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Values Beyond Ownership: Rethinking Cultural and Civilian Uses of Heritage within International Humanitarian Law

Abstract: Scholarship on international humanitarian law rethinks the current premise within international cultural heritage law that heritage should be protected in wartime based on its great importance to humankind only. The property value of heritage to civilians reveals extrinsic justifications for protecting heritage. The widespread acceptance of international humanitarian law instruments, coupled with the customary nature of some rules related to cultural heritage, can be conducive to heritage safeguarding during armed conflicts. However, this ownership-centred protection may fall short of adequately safeguarding cultural objects that hold significance beyond their property value, particularly artefacts that constitute a part of humanity's shared global heritage. Additionally, an approach primarily focused on property values may exacerbate inequities within the cultural heritage domain by favouring affluent collectors and resource-rich nations more capable of asserting ownership claims. In this sense, overemphasizing ownership rights can result

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in fragmentation, where cultural items are dispersed among private collectors rather than being curated to contribute to the communal narratives surrounding the conflict in which they were pillaged or misappropriated. In broadening the international legal framework that serves the protection of cultural heritage in armed conflicts, the integration of international humanitarian law and heritage law should result in legal responses for the management of cultural heritage in wartime that account for both the civilian-use and cultural value of heritage.

Keywords: cultural heritage, armed conflict, heritage value, international humanitarian law

Introduction

The necessity to protect cultural heritage¹ during armed conflicts sparked the earliest international legal efforts concerning cultural heritage.² Instruments such as the 1863 Lieber Code,³ the 1874 Draft International Regulations on the Laws and Customs of War (Brussels Declaration),⁴ and the 1880 Laws of War on Land (Oxford Manual)⁵ steered the approach that later conventions on humanitarian law adopted towards heritage protection in armed conflict. This approach is evident in the succinct provisions about cultural property in the Geneva Convention (IV) rel-

¹ International cultural heritage law occasionally employs the terms “cultural property” and “cultural heritage” interchangeably, while sometimes emphasizing different dimensions of heritage. Historically, “cultural property” is the predominant term in early treaties and their derived Protocols, including the international humanitarian law treaties that fall within the scope of this research. As these legal instruments articulate heritage protection around property law and ownership rights, “cultural property” is now closely associated with such rights, which constitute the primary focus of this article. However, contemporary heritage lawyers and scholars tend to use “cultural heritage” as an umbrella term to refer to the overall field, as seen in concepts like “cultural heritage law”, for example. In this sense, “cultural heritage” is an overarching term that encompasses both dimensions of heritage: tangible (movable and immovable) and intangible. This article draws on this concept of “cultural heritage” (also referred to simply as heritage) to articulate the central discussion of this article regarding the construction of values attributed to heritage beyond the materiality of property.

² R. O’Keefe, *Protection of Cultural Property*, in: D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 4th ed., Oxford University Press, Oxford 2021; J. Blake, *International Cultural Heritage Law*, Oxford University Press, Oxford 2015.

³ Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, Arts. 35 and 36.

⁴ Draft International Regulations on the Laws and Customs of War, 27 August 1874, Arts. 13(g) and 15. See also J. Toman, D. Schindler (eds.), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, Nijhoff, Leiden 2004.

⁵ Laws of War on Land, 9 September 1880, Art. 32. See also J. Toman, D. Schindler, op. cit.

ative to the Protection of Civilian Persons in Time of War (“Geneva Conventions of 1949”)⁶ and Additional Protocols I (relating to the Protection of Victims of International Armed Conflicts)⁷ and II (relating to the Protection of Victims of Non-International Armed Conflicts),⁸ where international humanitarian law shields cultural heritage incidentally by protecting civilian property. I recast the scholarly debate concerning heritage protection during armed conflict to analyse the extent to which the emphasis placed by international humanitarian law on ownership issues can effectively contribute to safeguarding cultural heritage. The widespread acceptance of international humanitarian law instruments,⁹ coupled with the customary nature of some rules related to cultural heritage,¹⁰ can be conducive to heritage safeguarding during armed conflicts.¹¹ However, the emphasis of international humanitarian law on civilians has implications for the protection of cultural heritage as well, as it becomes entangled with ownership rights. My argument is that international humanitarian law needs to reconsider the position of cultural property within its regime away from the similarity to other forms of protected property.

This alignment between international humanitarian law and cultural heritage law is not without its challenges, particularly because the concept of heritage encompasses historic, artistic, societal, and cultural values that extend beyond individual rights.¹² Focusing solely on ownership rights could disregard these other values. If these values are not adequately considered when protecting cultural heritage during armed conflict, it could lead to an incomplete protection of heritage, especially from a cultural perspective.¹³ This ownership-centred protection may fall short of adequately safeguarding cultural objects that hold significance beyond their property value, particularly artefacts that constitute a part of humanity’s shared global heritage. Additionally, overemphasizing ownership rights can result in fragmentation, where cultural items are dispersed among private collectors rather than being curated to contribute to the communal narratives surrounding the conflict in which they were pillaged or misappropriated. Lastly, an approach primarily focused on property values may exacerbate inequities within the cultural

⁶ 12 August 1949, 75 UNTS 287.

⁷ 8 June 1977, 1125 UNTS 3.

⁸ 8 June 1977, 1125 UNTS 609.

⁹ R. O’Keefe, *Protection of Cultural Property under International Criminal Law*, “Melbourne Journal of International Law” 2010, Vol. 11, pp. 339-392.

¹⁰ J.-M. Henckaerts, L. Doswald-Beck, *Customary International Humanitarian Law*, 3rd ed., Cambridge University Press, Cambridge 2009.

¹¹ International Committee of the Red Cross (ICRC), *Introduction*, “Customary International Humanitarian Law Database”, <https://ihl-databases.icrc.org/en/customary-ihl/v1/in> [accessed: 10.02.2024].

¹² L.H. Fredheim, M. Khalaf, *The Significance of Values: Heritage Value Typologies Re-Examined*, “International Journal of Heritage Studies” 2016, Vol. 22(6), pp. 466-481.

¹³ M. Frulli, *The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency*, “European Journal of International Law” 2011, Vol. 22(1), pp. 203-217.

heritage domain by favouring affluent collectors or resource-rich nations more capable of asserting ownership claims.

The question of whether a regime designed to protect civilians during armed conflict is suitable for protecting cultural heritage offers new directions for both the policy and practice surrounding the protection of cultural heritage in wartime.¹⁴ From a policy perspective, it introduces avenues for enhancing the involvement of international cultural heritage lawyers and institutions with international humanitarian law. When it comes to practice, these directions should encompass the contribution of cultural heritage to the social, cultural, and economic aspects of the communities impacted by armed conflicts. Recent conflicts in Yemen, Syria, Iraq,¹⁵ Ukraine,¹⁶ and Palestine,¹⁷ to name a few, have underscored the significance and timeliness of this discussion.

This article first examines how international humanitarian law protects people's bodily integrity and private property (including cultural heritage) during armed conflicts. This is because the priority of international humanitarian law is to provide minimum standards for how parties should engage in armed conflicts (which include protecting buildings with cultural heritage value). Second, this article examines how international cultural heritage law justifies heritage safeguarding based on its great importance to humankind. International cultural heritage law perceives heritage as something that should be protected as an end in itself, separate from the civilian population.¹⁸ Examining the distinct priorities of regimes in their interactions with cultural property should capture the attention of international cultural heritage lawyers because when regulatory regimes overlap, their priorities can either complement or compete with each other. International humanitarian law protecting cultural objects belonging to civilians exemplifies this complex relationship between different legal regimes (i.e. warfare and cultural heritage).

My contribution to the current debate on cultural heritage protection during wartime centres on rethinking the underlying assumptions of international cultural heritage law. Specifically, I explore how international humanitarian law challenges the conventional notion that the preservation of cultural heritage in wartime is justified solely by its great importance to humankind. To accomplish this, my research

¹⁴ For an examination of the practical predicaments concerning the safeguarding of cultural heritage during armed conflicts, see H. Frowe, D. Matravers, *Conflict and Cultural Heritage: A Moral Analysis of the Challenges of Heritage Protection*, Getty Publications, Los Angeles 2019.

¹⁵ J.D. McCafferty, *UNESCO, Cultural Heritage and Conflict in Yemen, Syria and Iraq*, Springer, Cham 2023.

¹⁶ M. Young, *Saving the Artwork of Ukraine*, "The Wilson Quarterly" 2022, <https://www.wilsonquarterly.com/quarterly/ripples-of-war/saving-the-artwork-of-ukraine> [accessed: 24.06.2024].

¹⁷ F. Cobbing, L. Hulin, *Guest Editorial: Gaza's Cultural Heritage and Intellectual Life*, "Palestine Exploration Quarterly" 2024, Vol. 156(1), pp. 1-3.

¹⁸ For a study on the role of the conservation paradigm and intrinsic value on the 1954 Hague Convention, see L. Lixinski, *International Heritage Law for Communities: Exclusion and Re-Imagination*, Oxford University Press, Oxford 2019; idem, *Legalized Identities: Cultural Heritage Law and the Shaping of Transitional Justice*, Cambridge University Press, Cambridge 2021.

integrates with scholarship that bridges cultural heritage law with international humanitarian law as a legal regime which, despite its limitations, can advance the mission of cultural heritage law in safeguarding cultural heritage.¹⁹ I address these limitations through the lens of values, utilizing the rules of interpretation of international law²⁰ to examine the values (priorities) embedded in treaties that provide for heritage safeguarding during armed conflict. Through a comparative analysis of these priorities, my intervention aids in formulating an interpretation of international humanitarian law that protects cultural heritage both for its property value to civilians and its heritage value. As established on current scholarship, heritage safeguarding also encompasses intangible dimensions of cultural heritage (traditions, rituals, ceremonies)²¹ that international cultural heritage law came to articulate in the Convention for the Safeguarding of the Intangible Cultural Heritage.²² However, this intangible aspect currently falls outside the purview of treaties within the international cultural heritage law realm dedicated predominantly to wartime application. My analysis is centred on values and demonstrates how international humanitarian law, by protecting civilians, can incorporate this community-centred dimension introduced by intangible heritage values.

Priorities of International Law in the Protection of Cultural Heritage during Armed Conflicts

The great wars of the first half of the 20th century provided context for norm production within international humanitarian law.²³ Civilians were the first priority. The existing legal framework during those wars proved insufficient to protect ci-

¹⁹ R. O'Keefe, *Protection of Cultural Property*, in: D. Fleck (ed.), *The Handbook...*; J. Kleffner, *Scope of Application of International Humanitarian Law*, in: D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 4th ed., Oxford University Press, Oxford 2021, pp. 50-79; D. Fleck, *Historical Development and Legal Basis*, in: D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 4th ed., Oxford University Press, Oxford 2021; N. Higgins, *The Protection of Cultural Heritage during Armed Conflict: The Changing Paradigms*, Routledge, London 2020.

²⁰ For rules of interpretation of international law, see C. Djeflal, *How Post-Positivism Sheds Light on Treaty Interpretation: Celebrating the VCLT Rule of Interpretation*, in: L. Siliquini-Cinelli (ed.), *Legal Positivism in a Global and Transnational Age*, Springer, Cham 2019, pp. 277-294; N. Matz-Lück, *Norm Interpretation across International Regimes: Competences and Legitimacy*, in: M.A. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation*, Cambridge University Press, Cambridge 2012, pp. 201-234; U. Linderfalk, *On the Meaning of the 'Object and Purpose' Criterion, in the Context of the Vienna Convention on the Law of Treaties, Article 19*, "Nordic Journal of International Law" 2003, Vol. 72(4), pp. 429-448; International Law Commission, *Tenth Report on Reservations to Treaties by Mr. Alain Pellet, Special Rapporteur*, 1 June 2005, UN Doc. A/CN.4/558; I. Buffard, K. Zemanek, *The 'Object and Purpose' of a Treaty: An Enigma?* "Austrian Review of International & European Law" 1998, Vol. 3, pp. 311-343.

²¹ J. Blake, *Protection of Intangible Cultural Heritage in the Event of Armed Conflict: An Imperative for Cultural Heritage, Humanitarian and Human Rights Law*, "Europa Ethnica" 2017, Vol. 74(3-4), pp. 73-81.

²² 17 October 2003, 2368 UNTS 3.

²³ J. Blake, *International Cultural Heritage Law...*

vilians in enemy and occupied territories. In response to this, the Red Cross played a crucial role in including the protection of non-combatant victims of armed conflicts in international humanitarian law. This non-governmental body hosted and led the diplomatic conferences that negotiated the Geneva Conventions of 1949. Among such conventions, the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (“Geneva Convention IV”) provided for the protection of both private and state property.²⁴

The provisions of the Geneva Conventions of 1949 for protecting private or state property may include cultural heritage. However, as the main focus of international humanitarian law is on safeguarding civilians, this protection depends on the condition that cultural heritage is classified as civilian property or utilized for non-military purposes. This civilian use emphasizes the property value of cultural heritage to civilians. However, the non-military nature of cultural heritage means that the military necessity to win the war takes precedence over the protection of cultural heritage.²⁵ The exemption clause of military necessity (“except where such destruction is rendered absolutely necessary by military operations”) enables military force rather than offering heritage protection.²⁶ The shortcomings of the existing international framework necessitated the adoption of specific rules to protect cultural heritage – a protection that extends beyond its civilian use.

The extensive damage of the Second World War provided context for negotiating a treaty separate from the Geneva Conventions of 1949 to avoid repeating the destruction and damage perpetrated during the Great Wars.²⁷ Since the establishment of the United Nations (UN) in 1945, the United Nations Educational, Scientific and Cultural Organization (UNESCO) has been responsible for “promoting peace through heritage and culture”.²⁸ UNESCO has built on the provisions of the Geneva Convention IV to protect cultural heritage in wartime. While the Geneva Convention IV protects cultural heritage in relation to its civilian use,²⁹ UNESCO adopts legal instruments to protect cultural heritage in its own right. The first legal

²⁴ Article 53 of the Geneva Convention IV reads: “Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations”.

²⁵ N. Higgins, *op. cit.*

²⁶ C. Forrest, *International Law and the Protection of Cultural Heritage*, Routledge, London–New York 2010.

²⁷ This concern is emphasized in the preamble of the 1954 Hague Convention, which states that “cultural property has suffered grave damage during recent armed conflicts and that, by reason of the developments in the technique of warfare, it is in increasing danger of destruction”. See Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, 14 May 1954, 249 UNTS 240.

²⁸ L. Lixinski, *International Heritage Law...*

²⁹ 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*, Routledge, London–New York 1996.

instruments were adopted in 1954, namely, the Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention (“1954 Hague Convention”)³⁰ and its Protocol I.³¹ Differently from the Geneva Convention IV, these treaties do not make the protection of cultural heritage beholden to ownership rights.

The main scope of the 1954 Hague Convention is the direct protection of cultural heritage against destruction, damage, vandalism, theft, looting, and misappropriation during armed conflicts.³² This Convention reflects a shift in the prioritization of international law to the protection of cultural heritage in wartime. This treaty was the first to define “cultural property” and provide an international legal framework applicable to cultural heritage as a category.³³ The definition of cultural property and the adoption of a treaty focused on its protection illustrate international law’s pursuit to safeguard cultural property in its own right. This approach is distinct from how the Geneva Convention IV protects heritage, i.e. as civilian property and subject to military necessity. The Hague Protocol I gives effect to the dispositions of the 1954 Hague Convention by addressing the illegal transfer and movement of cultural property coming from States Parties.³⁴ The 1954 Hague Convention and Protocols apply to both non-international and international armed conflicts, including belligerent occupation.³⁵ For its regulation of warfare and cultural property, the 1954 Hague Convention and Protocols straddle international humanitarian law and international cultural heritage law.

The 1954 Hague Convention and its Protocol I are normative responses from the cultural heritage field to advance the very limited protection the Geneva Convention IV provided for heritage safeguarding during armed conflicts.³⁶

³⁰ 14 May 1954, 249 UNTS 240.

³¹ 14 May 1954, 249 UNTS 358.

³² Article 4 of the 1954 Hague Convention (respect for cultural property) reads: “1. The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the 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; and by refraining from any act of hostility, directed against such property. 2. The obligations mentioned in paragraph 1 of the present Article may be waived only in cases where military necessity imperatively requires such a waiver. 3. The High Contracting Parties further undertake 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. They shall refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party. 4. They shall refrain from any act directed by way of reprisals against cultural property. [...]”.

³³ 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, Cambridge 2017.

³⁴ J. Blake, *International Cultural Heritage Law...*

³⁵ R. O’Keefe, *The Protection of Cultural Property in Armed Conflict*, Cambridge University Press, Cambridge 2006.

³⁶ For more on how the 1954 Hague Convention and its Protocols responded to losses in warfare, see A. Chechi, *Rescuing Cultural Heritage from War and Terrorism: A View from Switzerland*, “Santander Art and Culture Law Review” 2015, Vol. 2(1), pp. 83-100.

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The main contribution of these legal instruments is to establish a cultural-value oriented approach to safeguarding heritage in wartime.³⁷ This cultural-value oriented approach of the 1954 Hague Convention differs from the civilian-use justification for heritage protection that underpins the Geneva Convention IV. Still, the 1954 Hague Convention proved insufficient in two main aspects. First, the special protection granted for cultural property and places that keep them (Article 8) “has never worked as intended and is effectively defunct”.³⁸ The limitation is due to the narrow criterion of eligibility that only grants special protection to refuges that, according to the Convention,

[...] are situated at an adequate distance from any large industrial center or from any important military objective constituting a vulnerable point, such as, for example, an aerodrome, broadcasting station, establishment engaged upon work of national defense, a port or railway station of relative importance or a main line of communication.³⁹

Second, the criminal sanctions intended for States Parties to apply to those who breach the Convention are unclear about their applicability to non-international armed conflicts.⁴⁰ As I discuss later, the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (“Hague Protocol II”)⁴¹ addresses these shortcomings by granting enhanced protection and clarifying criminal sanctions in relation to serious violations, which States Parties must suppress, including through the criminal law and courts of another willing State Party.⁴²

After the adoption of the 1954 Hague Convention and its Protocol I (and before the adoption of the Hague Protocol II), the Protocols Additional to the Geneva Conventions of 1949 were, chronologically, the next international legal instruments to contribute to heritage protection during armed conflicts. Both Additional Protocols were adopted in 1977. The Additional Protocol I is applicable to international armed conflicts, while the Additional Protocol II applies to non-international armed conflicts. The Additional Protocols I and II provide for heritage protection in largely similar terms.⁴³

³⁷ M. Frulli, *op. cit.*

³⁸ R. O’Keefe, *Cultural Heritage and International Humanitarian Law*, in: F. Francioni, A.F. Vrdoljak (eds.), *The Oxford Handbook of International Cultural Heritage Law*, Oxford University Press, Oxford 2020, p. 48.

³⁹ 1954 Hague Convention, Art. 8(1)(a).

⁴⁰ R. O’Keefe, *Cultural Heritage and International Humanitarian Law...*, p. 66. Article 28 of the 1954 Hague Convention reads: “Sanctions. The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention”.

⁴¹ 26 March 1999, 2253 UNTS 172.

⁴² R. O’Keefe, *Cultural Heritage and International Humanitarian Law...*, p. 67.

⁴³ Article 53 of the Geneva Protocol I (Protection of cultural objects and of places of worship) reads: “Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property

Both Additional Protocols reinforced the civilian-use approach of the Geneva Convention IV for protecting cultural heritage in wartime.⁴⁴ The only difference is that the Additional Protocol II does not explicitly prohibit making cultural objects the object of reprisals.⁴⁵ As international humanitarian law, the scope of the Additional Protocols is enabling military force while protecting the civilian population to the greatest extent possible. This background and context are crucial to understanding the legal and political priorities of international humanitarian law, and why its provisions for heritage protection are an incidental outcome, not its primary scope.⁴⁶

In 1999, the adoption of the Second Protocol to the 1954 Hague Convention within UNESCO strengthened the cultural-value oriented approach to protecting heritage during armed conflicts. The Hague Protocol II developed a framework for responding to the new challenges posed by conflicts in the second half of the 20th century, such as the Iran-Iraq war.⁴⁷ The main improvement of the Hague Protocol II was its strengthening of the otherwise limited criminal law provision established by the 1954 Hague Convention. The criminal sanctions established under Article 28 of the 1954 Hague Convention were insufficient to deal with new methods of warfare:⁴⁸

The [1954 Hague] Convention has applied to various States Parties in a number of conflicts in the past fifty-three years. However, the destruction of cultural property in conflicts in Afghanistan following the Soviet invasion, in the Iran and Iraq war, in the first and second Gulf wars, particularly in Kuwait, in the conflict in Cambodia and Vietnam, in the conflict in the former Yugoslavia, and the ongoing conflicts in Lebanon, Israel and Palestinian territories, highlighted a number of inadequacies in the Convention and required its revision, which took the form of a second Protocol to the Convention in 1999.⁴⁹

Moreover, in alignment with its focus on prioritizing the protection of cultural heritage, the Hague Protocol II created the International List of Cultural Proper-

in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited: a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; b) to use such objects in support of the military effort; c) to make such objects the object of reprisals’.

⁴⁴ N. Higgins, op. cit.

⁴⁵ Geneva Protocol II, Art. 16.

⁴⁶ For an analysis of how the law sheds light on the socio-political contexts in which heritage policies are decided upon, see L. Lixinski, *Between Orthodoxy and Heterodoxy: The Troubled Relationships between Heritage Studies and Heritage Law*, “International Journal of Heritage Studies” 2015, Vol. 21(3), pp. 203-214.

⁴⁷ L. Lixinski, *International Heritage Law...*

⁴⁸ J.H. Merryman, *Cultural Property Internationalism*, “International Journal of Cultural Property” 2005, Vol. 12(1), pp. 11-39.

⁴⁹ C. Forrest, op. cit.

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ty under Enhanced Protection.⁵⁰ Such enhanced protection improved the special protection that the 1954 Hague Convention previously established.⁵¹ The Hague Protocol II strengthened this framework by attributing more serious consequences to crimes against property under enhanced protection, as it clearly defines a set of crimes that violate the Protocol.⁵²

By extending and strengthening the criminalization of attacks against cultural property under enhanced protection, the Hague Protocol II highlights nuances surrounding the protection of cultural property (enhanced or special protection) during wartime. This approach is “consistent with one of the main functions of criminal law: to express retribution and, more precisely, not only to express the fact of wrong-doing but also to articulate the degree of wrong-doing”.⁵³

An examination of the international instruments aimed at protecting cultural property in wartime reveals that each instrument prioritizes different perspectives concerning heritage safeguarding. On one hand, the Geneva Convention IV and its Protocols primarily aim to enable military force and avoid civilian harm.⁵⁴ While this civilian protection can also contribute to safeguarding cultural heritage, its relevance is contingent on the classification of cultural heritage as civilian property. Conversely, the 1954 Hague Convention and its Protocols directly protect cultural heritage in armed conflicts as a primary goal.⁵⁵ This deliberate protection is different from the one provided by international humanitarian law *senso stricto*, which protects people first, and heritage incidentally, based on its use for civilians.⁵⁶

The background of international legal instruments providing for heritage protection in armed conflicts contributes to understanding heritage as a discourse

⁵⁰ Hague Protocol II, Arts. 10 and 11. See also 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 Publishing, Paris 2009.

⁵¹ 1954 Hague Convention, Art. 8.

⁵² Article 15 of the Hague Protocol II (Serious violations of this Protocol) reads: “1. Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts: 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 Convention and this Protocol; d. making cultural property protected under the Convention and this Protocol the object of attack; e. theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention. 2. Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences punishable by appropriate penalties. When doing so, Parties shall comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act”.

⁵³ M. Frulli, *op. cit.*

⁵⁴ R. O’Keefe, *The Protection of Cultural Property in Armed Conflict...*

⁵⁵ M. Frulli, *op. cit.*

⁵⁶ J.D. Kila, *Iconoclasm and Cultural Heritage Destruction During Contemporary Armed Conflicts*, in: S. Hufnagel, D. Chappell (eds.), *The Palgrave Handbook on Art Crime*, Palgrave Macmillan, London 2019, pp. 653-683.

connected with legal and political realities and priorities. This section thus analysed how the background and context of different treaties reveal tensions and open contestations about the legal priorities when deterring attacks against cultural heritage in wartime. In turn, understanding the priorities of treaties that provide for heritage protection in armed conflict lays the groundwork for the next section, which examines the “object and purpose” of such treaties and pragmatic dimensions concerning the interaction of these treaties with regard to their scope of application, relationship clauses, and implementation.

The Interaction of Treaties that Provide for Heritage Safeguarding in Armed Conflict

The task of interpreting international law instruments follows the rules of interpretation laid down in the Vienna Convention on the Law of Treaties (VCLT).⁵⁷ According to the teleological rule of interpretation of the VCLT, “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.⁵⁸ The terms of a treaty consist of its text, including its preamble and annexes.⁵⁹ The previous section of this article recast the background and context of international legal instruments that strengthen the protection of cultural heritage during armed conflict through the lens of prioritization. The circumstances surrounding the conclusion of a treaty are a supplementary means of interpretation when the general rule of interpretation “leaves the meaning ambiguous or obscure; or [...] leads to a result which is manifestly absurd or unreasonable”.⁶⁰ Forrest describes these complementary approaches to the interpretation of international law as: (1) an approach that objectively focuses on the literal text of the international instrument, which relates to content and keyword analysis; and (2) a wider approach that interprets international law in light of its object and purpose.⁶¹ I use both the text-centred and the “object and purpose” approaches as my methodology for interpreting international law.

The VCLT also considers “any relevant rules of international law applicable in the relations between the parties”⁶² in order to guide treaty interpretation. This systemic interpretation established by the VCLT is crucial when analysing cultural heritage safeguarding by states that are parties to international humanitarian

⁵⁷ 23 May 1969, 1155 UNTS 331.

⁵⁸ VCLT, Art. 31(1).

⁵⁹ VCLT, Art. 31(2).

⁶⁰ VCLT, Art. 32.

⁶¹ C. Forrest, *op. cit.*, pp. 44-45.

⁶² VCLT, Art. 31(3)(c).

law treaties, but are not parties to one or more conventions on the protection of cultural heritage during armed conflict. As established in the previous section, such protection is mostly incidental when it comes to treaties that aim at humanitarian priorities rather than safeguarding cultural heritage per se. Given its emphasis on ownership rights, international humanitarian law treaties, when singularly considered, have gaps that do not fully protect cultural heritage from a cultural perspective. Therefore, analysing the gaps and contributions⁶³ that arise from the interaction of treaties providing for cultural heritage protection in wartime is of great interest and importance in promoting sustainable heritage safeguarding.⁶⁴ My contribution pertains to how international instruments applicable in wartime can fill the gaps concerning heritage protection when operating interconnectedly.⁶⁵

The Geneva Conventions of 1949 and Additional Protocols I and II

The 1949 Geneva Convention IV relative to the Protection of Civilian Persons in Time of War primarily protects – as its name highlights – persons (not objects or buildings) in wartime. In addition to its name, the structure of the Convention also emphasizes its focus on protecting people. Except for the general provisions (part I) and execution of the Convention (part IV), part II regulates the “general protection of *populations* against certain consequences of war”; and part III, the “status and treatment of protected *persons*”.⁶⁶ Thus the operative text of the Geneva Convention IV reinforces its emphasis on protecting people (not objects or buildings), as the only definition it highlights is the definition of protected persons.⁶⁷ This is why academic scholarship has established that “the object and

⁶³ International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 18 July 2006, UN Doc. A/CN.4/L.702.

⁶⁴ Sustainable heritage safeguarding relates to the principles of inter-generational equity and integration established in the 1992 Rio Declaration on Environment and Development (principles 3 and 4). See UN General Assembly, *Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992)*, 12 August 1992, UN Doc. A/CONF.151/26 (Vol. I). The principle of inter-generational equity underpins the call for preserving cultural heritage for present and future generations, especially in the face of damages of war. The principle of integration encourages research into the role of cultural heritage in advancing paths of sustainable development, such as in L. Pineshi (ed.), *Cultural Heritage, Sustainable Development and Human Rights: Towards an Integrated Approach*, Routledge, London 2024, and C. Bortolotto, A. Skounti (eds.), *Intangible Cultural Heritage and Sustainable Development: Inside a UNESCO Convention*, Routledge, London 2023.

⁶⁵ For an analysis of the need to integrate cultural heritage priorities into humanitarian actions, see I. Bokova, *Culture on the Front Line of New Wars*, “The Brown Journal of World Affairs” 2015, Vol. 22(1), pp. 289-296.

⁶⁶ Geneva Convention IV, Parts II and III (emphasis added).

⁶⁷ Article 4 of the 1954 Hague Convention reads: “Persons protected by the Convention are those who at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals”.

purpose of the Geneva Conventions is the protection of certain groups no longer of military significance”.⁶⁸

The “object and purpose” of a treaty is “firstly, the rights and obligations to which a treaty gives expression – its normative content; second, the state (or states) of affairs envisaged by the parties to be attained by applying the treaty – in some camps referred to as the *telos* (or *telois*) of the treaty”.⁶⁹ Therefore, the rationale connecting the guiding principles and desired aims of the Geneva Convention IV and Additional Protocols is the protection of the civilian population in wartime. Viewed in this context, “cultural heritage is considered *prima facie* a civilian object like any other”.⁷⁰ This perception of cultural heritage as strictly entangled with ownership rights disregards historic, artistic, societal, and cultural values that extend beyond individual rights. As the Geneva Convention IV insufficiently factors in these values, the Convention, considered alone, offers an incomplete protection of heritage.

However, it is worth noting that the Additional Protocols I (Article 53) and II (Article 16), adopted in 1977, refer to the 1954 Hague Convention to explicitly establish the prevalence of the latter in case of a contradiction between the treaties.⁷¹ As I examine next, the Additional Protocols, albeit in a more limited way, reinforce the goal of the 1954 Hague Convention and its Protocols to safeguard heritage in armed conflicts. By establishing a direct interconnection with the 1954 Hague Convention, these Protocols create an avenue for a more sustainable and interconnected approach to safeguarding cultural heritage amid armed conflicts.

The 1954 Hague Convention and its Protocols I and II

The 1954 Hague Convention applies mostly when cultural heritage is targeted in armed conflict. However, the 1954 Hague Convention and its Protocols also set up preventive measures to be organized in peacetime.⁷² Such measures include preparation for the safeguarding of heritage against predictable impacts of an armed conflict;⁷³ military regulation concerning the protection of cultural heritage during armed conflicts; specialized bodies on heritage safeguarding within the armed forces, customs, and law enforcement;⁷⁴ and capacity-building, especially for armed forces and personnel engaged in heritage safeguarding.⁷⁵ Additional preventive

⁶⁸ F. Hampson, *Belligerent Reprisals and the 1977 Protocols to the Geneva Conventions of 1949*, “International and Comparative Law Quarterly” 1988, Vol. 37(4), pp. 818-843.

⁶⁹ U. Linderfalk, *op. cit.*

⁷⁰ R. O’Keefe, *Cultural Heritage and International Humanitarian Law...*, p. 66.

⁷¹ C. Forrest, *op. cit.*

⁷² L. Rush, *Blue Shield Protection of Cultural Property: A Perspective from the Field*, in: S. Hufnagel, D. Chappell (eds.), *The Palgrave Handbook on Art Crime*, Palgrave Macmillan, London 2019, pp. 607-624.

⁷³ 1954 Hague Convention, Art. 3.

⁷⁴ 1954 Hague Convention, Art. 7.

⁷⁵ 1954 Hague Convention, Art. 25; Hague Protocol II, Art. 30.

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measures include the preparation of inventories; the planning of emergency measures for protection against fire or structural collapse; preparations for the removal of movable cultural property or the provision for adequate *in situ* protection of such property; and the designation of competent authorities responsible for the safeguarding of cultural property.⁷⁶

The preventive measures, which are to be implemented regardless of imminent war conditions, highlight the responsibilities for heritage safeguarding to be taken during wartime and peacetime. By instituting such measures, the 1954 Hague Convention and its Protocol II broadened the scope of the Geneva Convention IV and Additional Protocols, which pertain to conditions of warfare. By strengthening the otherwise constrained standards provided by the Geneva Convention IV and Additional Protocols – which lack preventive measures to safeguard cultural heritage – the 1954 Hague Convention and its Protocols address a deficiency in the protection of cultural heritage in wartime. Therefore, these conventions can facilitate a more sustainable approach to heritage safeguarding by operating interconnectedly.

Another contribution of the 1954 Hague Convention and its Protocols concerns the actors involved and institutional arrangements. The International Committee of the Red Cross (ICRC) provides – within the Geneva Conventions of 1949 and Additional Protocols – for the participation of military personnel and security and intelligence services only. The adoption of the 1954 Hague Convention and its Protocols, which specifically focus on heritage safeguarding, emphasizes the requirement to incorporate heritage professionals into the institutional arrangements related to warfare.⁷⁷ Furthermore, the 1954 Hague Convention and its Protocols introduce UNESCO into this discourse. This active participation of heritage professionals and organizations serves as a conspicuous affirmation of the importance of heritage considerations during armed conflict. This engagement also holds significant potential for advancing the cause of sustainable heritage safeguarding.

The 1954 Hague Convention and its Protocols created an avenue for establishing non-governmental organizations specialized in heritage safeguarding, such as the Blue Shield.⁷⁸ The Blue Shield is an international organization with national committees dedicated to the preservation of heritage, particularly during armed conflicts and preparatory initiatives.⁷⁹ The organization's name highlights the importance of conventions tailored for heritage protection in wartime, as Blue Shield draws on the emblem of the 1954 Hague Convention, which “take[s] the form of

⁷⁶ Hague Protocol, Art. 5; C. Forrest, *op. cit.*

⁷⁷ J. Toman, *Cultural Property in War...*

⁷⁸ L. Rush, *op. cit.*

⁷⁹ Blue Shield, *Who We Are*, <https://theblueshield.org/about-us/who-we-are/> [accessed: 25.01.2024].

a shield, pointed below, persaltire blue and white”.⁸⁰ In sum, the 1954 Hague Convention and its Protocols encourage the development of expertise in cultural heritage protection during armed conflict. Such expertise fosters the belief that heritage should be protected in wartime and, in turn, enhances the establishment of standards in this matter. Compared to the Geneva Convention IV and Additional Protocols, the main contribution of the 1954 Hague Convention and its Protocols is to increase the international commitment to heritage protection. The 1954 Hague Convention and its Protocols justify the protection of cultural heritage based on heritage’s universal value, which is clear throughout the preamble and the operative provisions of the Convention, i.e.:

Being convinced that damage to cultural property belonging to any people whatsoever means damage to the *cultural heritage of all mankind* [...]; (preamble)
Considering that the preservation of the *cultural heritage is of great importance for all peoples of the world* [...]; (preamble)

Article 1. Definition of cultural property

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* [...];

Article 7. Military measures

1. The High Contracting Parties undertake to [...] foster in the members of their armed forces a spirit of respect for the *culture and cultural property of all peoples*. [...]

Article 8. Granting of special protection

1. There may be placed under special protection a limited number of [...] centers containing *monuments and other immovable cultural property of very great importance* [...].⁸¹

The Hague Protocol II adopts the same approach:

Article 10. Enhanced protection

Cultural property may be placed under enhanced protection provided that it meets the following three conditions:

- a. it is cultural heritage of the *greatest importance for humanity* [...].⁸²

The emphasis on cultural heritage’s universal value supports the argument that finds “the [1954 Hague] Convention’s ‘object and purpose’ to be the international protection of the cultural heritage of all mankind”.⁸³ Compared to classic

⁸⁰ 1954 Hague Convention, Art. 16.

⁸¹ 1954 Hague Convention (emphasis added).

⁸² Hague Protocol II, Art. 10(a) (emphasis added).

⁸³ R. O’Keefe, *The Meaning of ‘Cultural Property’ under the 1954 Hague Convention*, “Netherlands International Law Review” 1999, Vol. 46(1), pp. 26-56.

international humanitarian law, the 1954 Hague Convention and its Protocols set higher standards for heritage safeguarding during wartime. While international humanitarian law protects cultural heritage as long as it qualifies as civilian property, the 1954 Hague Convention and its Protocols protect heritage in its own capacity due to its importance to humankind. In doing so, the 1954 Hague Convention and its Protocols reinforce the notion that attacks on cultural heritage during armed conflict are wrong and unacceptable.⁸⁴ In this context, the main concern is the destruction of cultural heritage, primarily buildings, including those housing cultural heritage. This concern implies that harm to cultural heritage becomes a consideration in target assessments. Therefore, the 1954 Hague Convention and its Protocols bridge a gap when interacting with the Geneva Conventions of 1949 and Additional Protocols. These latter treaties offer safeguards for civilian and state property against pillage, plunder, and misappropriation, all pertaining to ownership rights. In essence, the Geneva Conventions of 1949 and Additional Protocols furnish overall protection for cultural heritage as a form of property rather than recognizing its value from a cultural perspective.

Safeguarding Cultural Property vs. Safeguarding Cultural Heritage: Insights from International Humanitarian Law

Scholarship came to establish a conceptual difference between cultural property and cultural heritage, based on the dimensions that each concept emphasizes. The term “cultural property” highlights mostly ownership rights and the economic aspects of heritage’s tangible dimensions.⁸⁵ Conversely, “cultural heritage” places weight on “expressions of human creativity and as part of a unique or very special tradition of human skills and craftwork”.⁸⁶ The 1954 Hague Convention emphasizes the tangible dimensions of “cultural property”, which is unsurprising considering that the intangible facets integral to “cultural heritage” found clearer articulation mostly in later international cultural heritage law treaties. Nevertheless, interpreting the 1954 Hague Convention without acknowledging the scholarly and legal discourses surrounding cultural heritage (not only cultural property) would overlook significant factors related to identity, history, and memory that international cultural heritage law has come to emphasize. I draw on this premise to explore how interpreting international humanitarian law from a cultural heritage perspective can facilitate a comprehensive safeguarding of heritage, encompassing both its tangible and intangible dimensions.

⁸⁴ M. Frulli, op. cit.

⁸⁵ L. Lixinski, *International Heritage Law...*; F. Francioni, *Public and Private in the International Protection of Global Cultural Goods*, “European Journal of International Law” 2012, Vol. 23(3), pp. 719-730.

⁸⁶ F. Francioni, op. cit.

The difference between cultural property and heritage is clear in the categories proposed to explain the interaction of humanitarian and cultural priorities which inform cultural heritage protection in wartime. The academic literature uses two categories to classify the place of cultural heritage in international legal instruments for heritage protection during armed conflicts, i.e. according to the civilian-use approach, and the cultural-value oriented approach.⁸⁷ The civilian-use paradigm protects cultural heritage as an instrument for civilian protection. Therefore, buildings with potential cultural significance, such as churches, schools, and hospitals, are protected inasmuch as they safeguard civilian lives.⁸⁸

This civilian-use paradigm emphasizes the focus of international humanitarian law on protecting civilians, including their property.⁸⁹ On the other hand, insofar as concerns the protection of cultural heritage, international humanitarian law provides for non-specific offences against heritage itself. That is, it criminalizes offences against heritage in order to reassure their civilian-use value, not as a way of expressing how unacceptable it is to attack cultural values. For instance, the Additional Protocol I to the Geneva Conventions of 1949 regulates cultural heritage under the chapter concerning civilian objects, which implies that it does not protect heritage based on its intrinsic value, but on its value as civilian property with respect to the affected civilian population. The regulation of cultural heritage as a civilian object demonstrates the prevalence of the civilian-use approach in classic international humanitarian law.

On the other hand, the cultural-value oriented approach prevails in instruments that provide standards “intended directly to criminalize acts against cultural property with a much higher degree of specificity and differentiation in gravity”.⁹⁰ While the cultural-value paradigm informed the 1954 Hague Convention and its Protocol I,⁹¹ it is most visible in the Hague Protocol II. This is because, as previously discussed, the Hague Protocol II addresses the weak criminal provisions of the 1954 Hague Convention by granting enhanced protection and clarifying criminal sanctions. The culture-value paradigm underpins international cultural heritage law. The telos of international cultural heritage law consists of qualifying heritage as worthy of a specific form of protection (or protected due to its connection to an immediate community), i.e. as being different from mere civilian property.⁹²

Thus, while the Geneva Convention IV and its Additional Protocols align with a civilian-use approach in protecting cultural property, the 1954 Hague Conven-

⁸⁷ M. Frulli, *op. cit.*

⁸⁸ *Ibidem.*

⁸⁹ E. Crawford, A. Pert, *International Humanitarian Law*, 2nd ed., Cambridge University Press, Cambridge 2020.

⁹⁰ M. Frulli, *op. cit.*

⁹¹ N. Higgins, *op. cit.*

⁹² M. Lostal, *op. cit.*

tion and its Protocols adopt a cultural-value approach. However, the emphasis of the 1954 Hague Convention and its Protocols on preserving the physical aspects of heritage during armed conflicts (focusing on the tangible material dimension) fails to embrace the intangible facets of heritage. These facets have, however, become more clearly articulated in later treaties within international cultural heritage law, which ultimately inform the scholarly distinction between cultural property and cultural heritage. These different priorities also have practical implications, one example being the doctrine of military necessity.

The doctrine of military necessity illustrates how different rationales and priorities impact heritage safeguarding during armed conflict. International humanitarian law created a limiting rule for heritage protection when the destruction was absolutely necessary for military operations.⁹³ The 1954 Hague Convention, for its part, also recognized military necessity in terms of protecting (or not) cultural heritage.⁹⁴ However, by underscoring the great importance of heritage to humankind, the 1954 Hague Convention, while acknowledging a certain necessity for using force, introduces heritage as a priority that offsets the inclination of international humanitarian law to enable military actions. While the Geneva Convention IV introduced rules that confined heritage protection to scenarios where the attack would not yield military advantage, the 1954 Hague Convention raised the stakes.⁹⁵ By rationalizing the protection of cultural heritage as a concern for all humankind, the cultural-value approach underscores cultural values beyond the civilian-use approach, which primarily centres on the property values of cultural heritage.

From a pragmatic viewpoint, the different priorities of the treaties within the scope of this article impact when and how states internationally commit to protecting heritage in armed conflict. Of course, the greater the number of States Parties to a convention, the more likely it is that the perspectives of this treaty will influence and guide countries in their efforts to protect cultural heritage during wartime. The table below displays the number of States Parties to each of the international legal instruments supporting the protection of cultural heritage during armed conflict, arranged in descending order from the higher to the lower number of Parties:

⁹³ J.H. Merryman, *op. cit.*

⁹⁴ Article 4 of the 1954 Hague Convention (Respect for cultural property) reads: “1. The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the 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; and by refraining from any act of hostility, directed against such property. 2. The obligations mentioned in paragraph 1 of the present Article may be waived only in cases where military necessity imperatively requires such a waiver”. See also C. Forrest, *op. cit.*

⁹⁵ J. Toman, *Cultural Property in War...*

Table 1. Number of States Parties to international legal instruments concerning the protection of cultural heritage during armed conflict

International legal instrument	States Parties
Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War 1949	197 ⁹⁶
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) 1977	174 ⁹⁷
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) 1977	169 ⁹⁸
Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954	135 ⁹⁹
Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954	112 ¹⁰⁰
Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1999	88 ¹⁰¹

As Table 1 shows, the Geneva Conventions of 1949 are ratified by all states,¹⁰² hence they are universally applicable. Since they are considered customary international law,¹⁰³ they provide consistent standards concerning how civilian proper-

⁹⁶ International Committee of the Red Cross (ICRC), *States Parties to the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War 1949*, <https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/state-parties?activeTab=undefined> [accessed: 14.05.2024].

⁹⁷ International Committee of the Red Cross (ICRC), *States Parties to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPAGES_NORMStatesParties&xp_treatySelected=470 [accessed: 14.05.2024].

⁹⁸ International Committee of the Red Cross (ICRC), *States Parties to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPAGES_NORMStatesParties&xp_treatySelected=475 [accessed: 14.05.2024].

⁹⁹ United Nations Educational, Scientific and Cultural Organization (UNESCO), *States Parties to the Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954*, <https://www.unesco.org/en/legal-affairs/convention-protection-cultural-property-event-armed-conflict-regulations-execution-convention#item-4> [accessed: 14.05.2024].

¹⁰⁰ United Nations Educational, Scientific and Cultural Organization (UNESCO), *States Parties to the Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954*, <https://www.unesco.org/en/legal-affairs/protocol-convention-protection-cultural-property-event-armed-conflict#item-4> [accessed: 14.05.2024].

¹⁰¹ United Nations Educational, Scientific and Cultural Organization (UNESCO), *States Parties to the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1999*, <https://www.unesco.org/en/legal-affairs/second-protocol-hague-convention-1954-protection-cultural-property-event-armed-conflict#item-4> [accessed: 14.05.2024].

¹⁰² International Committee of the Red Cross (ICRC), *States Parties to the Geneva Convention (IV)...*

¹⁰³ R. O'Keefe, *Protection of Cultural Property under International Criminal Law...*

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ty (including cultural property) should be protected in wartime. According to the ICRC Customary International Law Study, other rules of customary international law in relation to cultural heritage are:

Rule 38. 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.

Rule 39. 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.

Rule 40. 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.

Rule 41. The occupying power must prevent the illicit export of cultural property from occupied territory and must return illicitly exported property to the competent authorities of the occupied territory.¹⁰⁴

According to the ICRC Customary International Law Study, these rules constitute a consensus among nations on the subject of heritage protection in wartime. The broad acknowledgment of the Geneva Convention IV and Additional Protocols, and the customary status of its rules related to cultural heritage is conducive to heritage safeguarding amid armed conflicts. This protection is particularly apparent in the context of upholding civilians' ownership rights.

Conversely, the 1954 Hague Convention and its Protocols have fewer States Parties. That is, some countries have not yet committed to their obligations, primarily aiming at the safeguarding of cultural heritage in armed conflict, regardless of their relationship with civilians. From a legal perspective, these countries protect cultural heritage in wartime primarily as civilian property. As previously discussed, this civilian-use approach disregards, for instance, preventive measures for heritage protection to be taken in peacetime and the involvement of personnel and institutions working in the cultural heritage field during warfare. When the 1954 Hague Convention and its Protocols are not applicable, the cultural-value approach loses some of its strength, and cultural objects are protected incidentally, much the same as other civilian properties. Therefore, for states that haven't ratified the treaties for the protection of cultural heritage during

¹⁰⁴ J.-M. Henckaerts, L. Doswald-Beck, *op. cit.*

wartime, customary law concerning heritage protection serves as the gateway for integrating the values underpinning international humanitarian law and international cultural heritage law.

The predicaments surrounding cultural heritage protection during armed conflicts can be framed as an issue of “blood and bricks”.¹⁰⁵ “Blood” connotes the protection of civilian lives and property. On the other hand, “bricks” connotes the preservation of cultural heritage’s integrity against harm and destruction.¹⁰⁶ International cultural heritage law currently emphasizes the heritage facets of cultural property. Still, as previously discussed, the 1954 Hague Convention and its Protocols, singularly considered, are still focused on the “bricks”, i.e. the protection of the integrity of the cultural property. Of course, this protection is crucial in the context of bombings, artillery, and other military attacks. However, while the significance of cultural heritage to humankind serves the purpose of rationalizing its protection in wartime under the 1954 Hague Convention, the over-focus on the “bricks” highlights the inadequacies of the 1954 Hague Convention when it comes to addressing the intangible aspects of cultural heritage protection during armed conflict.

The emphasis on the tangible dimensions of cultural heritage leaves aside the intangible dimensions of heritage, such as cultural practices, expressions, and skills deeply rooted in communities’ traditions and passed down through generations. Since these intangible dimensions depend on civilians to be kept alive and to introduce them to new generations, the focus of the Geneva Convention IV and its Protocols on civilian protection can incidentally contribute to safeguarding the intangible dimensions of cultural heritage by protecting the communities that practice and express cultural heritage traditions. This contribution of the civilian-use rationale for protecting intangible cultural heritage in wartime is particularly significant for states that are not Parties to those international cultural heritage treaties specifically designed for safeguarding intangible cultural heritage.

The civilian-use and cultural-value oriented approaches for heritage protection during armed conflicts highlight how “the protection of heritage [in wartime] raises difficult philosophical questions about value, proportionality, [...] and collateral damage with which any proposal for heritage protection must seriously engage”.¹⁰⁷ International cultural heritage law addresses such questions by defending the protection of cultural heritage for its great importance to humankind. This means that international cultural heritage law focuses “specifically on the value of heritage in people’s lives (broadly construed) and presents this as a reason to forcefully defend heritage even if doing so is not a means of achieving other valuable goals”.¹⁰⁸

¹⁰⁵ H. Slim, *Choosing between Human Life and Cultural Heritage in War*, in: J.B. Cuno, T.G. Weiss (eds.), *Cultural Heritage and Mass Atrocities*, Getty Publications, Los Angeles 2022, pp. 299-308.

¹⁰⁶ *Ibidem*.

¹⁰⁷ H. Frowe, D. Matravers, *op. cit.*

¹⁰⁸ *Ibidem*.

In turn, international humanitarian law demonstrates how the global consensus about protecting civilian property can be conducive to enforcing cultural heritage priorities with respect to the protection of cultural property. In this sense, the interaction of international cultural heritage law with humanitarian law can serve as a suitable avenue for advancing and achieving cultural heritage priorities.

The contributions of international humanitarian law to the safeguarding of cultural heritage during armed conflicts respond to the plea of international cultural heritage lawyers for “a less isolated cultural heritage law”.¹⁰⁹ The widespread applicability of international humanitarian law – particularly to states which are not Parties to treaties within the realm of international cultural heritage protection – lends relevance to the insights provided by international humanitarian law. Integrating these legal frameworks involves recognizing heritage as a strategic military concern, as attacks against heritage can undermine the legitimacy of military forces in the eyes of local communities. This factor can wield significant influence over the course of victory (or defeat).¹¹⁰ Additionally, intertwining civilian protection with cultural heritage concerns leads to the safeguarding of the intangible facets of cultural heritage sustained by the civilian populace.

Concluding Remarks

This article addresses the challenges arising from the different priorities of different international legal regimes that provide for the safeguarding of cultural heritage during armed conflicts. In particular, it analyses the goals, strategies, and priorities of international humanitarian law in order to examine the impact of this regime on the protection of cultural heritage during armed conflicts. The main priority that underpins international humanitarian law is the protection of civilians, including their property, in wartime. As the effectiveness of international humanitarian law is measured by its capacity to protect civilian property, cultural heritage lawyers may enquire as to how suitable this regime is for protecting cultural heritage per se. Although the contribution of international humanitarian law is restricted to cultural property owned by civilians or the state, and offset by military necessity, this regime nevertheless provides avenues for protecting cultural objects against pillage, plundering, misappropriation, and destruction. Moreover, by protecting civilians, international humanitarian law also protects their traditions, rituals, ceremonies, and other practices that might constitute intangible cultural heritage.

Scholarship on international humanitarian law rethinks the current premise within international cultural heritage law that heritage should be protected based on its great importance to humankind only. The property value of heritage to ci-

¹⁰⁹ C. Bories, *White Paper 19: Cultural Heritage*, Paris 2023, <https://www.ilaparis2023.org/wp-content/uploads/2023/01/patrimoine-culturel-EN.pdf> [accessed: 12.02.2024].

¹¹⁰ I. Bokova, op. cit.

vilians is used to offer extrinsic justifications for protecting heritage. By drawing on such extrinsic justifications to bridge cultural heritage with international humanitarian law, this article instrumentalizes the civilian use of cultural heritage in wartime to ensure that heritage priorities are taken into account. This contribution is thus significant in terms of broadening the international legal framework that serves the protection of cultural heritage in armed conflicts and impacts legal responses for the management of cultural heritage in wartime to account for the values underpinning international cultural heritage law (the cultural value of heritage) and humanitarian law (civilian-use of heritage).

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