546 (2004).

periodic reports to the Committee concerning the implementation of sanctions measures, and updates on the changing nature of the threat posed by Al Qaida, the Taliban and Islamic State. The report submitted on 25 September 2015 recognized that *"[a]lthough the illicit trafficking of cultural heritage from Iraq and the Syrian Arab Republic has been going on for years, the activities of ISIL and ANF [Al-Nusra Front] have significantly increased the scale of this problem and risk."*[235] The Monitoring Team also noted that, even while under military pressure, the Islamic State group had not abandoned *"its exploitation of cultural sites and has continued to invest scarce resources in excavating antiquities in the areas that it still controls."*[236] One of the main issues affecting the recovery of these artifacts is the difficulty in identifying "*antiquities as originating from Iraq and the Syrian Arab Republic."*[237]

2.2.4. Domestic legal framework

The Iraqi Constitution, which was approved by referendum in 2005, contains provisions relevant to Iraqi cultural heritage. Article 113 states that *"[A]ntiquities, archaeological sites, cultural buildings, manuscripts, and coins shall be considered national treasures under the jurisdiction of the federal authorities, and shall be managed in cooperation with the regions and governorates, and this shall be regulated by law."* With regard to religious sites, Article 10 provides that *"[t]he holy shrines and religious sites in Iraq are religious and civilizational entities. The state is committed to assuring and maintaining their sanctity, and to guaranteeing the free practice of rituals in them."* Article 35 provides that *"[t]he state shall promote cultural activities and institutions in a manner that befits the civilizational and cultural history of Iraq".*

The Iraqi Constitution needs to be read together with Law No. 55 for the Antiquities and Heritage of Iraq (the Iraqi Antiquities Law), adopted in 2002. This law distinguishes between "antiquity" (over 200 years old), "heritage material" (under 200 years of age, but with historical, national, religious and artistic value) and "heritage sites" (*"where a notable historical event took place, therein, regardless of its age"*),[238] and forbids the damage, sale or export of antiquities. The law also contains a chapter dedicated to excavations, which provides that any antiquity discovered through excavation belongs to the State and cannot be disposed of, whether within or outside the territory of Iraq. If Iraqi antiquities are stolen and exported, the Antiquity Authority is entitled to order their return through any legal or diplomatic channel (Arts. 35-37). The Iraqi Antiquities Law also provides for criminal sanctions in case of violations.[239]

In addition, the Iraqi Higher Criminal Court has jurisdiction over war crimes, which specifically include *"[i]ntentionally directing attacks against buildings that are dedicated to religion, education, art, science or charitable purposes, historic monuments [...] provided they are not military objectives"* (including in non-international armed conflicts).[240] War crimes also encompass the *"[e]xtensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly"*,[241] and the destruction or seizure of the property of an adversary unless it is *"imperatively demanded by the necessities of war"* (again this includes non-international armed conflicts),[242] which may cover cultural properties. Intentionally launching an attack *"in the knowledge that such an attack will cause [...] damage to civilian objects which would be clearly excessive in relation to the concrete and direct overall military advantages anticipated"*[243] is likewise prohibited.

[235] See Letter dated 25 September 2015 from the Chair of the Security Council Committee, pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities, addressed to the President of the Security Council (25 September 2015), UN Doc. S/2015/739, para. 6. For an extensive discussion on the illicit trade of cultural heritage in Syria and Iraq, see also Letter dated 4 March 2016 from from the Chair of the Security Council Committee, pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2016) concerning ISIL (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities, addressed to the President of the Security Council (4 April 2016), UN Doc. S/2016/213, paras. 24-36.

[236] Nineteenth report of the Analytical Support and Sanctions Monitoring Team submitted pursuant to Resolution 2253 (2015) concerning ISL (Da'esh), Al-Qaida and associated individuals and entities, UN Doc. S/2017/35, para. 23.

[237] Ibid, para. 67.

[238] Law No. 55 for the Antiquities and Heritage of Iraq, 2002, art. 4 (7-9).

[239] Ibid, arts. 39-44. For example, someone who possesses an antiquity without reporting it to the Antiquity Authority shall be punished with a prison sentence (not exceeding 10 years) or a fine. The export (or intent to export) an antiquity is punishable with a prison sentence (up to three years) or a fine. Any excavation (or attempt thereof) without the permission of the Antiquity Authority may also be sanctioned by imprisonment (up to 10 years) and a fine. Damaging antiquities or heritage monuments or sites is also punishable with imprisonment (up to 10 years) and a fine. Finally, trafficking in antiquities is also punishable with imprisonment (up to 10 years) and a fine.

[240] Law of The Iraqi Higher Criminal Court Law (Law No. (10)), 2005, art. 13(2)(J) and (4)(D).

[241] Ibid, art. 13(1)(D).

[242] Ibid, art. 13(2)(N) and (4)(L).

[243] Ibid, art. 13(2)(D).

2.3 SYRIA

2.3.1. Context

The unrest which erupted in Syria in 2011 in the wake of the so-called "Arab Spring", with protests calling for reforms and the overthrowing of the Assad regime, rapidly descended into civil war, when the Free Syrian Army (FSA) was formed. The conflict has since intensified and became increasingly polarized along sectarian lines, pitting the country's Sunni majority against the Shia Alawite minority and their allies. It has also gradually turned into a proxy war that has drawn in regional and world powers. The rise and fall of the Islamic State group has added another dimension to the conflict. Despite international efforts to bring an end to the civil war, no political solution is in sight.

The main parties to the conflict today include the Syrian government, the various FSA brigades, the YPG/YPJ and the Syrian Democratic Forces (SDF), as well as radical Islamist ANSAs (the Islamic State group, Jabbat Fatah Al-Sham and Ahrar al-Sham). A number of countries in the region and beyond are either directly involved in the conflict or provide support to one party or another.

2.3.2. ANSAs and cultural heritage in Syria

Syria has been described as an "an open-air museum",[244] with six listed World Heritage sites: the ancient cities of Damascus, Bosra and Aleppo, the archaeological site of Palmyra (an ancient Aramaic city), the Crac des Chevaliers and Qal'at Salah El-Din fortresses, and the ancient villages of northern Syria, also known as the dead cities. In addition, there are 12 properties on Syria's Tentative List of World Heritage sites, intended to be nominated to the World Heritage List, including the ancient sites of Ebla, Apamea, Dura Europos and Mari,[245] as well as a substantial amount of cultural heritage, both movable and immovable, situated throughout its territory.

Initially, the damage caused to cultural property in the course of the armed conflict resulted from the general breakdown of the rule of law. Although satellite images provided a relatively accurate account of the degree of damage incurred, difficulties in conducting independent investigations within Syria, and the fact that the Assad regime and the different ANSAs (as well as their allies) often traded blame for the damage or destruction of cultural heritage, made it challenging to identify which party should be held responsible. This has not been the case of the Islamic State group, which has generally claimed responsibility for its repeated attacks against cultural heritage. Following the emergence of the Islamic State group, the nature of the danger to which Syria's cultural heritage had so far been exposed acquired a whole new dimension. Cultural properties became a key target for ideological reasons, with the destruction of the main parts of Palmyra, the raid on the Mosul Museum, and the detonation of Jonah's Tomb and the Al Nuri Mosque in Mosul representing just a few examples. Moreover, according to the United Nations, the level of plunder and illicit trafficking of cultural objects from Syria has reached unprecedented levels.[246]

However, with the notorious exception of the Islamic State group, ANSAs involved in the Syrian armed conflict do not all adopt the deliberate destruction of cultural heritage as a policy and method of warfare. For example, as noted above, in the areas controlled by YPG/YPJ, the autonomous self-administration of Rojava has taken concrete measures to protect archaeological sites from looting and combat the smuggling of antiquities. It established an "Authority of Tourism and protection of Antiquities" and passed legislation on the protection of cultural heritage inspired by the Syrian Antiquities Law.[247] It has also built a special

[244] C. Ali, "Syrian heritage under threat", *Journal of Eastern Mediterranean Archaeology & Heritage Studies*, 2013, 4(1), p. 351.
[244] C. Ali, "Syrian heritage under threat", *Journal of Eastern Mediterranean Archaeology & Heritage Studies*, 2013, 4(1), p. 351.
[245] See J. Casana and M. Panahipour, *supra* note 21.
[246] "'Stop the destruction', UN officials urge in plea to save Syria's cultural heritage", UN News, 12 March 2014, available at https://news.un.org/en/story/2014/03/463782-stop-destruction-un-officials-urge-plea-save-syrias-cultural-heritage. See also H. Naylor, "Syria's ancient sites were already damaged by war. Now they're being looted", *Washington Post*, 20 December 2014, available at www.washingtonpost.com/world/middle_east/syrias-ancient-sites-were-already-damaged-by-war-now-theyre-being-looted/2014/12/19/117911a8-2556-4c84-90f1-8034e8e8a001_story.html?noredirect=on&utm_term=.8d187689478c.
[247] Copy in file with Geneva Call.

storage area to preserve cultural artifacts confiscated from traffickers by the local police. YPG/YPJ is reported to have issued a command order to respect cultural property,[248] though in some cases they have established military positions in the vicinity of archaeological sites, as Geneva Call observed during its field trips. The group is also reported to have informed the US-led coalition of the whereabouts of a cultural site occupied by the Islamic State group, in order to forestall its bombardment.[249]

FSA brigades claim to apply the Syrian Antiquities Law.[250] As noted above, the military commanders interviewed by Geneva Call in 2015 also stated that they have deployed guards to protect cultural sites from plunder and have increased protection of the Umayyad mosque of Aleppo.[251] They declared that they had not received any specific training and were unaware of the international legal standards applicable to the protection of cultural heritage, although they demonstrated some knowledge of the general rules of IHL. To the question, "Have your brigades used cultural sites in their military operations?", a FSA commander replied, speaking for his own brigade: *"No [we do not use cultural sites for military purposes]. For example, we have freed the Temple in the Harem District (within the Idlib Governorate), and now we protect and guard it. We have never occupied a historical site."*[252]

© AFP/Joseph Eid
Palmyra's Temple of Bel, in Syria, against what remains after the Islamic State group left

[248] Interview with Xedur Relil, YPG commander and spokesperson, and Nasrin Abdallah, YPJ commander and spokesperson, Amuda, Syria, 7 November 2015.
[249] Ibid.
[250] For an overview of the Syrian Antiquities Law, see M. Lostal, "Syria's world cultural heritage and individual criminal responsibility", *International Review of Law*, 2015, 3.
[251] Meeting with FSA brigade commanders, *supra* note 166.
[252] Meeting with FSA brigade commanders, *supra* note 165.

However, with respect to the targeting of cultural sites used by the enemy, the response was more ambiguous:

As far as Aleppo is concerned, it is a sensitive situation as the whole city is a historical site where we are face-to-face with the regime. Because of its importance, we have refrained from attacking it […]. The Citadel of Aleppo [a World Heritage Site] has been used as a shelter for the soldiers of the regime. The FSA has attacked the site in order to establish authority on it. If we go inside this area, the regime might then bombard the whole area. As we recognize this risk, we avoid going into the Citadel so that the regime does not use this as an excuse to destroy and kill us all.[253]

Another FSA brigade commander recounted that, towards the end of 2012, government armed forces placed snipers in a castle in Harem (Idlib), which was situated on top of a hill. The commander affirmed that they had no alternative other than attack but gave advance warning and avoided the use of heavy artillery.[254]

These statements must be considered along with independent reports. As mentioned above, *"[t]he continuing armed conflict in Syria between the national armed forces and the Free Syrian Army (FSA) and the al-Nusra Front has also led to significant damage to, or destruction of, cultural heritage."*[255] For example, Crac des Chevaliers, a medieval Crusader fortress near the city of Homs, was used as a military base by ANSAs in the summer of 2013, when Assad's forces began their offensive against Homs. Therefore, it became a strategic target in the government's attempt to regain control of the city. In July 2013, Assad's army allegedly launched an air raid on the castle, reducing parts of it to rubble.[256] In addition to independent reports, Syria's Directorate-General of Antiquities and Museums (DGAM) has also reported that the ancient villages in northern Syria have been looted and illegally excavated, and ANSAs have used al-Qatora's 2,000-year-old statues as sniper posts and target practice.[257]

Moreover, although the Islamic State group is recognized as responsible for the systematic plunder of archaeological sites, wholesale looting has also been taking place in areas under the control of other ANSAs. Based on satellite images, it has been established that, as of early 2015, the total number of sites looted within the territories "under the control of the Kurds, rebel groups and the Assad regime" was higher than the total number of looted sites under the control of Islamic State.[258]

2.3.3. International legal framework

Syria is a party to the 1954 Hague Convention and the World Heritage Convention, and has signed but not ratified the 1999 Second Protocol. Syria is also a party to 1977 Additional Protocol I, but not to Additional Protocol II, which is applicable in non-international armed conflicts. Syria is a party to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (since 2018). In addition, the UN Security Council has requested States to put in place legally binding measures to stop the trafficking of antiquities and cultural objects from Syria.[259] Syria is not a party to the ICC Statute.

[253] Ibid.
[254] Meeting with FSA brigade commanders, *supra* note 166.
[255] K. Hausler, *supra* note 14, p. 119.
[256] Channel 4 News, "Syria: inside the Crac des Chevaliers crusader castle", 31 March 2014, available at www.youtube.com/watch?v=S9tqmxe4llw. The waiver of imperative military necessity according to which a cultural property and its surroundings may be directly attacked or used for military purposes is undefined in the 1954 Hague Convention. This means that it is open to question whether, for example, the alleged use of Crac des Chevaliers by ANSAs, and the subsequent air raid of regime forces could be deemed lawful.
[257] Syrian Arab Republic Ministry of Culture, Directorate-General of Antiquities and Museums (DGAM) Report (2014), 24.
[258] J. Casana and M. Panahipour, *supra* note 21, pp. 142-151. See also A. Taylor, "The Islamic State isn't the only group looting Syrian archaeological sites", *Washington Post*, 21 October 2015, available at www.washingtonpost.com/news/worldviews/wp/2015/10/21/the-islamic-state-isnt-the-only-group-looting-syrian-archaeological-sites/?postshare=6601445510143476; and M. Danti, *supra* note 22.
[259] UN Security Council Resolution 2199 (2015).

2.3.4. Domestic legal framework

A new Constitution was adopted in February 2012 following a referendum. Article 32 of the 2012 Syrian Constitution imposes an obligation on the state to *"protect antiquities, archaeological and heritage sites and objects of artistic, historical and cultural value".*[260] Even before the war, Syria had explicit legislation in place for the protection of its antiquities in the form of the Syrian Antiquities Law of 1963 (Syrian Antiquities Law).[261] This law, last amended in 1999, is divided into six chapters covering general provisions, immovable antiquities, movable antiquities, excavations, penalties and miscellaneous provisions. The law does not contemplate the derogation or suspension of its obligations in exceptional circumstances and therefore continues to apply during the current armed conflict. It provides a highly punitive set of sanctions.[262]

There are two provisions in the prescriptive part of the law that are directly relevant to the current armed conflict. Article 7 prohibits, *inter alia*, destroying, transforming or damaging both movable and immovable antiquities by writing or engraving on them, or changing their features in any way. This offence carries a penalty of five to ten years of imprisonment plus fines (Art. 58(a)). Article 26 bans the building of military facilities within 500 metres of registered immovable archaeological and historical properties and imposes sanctions of one to three years' imprisonment (Article 59(a)).

The Syrian Antiquities Law explicitly adopts the doctrine of superior responsibility in Article 63: *"A penalty equal to that of the perpetrator is given to anyone whose legal responsibility is to protect antiquities or control the crimes mentioned in this Law, if they knew or were told of such crimes and failed to take the appropriate measures in order to control them."* This could encompass the responsibility of ANSA commanders, since it can be established that they bear a legal responsibility (pursuant to Article 4(3) of the 1954 Hague Convention) to protect antiquities and control the crimes contained in the Syrian Antiquities Law.

© APSA
Crak des Chevaliers fortress blasted by air raid, Syria

[260] Constitution of the Syrian Arab Republic, 2012, available at www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_125885.pdf, art. 32.

[261] Syrian Arab Republic, Antiquities Law, 26 October 1963, available at www.unesco.org/culture/natlaws/media/pdf/syrianarabrepublic/sy_antiquitieslaw1963_engtof.pdf.

[262] For example, trade in antiquities in general, as well as selling fakes, is prohibited and punishable with penalties ranging from 5 to 15 years imprisonment plus fines. Ibid, arts. 57 and 58.

CHAPTER 3

ENGAGEMENT WITH ANSAS ON THE PROTECTION OF CULTURAL HERITAGE IN ARMED CONFLICT

© Photo courtesy of Penn Cultural Heritage Center at the University of Pennsylvania Museum
Truckloads of sand bags protect the mosaics from damage caused by further attacks

This chapter provides a summary of the perspectives of ANSAs interviewed in the context of this study. It examines their attitudes towards and understanding of cultural heritage, their knowledge of international legal rules and measures they have taken to protect cultural heritage, as well as challenges they have faced. The chapter also offers an insight into the ways that specialized organizations have responded to the impact (both negative and positive) of ANSAs on cultural heritage and their level of interactions with these actors.

1. ANSA PERSPECTIVES ON CULTURAL HERITAGE

1.1. Attitude towards and understanding of cultural heritage

Although ANSAs might be viewed as reluctant to accept the legitimacy of international rules, since they are generally excluded from norm-making processes and cannot become parties to international treaties, none of those interviewed by Geneva Call expressed disagreement with the rules protecting cultural heritage. On the contrary, they all acknowledged the value of cultural heritage and recognized the need for its protection. This view was particularly strong among ANSAs that fight—or claim to fight—for the rights of national, ethnic or religious minorities.

The HPG/PKK asserted that:

cultural heritage is what is handed down to us and what we hand on to posterity, it is fundamental for humanity […]. The Buddha statues, the ancient cities of Palmyra and Nineveh are all treasures of humanity and the destruction of anyone of them amounts to the destruction of a portion of the treasury of human memory. […]. The protection of cultural heritage is a fundamental principle for us and we therefore consider any harm directed toward such values as crimes.[263]

The MNLA condemned the looting of the Ahmed Baba Institute and hoped that Timbuktu would recover this rich heritage.[264] PMF commanders stated that they respect cultural sites as religious and historical places, and also recognized their touristic potential.[265] Some ANSA representatives enquired whether cultural heritage should be considered as more important than human lives. For example, a leader of the Islam Army (Syria) acknowledged that: *"it is a very important topic"*, but asked "*how do you want to convince people living in a very violent environment, with endless fighting and with nothing to eat that they should engage in protecting the cultural heritage of their country, even if they want?"*[266] In contrast, the representative of the YBS declared that *"they fight to protect cultural sites the same way than civilians because it is part of our values and our duty to preserve them."*[267]

When asked about the concept of "cultural heritage", all of the ANSA interviewees demonstrated an instinctively broad understanding of the term, encompassing both tangible and intangible dimensions, although they were unaware of its definition under international law. The representative of the MNLA, for example, defined cultural heritage as *"what remains: material constructions but also morality, artisanship, and immaterial practices, such as proverbs, riddles, poesy, prose, songs and language itself"*.[268]

It is interesting to note that, despite espousing the same ideology and in some cases operating in the same context, certain radical Islamist ANSAs have conducted deliberate attacks on cultural heritage while others have not or have expressed disagreement with such acts.[269] For example, Al-Qaeda in the Arabian Peninsula (AQAP) declared that its combatants *"should avoid targeting places of worship of any religion or faith, regardless whether they are Christian, Jewish, or other."*[270] Even within ANSAs that have conducted deliberate attacks, there has been some level of internal debate, if not disagreement, about the appropriateness of such destruction and the justification for doing so. According to Al Mahdi, this was apparently the case with Ansar Dine and AQMI:

In the discussion session that led to the decision to destroy the monuments, I openly said that I thought such an action was not appropriate, since it would cause more

[263] Written response by HPG/PKK, January 2016.
[264] Letter from Ambéïry Ag Rhissa, *supra* note 173.
[265] Interview with PMF commanders Hasan Fadham, Abdullah Al Guborri and Hussein Al-Assadi, *supra* note 169.
[266] Interview with Mohammad Bayraqdar, Islam Army, Zurich, Switzerland, 16 December 2016.
[267] Interview with Zeki Shengal, *supra* note 168.
[268] Interview with Moussa Ag Assarid, *supra* note 192.
[269] For a recent analysis on the variations in the patterns of violence and restraint between Ansar Dine and MUJAO, see ICRC, *The Roots of Restraints in War*, 2018, Chapter 4.
[270] Quoted in Geneva Academy of International Humanitarian Law and Human Rights, *Reactions to Norms: Armed Groups and the Protection of Civilians*, January 2014, available at www.geneva-academy.ch/joomlatools-files/docman-files/Publications/Policy%20Briefing/Geneva%20Academy%20Policy%20Briefing%201_Amed%20Groups%20and%20the%20Protection%20of%20Civilians_April%202014.pdf, p. 37.

harm than good. I reminded them of the Sharia ruling that says that no vice may be suppressed if its suppression leads to another equal or greater vice. I warned them that the destruction could lead to greater misfortune for the people. I was thinking, in particular, that it might incite hatred among the local people. I imagine armed groups firing on them. […]. I was convinced that the destruction of the mausoleums had no legal basis in Sharia law. It's true that, according to a fatwa recognized by all traditions of Islam, tombs must not be erected more than one chibr (about 10 centimetres) above ground. But this fatwa only applies to new tombs and not to those that already exist. […] Then there is the question of supplications. I reject the idea of asking a dead person to intercede with God on my behalf. […] I believed that the mausoleums were built to take advantage of people's naïveté. So, while I knew what the destruction of the mausoleums had no basis in Sharia law, I did not see any objection to putting an end to these myths and destroying the buildings. However, I was totally opposed to any interventions in the interior of the mosque.[271]

Likewise, it appears that the Taliban were initially opposed to the idea of destroying the Bamiyan Buddha statues and even asked for UN assistance to protect them from damage by erosion.[272] In 1999, the leader, Mullah Mohamed Omar, issued a decree in favour of their preservation.[273] He reportedly changed his mind two years later to protest international aid reserved exclusively for statue maintenance while Afghanistan was experiencing famine.

I did not want to destroy the Bamiyan Buddhas. In fact, some foreigners came to me and said they would like to conduct the repair work of the Bamiyan Buddha that had been slightly damaged due to rains. This shocked me. I thought, these callous people have no regard for thousands of living human beings—the Afghans who are dying of hunger, but they are so concerned about non-living objects like the Buddha. This was extremely deplorable. That is why I ordered its destruction. Had they come for humanitarian work, I would have never ordered the Buddha's destruction.[274]

However, other sources report that the Taliban ultimately decided to destroy the statues because they were considered idolatrous and against Islam,[275] while other say they were encouraged by Al-Qaeda to defy the world.[276]

1.2. Knowledge of international rules related to the respect and protection of cultural heritage

All of the interviewed ANSAs admitted to lacking knowledge of the specificities of the various international legal rules governing the protection of cultural heritage, including those applicable in armed conflict, having at best a basic awareness of the general rules of IHL, such as the principle of distinction, which merely requires distinguishing between legitimate military targets and civilian properties. Some ANSAs mentioned their internal code of conduct or policies, which include references to respect for cultural heritage, but in very broad terms. For example, the internal regulations of the Rojava police in Syria state that the Asayish must *"protect the heritage and the values of people of all components and maintain the security and safety of the holy places and relics."*[277] The regulations provide no definition of heritage or instructions on how to implement such a provision.

Several ANSAs interviewed shared doubts as to what qualified as cultural heritage and the circumstances under which they could use cultural sites for military purposes or target them if used by enemy forces. For instance, the MNLA representative admitted being unsure as to whether a fortress built by the French near Kidal qualified as cultural heritage because the building is perceived as a symbol of colonialism. He

[271] UNESCO Courier, *supra* note 141.
[272] M. Semple, "Why the Buddhas of Bamian were destroyed", *Afghanistan Analysts Network*, 2 March 2011, available at www.afghanistan-analysts.org/guest-blog-why-the-buddhas-of-bamian-were-destroyed.
[273] L. Harding, "How the Buddha got his wounds", *The Guardian*, 3 March 2001, available at https://web.archive.org/web/20060228113747 and www.guardian.co.uk/Archive/Article/0%2C4273%2C4145138%2C00.html.
[274] His interview is available at www.rediff.com/news/2004/apr/12inter.htm.
[275] B. Crossette, "Taliban explains Buddha demolition", New York Times, 19 March 2001, available at https://web.archive.org/web/20090503215139/http:/www.nytimes.com/2001/03/19/world/19TALI.html?ex=1142571600&en=e5ba6c267eada53a&ei=5070. See also W.L. Rathje, "Why the Taliban are destroying Buddhas", USA Today, 22 March 2001, available at https://usatoday30.usatoday.com/news/science/archaeology/2001-03-22-afghan-buddhas.htm.
[276] M. Semple, *supra* note 272.
[277] Asayish Rules and Regulations, available at www.hrw.org/report/2014/06/19/under-kurdish-rule/abuses-pyd-run-enclaves-syria, Appendix III, Chapter 2, Responsibilities.

stated that the MNLA used it for military purposes in a situation that did not appear to fall within the military necessity requirement as provided for under international law.

Of course, this may be due to a lack of awareness of the international rules regarding the protection of cultural heritage as mentioned above. In a similar vein, FSA military commanders enquired about the lawful conduct to adopt when enemy forces occupy large historical areas or placed snipers on minarets and castles. Some admitted having indeed attacked such sites. As these are recurrent situations on the battlefield, knowledge of the law could spare damage to cultural heritage.

Similarly, none of the ANSAs consulted by Geneva Call were aware of the existence of the Blue Shield emblem, what it looked like or the attached obligations. The Blue Shield emblem is provided for in the 1954 Hague Convention (Art. 16), and allows States parties to signal the presence of cultural property that falls under its protection.

On a positive note, all of the interviewed ANSAs expressed interest in receiving training on the international legal framework protecting cultural heritage. Pilot training sessions conducted by Geneva Call with senior military commanders of FSA brigades in 2015 and 2017 support the idea that training would be beneficial, given the amount of practical and relevant questions asked by brigade commanders and the subsequent measures undertaken following the training. One brigade reportedly established measures to protect the Umayyad Mosque of Aleppo, especially its sundial, as well as Zachariah's museum, with sandbags and bricks, while another withdrew its presence from a castle in Aleppo (see Chapter 2).

1.3. Protective measures and capacity issues

Many of the ANSAs interviewed have taken measures to safeguard and respect cultural heritage. Such measures include posting guards to protect archaeological sites or religious temples from plunder or attack; storing cultural artifacts (e.g. ancient manuscripts or statues) seized from traffickers in safe places; securing cultural sites with sandbags and other *in situ* means of risk mitigation, and clearing archaeological sites contaminated with booby traps and explosive remnants of war.

A number of the ANSAs interviewed had also bound themselves to respect cultural property and had established a body or department within their organization specifically devoted to cultural issues. For instance, in 2015, the autonomous self-administration of Rojava passed a law that prohibits the excavation of archaeological sites and the destruction, damage and trafficking of antiquities. The law established an "Authority of Tourism and Protection of Antiquities", which has subsequently documented the conditions of archaeological sites situated in areas under the control of the YPG/YPJ.[278] Despite ongoing efforts, many sites are at risk or have been damaged due to fighting, illegal excavations, bulldozing and natural forces. The authority has also conducted emergency restoration work and public awareness-raising activities (through TV programmes, exhibitions, lectures, etc.).[279] Resources permitting, it plans to build a museum to display artifacts and educate the local population about the importance of protecting cultural heritage. Moreover, it collaborates with a special unit of the Asayish police force that deals with organized crime, including illicit trafficking and excavations, in order to enforce the legislation.

[278] The Authority of Tourism and Protection of Antiquities, "The situation of archaeological sites in Al Jazira territory, Syria", 2017.

[279] Ibid.

Saad Abbas Ismail, Syrian archaeologist

Saad Ismail is a professional archaeologist who lives in Qamishli in northeast Syria. He studied archaeology at the Lebanese University in Beirut and has worked on various archaeological sites in Afghanistan, Lebanon and Syria. Since 2015, he has been collaborating with the Rojava "Authority of Tourism and Protection of Antiquities". He also trains the Asayish police force on how to deal with artifacts, evaluate their value and conserve them in a suitable manner. Thousands of such objects have been stored in a secure place by the Asayish.[280]

© Photo courtesy of Saad Ismail
Dr Saad Ismail training Asayish police force on the protection of antiquities

Although they have some level of internal capacity, many ANSAs lack qualified or skilled personnel and expertise, knowledge of international standards, technical equipment, infrastructure and the financial resources to sustain their efforts to protect cultural heritage. Some have contacted specialized agencies to express their interest in cooperating and receiving assistance for the safeguarding of cultural and archaeological sites, but their requests have remained unanswered. This is the case of MNLA which informed UNESCO about their seizure of more than 1,000 ancient manuscripts and unsuccessfully asked for support to return them to the Ahmed Baba Institute in Timbuktu.[281]

[280] "Saad Ismail Message in Marburg Conference", 22 July 2017, available at www.youtube.com/watch?v=nZR-NN5dZ4Y&feature=youtu.be.

[281] Such lack of response and international support is even more acute for ANSAs considered as "terrorist organizations". A case in point is the Hamas-run "Ministry of Tourism and Antiquities" in Gaza. "Gaza's archaeological treasures at risk from war and neglect", BBC News, 7 January 2013, available at www.bbc.com/news/world-middle-east-20853440.

Somaliland's Department of Archaeology

Another similar example comes from the breakaway region of Somaliland in north-west Somalia. In 2007, the authorities of this self-declared Republic established a Department of Archaeology through presidential decree, headed by Dr. Sada Mire, a Swedish-Somali archaeologist.

The region has proven to be rich in archaeological wonders. Dr. Sada Mire and her team recorded hundreds of sites, including prehistoric rock art sites, medieval Islamic towns and pre-Islamic Christian burial sites.[282] Among the sites the Department of Archaeology placed on its Tentative List of World Heritage is the rock art site of Dhambalin near the Red Sea town of Berbera. The rock paintings depicting horned cattle, sheep and giraffes, which no longer exist in northern Somalia, could be up to 5,000 years old.

Over the years, many sites have suffered degradation due to erosion, vandalism and uncontrolled construction. But by far the most severe threat is looting and illicit trade. In response, the Department of Archaeology, known as the Department of Tourism and Archaeology since 2012, has engaged with local communities and produced TV programmes to explain the value of Somali heritage and the importance of ensuring its protection.[283]

The Department has faced many challenges since its creation, notably lack of financial resources, lack of trained staff and institutional memory, lack of a legal framework,[284] and a lack of infrastructure such as storage and research facilities.[285] Since Somaliland is not recognized internationally, it has proved very difficult to obtain funding otherwise generally available to States. Moreover, *"Somalia's failure to ratify the World Heritage Convention of 1972 means that Somali heritage, wherever it may be in Somali territory (including Somaliland) is not entitled to support from UNESCO."*[286]

After leaving her government position in 2012, Dr Sada Mire created the Horn Heritage Organization to support the protection of Somali heritage with external funding. The NGO has carried numerous projects in different areas of heritage research, documentation, training and preservation. Mire is also assistant professor at Leiden University where she produced a MOOC course (Massive Online Open Access Course) on the topic "Heritage under Threat", which was attended by over 300 Somaliland heritage and archaeology students.

© Photo courtesy of Sada Mire
Dr Sada Mire crouching next to prehistoric rock art at Dhambalin in Somaliland, a site she discovered in 2007

[282] S. Mire, "Mapping the archaeology of Somaliland: Religion, art, script, time, urbanism, trade and empire", *African Archaeological Review,* 2015, 32(1), pp. 111-136.

[283] Ibid. See also S. Mire, *supra* note 145, pp. 71-91.

[284] The Department of Archaeology has advocated for the adoption of an antiquities law for Somaliland, but to date this has not been successful. Interview with Sada Mire, Leiden, Netherlands, 15 May 2018.

[285] Somaliland lacks functioning museums. This factor contributes to the disappearance of artifacts. Museums are needed for storage, display, research, public education and activity centres. The material that is excavated or acquired in other ways should be safely kept in a protected space.

[286] S. Mire, *supra* note 145, p. 83.

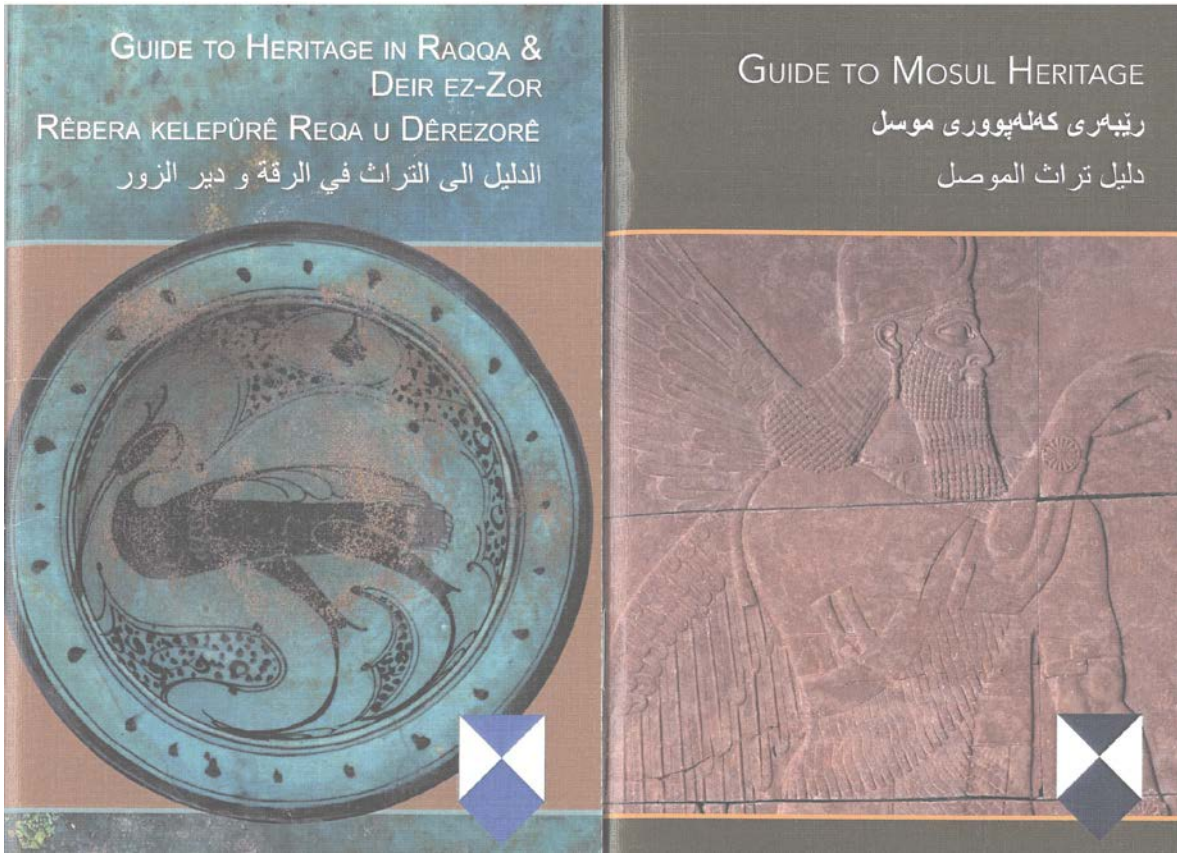
2. SPECIALIZED ORGANIZATIONS' ENGAGEMENT WITH ANSAS ON CULTURAL HERITAGE

It appears from the survey conducted as part of this study that only a few specialized organizations engage directly with ANSAs to promote the respect and safeguarding of cultural heritage. One exception is the Smithsonian Institution, whose Syrian colleagues have been negotiating with ANSAs since 2012 to access heritage sites in opposition-controlled areas, as part of its "Safeguarding the Heritage of Syria and Iraq (SHOSI) Project."[287] Along with the US Committee of the Blue Shield, the Smithsonian created a pocket training manual known as the "Guide to Mosul Heritage", which was distributed to Iraqi Kurdish Peshmerga, among other armed forces, prior to the recapture of the city in 2017.[288]

Generally speaking, the survey identified a paradoxical situation. On the one hand, well-established institutions whose mandate encompasses the protection of cultural heritage, including in armed conflict, appear not to engage with ANSAs on this issue at present because of restrictions within their mandate or political limitations. On the other hand, a number of newly established organizations, some of which were created as an *ad hoc* response to protect cultural heritage in current armed conflicts (in particular Iraq and Syria), are willing to engage with ANSAs to some extent but lack funding and the capacity to do so.

Falling within the first category, UNESCO is facing a dilemma. According to Article I(3) of its Constitution, UNESCO *"is prohibited from intervening in matters which are essentially within the Member States' domestic jurisdiction. Establishing contact with ANSAs may be considered a breach of this obligation, as UNESCO is only allowed to enter in contact with the effective and recognized government of its Member States."*[289]

In contrast, Article 19(3) of the 1954 Hague Convention grants UNESCO the possibility to "offer its services to



Guide to Heritage in Raqqa & Deir Ez-Zor and Guide to Mosul Heritage, produced by Simithsonian Institution, US Committee of the Blue Shield and Penn Cultural Heritage Center

[287] Response from the Smithsonian Cultural Rescue Initiative, 27 September 2016.
[288] Ibid; interview with Dr. Abdullah Khorsheed Qader, Director of the Iraqi Institute for the Conservation of Antiquities and Heritage, Erbil, Iraq, 12 February 2017.
[289] Response from UNESCO, 17 December 2015.

the parties to the conflict" (meaning both State and non-State parties) in the context of non-international armed conflicts. Moreover, Article 19(4) expressly states that establishing such contact with parties to the conflict shall not affect their legal status. No reservation has been made by any State party regarding these provisions. Therefore, it may be argued that, within the framework of the 1954 Hague Convention, *"establishing contact with a non-state actor during an armed conflict involving one or several High Contracting Party(ies) [to the Convention] or taking place within the territory of one or several High Contracting Party(ies) cannot be considered as a violation of the principle of non-intervention in internal affairs."*[290]

Furthermore, UNESCO Member States together with the Secretariat developed a "Standard Plan of Action to Protect Cultural Property in the Event of Armed Conflict" that explicitly states that one of the Secretariat's possible actions is to *"[e]stablish contacts with the warring parties (including States and ANSAs as applicable) and send letters to them signed by the Director-General regarding the protection of cultural property in the event of armed conflict"*.[291] While this document has not been formally adopted by the States parties to the Hague Convention, they have taken note of it. In practice, however, the situation is more complex and politically sensitive. UNESCO has recently acknowledged that the "*nature of contemporary conflicts […] presents a challenge, as they often involve non-State actors, with whom intergovernmental organizations cannot establish relations."*[292]

In the past, there have been two instances when UNESCO has decided to engage, out of its own initiative, with ANSAs for the benefit of cultural and natural heritage, respectively. In response to threats by the Taliban to destroy the Bamiyan Buddhas in Afghanistan in 2001, the then Director-General of UNESCO, Koïchiro Matsuura, established direct contact with Mullah Omar, the leader of the Taliban, and subsequently appointed Ambassador Pierre Lafrance as special envoy to meet with Mullah Omar and dissuade him from destroying the site.[293] Likewise, in the context of the escalation of the conflict in the Democratic Republic of the Congo and the ensuing threat to the country's five World Heritage properties, the director of the World Heritage Centre undertook a country visit from 24 November to 3 December 2001, on the occasion of which he met with a number of stakeholders and "senior decision-makers, including heads of the rebel administration in Goma, Beni and Bunia".[294] In addition, in 2004, the World Heritage Committee *"request[ed] the Director-General of UNESCO to use UN and other appropriate diplomatic channels to influence high-level SPLA [Sudan People's Liberation Army] officials, urging them to put a halt to the poaching by their fighters as well as an immediate retreat of SPLA troops from the vicinity of the Garamba National Park"*.[295] The following year, it *"invite[d] the Director-General of UNESCO to use his good offices to sensitize all the parties concerned about the real risk to the outstanding universal value of Garamba National Park and to engage such parties in a dialogue leading to avoid the loss of such value"*.[296] However, this type of initiative and direct engagement with ANSAs no longer represents current practice as the above-mentioned case-studies illustrate (see Chapter 2).

In recent years, the former UNESCO Director-General Irina Bokova has regularly called on the parties to the conflicts in Libya, Syria and Yemen, among others, to respect their obligations under IHL, in particular the 1954 Hague Convention.[297] UNESCO acknowledges that solutions need to be identified, especially considering the current situation globally with ANSAs increasingly involved in major conflicts, including in the destruction of cultural heritage. Potential approaches include encouraging the ratification of the 1954 Hague Convention and the 1999 Second Protocol and developing *"cooperation with entities such as Geneva*

[290] Response from UNESCO, 17 December 2015 and interview with UNESCO, Paris, France, 15 November 2016.

[291] UNESCO, Standard Plan of Action to Protect Cultural Property in the Event of Armed Conflict, Doc. CLT-11-CONF-209-INF1, 12 December 2011, Annex. The plan was slightly revised in 2013 to reflect the experience of the armed conflicts in Mali and Syria. See UNESCO Doc. CLT-13/10HCP/CONF.201/INF.3, 21 November 2013.

[292] ICC, UNESCO Amicus Curiae Observations, *supra* note 9.

[293] Ambassador Lafrance unfortunately did not succeed and the Taliban destroyed the Buddhas in March 2001; UNESCO World Heritage Committee, Item 4b of the Provisional Agenda: Acts constituting "crimes against the common heritage of humanity", 22 November 2001, available at http://whc.unesco.org/archive/2001/whc-01-conf208-23e.pdf.

[294] UNESCO World Heritage Committee, "World Heritage Sites of the Democratic Republic of the Congo (DRC)", Decision CONF 208 VIII.12-28, 3 December 2001.

[295] UNESCO World Heritage Committee, "World Heritage Properties of the Democratic Republic of the Congo (DRC)" Decision 28 COM 15A.3, 29 October 2004.

[296] UNESCO World Heritage Committee, "World Heritage Properties of the Democratic Republic of the Congo (DRC)", Decision 29 COM 7A.4, 9 September 2005.

[297] For instance, "UNESCO Director-General calls for the protection of Yemen's heritage after new damage to historic houses in Old Sana'a", 22 September 2016, available at www.unesco.org/new/en/media-services/single-view/news/unesco_director_general_calls_for_the_protection_of_yemen. See also "UNESCO Director-General deplores heavy damages at the National Museum of Aleppo", 14 July 2016, available at www.unesco.org/new/en/harare/about-this-office/single-view/news/unesco_director_general_deplores_heavy_damages_at_the_nation; and "UNESCO's Director General calls on all parties to cease violence and to protect the World Heritage Site of Sabratha in Libya", 22 September 2017, available at https://en.unesco.org/news/unesco-s-director-general-calls-all-parties-cease-violence-and-protect-world-heritage-site.

Call, which works in promoting principles inspired from international humanitarian law along armed non-State actors."[298] In addition, building on the right of initiative granted by Article 19(3) of the Hague Convention, UNESCO has been considering the possibility of establishing "cultural protected zones" through special agreements between the parties to conflict, in accordance with Article 19(2).[299] In Syria, several attempts have been made to broker agreements between fighting forces not to engage in hostilities in the vicinity of the World Heritage Ancient City of Bosra and the Idlib museum.[300]

In February 2016, UNESCO entered into a Memorandum of Understanding with the ICRC to strengthen cooperation on the protection of cultural property in contexts of armed conflict. Possible activities may include, for example, *"[c]ooperating in the sensitization, awareness-raising and national capacity-building of officials on the protection of cultural property in situations of armed conflict, in particular through National Committees for the implementation of International Humanitarian Law, where they exist, or other relevant national bodies"* and *"[s]haring information on cultural property at risk in situations of armed conflict, when and where feasible and compatible with security conditions, operational constraints (including the confidential nature of the ICRC's work), and availability of means"*.[301] Moreover:

upon the request of UNESCO or a party to the conflict, with the agreement of all parties to the conflict and in close consultation with the local actors concerned (including competent national authorities), the ICRC may assist in rescuing specific cultural property at imminent risk, for example by facilitating the evacuation of collections and/or providing supplies and equipment needed to undertake emergency safeguarding measures.[302]

The Memorandum of Understanding does not specifically mention ANSAs. The ICRC addresses rules related to the conduct of hostilities and the protection of civilian objects in its IHL training courses but has engaged with ANSAs specifically on the respect and protection of cultural property only on an *ad hoc* basis, depending on the context.[303] An internal guiding tool on cultural heritage has been developed to mainstream operational responses in the field.[304]

As mentioned above, the Smithsonian Institution has supported emergency conservation and protection efforts in areas controlled by Syrian ANSAs. Along with the Day After Project and other partners, it has provided equipment, training and technical support for Syrian cultural heritage professionals to secure cultural objects, for example, through the use of sandbags and other *in situ* risk-mitigation measures to safeguard the ancient Roman and Byzantine mosaics of the Ma'arra Museum in Idlib Province, an area under the control of Syrian ANSAs.[305] The museum was significantly damaged as a result of the fighting, and the Smithsonian supported efforts to secure this priceless collection—one of the most important in the Middle East—from further harm. Altogether, some 1,600 square feet of mosaics were protected. When the museum was bombarded in 2015 and 2016, the sandbag barriers held, protecting the mosaics and preventing the walls on which they were installed from collapse.[306] The Smithsonian, along with the US Committee of the Blue Shield, also worked to sensitize

[298] ICC, UNESCO Amicus Curiae Observations, *supra* note 9. As part of this effort, UNESCO funded the present study and the development by Geneva Call of training material on international rules related to the protection of cultural heritage in non-international armed conflict.

[299] Response from UNESCO, 17 December 2015. See also the report of an expert meeting on the "responsibility to protect" as applied to the protection of cultural heritage in armed conflict, Paris, 26-27 November 2015, available at www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/R2P-FinalReport-EN.pdf. The UNESCO Secretariat emphasized that its ability to assist in the creation and maintenance of "cultural protected zones" was dependent on the consent of the State in whose territory the conflict took place.

[300] See, for instance, "The Director-General of UNESCO calls for all Syrians to commit to the safeguarding of cultural heritage in Bosra and Idlib", available at http://en.unesco.org/news/director-general-unesco-calls-all-syrians-commit-safeguarding-cultural-heritage-bosra-and-idlib. See also M. Danti, *supra* note 22, p. 141.

[301] Memorandum of Understanding between UNESCO and the ICRC, 29 February 2016, art. 1(v).

[302] Ibid, art. 1(vi).

[303] Interview with ICRC, Geneva, Switzerland, 23 September 2016.

[304] Ibid.

[305] United States Government Accountability Office (U.S. GAO), Report to Congressional Requesters: Cultural Property – Protection of Iraqi and Syrian Antiquities, August 2016, available at www.gao.gov/products/GAO-16-673, pp. 27-28. See also Smithsonian Global, Safeguarding Cultural Heritage in Syria and Iraq, available at https://global.si.edu/success-stories/safeguarding-cultural-heritage-syria-and-iraq.

[306] Ibid.

Kurdish Peshmerga and other armed actors active in the battle of Mosul, about the importance of protecting cultural heritage. However, although the Smithsonian believes that it is in principle permitted to engage with ANSAs, *"direct contact with organizations the United States has determined as terrorist organizations is prohibited."*[307]

At the other end of the spectrum, Heritage for Peace is an example of a newly established organization that is willing to engage with ANSAs but lacks funding and the capacity to do so. Created in 2013 as a response to the conflict in Syria, the NGO's main mission is to *"support the Syrian heritage sector to safeguard their patrimony in any way they can"*[308]. Its activities consist of providing training and capacity building to interested stakeholders in the effort to protect cultural heritage. This includes educating belligerent forces on their obligations to protect Syria's cultural heritage under international law. Heritage for Peace says that it is willing to engage with *"any actor willing to work towards the protection of cultural heritage, if they are not designated terrorist organizations."*[309] In 2014 and 2015, it conducted "train-the-trainer" courses in Turkey for members of the FSA-affiliated political opposition, in particular the so-called Interim Syrian Ministry of Culture (IMoC). Through Heritage for Peace, the IMoC and the Syrian Directorate General of Antiquities and Museums (DGAM) attended a conference entitled "Heritage and Conflict: Learning from previous experiences to safeguard cultural heritage during the Syrian crisis", held in Santander, Spain in April 2014, that led to the "Santander Declaration on the Protection of Syria's Heritage"[310]. Although the overall result of these efforts has been positive, Heritage for Peace has faced certain difficulties such as funding, staffing-related issues, logistical challenges and so on.[311]

The Day After Project is another example of a newly established initiative created in response to Syria's cultural heritage crisis.[312] It comprises a network of heritage professionals and civil society activists who work in areas under the control of ANSAs to protect cultural sites, museums and collections, among others, and to address emergency preservation concerns. It also reports on the damage and destruction of cultural heritage inside Syria and advocates for better protection at the international level.[313]

Though not a newly established organization, the Blue Shield faces human and financial resources challenges similar to those affecting Heritage for Peace.[314] It acknowledges the role that ANSAs can play in the protection of cultural heritage in armed conflict and is open, in principle, to engaging with them. There is nothing in its statutes to preclude the organization from establishing contact with ANSAs, but so far it has not done so, mainly due to a lack of capacity and funding.[315]

To conclude, while there have been a number of initiatives undertaken in recent years, especially with regard to Syria, specialized organizations concerned with the protection of cultural heritage are not engaging with ANSAs on a systematic basis. Such engagement could make a considerable difference in practice to the level of protection afforded to cultural heritage located in areas affected by non-international armed conflicts.

[307] Response from the Smithsonian Cultural Rescue Initiative, 27 September 2016.
[308] Heritage for Peace, "Who we are", available at www.heritageforpeace.org/about-us/who-we-are.
[309] Response from Heritage for Peace, 7 December 2015.
[310] Santander Declaration on the Protection of Syria's Heritage, 25 April 2014, available at www.heritageforpeace.org/wp-content/uploads/2014/05/Santander-Statement-and-Outcomes.pdf. The Declaration acknowledges that Syria's heritage possesses a universal value, which transcends its national importance, and that there is a need to respect international law concerning the protection of cultural heritage in the event of armed conflict.
[311] Response from Heritage for Peace, 7 December 2015.
[312] The Day After. "Heritage Protection Initiative", available at http://hpi.tda-sy.org/en/about-us.
[313] The Day After. Supporting Democratic Transition in Syria, available at http://tda-sy.org/en/content/219/487/programs/heritage-protection-initiative.
[314] Response from Blue Shield, 18 January 2016.
[315] Ibid.

CONCLUSION

Most armed conflicts nowadays are non-international in character. ANSAs involved in such conflicts are active in (and sometimes even in control of) areas rich in cultural heritage, including World Heritage sites. Insofar as cultural heritage is of importance for the whole of humanity, ensuring its preservation necessitates acknowledging the role that ANSAs play in this regard.

This study has identified examples of both negative and positive practices. Some ANSAs have deliberately destroyed religious buildings and shrines, historical monuments, statues, ancient manuscripts and archaeological sites as part of their efforts to assert their ideological view and garner global attention. They have also engaged in strategic looting and selling of valuable cultural artefacts to help finance their operations. In contrast, other ANSAs do not adopt this policy and acknowledge the value of protecting cultural heritage, even though their military tactics may expose them to collateral damage. A number of ANSA have even committed themselves to respect cultural property and have taken practical measures to safeguard archaeological sites, religious temples or cultural objects, such as statues or ancient manuscripts.

So far, the reaction of the international community has focused mainly on the first category of ANSAs—those that have intentionally damaged or destroyed cultural heritage. UN Security Council Resolution 2347 is a clear illustration of this approach. It condemns the unlawful destruction of cultural heritage, notably by "terrorist groups", and calls upon Member States to consider a number of measures, including domestic legislative measures, to prevent and counter the illicit trade and trafficking in cultural property. The ICC prosecution of Al Mahdi for destruction of heritage in Mali is also significant and may have a deterrent effect on would-be perpetrators, including ANSA leaders. Yet, such approaches have their limitations.

At present, the ICC does not have jurisdiction over crimes committed in the territory of Iraq and Syria, although it could prosecute nationals of Member States who have been involved in such crimes. Domestic courts thus have a role to play in prosecuting alleged perpetrators of attacks against cultural heritage. In order to do so, domestic laws must clearly criminalize violations of the rules protecting cultural heritage and provide courts with a jurisdictional basis to prosecute those crimes. Although Iraq, Mali and Syria have domestic laws to prohibit the looting and destruction of antiquities, these States have simply been unable to enforce their own laws.

Given these limitations, complementary approaches are needed to enhance the protection of cultural heritage in today's armed conflicts. This study demonstrates that there is room for direct engagement with many ANSAs. All of those interviewed by Geneva Call admitted to a lack of knowledge of the various international legal rules protecting cultural heritage and manifested interest in receiving training and advice on how to implement them in practice. Some of them have approached specialized agencies for technical assistance but have not had their requests answered. This has resulted in missed opportunities. The case of the MNLA contacting UNESCO to request support for returning more than 1,000 ancient manuscripts is telling in this regard. Hence, engaging with ANSAs on better respect of IHL is critical to ensure better protection of cultural heritage. The fact that a number of them recognize the importance of cultural heritage and take measures for its preservation is commendable. The international community should take this into consideration.

Even though the ways forward recommended below are unlikely to influence those groups that deliberately attack cultural heritage for ideological reasons, this should not overshadow the considerable room for improvement that exists with regards to ANSAs that do not follow this policy and show interest in its protection. As this study tries to show, some level of emergency heritage response is possible, even in times of war.

1) Conduct public awareness-raising campaigns (through TV, radio, social media, etc.) in areas where ANSAs operate, highlighting the significance of cultural heritage, its need for protection and the key role it plays in post-conflict recovery. This includes engagement with local communities, who may be both actors of protection and of destruction (in terms of illicit digging and looting of archaeological sites). Community leaders and local NGOs are well placed to educate the local people on the value of safeguarding cultural heritage.[316] They can build their messages on traditional norms and code of behaviour in warfare.[317]

2) Clarify the obligations applicable to ANSAs through existing authorities, such as the supervisory bodies of the applicable Conventions, the Special Rapporteur in the field of cultural rights, UNESCO and other relevant organizations. There is no need to amend existing rules or create new ones,[318] but the scope of application of the 1954 Hague Convention to ANSAs, such as the provisions concerning the respect of cultural property and whether they include those regarding its transport, remains uncertain in some respects (see Chapter 1). Structural gaps in The 1954 Hague Convention and 1999 Second Protocol, such as safeguarding measures and risk preparedness mechanisms, technical assistance and channels of communication with UNESCO, should also be addressed.

3) Provide training to ANSAs on the international rules protecting cultural heritage in armed conflict. Geneva Call has created innovative dissemination tools (e.g. videos and booklets as well as a quiz application) as part of its public awareness campaign "Fighter not Killer",[319] and has developed a training module on IHL rules related to cultural heritage specifically directed towards ANSAs. Pilot training sessions have been conducted with FSA brigade commanders on two occasions. These were well received and, as hinted above (Chapter 2), yielded positive results on the ground. Following the training sessions, some FSA brigades reportedly took measures to protect cultural sites in Aleppo.

4) Encourage ANSAs to commit to safeguard and respect cultural heritage through the negotiation of special agreements (e.g. on the establishment of "cultural protected zones" around heritage sites located in conflict areas) or the adoption of other measures (e.g. unilateral declarations, codes of conduct, command orders, legislation, etc.). As explained above, ANSAs parties to armed conflict are bound to respect cultural heritage in accordance with the rules established by States. Promoting their adherence to such rules is instrumental to ensure ownership. Examples of commitments by ANSAs on cultural heritage exist (as illustrated in Chapter 2). Such commitments should be monitored and used as a basis for holding ANSAs accountable to what they have voluntarily agreed to.

5) Support efforts to engage with ANSAs to respect and protect cultural heritage in armed conflict. Common Article 3 to the Geneva Conventions clearly states that impartial humanitarian organizations may engage with all parties to armed conflict, including non-State parties, to promote their respect of IHL. Article 19(3) of the 1954 Hague Convention grants the same possibility to UNESCO. Humanitarian and cultural heritage organizations should build on this legal basis to advocate the case for engagement with ANSAs in relevant *fora*. Cultural heritage must be respected by all belligerents, States and ANSAs. If engagement with ANSAs was carried out more systematically, it could potentially enhance their compliance with international law. In additon to advocacy, further research should also be conducted to document ANSA practices, both regarding tangible and intangible heritage.

6) Support efforts by heritage professionals and, where appropriate, relevant civilian antiquities authorities, active in areas under ANSA control, to safeguard cultural heritage at risk. This should include support for emergency preservation projects and training on international standards, such as recording and documenting sites, monuments or traditions, techniques of protection from immediate dangers, damage assessment and so on. It should also be accompanied by technical assistance and advice to increase the capacity for emergency response among local heritage professionals. The example of the Smithsonian Institution in Iraq and Syria, mentioned in Chapter 3, demonstrates that such emergency response is indeed possible. Ultimately, local efforts represent the most reliable method for protecting heritage in situations of armed conflict.

[316] Specialized local NGOs were created in some contexts. See for example, the Association to Protect Syrian Archaeology (APSA) http://apsa2011.com in Syria, and Horn Heritage www.somaliheritage.org/hornheritage.php in Somaliland.

[317] For example, the Somali code of behaviour in warfare, Biri-Ma-Geydo (which means literally "Spared from the Spear") states that: "in any way, places of worship and religious sites, such as mosques, Koranic schools, saints' shrines, must not be violated. No weapons could be taken into them. No homicide or any other harm would be committed inside their walls [...]." See ICRC, "Spared from the Spear, traditional Somali behaviour in Warfare", 1998, p. 51.

[318] For a critique of the revisionist trend which cyclically comes to the conclusion that a new set of rules is needed to enhance the protection of cultural heritage, see M. Lostal, *supra* note 11, pp.2-8.

[319] See http://fighternotkiller.org

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