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TITLE: A Case Study on the Protection of Cultural Property Under the Law of Armed Conflict:
Russia-Ukraine War

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PAGES: 121-147

ORIGINAL PDF URL: <https://dergipark.org.tr/tr/download/article-file/3257885>

A Case Study on the Protection of Cultural Property Under the Law of Armed Conflict: Russia-Ukraine War

Silahlı Çatışmalar Hukukunda Kültürel Varlıkların Korunmasına Dair Vaka İncelemesi: Rusya Ukrayna Savaşı

Firdes Şeyda Kahraman* 

Abstract

This study provides a comprehensive examination of impacts and repercussions of Russian-Ukrainian war on the protection of cultural property under international humanitarian law. In this regard, the study first analyzes the significance of cultural property prior to outlining how states identify these properties. Thereafter, it evaluates the role and enforceability of the 1949 Geneva Convention IV on the Protection of Civilian Persons in Times of War, which governs the protection of cultural property in international humanitarian law. Since the 1949 Geneva Convention IV classifies cultural properties as civilian objects, they are therefore entitled to the protective regime offered by the Convention—not as cultural properties, but as civilian objects. Following that, the applicability of the 1977 Additional Protocol I's regime for protecting cultural property to the Russian-Ukrainian war in the context of an international armed conflict is also discussed herein. The underlying reason is that the 1954 Hague Convention is the first in international law to provide exclusive protection for cultural property. The principle of military necessity is included as an exception in the 1954 Hague Convention and constitutes the weakness of the Convention. By addressing this exception, it was concluded that Russia damaged and destroyed the cultural property of Ukraine in violation of the requirements of the principle of military necessity. Last but not least, the 1999 Second Protocol to the 1954 Hague Convention has undergone an examination herein with a focus on settling issues with the Convention's military necessity exception.

Keywords

Cultural property, International humanitarian law, Protection, Safeguarding, Russian-Ukraine War, International armed conflict

Öz

Bu çalışmada uluslararası insancıl hukukta Rusya-Ukrayna savaşı sırasında kültürel varlıkların korunması incelenmiştir. Çalışmada bu bakımdan öncelikle kültürel varlıkların önemi ortaya koyulmakta olup, ardından devletler tarafından kültürel varlıkların nasıl saptandığına değinilmektedir. Daha sonra uluslararası insancıl hukukta kültürel varlıkların korunmasına ilişkin öncelikle 1949 Cenevre Sözleşmeleri'nden Sivillerin Korunması konusunun düzenlendiği IV. Cenevre Sözleşmesi ele alınmıştır. Kültürel varlıkların 1949 IV. Cenevre Sözleşmesi kapsamında sivil varlıklar olarak kabul edilmeleri nedeniyle Sözleşme'nin tanıdığı koruma rejiminde kültürel varlıklar olarak değil sivil varlıklar olarak yararlandıkları belirtilmektedir. Ardından Rusya-Ukrayna savaşının uluslararası bir silahlı çatışma olması nedeniyle 1977 tarihli I No.lu Ek Protokol'de kültürel varlıklar bakımından öngörülen koruma rejimine değinilmiştir. Askeri gereklilik ilkesine 1954 Lahey Sözleşmesi'nde bir istisna olarak yer verilmiş olup Sözleşme'nin zayıf yönünü oluşturmaktadır. Söz konusu istisna ele alınarak Rusya'nın askeri gereklilik ilkesinin gerekliliklerine aykırı şekilde Ukrayna'nın kültürel varlıklarına zarar verdiği ve yok ettiği sonucuna varılmıştır. Son olarak, 1954 Lahey Sözleşmesi'nin 1999 tarihli İkinci Protokolü, Sözleşme'nin askeri gereklilik istisnası ile ilgili sorunların çözümüne odaklanan bir incelemeye tabi tutulmuştur.

Anahtar Kelimeler

Kültürel varlık, Uluslararası insancıl hukuk, Koruma, Muhafaza etme, Rusya-Ukrayna Savaşı, Uluslararası silahlı çatışma

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To cite this article: Kahraman FS, "A Case Study On The Protection Of Cultural Property Under The Law Of Armed Conflict: Russia-Ukraine War" (2024) 44(1) PPIL 121. <https://doi.org/10.26650/ppil.2023.44.1.1325962>

Introduction

On February 24, 2022, the Russian Federation launched an armed attack against Ukraine in violation of the prohibition on the use of force in Article 2, paragraph 4 of the United Nations Charter¹. Breach of Article 2/4 by any means and on any grounds, constitutes an act of aggression.² The attack launched by the Russian Federation was not only a response but also a consequence of the escalation of tensions with Ukraine, which began in 2014 with the annexation of Crimea and was further aggravated owing to ensuring political issues and unrest in the Donbas. Even if this armed conflict between Russia and Ukraine had begun before 2022, it was not anticipated to escalate into a land war comparable in scale to the Second World War. The Russian Federation attempted to justify its invasion of Ukraine on moral and cultural grounds.³ Despite the fact that Ukraine has been independent since 1991, the Russian Federation contends that it is an integral component of Russian history, culture, and spirituality⁴, and further maintains that Russians and Ukrainians constitute a single and unified Russian people without any separate identity, and that unity must be restored. Due to the justifications stated by the Russian Federation, Ukraine's numerous cultural properties have become unwelcome objects, thus leading to the risk of perceiving cultural properties as an object of aggression.

During any armed conflict, destroying the enemy's military and critical infrastructure, as well as its memory and identity is the primary goal. Thus, religious buildings, monuments, museums, archaeological sites, and libraries that qualify and are considered part of a country's cultural property are targeted for destruction. After more than a year since the war waged between the Russian Federation and Ukraine, some of Ukraine's cultural properties have been partially or completely destroyed in the military attacks of the Russian Federation. Many civil and cultural properties, including monuments, buildings, theatres, houses of worship, libraries, and schools, have been destroyed.⁵ Ongoing indiscriminate attacks by the Russian Federation have damaged Ukraine's cultural heritage beyond repair.

As a matter of fact, cultural properties as well as civilians exposed to an armed conflict benefit from international protection. International law strictly prohibits both the destruction of cultural property and the killing of civilians. In this study, the Russian Federation's assaults, looting, and annihilating actions, among others

1 United Nations Charter (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI <<https://www.un.org/en/about-us/un-charter/full-text>> accessed September 12, 2023.

2 Ali Osman Karaoglu, 'Libya'ya Askeri Müdahale ve Uluslararası Hukukta Yeniden İnşa Sorumluluğu' (2019) 6(1) İMÜHFD 199, 203-204.

3 Magdalena Psikowska-Schnass, 'Russia's War on Ukraine's Cultural Heritage' (EPRC, 22 April 2022) accessed 1 June 2023.

4 Tom Seymour and Sophia Kishkovsky 'Is Ukraine's Cultural Heritage Under Coordinated Attack?' (The Art Newspaper, 10 June 2022) accessed 15 May 2023.

5 'Targeted Destruction of Ukraine's Culture Must Stop: UN Experts' (UNHROHC, 22 February 2023) accessed 7 March 2023.

targeting Ukraine's cultural properties directly or indirectly are examined considering international law. The objective of this study is to determine whether the Russian Federation acts against Ukrainian cultural property that violates international law. The principles of international humanitarian law are examined in order to fulfil this purpose. This study examines the provisions for protecting cultural property, the situations leading up to the violation, and the particular Russian Federation actions that were prohibited. Following the primary brief discussion on the definition and significance of cultural property, comprehensive evaluation of the protection of cultural properties in Ukraine is conducted in accordance with the 1949 Convention (IV) Relative to the Protection of Civilian Persons in Time of War (1949 Geneva Convention IV)⁶, the 1977 Protocol Additional to the 1949 Geneva Conventions on the Protection of Victims of International Armed Conflicts (1977 Additional Protocol I)⁷, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention)⁸ and the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (1999 Second Protocol).⁹

I. Framework for Conceptualising Cultural Property

A. Importance of Cultural Property

Culture plays a crucial role in determining the national identity and social memory of a society. Any attempt to destroy of culture undermines the basis of national identity and the sense of belonging to a specific nation.¹⁰ It is indeed impossible to separate a people's cultural heritage from the people themselves and their rights. The human rights perspective requires that the rights of people with regard to their cultural heritage be taken into consideration. The right of everyone to participate in cultural life intrinsically serves as the legal foundation for the right to enjoy cultural heritage, which is enshrined as a component of international human rights law. The Human Rights Council declared in its September 2016 Resolution¹¹ 33/20 on Cultural Rights and

6 1949 Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 <<https://treaties.un.org/doc/Publication/UNTS/Volume%2075/volume-75-I-973-English.pdf>> accessed March 19, 2024.

7 Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (adopted 08 June 1977, entered into force 07 December 1978) 1125 UNTS 609 <https://ihl-databases.icrc.org/assets/treaties/475-AP-II-EN.pdf> accessed March 19, 2024.

8 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 216 <https://www.unesco.org/en/legal-affairs/convention-protection-cultural-property-event-armed-conflict-regulations-execution-convention> accessed 19 March 2024.

9 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (adopted 26 March 1999, entered into force 9 March 2004) 2253 UNTS 172 <https://www.unesco.org/en/legal-affairs/second-protocol-hague-convention-1954-protection-cultural-property-event-armed-conflict> accessed 19 March 2024.

10 Alla Kravchenko, Iryna Kyzymenko, Nataliia Husieva and Olena Krasilnikova, 'Crime Against Memory or Cultural Genocide? On The Destruction of The Cultural Heritage of Ukraine During Russian Aggression in The XXI Century' (2022) 10(2) EJTS 206, 209.

11 Cultural Rights and The Protection of Cultural Heritage Human Rights Council, A/HRC/RES/33/20, (2016).

the Protection of Cultural Heritage that the destruction or damage to cultural heritage can have a detrimental and irreversible impact on the enjoyment of cultural rights.¹²

Cultural property includes not only stones, buildings, pottery, and objects, but, also identity and dignity.¹³ Societies cherish and preserve their culture by building monuments, establishing museums, and maintaining historical structures.¹⁴ Cultural property is a source of community prosperity, and its destruction endangers peace.¹⁵ According to the United Nations Educational, Scientific, and Cultural Organization (UNESCO), access to historical sites and monuments is a critical component of a sense of belonging.¹⁶

Culture is frequently a deliberate target in armed conflicts, and belligerents are aware that eliminating cultural traces and remnants of the past amounts to erasing people's memories and causes long-term harm to people's identities.¹⁷ Urban areas are at the frontline of contemporary conflicts, thereby resulting in direct or indirect inevitable damage to cultural property. Furthermore, deliberate targeting of cultural property permanently undermines the foundations of society and intensifies social fragmentation.¹⁸ The Director-General of UNESCO stated that Ukraine's cultural heritage should be preserved "*as a testimony of the past but also as a catalyst for peace and cohesion for the future, which the international community has a duty to protect and preserve*".¹⁹ The cultural heritage of Ukraine is an integral part of world culture.

Since 1999, the nature and impact of armed conflict on cultural property have altered, with an increase in non-international armed conflicts. After the Second World War, it was believed that belligerents in armed conflicts would no longer intentionally destroy cultural heritage. Therefore, the destruction of cultural property during the conflicts in Yugoslavia exerted a significant impact on the international community.²⁰ Another incident that had an impact on the world community was the Russian Federation's invasion of Ukraine in 2022, which put into doubt the validity of the

12 Bennoune K, 'The Human Rights Based Approach to The Protection of Cultural Heritage' in *International Conference on the 20th Anniversary of the 1999 Second Protocol of the 1954 Hague Convention: Protecting Cultural Property Conference Proceedings, Protecting Cultural Property* (UNESCO 2020) 23.

13 Michael Møller, *Opening Speech in International Conference on the 20th Anniversary of the 1999 Second Protocol of the 1954 Hague Convention, Protecting Cultural Property: Protecting Cultural Property Conference Proceedings* (UNESCO 2020) 20.

14 Ayesha Jawad and Maira Bokhari, 'Measuring the Protection of Cultural Property Under International Humanitarian Laws: Analysis of Russia-Ukraine Conflict' (2022) 4(3) *JLSS* 469, 471.

15 Møller (n 13) 19.

16 'Cultural Heritage: 7 Successes of UNESCO's Preservation Work' (UNESCO, 2023) accessed 22 June 2023.

17 "Creating Our Future: Creativity and Cultural Heritage as Strategic Resources for a Diverse and Democratic Europe" Declaration on The Russian Federation's Aggression Against Ukraine" (Council of Europe Conference of Ministers of Culture, 31 March 2022) accessed 5 June 2023.

18 International Conference on the 20th Anniversary of the 1999 Second Protocol of the 1954 Hague Convention, *Protecting Cultural Property: Protecting Cultural Property Conference Proceedings* (UNESCO 2020) 79.

19 'UNESCO Statement' (UNESCO, 8 March 2022) accessed 12 September 2023.

20 'When Cultural Heritage Becomes Collateral Damage in War' (Swissinfo, 15 April 2022) accessed 5 June 2023.

assertions that land warfare had ceased. In an armed conflict, what remains constant is the eradication of identity and consequently of culture and cultural heritage. This results in the destruction of historical buildings, theatres, places of worship, museums, museum collections, and other structures.²¹ Do all historical structures, houses of worship, and museums count as cultural property? The right answer to this question is strongly and inextricably linked to defining cultural property and determining the properties of the definition.

B. Definition of Cultural Property

Cultural properties were damaged or destroyed during the Second World War, mainly in Europe and other regions of the world. Despite the global disagreement over what constitutes cultural property, historians and jurists agree on the significance of cultural property protection in times of war.²² The enormous destruction of cultural properties during the Second World War eventually paved the way for substantial improvements in international law on protection and preservation. The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention), adopted in 1954, was the first international convention regulating the global protection of cultural property.

According to Article 1 of the 1954 Hague Convention, “cultural property” is defined as follows:

*“For the purposes of the present Convention, the term ‘cultural property’ shall cover, irrespective of origin or ownership: (a) 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; (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a); (c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as ‘centers containing monuments’”.*²³

When this study examines the concept of cultural property, the above-mentioned definition is considered in all aspects. A State Party to the 1954 Hague Convention determines and identifies items of its own cultural property among any movable or immovable objects that are deemed “of great importance for the cultural heritage of

21 Nout van Woudenberg, 1999 – 2019: New Security Threats for Cultural Property in International Conference on the 20th Anniversary of the 1999 Second Protocol of the 1954 Hague Convention: Protecting Cultural Property Conference Proceedings, Protecting Cultural Property (UNESCO 2020) 111.

22 Jawad et al. (n 14) 471.

23 1954 Hague Convention, Article 1.

every people.” The Convention broadens the concept of cultural property to include “movable and immovable properties deemed of great importance to each people’s cultural heritage.”²⁴ Accordingly, the term “cultural property” does not only refer to the places listed on the World Heritage List²⁵ but, also to a variety of both moveable and immovable properties, as prescribed in the Convention. In the event of an armed conflict, it is impractical to safeguard every religious, artistic, scientific, or charitable structure, historical landmark, or work of art. A higher level of protection can only be enforceable under a convention with a restricted and narrow scope of application. Therefore, a more selective approach to the protection of cultural property was adopted in the 1954 Hague Convention’s definition of cultural property.²⁶

Since states have the exclusive authority to determine and decide on their cultural property, national laws are naturally bound to vary on what constitutes and qualifies as cultural property. Whether a state recognizes a specific property as being of considerable significance for its cultural heritage or not can be determined by consulting the concerned state’s national cultural heritage registry or comparable local legal or administrative inventory.²⁷ In this respect, it can be legitimately asserted that the cultural property in Ukraine protected by the 1954 Hague Convention includes far more monuments and sites than the seven UNESCO World Heritage Sites.²⁸ The Ministry of Culture and Information Policy of Ukraine identifies the objects of the cultural heritage of Ukraine in the “List of Monuments of Cultural Heritage of National Importance Entered in the State Register of Immovable Monuments of Ukraine” in a separate designed manner for every region.²⁹ There is no doubt that the sites included on the lists fall under the conceptual definition of cultural property as solely the state holds the authority to determine whether a site or object qualifies as cultural property or not.³⁰ Both UNESCO and the Ministry of Foreign Affairs of Ukraine confirm that cultural property has been destroyed as a result of Russia’s armed conflict with Ukraine. As of June 12, 2023, there remain 259 cultural sites, including 112 religious structures, 22 museums, 93 historical buildings, 19 monuments, 12 libraries, and one archive, which should be protected under Article 1 of the 1954 Hague Convention. However, the actual quantity of damaged cultural properties is likely to exceed the total

24 Tiberiu Horea Moldovan, ‘The Russian Invasion in Ukraine and Cultural Heritage Protection’ (2022) 9(2) JAHA 231, 235.

25 Roger O’Keefe, Camille Péron, Tofiq Musayev and Gianluca Ferrari, *Protection of Cultural Property: Military Manual*, (UNESCO 2016) accessed 22 June 2023.

26 Roger O’Keefe, *The Protection of Cultural Property in Armed Conflict* (Cambridge 2006) 101.

27 O’Keefe et al. (n 25) 14.

28 Evelien Campfens and Kateryna Busol, ‘Protecting Cultural Heritage from Armed Conflicts in Ukraine and Beyond’ (EP, 2023) accessed 15 May 2023.

29 According to the List, a total of 1345 immovable cultural properties are registered in 24 regions (oblasts), 2 cities, and 1 autonomous republic, ‘Перелік пам’яток культурної спадщини національного значення, занесених до Державного реєстру нерухомих пам’яток України’ (The Ministry of Culture and Information Policy of Ukraine) accessed 10 April 2023.

30 Firdes Şeyda Türkay Kahraman, *Kültürel Varlık Kavramı ve Uluslararası Hukukta Kültürel Varlıkların Korunması: Karabağ’a Dair Bir İnceleme* in Ali Samir Merdan (eds), 2020 Karabağ Savaşı İlhan Aliyev: Karabağ Azerbaycan’dır! (Nobel 2022) 478.

number of those sites.³¹ Up until June 2023, according to the Ministry of Culture and Information Policy of Ukraine; 63 museums, 305 religious structures, 569 historical buildings, and a significant number of artifacts, were destroyed or damaged. It is worth noting that there are significant conventions in international law that regulate the safeguarding of cultural property during an armed conflict, such as the 1949 Geneva Conventions and its 1977 Additional Protocol I, and the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, and its 1999 Second Protocol. When the protection of cultural property among the Russian-Ukrainian war is concerned, the conventions mentioned above must be examined.

II. Protection of Cultural Property in the Law of Armed Conflict

A. 1949 Geneva Conventions

Every conflict bears its own characteristics, but cultural heritage is constantly at risk in most cases and frequently targeted in hostilities. Deliberate destruction of cultural heritage is not a new feature of warfare. Among the historic sites that have been severely devastated in conflict zones are the archaeological ruins of Palmyra in Syria and Nimrud in Iraq. Such targeting has similarly led to the destruction and pillage of cultural properties in various countries, such as the Balkans, Afghanistan, Ethiopia, Libya, Mali, Nagorno-Karabakh, Yemen, and Nigeria, during armed conflict.³² After the Second World War, the scale of institutionalization grew considerably³³ and efforts to restrain the authority of governments for the benefit of individuals gained recognition, especially in subjects, most notably human rights and humanitarian law.³⁴ The 1949 Geneva Conventions and 1977 Additional Protocols provide international regulations for the humane treatment of prisoners of war³⁵ and, the wounded and sick during armed conflict³⁶, as well as for the protection of civilians in war zones³⁷ and for, the protection of civilian property.³⁸ Attacks on civilians who do not take part in

31 'Targeted Destruction of Ukraine's Culture Must Stop: UN Experts' (n 5).

32 Protection of Cultural Heritage in Armed Conflicts, European Parliament, Briefing (EP March 2016) accessed 7 March 2023.

33 Mehmet Emin Büyükt, 'Machiavelli'den Grotius'e Egemenlik Kuramının ve Modern Devletler Hukukunun Gelişimi' (2022) 80(1) İHM 55.

34 International Legal Protection of Human Rights in Armed Conflict (UNHR 2011) 14,72 <https://www.ohchr.org/sites/default/files/Documents/Publications/HR_in_armed_conflict.pdf> accessed March 19, 2024.

35 Articles 13, 14, Convention (III) Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 972 <<https://treaties.un.org/doc/Publication/UNTS/Volume%2075/volume-75-I-972-English.pdf>> accessed March 20, 2024.

36 Article 12, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 18 August 1949, entered into force 21 October 1950) 75 UNTS 970 <<https://treaties.un.org/doc/Publication/UNTS/Volume%2075/volume-75-I-970-English.pdf>> accessed March 20, 2024.

37 1949 Geneva Convention IV, Articles 13, 32, 27 and 47.

38 1949 Geneva Convention IV, Article 53.

an armed conflict³⁹, as well as attacks on civilian property⁴⁰ are prohibited activities. Armed conflicts are classified as international or non-international under international humanitarian law.⁴¹ The resort to armed force with two or more states constitutes an international armed conflict.⁴²

The fundamental general principles⁴³ of international humanitarian law include distinction,⁴⁴ proportionality⁴⁵, and precaution⁴⁶. In other words, in all armed conflicts, an attack must be directed against a legitimate military objective (the principle of distinction), not violate the concept of proportionality, and follow the principle of precaution at the time of the attack.⁴⁷ An attack should be canceled or suspended if it indicates that it would violate the principles of distinction or proportionality.⁴⁸ Treaties, customs, and general principles of law provide the foundation for these principles rather than a separate source of international law.⁴⁹

39 1977 Additional Protocol I, Articles 11, 48, 51. For further information Yücel Acer, 'Ermenistan'ın Savaş Suçları Uluslararası Hukuk ve Ermenistan'ın Karabağ'a Dair Askeri Faaliyetleri' (SETA, 2020) accessed 23 March 2024.

40 Additional Protocol I, Articles 52 and 53.

41 Conflicts "not of an international character" are defined under article 3 Common to the Geneva Conventions, Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 971 <<https://treaties.un.org/doc/Publication/UNTS/Volume%2075/volume-75-I-971-English.pdf>> accessed March 20, 2024; Convention (III) Relative to the Treatment of Prisoners of War (n 36).

42 Article 2 common to the 1949 Geneva Conventions. For further information Roger O'Keefe, *The Application of the Second Protocol to Non-International Armed Conflicts in International Conference on the 20th Anniversary of the 1999 Second Protocol of the 1954 Hague Convention, Protecting Cultural Property: Protecting Cultural Property Conference Proceedings* (UNESCO 2020) 40.

43 In the doctrine, the basic general principles of international humanitarian law include distinction, proportionality, proportionality as well as humanity, necessity, prohibition of unnecessary suffering, and the independence of *jus in bello* from *jus ad bellum*, 'Handbook on International Rules Governing Military Operations' (ICRC 2013) 53; Marco S. Antonie B AND Anne Q, 'How Does Law Protect in War?', (3rd edn, ICRC 1999) 10-14; Nils Melzer, 'International Humanitarian Law' (ICRC 2019) 17; The Handbook of International Humanitarian Law, Ed. Dieter Fleck (Oxford 2008) 35-37; The Handbook of International Law of Military Operations, Eds. Terry Gill and Dieter Fleck, 2nd Ed. (Oxford 2015) 36.

44 Parties in conflict must distinguish between civilians and military objectives that are directly engaged in hostilities and between civilians and civilian objects. Attacks against military objectives are permitted, but it is prohibited to attack civilians or civilian property, Jann K. Kleffner, 'Kleffner J K, *Human Rights and International Humanitarian Law*', in Terry Gill, Dieter Fleck (eds), *The Handbook of International Law of Military Operations* (2nd edn, Oxford 2015) 36; Melzer, (n 44) 18; Nils Melzer, *The Principle of Distinction Between Civilians and Combatants*, in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford 2014) 382.

45 The principle of proportionality prohibits attacks, even when directed against a military objective, that "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." If a military target is targeted and the principle of proportionality is respected, precautionary measures should also be taken to protect civilians or civilian objects from the effects of the attack, Sassoli et al (n 44) 9; Gill T D, 'Legal Basis of the Right of Self-Defence Under the UN Charter and Under Customary International Law' in Terry Gill, Dieter Fleck (eds), *The Handbook of International Law of Military Operations* (2nd edn, Oxford 2015) 223.

46 In the choice of means and methods of warfare, all possible precautions should be taken with a view to avoiding or minimising incidental harm to civilians and civilian objects, Handbook of International Rules Governing Military Operations (n 44) 149; Nils Melzer and Gloria Gaggioli Gasteyer, 'Conceptual Distinction and Overlaps between Law Enforcement and the Conduct of Hostilities', Gill et al. (n 44) 78.

47 Handbook on International Rules Governing Military Operations (n 44) 145; Melzer (n 44) 18.

48 Handbook on International Rules Governing Military Operations (n 44) 150.

49 Sassoli et al (n 45) 10.

The obligations to determine proportionality and to minimize damage to civilians and civilian property during an attack remain in effect.⁵⁰ The prohibition of excessive damage, inherent in the prohibition of indiscriminate attack, compels belligerents to relate the military advantage expected from an attack to potential civilian casualties. However, an attack may be justified if the anticipated military advantage is tactically or strategically significant to justify the collateral damage. The requirements for the balancing act remain vague, providing considerable flexibility in the assessment of potential outcomes.⁵¹

The 1949 Geneva Convention IV regulates the treaty-based protection of civilian objects and items of cultural property defined as civilian objects during armed conflicts.⁵² This provision is interpreted quite broadly, and the prohibition covers the destruction of all property (real or personal), whether private property of protected persons or State property.⁵³ Under the principle of distinction, a fundamental rule of international humanitarian law, attacks can only be directed against military targets; therefore, in principle, all civilian objects are entitled to protection during hostilities.⁵⁴

The Russian Federation and Ukraine are the State Parties to the 1949 Geneva Conventions. The provisions thereof are binding on both parties. Nevertheless, numerous indiscriminate attacks on civilians, as well as the destruction and damage of civilian property, have been confirmed by the Ministry of Culture of Ukraine since the outset of the conflict.⁵⁵ The distinction of civilian buildings and monuments during indiscriminate attacks violates the distinction and proportionality norms, which are the fundamental principles of international humanitarian law. Compared with the likelihood of civilian casualties and anticipated direct military advantages to be gained through Russian assaults, excessive and extensive damage has been inflicted on civilian objects in Ukraine. The Russian armed forces, for instance, might arbitrarily use any place or location registered, by Ukraine as a cultural property as, a target for an armament or training facility. It is strictly prohibited to attack civilian objects that are not being used for hostile acts or military purposes.⁵⁶ Such destruction and appropriation must be extensive to qualify as a grave breach.⁵⁷ In the Karadzic case the bombardment of Sarajevo on May 28-29, 1992 and June 5-8, 1992 was indiscriminate

50 Melzer N, 'Targeted Killings in Operational Law Perspective', in Terry Gill, Dieter Fleck (eds), *The Handbook of International Law of Military Operations* (2nd edn, Oxford 2015) 301.

51 Fleck (n 44) 198.

52 1949 Geneva Convention IV, Article 53.

53 Commentary of the Article 53, Commentary of 1958 to the 1949 Convention (IV) Relative to the Protection of Civilian Persons in Time of War <<https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/article-53/commentary/1958?activeTab=undefined>> accessed March 19, 2024.

54 Kristin Hausler, 'How Does International Law Protect Ukrainian Cultural Heritage in War? Is It Protected Differently Than Other Civilian Objects?' (BIICL, 2022) accessed 5 June 2023.

55 Ministry of Culture and Information Policy of Ukraine (n 32).

56 1949 Geneva Convention IV, Article 147.

57 Commentary of the Article 147 (n 53).

and disproportionate.⁵⁸ The Trial Chamber found that the Planned Events took place “*in a purely urban setting where large concentrations of civilians and civilian buildings were closely intermingled with a number of military targets and that the SRK shelling targeted entire civilian neighbourhoods of Sarajevo, without differentiating between civilian and military targets*”.⁵⁹ As stated in the same judgement, no further finding of disproportionality is required where the assaults are directed against civilians and the shelling is indiscriminate.⁶⁰ In the Dordevic Case, the The International Criminal Tribunal for the Former Yugoslavia (ICTY) evaluated evidence that Serbian soldiers used force against Kosovo Albanian towns and villages, destroying religious and culturally significant property. The Tribunal sought evidence that the attacks were proportionate or militarily necessary.⁶¹

Parties in conflict must show mutual respect for each other’s cultural property. Such respect absolutely requires additional precautions to avoid causing any damage to cultural property. Attacks on cultural property might be carried out only when justified by the principle of military necessity. Article 147 of the 1949 Geneva Convention IV prohibits the destruction and appropriation of cultural property during armed conflict unless justified by military necessity. Such action would be a grave breach of the Geneva Conventions.⁶² Baghdassarian asserts that the 1949 Geneva Convention IV protects civilian objects such as churches, sites, monuments, and museums regardless of whether they are military targets or not.⁶³ Attacks on civilian objects cannot be justified on the grounds of military necessity due to the fact that they provide no military advantage and cause harm to civilians. An example of this is the destruction of the Old Town in Dubrovnik. In the Strugar case, the Trial Chamber defined the offence of destruction not justified by military necessity as follows: “*(a) destruction or damage of property on a large scale; (b) the destruction or damage was not justified by military necessity; and (c) the perpetrator acted with the intent to destroy or damage the property or in the knowledge that such destruction or damage was a probable consequence of his acts.*”⁶⁴ The ICTY found evidence of indiscriminate rocket fire in the Old City, which was listed on the World Heritage List in 1979.⁶⁵ The Trial Chamber concluded that this bombardment was intentional, did not target Croatian military facilities, and seriously damaged Old Town. This shelling constituted an attack on both civilians and civilian objects, and resulted in destruction of cultural property

⁵⁸ Commentary of the Article 147 (n 53).

⁵⁹ *Prosecutor v Karadzic* (Judgement) RMCT-MICT-13-55-A (20 March 2019) 477.

⁶⁰ *Karadzic* (n 59) 506.

⁶¹ *Prosecutor v Dordevic* (Public Judgement) ICTY-IT-05-87/1-T (23 February 2011) 2055 https://www.icty.org/x/cases/djordjevic/tjug/en/110223_djordjevic_judgt_en.pdf accessed May 16, 2024.

⁶² 1949 Geneva Convention IV, Article 147.

⁶³ Anoush Baghdassarian, ‘The History Behind the Violence in Nagorno-Karabakh’ (Lawfare, 19 October 2020) accessed 22 June 2023.

⁶⁴ *Prosecutor v Strugar* (Judgement) ICTY-IT-01-42-A (17 July 2008) 326.

⁶⁵ *Strugar* (n 64) 273.

not justified by military necessity.⁶⁶ The Trial Chamber held that a perpetrator must act with a direct intention to damage or destroy the property.⁶⁷ Comparably, the Jokic judgement specifies several offences committed by soldiers, such as the violation of duty to limit their operations to military targets, the inability to distinguish between civilian and military targets, the attack of protected objects⁶⁸, destruction not justified by military necessity, and a prohibition on unlawful attacks on civilian targets.⁶⁹

According to UNESCO reports in June 2023, 112 religious buildings were damaged or destroyed, whereas the Ministry of Culture of Ukraine reported that 305 religious buildings were damaged or destroyed. Unless otherwise proved, these figures indicate of the fact that the Russian Federation has violated Article 147 of the 1949 Geneva Convention IV by destroying and damaging religious buildings without any grounded military necessity.

A treaty provision also becomes binding on a non-party state only if that rule has become part of customary international law. The International Committee of the Red Cross has compiled a collection of customary international humanitarian law rules. According to customary international humanitarian law, it is an obligation to take special care and precautions to avoid damage, unless rendered an absolute necessity for military purposes.⁷⁰ As a result, even if the Russian Federation withdraws from the 1949 Geneva Conventions in the future, it will be in open violation of customary international law when it damages cultural property without compelling military necessity. Although the 1949 Geneva Conventions fail to lay down specifically designed provisions for the protection of cultural property, the 1977 Additional Protocol I includes a special provision for cultural property protection.

B. 1977 Additional Protocol I

While the 1949 Geneva Conventions do not contain a specific provision on cultural property, Article 52 of the 1977 Additional Protocol I provides that civilian property shall not be the target of any attacks or reprisals.⁷¹ According to Article 52, it is a general principle that when a civilian object is used for military purposes, it becomes a military target, thereby becoming vulnerable to attacks or reprisals.⁷² It is stated in the same article that any object, cultural or non-cultural, can be targeted only if

⁶⁶ *Strugar* (n 64) 3.

⁶⁷ *Strugar* (n 64) 278.

⁶⁸ *Prosecutor v Jokic* (Sentencing Judgement) ICTY-IT-01-42/1-S (18 March 2004) 42.

⁶⁹ *Jokic* (n 68) 45.

⁷⁰ Under paragraph b of Rule 38 and Rule 39, it is strictly forbidden to attack properties of significant importance unless it is absolutely necessary for military purposes, Jean Marie Henckaerts and Louise Doswald Beck, 'Customary International Humanitarian Law: Rule 38' (ICRC, 2005) accessed 12 September 2023.

⁷¹ Additional Protocol I, Article 52 (1).

⁷² Additional Protocol I, Article 52 (2).

it is a legitimate military target. Military objectives are restricted to such objects that, regardless of their nature, location, purpose, or use, effectively contribute to military operations and whose neutralization or destruction would provide a definite military advantage under the current circumstances. In other words, a civilian object, including cultural property, may become a legitimate military objective if its nature, location, purpose, or use effectively contributes to military operations and its capture, neutralization or destruction yields a definite military advantage.⁷³ This definition of a military target was also used in the Karadzic case. According to the Decision, the commonly accepted definition of military objectives is regulated in this provision.⁷⁴ In the Strugar case, the fact that the cultural property has not been used for military purposes is a factor indicating that it does not make an effective contribution to military operations. However, the destruction of a military target does not necessarily constitute a military advantage.⁷⁵ Similarly, in the Al-Mahdi case of the International Criminal Court, all the sites were dedicated to religious and historical monuments and were not military targets. With the exception of one Mausoleum, all buildings are listed as UNESCO World Heritage Sites and have the status of protected areas.⁷⁶

Article 53 states that, without prejudice to the provisions of the 1954 Hague Convention, “*historic monuments, works of art, or places of worship which constitute the cultural or spiritual heritage of peoples*” may not be used to support military efforts as barracks or as a part of defense mission, or made the target of hostile acts or reprisals.⁷⁷ Attacks on historical monuments, works of art, or places of worship could constitute grave breaches. The obligation regulated by the 1977 Second Protocol is also stricter than that required by the 1954 Hague Convention, as it does not allow for any derogation, even “*where military necessity imperatively requires such a waiver*.”⁷⁸ Even the States that have not ratified the Additional Protocols have not objected to the applicability of this principle, which stipulates protection of cultural property in the event of international armed conflicts.⁷⁹ According to Article 85, paragraph 4, sub-paragraph d of the Protocol, “*making the clearly-recognized historic monuments,*

⁷³ “A closer look at the various criteria used reveals that the first refers to objects which, by their nature, make an effective contribution to military action... The second criterion is concerned with the location of objects. Clearly, there are objects which by their nature have no military function but which, by virtue of their location, make an effective contribution to military action. This may be, for example, a bridge or other construction. The criterion of purpose is concerned with the intended future use of an object, while that of use is concerned with its present function. Most civilian objects can become useful objects to the armed forces. Thus, for example, a school or a hotel is a civilian object, but if they are used to accommodate troops or headquarters staff, they become military objectives”, Commentary of Article 52 (2), ‘Commentary on the Additional Protocols to the Geneva Conventions’ (ICRC 1987) 636 accessed March 21, 2024.

⁷⁴ Karadzic (n 59) 488.

⁷⁵ Strugar (n 64) 330.

⁷⁶ *Prosecutor v Al Mahdi* (Judgement and Sentence) ICC-01/12-01/15 (27 September 2016) 39.

⁷⁷ 1977 Additional Protocol I, Article 53 (a).

⁷⁸ Commentary of Article 5 (a) (n 73) 647-648.

⁷⁹ Fausto Pocar, *Cultural Property and Military Necessity Under The 1999 Second Protocol in International Conference on the 20th Anniversary of the 1999 Second Protocol of the 1954 Hague Convention, Protecting Cultural Property: Protecting Cultural Property Conference Proceedings* (UNESCO 2020) 101.

*works of art or places of worship, which constitute the cultural and spiritual heritage of the peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing, as a result, extensive destruction thereof... and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives” constitutes a grave breach of international humanitarian law.*⁸⁰

Russia and Ukraine have an obligation to comply with the conventions regulating the law of war to which they are parties, as well as the provisions thereof that have become norms of customary international law. Both States were parties to the 1977 Additional Protocol I, which regulates protections for cultural property. A treaty provision also becomes binding on a non-party state only if that rule has become part of customary international law. In this respect, even if Russia and Ukraine are not parties to the conventions mentioned in this study, all states are bound by the provisions that have become rules of customary international law.

In the conduct of attacks, those who decide to attack shall do everything feasible to verify that the targets to be attacked are not civilians or civilian objects and are not subject to special protection but are military targets within the meaning of Article 52, paragraph 2.⁸¹ Military and humanitarian considerations may affect the feasibility of precautions.⁸² Necessary measures include the timely collection, analysis, and dissemination of intelligence to those who plan, authorise, and execute attacks.⁸³ Due to a lack of information, non-commissioned officers and unit commanders may not have an overview for an adequate assessment of the legality of operations when evaluating a proportionality assessment. The decisive factor will be the information available to such commanders at the time a decision is reached.⁸⁴

Pursuant to the Military Manual of the Russian Federation, using cultural property, historical monuments, places of worship, and other buildings representing the cultural or spiritual heritage of a people “for the purpose of gaining military advantage” is a prohibited method of warfare.⁸⁵ The destruction of cultural property, historical monuments, places of worship, and other objects of the cultural or spiritual heritage of peoples, as well as their non-use for the purpose of achieving success in military

80 1977 Additional Protocol I, Article 85 (4) (d).

81 1977 Additional Protocol I, Article 57 (2) (a) (i).

82 Sassoli et al. (n 44) 19.

83 Michael Schmitt, ‘Targeting in Operational Law’, The Handbook of International Law of Military Operations, Eds. Terry Gill and Dieter Fleck, 2nd Ed. (Oxford 2015) 287.

84 Fleck (n 44) 208.

85 Russian Federation, Instructions on the Application of the Rules of International Humanitarian Law by the Armed Forces of the USSR, Appendix to Order of the USSR Defence Minister No. 75, 1990, 5(s), cited in ‘Practice Relating to Rule 39’ Use of Cultural Property for Military Purposes, <<https://ihl-databases.icrc.org/en/customary-ihl/v2/rule39>> accessed 7 March 2023.

operations, is also prohibited under the Russian Federation's Regulations on the Application of International Humanitarian Law.⁸⁶ The use of cultural property, historical landmarks, or places of worship that are part of a people's cultural or spiritual heritage to support military operations is a prohibited method of warfare, according to the Report on the Practice of the Russian Federation.⁸⁷ While attacking Ukrainian cultural property, the Russian Federation also violates the rules of its domestic legislation.

According to the customary rules of international humanitarian law of the International Committee of the Red Cross,⁸⁸ it is required parties of a conflict must respect each other's cultural property and prohibit the seizure, destruction of or intentional damage to historical monuments and buildings related to religion, charity, education, art, and science as well as works of art and science. Rule 40, paragraph b, prohibits theft, pillage, or misappropriation of cultural property of great importance to the cultural heritage of every people, as well as all acts of seizure, destruction or wilful damage against such property. Russian troops pillaged the Oleksiy Shovkunenko Art Museum in the Ukrainian region of Kherson.⁸⁹ In addition to Mariupol, there have been allegations of looting in many other Ukrainian cities.⁹⁰ Such acts committed by the Russian Federation constitute a violation of customary international law.

Cultural heritage is the subject of a special legal regime in times of conflict. The key standards⁹¹ of the legal protection regime to comply with under circumstances stemming from conflicts include the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its 1999 Second Protocol. The 1954 Hague Convention and its Protocol are the essential core of the law of armed conflict.⁹² In this sense, both the Russian Federation and Ukraine have ratified the Hague Convention of 1954.

86 Russian Federation, Regulations on the Application of International Humanitarian Law by the Armed Forces of the Russian Federation, Ministry of Defence of the Russian Federation, Moscow, 8 August 2001, 7, cited in 'Practice Relating to Rule 39' Use of Cultural Property for Military Purposes, <<https://ihl-databases.icrc.org/en/customary-ihl/v2/rule39>> accessed 20 May 2024.

87 Report on the Practice of the Russian Federation, 1997, Chapter 1.6, cited in 'Practice Relating to Rule 39' Use of Cultural Property for Military Purposes, <<https://ihl-databases.icrc.org/en/customary-ihl/v2/rule39>> accessed May 20, 2024.

88 'Customary International Humanitarian Law: Rule 40' (ICRC, 2005) accessed 12 September 2023.

89 'ICOM Launches the Emergency Red List of Cultural Objects at Risk – Ukraine, International Council of Museums' (ICOM, 24 November 2022 accessed 22 June 2023).

90 Irina Tarsis, 'Ukraine on My Mind: Cultural Heritage and the Current Armed Conflict' (2023) 33 (3) FIPMELJ 566, 573.

91 Bennoune (n 12) 22.

92 Frederik Rosén, *Cultural Property and the International Protection Gap in International Conference on the 20th Anniversary of the 1999 Second Protocol of the 1954 Hague Convention: Protecting Cultural Property Conference Proceedings, Protecting Cultural Property* (UNESCO 2020) 77.

C. 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict

Failures to prevent the loss of cultural property in the First and Second World Wars and other conflicts in the first half of the 20th century have led to significant progress in the protection of cultural property in their aftermath.⁹³ For instance, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict was adopted by the international community in 1954 as the first international treaty on the protection of cultural heritage.⁹⁴ The signatories acknowledge taking measures to protect cultural property in their territories from the effects of armed conflict, as well as to refrain from actions that could damage cultural property.⁹⁵ The provision allows the parties broad freedom to take measures and further stipulates that security shall be ensured primarily by measures taken by the country itself.⁹⁶

Cultural property shall not be regarded and counted as a legitimate target in military operations as per the provision set out in Article 4, paragraph 1, of the 1954 Hague Convention on the respect for cultural property, which states that their use as a target by means and on any grounds or any act of hostility directed against such property is strictly prohibited in order to ward off destruction of or damage to property of cultural significance amidst armed conflicts.⁹⁷ Actually, respect entails not exploiting cultural property in a way that exposes it to destruction or damage, as well as refraining from acts of hostility towards it. This obligation weakened by the addition of a provision specifying that military necessity requires such a waiver.⁹⁸ A church tower, for instance, becomes a legitimate military target that can be attacked and even destroyed if a sniper uses it. The issue here is that international law does not yet consider the use of cultural property for military purposes as an offence.⁹⁹ This obligation is subject to the rule of waiver mentioned in Article 4, paragraph 2, just like any obligation to refrain from hostile acts.

Although the Convention provides for a broad protection regime for cultural property protection, paragraph 2 thereof complicates the application of the regulation

93 Swissinfo (n 20).

94 Moldovan (n 24) 235.

95 1954 Hague Convention, Article 3.

96 Jiri 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* (UNESCO 1996) 61.

97 1954 Hague Convention, Article 4 (1). “This new approach was introduced with the twofold objective of enhancing the importance of respect and waiving the territoriality principle... Amendment has been designed to break with the territorial concept and to affirm the principle that cultural property, wherever situated, must be respected by all States” Toman (n 96) 69.

98 Alexander Herman, ‘Russian Invasion of Ukraine and The International Legal Protection of Cultural Property’ (Institute of Art and Law, 2022) 20 May 2023.

99 Brammertz S, ‘From Dubrovnik to Palmyra: Criminal Prosecutions of the Destruction of Cultural Property in Armed Conflict’ in *International Conference on the 20th Anniversary of the 1999 Second Protocol of the 1954 Hague Convention: Protecting Cultural Property Conference Proceedings, Protecting Cultural Property* (UNESCO 2020) 99.

provisions owing to the exception introduced as the military necessity. There is a rule of refraining from cultural property protection on the grounds of military necessity. In other words, cultural property may be targeted, damaged, or destroyed to achieve a military purpose. Thus, the Convention left state parties with no option but to resort to subjective interpretation by granting them the right to waive imperative military necessity, thus making the protection of cultural property complex and challenging.¹⁰⁰

The notion of military necessity is not specific to the law that regulates cultural property. Military necessity is one of the most fundamental principles of international humanitarian law and was therefore included in the 1954 Hague Convention.¹⁰¹ One of the main areas of concern for States has been the scope and application of this doctrine. Noting that the widespread destruction of cultural property during the conflict in the former Yugoslavia was one of the milestones resulting in the adoption of the Convention¹⁰², the military necessity exception, which exceeds cultural property protection, should be interpreted narrowly. The exception of military necessity to the general principle of targeting cultural property should be regarded as exceptionally unusual rather than as a broad exemption that may be used arbitrarily.¹⁰³ Kirchmair and Schäffer stated that Parties to a conflict should protect cultural property and refrain from seizing, destroying or deliberately damaging cultural property.¹⁰⁴ In *Strugar*, with regard to the crime of destroying or intentionally damaging cultural property, the Trial Chamber held that an act satisfies the elements of this offence as follows: (a) it has caused damage or destruction to property that constitutes the cultural or spiritual heritage of peoples; (b) the damaged or destroyed property was not used for military purposes at the time when the acts of hostility directed against these objects took place; and (c) the act was carried out with the intent to damage or destroy the property in question.¹⁰⁵ In the *Dordevic* case, the Chamber concluded that the two mosques attacked had been subjected to a separate and deliberate attack causing extensive damage. The evidence does not show a specific motive for either attack. In these circumstances, the Chamber is satisfied and finds that the mosques in Celina/Celinë and Bela Crkva/Bellacërkë were vandalised by elements of the Serbian forces and that the villages were vandalised because of their religious and cultural significance for the Kosovo Albanian inhabitants.¹⁰⁶

¹⁰⁰ Jawad et al (n 14) 473.

¹⁰¹ 1954 Hague Convention, Article 4 (2).

¹⁰² Gottlieb Y, 'The Protocol at 20: Observations on Legal Challenges and Inter-Disciplinary Partnerships' in *International Conference on the 20th Anniversary of the 1999 Second Protocol of the 1954 Hague Convention: Protecting Cultural Property Conference Proceedings, Protecting Cultural Property* (UNESCO 2020) 34.

¹⁰³ Bennoune (n 12) 22.

¹⁰⁴ Lando Kirchmair and Cornelia Schäffer, 'The War of Aggression Against Ukraine, Cultural Property and Genocide: Why it is Imperative to Take a Close Look at Cultural Property' (EJIL:Talk!, 21 March 2022) accessed 20 May 2023.

¹⁰⁵ *Strugar* (n 64) 326.

¹⁰⁶ *Dordevic* (n 61) 1810.

This provision is comparable to Article 52 of the 1977 Additional Protocol I. According to Article 52, a civilian object becomes a military target when it is used for military purposes.¹⁰⁷ Nevertheless, this rule should not be so broadly interpreted to apply to cultural property objects, even if they become potential targets of an attack. The ICTY assessed the destruction of the Mostar Old Bridge, which was and is still of “undeniable cultural, historical, and symbolic value”¹⁰⁸ in *Prlic et al* case and rendered the judgement that since the bridge served a military purpose and was a military target, its destruction provided a clear military advantage and was therefore justified by a military necessity. The decision of the Court was condemned for confusing the terms “military objective” and “military necessity” and for neglecting to consider or disregard the consequences of the proportionality and precaution principles. Likewise, it is claimed that disregard is shown for the 1954 Hague Convention’s stipulation that a waiver of “*the obligation to refrain from hostile acts against cultural property*” can only be justified where military necessity requires such a waiver.¹⁰⁹ This waiver ensures the relative freedom of Parties while also significantly weakening the obligation to refrain from exposing property to destruction. The obligation to respect a cultural property is derived only in situations of imperative military necessity, rather than when it is used for military purposes.¹¹⁰

Pocar asserted that it is thus justified to conduct hostile acts against a cultural property due to being a military target only when there is no feasible alternative available to obtain a similar military advantage.¹¹¹ The Convention fails to define the circumstances under which military necessity imperatively requires an exemption from the obligation to respect.¹¹² Given that the Russian Federation has destroyed several cultural properties, including the Yeletsky Dormition Monastery Complex in Chernihiv, the Central City Library Mykhaylo Mykhailovych Kotsiyubynsky in Chernihiv, the St. Anthony Caves in Chernihiv, Derzhprom (State Industry Building) in Kharkiv, Memorial Museum of G. S. Skovoroda in Kharkiv, National Art Museum of Ukraine (House of the Museum of Antiquities and Art) in Kyiv and Kamyana Mohyla (Stone Grave) in Zaporizhzhia since the outbreak of conflict, it can be asserted that these destructive acts in question violated the 1954 Hague Convention.

State Parties are obligated under Article 4, paragraph 3, of the Hague Convention to prohibit, prevent, and halt any form of theft, pillage or misappropriation, and any

107 1977 Additional Protocol I, Article 52.

108 *Prosecutor v Prlic* (Judgement) ICTY- IT-04-74-A (29 November 2017) 416.

109 1954 Hague Convention, Article 4 (2).

110 Toman (n 96) 70.

111 Pocar (n 79) 103.

112 Desch T, ‘*The Second Protocol Supplements The 1954 Hague Convention’s General Provisions Regarding Protection*’ in *International Conference on the 20th Anniversary of the 1999 Second Protocol of the 1954 Hague Convention, Protecting Cultural Property* (UNESCO 2020) 32.

acts of vandalism directed against cultural property.¹¹³ To this end, Parties must refrain from exposing their cultural property to any potential risks by engaging in hostile acts or endangering its immediate surroundings.¹¹⁴ No waiver of military necessity is permitted in the event of such acts.¹¹⁵ The waiver does not apply to reprisals against cultural property.¹¹⁶ Article 4, paragraphs 3 and 4, imposes an obligation on the primary authority in the territory to forbid and thwart such acts, whether committed or perpetrated by military units or civilians.

Given that Russia is a party to the 1954 Hague Convention, it must ensure that cultural property is not exported from areas of conflict in Ukraine. As previously mentioned, there is an allegation that Russian troops have pillaged and transferred to Russia the moveable property in the Oleksiy Shovkunenko Art Museum in the Kherson Region of Ukraine from the outset of Russia's invasion of Ukraine until the present day. If the artifacts in question are registered as cultural property, it would be possible to demonstrate that the Russian Federation's looting violated Article 4, paragraph 3. Due to the Oleksiy Shovkunenko Art Museum is not listed in the State Register of Immovable Monuments of Ukraine as a monument of cultural heritage of national importance in the Kherson Region, the protection of objects in the Museum is regulated by the 1949 Geneva Convention IV and the rules of customary international law.

Article 5, paragraph 2, of the 1954 Hague Convention further obliges the occupying party to "*take measures to protect cultural property*" and even foster close cooperation with national authorities to accomplish this purpose.¹¹⁷ Although it is vividly observed that Russia is in breach of Article 5, no tangible efforts have been made or no further measures have been taken in this regard.

The 1954 Hague Convention contains a provision for states to mark their cultural property so that it can be clearly distinguished. Article 6 of the 1954 Hague Convention titled "*Distinctive Marking of Cultural Property*"¹¹⁸ establishes the blue shield emblem as a protective symbol¹¹⁹ for the identification and safeguarding of cultural property. The blue shield is the cultural equivalent of the Red Cross and it enjoys, legal protection under international law.¹²⁰ The blue shield is defined in Article 16, paragraph 1 of the

113 1954 Hague Convention, Article 4 (3).

114 1954 Hague Convention, Article 4 (1).

115 1954 Hague Convention, Article 4 (2).

116 1954 Hague Convention, Article 4 (4).

117 1954 Hague Convention, Article 5 (2).

118 1954 Hague Convention, Article 6.

119 Jan Hladik, 'Marking of Cultural Property with the Distinctive Emblem of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict' (2004) 86(854) IRRC 379, 379.

120 Jawad et al. (n 14) 473.

Convention as the emblem to be used to identify the Convention's protected property.¹²¹ Although the blue shield emblem is not mandatory for an object to benefit from the Convention's broad protection, it is left to the decision and disposal of the States. The blue shield emblem facilitates determination of what is considered a cultural property under the Convention.¹²²

The challenge for military forces involved in armed conflicts is that State Parties to the 1954 Hague Convention do not expressly describe the objects they recognize as cultural property.¹²³ If a State Party to the 1954 Hague Convention has not complied with Article 3¹²⁴ regarding the need to take peacetime precautions against the foreseeable effects of conflict to be informed in advance of the presence and location of such property in its territory or has not marked cultural property with the blue shield emblem as permitted under Article 6¹²⁵, the hostile Party shall, for the purpose of complying with its obligation of respect under Article 4¹²⁶ of the Convention, take the necessary measures to ensure that the cultural property is marked with the blue shield emblem as required by Article 3.

The extent or length of the list of cultural properties has an immediate impact on the practicability and effectiveness of the blue shield emblem. The protection threshold is lowered when the list of cultural properties consists of an excessive number of objects. This diminishes the likelihood that cultural property will be preserved. When encountered with a high number of buildings bearing the distinctive Convention emblem, the enemy army would feel inevitably forced to violate the military necessity in order to conduct its military operations and would be unable to make decisions on the basis of the significance of this property.¹²⁷

Under particular circumstances, deliberate targeting of marked cultural property may constitute a serious violation of international humanitarian law. States that are parties to the Convention might be reluctant to mark cultural property due to the concern that they will be giving a target list to a prospective adversary, which would make it tougher to enforce military necessity provisions.¹²⁸ While facilitating the

121 1954 Hague Convention, Article 16 (1). In the case of historic palaces, important churches in major urban centres or monument centres, the display of the emblem may cause difficulties. "Another problem may arise from the sudden outbreak of conflict. Even assuming that the necessary preparations have been made in peacetime, will the services concerned have sufficient time and equipment to put up the emblems at the last moment? The Convention leaves the answer to these questions to the appropriate authorities of each High Contracting Party", Toman (n 96) 181.

122 Campfens et al. (n 28) 33.

123 O'Keefe et al. (n 25) 14.

124 1954 Hague Convention, Article 16 (1).

125 1954 Hague Convention, Article 6. Marking is not compulsory, hence it is not a prerequisite for respecting cultural property. If the property lacks a distinctive marker, the responsibility of the other party may be lessened due to ignorance of the existence of a cultural property, Toman (n 96) 90.

126 1954 Hague Convention, Article 4.

127 Toman (n 96) 50.

128 Hladik (n 119) 383.

identification of the cultural property, on one hand, this marking method might also ease deliberate targeting, on the other hand, thereby constituting an implicit threat towards the identified property. In the 1991 attack on the hills of Dubrovnik, Croatia, it was noted that the protective UNESCO emblems were visible from the positions of the attackers.¹²⁹

UNESCO raised concerns about potential hazards to cultural property at the outset of the Russian-Ukrainian War and recommended that cultural heritage should be designated with the blue shield emblem granted by the 1954 Hague Convention to safeguard cultural heritage.¹³⁰ In order to identify what falls within the definition of cultural property under the Convention and with a view to avoiding deliberate or incidental damage, Ukraine has placed the 1954 Hague Convention's distinctive blue shield emblem on monuments and sites.¹³¹

The 1954 Hague Convention on the protection of cultural property at risk from armed conflict places Russia and Ukraine under the obligation to refrain from committing any violation against the relevant provisions. The 1999 Second Protocol strengthens the rules contained in the Convention and, was ratified by Ukraine in 2020.¹³²

D. 1999 Second Protocol Additional to the 1954 Hague Convention

While the 1954 Hague Convention was in force, violations committed against cultural property amidst armed conflicts since the early 1980s have exposed its flaws and clearly demonstrated the need for its amendment.¹³³ The 1999 Second Protocol¹³⁴ was developed to enhance protection¹³⁵ and complement the general provisions on the protection of the 1954 Hague Convention.

The most debated issue during the drafting of the 1999 Second Protocol was the waiver of the obligation to preserve cultural property on the grounds of imperative military necessity. The 1999 Second Protocol clarifies and defines the principle of military necessity, moving further away from the primary objective of the 1954 Hague Convention.¹³⁶ Article 6, paragraph a of the Second Protocol addresses when and how

¹²⁹ Strugar (n 64) 279.

¹³⁰ Dick Jackson, 'Ukraine Symposium – Cultural Property Protection In The Ukraine Conflict' (Articles of War, 14 April 2022) accessed 31 May 2023.

¹³¹ Hausler (n 55) 1; Juliette Portala, 'U.N. Cultural Agency Moves to Protect Ukraine's Heritage Sites' (Reuters, 8 March 2022) accessed 15 May 2023.

¹³² Swissinfo (n 20).

¹³³ 'Historical Perspectives: Relevance and The Added-Value of The 1999 Second Protocol' in *International Conference on the 20th Anniversary of the 1999 Second Protocol of the 1954 Hague Convention, Protecting Cultural Property* (UNESCO 2020) 26.

¹³⁴ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (n 9).

¹³⁵ 1999 Second Protocol, Article 10.

¹³⁶ 1999 Second Protocol, Article 6 (a), (b).

cultural property may become a military target, as well as how to reflect the imperative character of the circumstances necessitating a waiver of the obligation to refrain from any hostile action against such property. A waiver of the imperative military necessity for directing an act of hostility against cultural property shall solely be permitted under the given Protocol if and when the target cultural property is rendered a military target by its function and there is no feasible alternative to obtain a military advantage similar to the one gained through directing an act of hostility.¹³⁷ In other words, the Second Protocol restricts the implementation of the waiver of military necessity to situations in which there is no feasible alternative to obtaining a similar military advantage, and it applies the proportionality principle to avoid or minimize collateral damage.¹³⁸ The conditions must not exist for a very short period of time, but must continue to exist for the duration of the act of hostilities. If these conditions disappear or cease to exist, it will no longer be possible to carry out the act of hostilities in accordance with the imperative military necessity provision.¹³⁹ It is extremely important to recognize this military necessity exception to the rule against targeting cultural property as exceptional, rather than discretionary and easily exploitable loopholes.¹⁴⁰

Ukraine ratified the 1999 Second Protocol¹⁴¹, but Russia did not. Given the accepted principle that international treaties are binding solely between their parties, the more specific definition of military necessity in the Second Protocol would not be directly applicable between Russia and Ukraine. In most provisions, the Protocol enhances the Convention rather than providing additional information. Therefore, some argue that the explanation of imperative military necessity in Article 6 of the Protocol is complementary to Article 4 of the 1954 Hague Convention and that this provision has been incorporated into customary international law.¹⁴² This indicates that any hostile act committed by Russia against Ukraine's cultural property will be considered unlawful unless carried out in accordance with Article 6 of the Second Protocol.¹⁴³

Although the 1999 Second Protocol succeeds in defining the conditions under which a waiver based on imperative military necessity may be invoked with the intention of using items of cultural property for purposes that are likely to expose it to destruction

¹³⁷ 1999 Second Protocol, Article 6 (a).

¹³⁸ Moldovan (n 24) 234.

¹³⁹ Jiri 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) accessed 21 March 2024.

¹⁴⁰ Bennoune (n 12) 22.

¹⁴¹ Ukraine became State Party in 30 June 2020. List of the State Parties of the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict The Hague UNESCO <https://www.unesco.org/en/legal-affairs/second-protocol-hague-convention-1954-protection-cultural-property-event-armed-conflict?hub=66535#item-3> accessed 20 March 2024.

¹⁴² Bennoune (n 12) 22.

¹⁴³ Hausler (n 55) 2; Campfens et al. (n 28) 33; Herman (n 98).

or damage in the event of armed conflict¹⁴⁴, the ambiguous definition of imperative military necessity poses the risk that States will attempt to attribute their actions thereto. Despite a more precise definition of “necessity” in the Second Protocol, there are no guidelines for rationalizing the decision-making process.¹⁴⁵ Recognizing this uncertainty, commanders continue to run the risk of using the imperative military necessity to justify their attacks on cultural property as per the Protocol, rather than limiting their options.¹⁴⁶

III. Conclusion

Cultural property has been intentionally targeted during various armed conflicts, and the inflicted damages thereon as well as the frequency of targeting has been kept increasing in recent armed conflicts. The Russian Federation and Ukraine have an obligation to adhere to the conventions to, which they are parties that, govern the rules of war and customary international law. These rules are typically laid down in international law by the 1949 Geneva Conventions and the 1977 Additional Protocols.

Cultural property has been damaged due to the Russian Federation’s invasion of Ukraine. Cultural property has the status of a civilian object under international humanitarian law. It is therefore entitled to protection under the 1949 Geneva Conventions. Since the Russian-Ukrainian war is an international armed conflict, the 1977 Additional Protocol I is also applicable.

Cultural property is protected by the general rules of international humanitarian law and the specific rules contained in the 1954 Hague Convention. Even while they are protected as civilian objects by international humanitarian law, not every church or monument will be protected as cultural property. The most specific conventions on the protection of cultural property encompass the 1954 Hague Convention, and its 1999 Second Protocol. The 1954 Hague Convention, the 1949 Geneva Conventions and the 1977 Additional Protocols provide protection for cultural property listed in the Ministry of Culture and Information Policy of Ukraine, while artifacts that are not listed can benefit from protection under the 1949 Geneva Conventions. The Russian Federation has broken the rules of the 1954 Hague Convention by damaging the cultural property of Ukraine amidst armed conflict. To remedy and inhibit the reoccurrence of this situation, direct engagement of the Russian Federation is utmost necessary to ensure the cultural property’s eternal existence.

¹⁴⁴ Desch (n 112) 32.

¹⁴⁵ Jawad et al. (n 14) 475.

¹⁴⁶ Craig J.S. Forrest, ‘The Doctrine of Military Necessity and The Protection of Cultural Property During Armed Conflicts’ (2007) 37(2) CWILJ 177, 186.

Peer-review: Externally peer-reviewed.

Conflict of Interest: The author has no conflict of interest to declare.

Grant Support: The author declared that this study has received no financial support.

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