



Overcoming Differences in Cultural Property Protection Thresholds



SUMMARY

Maat cooperates with the International Humanitarian Law Clinic of the Federal University of Rio Grande do Sul (UFRGS) to strengthen the capacities of young people studying international law, combine diverse legal assets and minds in the research of international humanitarian law as well as the different elements within armed conflicts-related issues and its applicable law.

This was achieved by the development of a joint research project on protecting cultural properties under the IHL, through the engagement of youth from Egypt and Brazil within a joint project with the aim of overcoming the linguistic and cultural barriers.

In this project, students participated in developing a definition for cultural property and exploring the relationship between different legal instruments, such as the First Additional Protocol to the 1954 Convention (API). This research has also allowed students to discuss the laws governing the protection of cultural property and their impact on hostilities. Online panel discussions were also organized with experts from the Arab region and Brazil in the field of international humanitarian law

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In conclusion, the Maat Association for Peace, Development and Human Rights and the International Humanitarian Law Clinic at the University of Rio would like to thank group of experts in the field of international humanitarian law from Brazil, Argentina, Iraq, Tunisia and Egypt participated in supporting this research project, and **they are:**

- **Ambassador Moushira Mahmoud Khattab** is an Egyptian politician and diplomat and Chairperson of the National Council for Human Rights in the Arab Republic of Egypt

- **Monia Ammar** Judge at the Court of Cassation in Tunis Former Regional Adviser to the International Committee of the Red Cross- Tunisia

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1. Introduction

Two decades after the destruction of the Bamiyan Buddha, in Afghanistan, by the Taliban, the international community continues to be horrified by multiple violations of cultural heritage¹ during armed conflicts². Throughout these twenty years, the damage to the world heritage came to a point that, in 2017, the United Nations Security Council established a mission with the mandate to protect cultural property under attack in Syria³. Most recently, in 2021, year of publication of this study, attacks are still happening worldwide, for example, the Azerbaijan's attacks on Armenian cultural property in Artsakh⁴, the targeting of Crimean cultural properties by Russia, and the war incidental damages to historical centers in Yemen⁵. On the other side, also in 2021, the International Criminal Court demanded the start of the reparations to the damaged cultural property in Mali. It is the final part of the case that led to the conviction of Ahmad Al Faqi Al Mahdi, in 2016, for targeting and destroying religious and historical sites in Mali, such as the Timbuktu's Mausoleums - attacked in 2012⁶.

Cultural property continues to be a target for military action during armed conflicts, mainly due to four reasons: a) conflicting goals - that could also be understood as a conflict of identities between the Opposing Parties-; b) military-strategic reasons; c) signaling - which could be acknowledged as an attack to cause shock to the international community-; and, d) economic incentives, which comprise the pillage of cultural objects for sale in illegal markets⁷. Despite the economic incentives, the other reasons for attacking cultural property all fall under the premise that cultural property, as part of the heritage of a people, has a great repercussion to the conflict.

¹ Cultural heritage may be understood comprehensively as the cultural legacy of a people or, in other words, the combination of all tangible and intangible things that are passed through generations and, therefore, must be preserved. Cultural property, for its turn, is a subdivision of the Cultural Heritage, encompassing tangible objects, such as monuments and works of art, that are intrinsically related to the materialization of the heritage. For more information see: Prott LV and O'Keefe PJ, "'Cultural Heritage' or 'Cultural Property'?" (1992) 1 International Journal of Cultural Property 307, <<https://www.cambridge.org/core/journals/international-journal-of-cultural-property/article/cultural-heritage-or-cultural-property/B17F38F4873BDA8B21EF1BEA7DCD7D45>> accessed 30 March 2021.

² UNESCO "Commémoration des 20 ans de la destruction des deux Bouddhas de Bamiyan, Afghanistan" (11 March 2021) <<https://whc.unesco.org/fr/actualites/2253>> accessed 30 March 2021

³ UNSC Res 2347 (24 March 2017) UN Doc S/RES/2347

⁴ Hetq Online "Armenian Civil Society NGOs Call on UNESCO to Protect Armenian Cultural Heritage in Artsakh" (06 April 2021) <<https://hetq.am/en/article/129362>> accessed 10 April 2021

⁵ World Heritage Convention, UNESCO, "UNESCO Mobilizes Funds and Expertise to Safeguard Yemen's Cultural Heritage" (11 August 2020) <<https://whc.unesco.org/en/news/2150>> accessed 10 April 2021

⁶ UNESCO "Mali and UNESCO receive symbolic reparation on behalf of international community for destruction of Timbuktu's mausoleums" (30 March 2021) <https://en.unesco.org/news/mali-and-unesco-receive-symbolic-reparation-behalf-international-community-destruction?utm_source=miragenews&utm_medium=miragenews&utm_campaign=news> accessed 10 April 2021

⁷ Johan Brosché, Mattias Legnér, Joakim Kreutz & Akram Ijla "Heritage under attack: motives for targeting cultural property during armed conflict" [2017] 23(3) International Journal of Heritage Studies <<https://www.tandfonline.com/doi/citedby/10.1080/13527258.2016.1261918?scroll=top&needAccess=true>> accessed 30 March 2021

This study aims at analyzing the role international law in protecting cultural property during armed conflicts, "[s]ince wars are generated in the minds of men, it is in their minds that fortresses of peace must be built."⁸

While for most people cultural property and cultural heritage may seem two abstract topics, detached from reality, they have a direct impact on the threshold of protection of cultural objects during armed conflicts. Under international humanitarian law, cultural property is protected in two main bodies of law: the first created by the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and the other originated by the 1977 Additional Protocols to the Geneva Conventions (1977 APs). Both bodies of law provide important contributions for the protection of cultural property, nevertheless the multiplicity of norms dealing with the same subject in times of armed conflict lead to conflict between norms. For example, the different thresholds of protection of cultural property in these bodies of norms, as the 1954 Hague Convention allows attacks against cultural objects if there is a military necessity and, on the other hand, the 1977 APs have a strict prohibition of attack on these objects, with only a reservation for situations in which an Opposing Party uses the cultural property to support military efforts⁹. This case, in particular, raises the question: in case a State is a party to both treaties, which regulation should be applied? Moreover, what is the level of protection of cultural property in such a case?

The difference in the levels of protection is rooted in the ponderation of the basic IHL principles, especially the principle of military necessity and the principle of humanity. Military necessity can be understood as the application of the kind and degree of force necessary to achieve legal military objectives; in a broader sense, this principle can also be understood as provision for permitting the use of the force in order to achieve a legitimate goal. On the other hand, the protection of cultural property is part of the rules of IHL - and has a broader protection than regular civilian objects - because of its importance for people; in this sense, the protection of the cultural property is mainly rooted in the principle of humanity, which prohibits all unnecessary suffering and destruction. This dilemma can also be understood and the principles of limitation (of the damage - precaution), proportionality (between damages and military gains), distinction (that separates the civilian objects from the military ones).¹⁰

This paper will analyze how the principles of public international law and international humanitarian law apply to define which levels of protection of cultural property must be respected, whether the 1954 Hague Conventions' or the 1977 APs', in the light of the theory of conflict between norms. For such purpose, it will be divided into four main subsections of analysis: the historical construction of the definition of cultural property; the protection of cultural heritage under the 1954 Hague Convention and its protocols; the protection of cultural heritage under the 1977 Additional Protocols to the Geneva Conventions; and, the rules governing the conflict between norms under

⁸ United Nations Educational, Scientific and Cultural Organization Constitution, London, 16 November 1945, United Nations Treaty Series, vol. 18, No. 52, p. 383, available from <https://treaties.un.org/doc/Publication/UNTS/Volume%2018/v18.pdf>

⁹ Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict* (1st edn, Cambridge University Press 2009), p. 219.

¹⁰ International Committee of the Red Cross, *International Humanitarian Law: Answers to your Questions* (International Red Cross Press, 2015), p. 46.

IHL. The three former sections will comprise a review of the scholarly opinion on the topic and also point to the specific provisions on the protection of cultural property of both bodies of law under scrutiny. The latter section, for its turn, will address the application of the principles of *lex specialis*, *lex posterior*, most protective rule, and the systemic integration to IHL, as well as their contributions to solve the dilemma of different levels of protection of cultural property under IHL.

As an answer to the questions on the different levels of protection, it is pointed out that there is no previous case that has developed this specific discussion. Nevertheless, as there are similar court cases in the International Court of Justice and in other tribunals, the most likely principle and norm to be applied are the *lex specialis* pointing to the use of the 1954 Hague Convention. On the other hand, it is necessary to say that the applicability of the 1977 APs, on the grounds of the most protective law principle, is not fully excluded, as there are also court cases in international human rights law that indicate the applicability of the higher standard of protection to civilians and their properties.

1.1 Difference from Cultural Heritage

Cultural property is subdivided within the notion of cultural heritage being “capable of encompassing this [within its] much broader range of possible elements, including the intangibles”.¹¹ The term ‘cultural heritage’ is broader than ‘cultural property’.¹²

Cultural heritage expresses a “form of inheritance to be kept in safekeeping and handed down to future generations”¹³, i.e., protection to all kinds of manifestation of human life, including expressions of a way to life that may be embodied in a: 1) tangible aspect which includes a) movable objects, such as artworks (paintings, drawings, sculptures, ceramics, textiles, etc); b) immovable objects, such as ritual, ceremonial sites, natural sites such as lakes and mountains; c) objects of historic, archaeological, and scientific importance; and 2) intangible aspect which includes, for instance, ideas in which new skills, knowledge, and techniques are built as in music, dance, and ceremonies when tradition may be shaped in song, dance, or spoken words.

Meanwhile, cultural property covers only tangible aspects of the protection that is covered under cultural heritage law, but intangibles are not included in common law countries and are only included as a sort of protection in civil law countries, which makes immaterial objects do not fall under the protection of the concept of cultural property.

¹¹ Lyndel V. Prott and Patrick J. O’Keefe, ‘cultural heritage’ or ‘cultural property’, *International Journal of Cultural Property*, (1992), P.309; Francesco Francioni, “Cultural Heritage”, Oxford University Press, November 2020, P. 18,19.

¹² Anna Przyborowska-Klimczak, “Les notions de ‘biens culturels’ et de ‘patrimoine culturel mondial’ dans le droit international”, *Polish Yearbook of International Law*, Vol. XVIII, 1989-1990, p. 51; Lyndel Prott and Patrick J. O’Keefe, “ ‘Cultural heritage’ or ‘cultural property’?” *International Journal of Cultural Property*, Vol. 1, 1992, p. 307; Roger O’Keefe, “The meaning of ‘cultural property’ under the 1954 Hague Convention”, *Netherlands International Law Review*, Vol. XLVI, 1999, p. 26; Janet Blake, “On defining the cultural heritage”, *International and Comparative Law Quarterly*, Vol. 49, 2000, p. 61; Manilo Frigo, ‘cultural property v. cultural heritage: A “battle of concepts” in international law?’, *IRRC*, June 2004, Vol. 86 No 854, P.369 .

¹³ Janet Blake, “On defining the cultural heritage”, *International and Comparative Law Quarterly*, Vol. 49, 2000, P.67; Ibid, Manilo Frigo, ‘cultural property v. cultural heritage: A “battle of concepts” in international law?’, (n 12), P.369.

Thus, cultural property is “*inadequate and inappropriate for the range of matters covered by the concept of the cultural heritage*”.

The concepts of both cultural heritage and cultural property laws are different. ‘Cultural property law’ has been seen as ‘*the right of possessor*’, while ‘cultural heritage law’ is ‘*the protection of heritage for the enjoyment of present and later generations*’, which allows the possibility of access for persons rather than the owner.¹⁴

Such a concept contradicts the right to private property, which is contrary to the core concept of cultural heritage.¹⁵ For example, if an artist made a sculpture, he is the owner and this sculpture could be buried with him, while it is a magnificent cultural heritage and it is considered as an achievement that has to be shown to the future generations. The ‘term’ property could allow people to treat cultural properties as they are their ‘own’ properties, which would give them ‘*the right to alienate, exploit, and exclude others from this property*’ as the term defined in common law countries. In contrast, cultural heritage law gives not only ‘physical protection’ but also allows persons other than the owner to access, this ‘person’ could be the community as a whole.

For instance, in the case of *the Arnamagnaean Foundation v Ministry of Education*,¹⁶ In Iceland, some families had in their possession manuscripts of the great Sagas from Iceland's Golden Age. The Icelander, Arne Magnussen, who was the Danish Commissioner of Lands, collected all the books and papers and bequeathed them to the University of Copenhagen with funds for their care. After many years, the Icelandic Government asked for the manuscripts to be returned, and signed a treaty with Denmark agreeing to the handing of the manuscripts to the University of Iceland. The Arne Magnussen Foundation sued the Ministry of Education on the ground that the Foundation was a private person and that this legislation amounted to expropriation of private property which, in accordance with Section 73 of the Danish Constitution, was only permitted under certain conditions. It thus became an issue to determine whether this was public or private property.

Under international law, not all international legal instruments use the same term in the drafts of their conventions and treaties. Some used the term ‘cultural property’ as mentioned in the 1954 Hague Convention, its Second Protocol,¹⁷ (UNESCO) Convention,¹⁸ and the Unidroit Convention of 24 June 1995. Some scholars who participated in drafting those conventions also used the term ‘cultural property’ in their commentaries on the conventions.¹⁹ On the other hand, some legal instruments wrote the term ‘cultural

¹⁴ Lyndel V. Prott and Patrick J. O’Keefe, ‘cultural heritage’ or ‘cultural property’, (n11), P.309.

¹⁵ Ibid, P.309

¹⁶ *The Arnamagnaean Foundation v Ministry of Education*, (Denmark),1966 UfR 22, 1971 UfR 299.

¹⁷ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1999, Art.1.

¹⁸ Convention Concerning the Protection of the World Cultural and Natural Heritage ‘UNESCO Convention’, adopted at the General Conference of the United Nations Educational, Scientific, and Cultural Organization Meeting in Paris, 21 November1972, Art.1, <https://whc.unesco.org/en/conventiontext/>.

¹⁹ Kurt Siehr, “The Unidroit Draft Convention on the International Protection of Cultural Property”, *International Journal of Cultural Property*, Vol. 1, 1992, p. 321; Riccardo Monaco, “Primo commento della Convenzione di Roma sui beni culturali rubati o illecitamente esportati”, *Rivista di studi politici internazionali*, Vol. 62, 1995, p. 500; Marina Schneider, “La Convention Unidroit sur les biens culturels volés ou illicitement exportés”, *Nouvelles de l’ICOM*, Vol. 49, 1995, p. 18; Vieira Loureiro, “A proteção internacional dos bens culturais: uma nova perspectiva”, *Revista dos Tribunais*, 1995, p. 364; Ridha Fraoua, “Projet de Convention de l’Unidroit sur le retour international des biens culturels volés ou illicitement exportés”, *Aktuelle Juristische Praxis*, 1995, p. 317;

heritage' on their drafts. This is the case of the Conventions stipulated under the auspices of Council of Europe²⁰ and UNESCO²¹.

The use of different terms in the drafts of those conventions and treaties leads to different scopes of protection under each one of them. As mentioned above, the term 'cultural property' does not include the intangibles that are covered under 'cultural heritage' term, which leads to different implementations of the protection of cultural property between the common and civil law countries because of the difference in defining the term 'property', and also the lack of protection of intangibles in most of the states that used the term 'property' in their regional legislations and ratified international agreements that used the same term in their drafts.

1.2 Definitions of Cultural Property and their Historical Construction

Lieber Code

The earliest mention of the codified provisions for the protection of cultural property was in the *Lieber Code of 1863*, which was stipulated as a criminal manual considering the codes to be followed by the union officers during the U.S. Civil War.²² This code called for the protection of cultural property during wartime including the protection of museums, works of arts, libraries, and collections. After the Lieber Code stipulated, the English, Italian, Spanish, German, and Japanese codes stated that movable and immovable properties dedicated to churches, museums, libraries, collections of arts and archives shall be treated as a private property, and be protected against bombardment.²³

Brussels Declarations

Brussels Declarations of 1874 were an initiative by Czar Alexander II of Russia. Upon his call, 15 European delegates met in Brussels to draft an international agreement to organize the laws and customs of wars. Article 17 of The Brussels Declarations stated "*buildings dedicated to art, science, or charitable purposes, hospitals, and places where the sick and wounded are collected provided they are not being used at the time for*

Pierre Lalive, "Une avancée du droit international: la Convention de Rome d'Unidroit sur les biens culturels volés ou illicitement exportés", *Revue de droit uniforme*, Vol. 1, 1996, p. 40; Manlio Frigo, "La convenzione dell'Unidroit sui beni culturali rubati o illecitamente esportati", *Rivista di diritto internazionale privato e processuale*, Vol. 32, 1996, p. 435.

²⁰ The European Convention on the Protection of the Archaeological Heritage, deposited by the Security General of the European Council, (6 May 1969), Art.1, <https://whc.unesco.org/en/conventiontext/>; Convention for the Protection of the Architectural Heritage of Europe, adopted on 3 October 1985 in Granada (Spain) and came into force on 1 December 1987, (Council of Europe Treaty Series no. 121, (1985), Art.1, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/121?module=treaty-detail&treaty-num=121>

²¹ Convention concerning the Protection of the World Cultural and Natural Heritage, (November 1972), Art.1, <https://whc.unesco.org/en/conventiontext/>; UNESCO Convention for the Protection of Underwater Cultural Heritage, (2 November 2001), Art.1, <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/official-text/>; The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, (17 October 2003), Art.2, <https://ich.unesco.org/en/convention>,

²² The Instructions for the Government of the Armies of the United States in the Field ("Lieber Code"), General Order No.100, (1863), Arts. 34-36, <https://ihl-databases.icrc.org/ihl/INTRO/110>

²³ Pietro Verri, "*The condition of cultural property in armed conflicts: From Antiquity to World War II*", *International Review of the Red Cross*, pp. 128-129, para. 29.

military purposes”, and imposed a duty on the besieged to indicate the presence of such buildings to be communicated to the enemy beforehand.²⁴

The 1880 Oxford Manual

The 1880 Oxford Manual drafted by the institute of International Law. This Manual consists of some of the opinions and proposals that were adopted as a manual of the law and customs of war at Oxford in 1880, after studying the Brussels Declaration. Article 34 of the Manual provides thus: *“In case of bombardment all necessary steps must be taken to spare, if it can be done, buildings dedicated to religion, art, science and charitable purposes ... on the condition that they are not being utilized at the time, directly or indirectly, for defense. It is the duty of the besieged to indicate the presence of such buildings by visible signs notified to the assailant beforehand”*.

Lieber Code, Brussels Declarations, and the 1880 Oxford Manual were of a legal value but were not binding over states to comply with their principles. All of them formed the basis of the law of war and under their auspices the Hague Conventions and the Regulations annexed to them were adopted in 1899 and 1907.

The Hague Regulations

After World War II, the destruction of various historical monuments and the lack of regulations tackling the issue made it evident that a new body of laws should be thought of after the atrocities and attacks committed against cultural property during the war. The Italian government then had the initiative of bringing the idea of drafting a convention about cultural property, with the support of UNESCO.²⁵

It was in the fourth session of the General Conference of UNESCO, held in Paris in 1949, that the protection of “all objects of cultural value” was first mentioned in a resolution.²⁶ To examine this specific resolution (6.42), and what it mentioned, the Secretariat set in motion a new study on the issue in cooperation and consultation with the International Council of Museums (ICOM). The study was later discussed at the fifth session of the General Conference, in which Resolution 4.44 authorized the Director-General to prepare and submit to Member States a draft for an international convention.

Various revisions after, and the sixth and seventh conferences to discuss the matter, the Director-General of UNESCO communicated the text of the draft international convention to Member States that replied up to 15 January 1954. The Dutch

²⁴ Ibid, P.129; Jiri Toman, *The Protection of Cultural Property in the Event of Armed Conflict*, (Dartmouth.), p. 9.

²⁵ Final Act of the Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict. The Hague, (14 May 1954), 249 U.N.T.S. 215, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=1A91F360D4048398C12563CD002D6BAF>; Stanislaw E. N, ahlik, *International Law and the Protection of Cultural Property in Armed Conflict*, 27 HASTINGS LAW JOURNAL 1069,(1976), P.1077.

²⁶ UNESCO 4th General Conference, Subfonds 4 C, 19 Sept.-5 Oct. 1949, <https://atom.archives.unesco.org/4th-general-conference-paris>

government, with UNESCO acceptance, hosted an Intergovernmental Conference, which took place at The Hague, in April-May 1954.²⁷

Many years of preparatory work²⁸ gave rise to a Conference at The Hague.²⁹ The Final Act of the Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict and the Hague Convention of 1954 was then signed by thirty-seven States. It widened the preservation of cultural heritage to an international scope, transcending the borders of States for its protection.³⁰ The Convention also concentrated various provisions on the issues related to cultural property into a single text, being considered as a true code for cultural property.

The Hague Regulations cover the protection of immovable and movable cultural heritage, including monuments of architecture, art or history, archaeological sites, works of art, manuscripts, books and other objects of artistic, historical or archaeological interest, as well as scientific collections of all kinds regardless of their origin or ownership.³¹

The definition of Cultural Property in the 1964 Hague Convention has broader aspects than what was stipulated before as it mentioned areas of protection of cultural property that were unseen and unmentioned such as film archives, digital archives, and information.³²

Article 53 of Protocol I and Article 16 of Protocol II³³ prohibited acts of hostility directed against any places related to the cultural or spiritual heritage of peoples, prohibited the use of cultural property as a military object, and also narrowed the principle of “military necessity” that allows the use of cultural property as a military object under certain conditions.

Additional Protocols to the Fourth Geneva Convention of 1949

In 1864, Henry Dunant and his book *A Memory of Solferino* established the roots of the creation of both the first Geneva Convention and the Red Cross. Dunant wrote his book after he witnessed ‘the Battle of Solferino’ in the second war of Italian Independence. He proposed in his book two ideas to end this suffering; first, the creation of humanitarian and relief volunteer groups in each country to provide treatment and assistance to those who were wounded and affected by the war. Second, an international legal agreement that obliges all countries involved in the war to provide humanitarian aid.

²⁷ Final Act of Intergovernmental Conference (n25), <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=1A91F360D4048398C12563CD002D6BA>

²⁸ From 21 April to 14 May 14, 1954.

²⁹ Final Act of the Intergovernmental Conference (n25,27), <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=1A91F360D4048398C12563CD002D6BA>

³⁰ Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954, it was signed on 14 May 1954 and entered into force on 7 August 1956, <https://ihl-databases.icrc.org/ihl/INTRO/400>.

³¹ Ibid, Art 1.

³² Ibid, Art.1.

³³ Protocol Additional to the Geneva Conventions of 12 August 1949, Art.53, <https://ihl-databases.icrc.org/ihl/INTRO/470>

In October 1863, after many discussions and delegations with 16 countries and medical workers gathered in Geneva, the first Geneva Convention came into birth and was signed by 12 nations. This first convention of 1864 was updated in 1909 and 1929. It provides protection for the wounded and sick, but also for medical and religious personnel, medical units and medical transports. While the Second Geneva Convention of 1949 provides protection to the wounded, sick, and shipwrecked military personnel at sea during war, the Third Geneva Convention applies to prisoners of war, and the Fourth Geneva Convention protects civilians, including those in occupied territory, the protection of cultural property was firstly stipulated in the 1977 additional protocols to the Fourth Geneva Convention of 1949 which were adopted in response to the increasing of non-international armed conflict. The first additional protocol was adopted to provide protection to the victims of wars and the second was devoted to non-international armed conflict. Article 53 of Protocol I and Article 16 of Protocol II³⁴ both prohibited acts of hostility directed against any places related to the cultural or spiritual heritage of peoples, prohibited the use of cultural property as a military object, and also narrowed the principle of “military necessity” that allows the use of cultural property as a military object under certain conditions.

Rome Statute and Cultural Property

Under International Criminal Law, the 1998 Rome Statute included in its definition of war crimes; attacks against buildings dedicated to religion, education, or charitable purposes, historic monuments.³⁵

UNESCO and Cultural Property

The UNESCO Convention of 1970 was drafted to combat illicit trafficking of cultural property and relates in its definition to the protection of movable cultural property.³⁶ In 1972, the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage relates to the definition of cultural property as a heritage with significant universal value.³⁷

Nowadays, cultural property is defined and protected in its physical objects and intangible elements that was finally mentioned in the 2003 UNESCO Convention for Safeguarding of Intangible Cultural Heritage.³⁸

Eventually, there is no unified definition of the concept of cultural property, which may lead to different interpretations of cultural property in each convention and

³⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, Art.53, <https://ihl-databases.icrc.org/ihl/INTRO/470>

³⁵ UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, Art. 8 (2bix), <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>

³⁶ UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property (The 1970 Convention), (1970), Art.1, http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html

³⁷ Convention Concerning the Protection of the World Cultural and Natural Heritage, (1972), Arts. 1,2, <https://whc.unesco.org/en/conventiontext/>.

³⁸ Convention for the Safeguarding of the Intangible Cultural Heritage, adopted by the UNESCO General Conference on 17 October 2003, entered into force in 2006, Art.2, <https://ich.unesco.org/en/convention>.

agreement. This will pose many obstacles such as: it may lead to different scopes of protection of cultural property in states that signed and ratified different conventions. Consequently, this will lead to a lack of application of the principles stipulated to protect cultural property.

2. Protection of Cultural Property under the Hague Regulations of 1954 and its Additional Protocol

2.1 Protection of Tangible Aspects under the Hague Regulations on Cultural Property

The most seen and perceptible protection in the 1954 Hague Regulations on Cultural Property is given to the tangible heritage, such as monuments, buildings and objects. When defining the term cultural property,³⁹ the convention mentions movable or immovable property, such as monuments, works of art, books and archives. It also encompasses buildings such as museums, libraries and centers containing a large amount of cultural property. All those examples relate to protection of tangible aspects.

One important restriction that appears in the text of Article 1 is that the mentioned protection should be of “great importance” to the cultural heritage of peoples. Such restriction was adopted by the Main Commission of the Conference⁴⁰. Although it restricts the definition only to objects of great importance, it does not mention value, putting into consideration that objects even when of a lower value could be of an extreme importance to peoples.

In terms of the scope of protection, the Convention applies in all cases of international armed conflict, even if the state of war is not recognized by one of them. There is not a need for a formal declaration of war to trigger the application of the Convention. It also applies in cases of occupation of the territory of a High Contracting Party⁴¹. Article 19 raises the issue relating to the application in non-international armed conflicts (NIACs), affirming that the Parties “shall be bound to apply, as, at a minimum, the provision of the present Convention which relates to respect for cultural property”.

Concerning the granting of special protection to cultural heritage, the entering into the International Register is a decision of the State in which the property, to be specially protected, is located. These objects shall not be situated near an important military objective, naming “aerodrome, broadcasting station, establishment engaged upon work of national defense, a port or railway station of relative importance or a main line of communication.”⁴² However, if the High Contracting Party requests the protection of cultural property that is located near important military objectives it must undertake, in the event of the armed conflict, to make no use of the objective and in the case of a port, railway station or aerodrome, to divert all traffic from there, and such

³⁹ The Hague Regulations on Cultural Property, was adopted at The Hague (Netherlands) in 1954, Art.1.

⁴⁰ Toman, Jiri, “*The Protection of Cultural Property in the Event of Armed Conflict*”, Legal Monographs and Treatises, Aldershot, England; Brookfield, Vt.: Dartmouth; Paris: Unesco, (1996), pp.45-57.

⁴¹ The Hague Regulations on Cultural Property, was adopted at The Hague (Netherlands) in 1954, Art.18.

⁴² Ibid., Art. 8(1)(a).

diversion has to be prepared in time of peace.⁴³ They also cannot be used for military purposes. The movable property can receive special protection as well, a refuge for it can be placed where, in all probability (as article 8(2) states), it would not be damaged by bombs.

Additionally, tangible cultural property may bear a distinctive emblem to facilitate its recognition⁴⁴. This emblem must be “in the form of a shield, pointed below, per saltire blue and white, and of a royal-blue triangle above the square, the space on either side being taken up by a white triangle”.⁴⁵Article 16(2) details that the emblem can be used alone (to distinct cultural property not under special protection; persons responsible for the duties of control in accordance with the Regulations for the execution of the Convention; personnel engaged in the protection of cultural property and identity cards mentioned in the Regulations for the execution of the Convention), or repeated three times in a triangular formation (to identify immovable cultural property that is under special protection; transport under special protection used in the transfer of cultural property⁴⁶ and in urgent cases⁴⁷; and to distinct improvised refuges, under the conditions provided for in the Regulations for the execution of the Convention).

Furthermore, the protection given by the Additional Protocol I (1977) with its adoption, happened due to the systematic pillage of the occupied territories, which was prohibited by the 1907 Hague Regulations. Since such prohibition was not enough it was in Protocol I that the principle of the restitution of cultural property - that has changed hands and been exported during a period of occupation - was established⁴⁸.

In addition, the adoption of Protocol II (1999) also improved the protection of cultural property. This Protocol introduced some new provisions relating to the precaution in attack, and precaution against the effect of hostilities⁴⁹. Article 7 states that it is the parties' duty to do everything feasible to verify that the objectives to be attacked are not cultural property and to take all feasible precautions in the choice of means and methods of attack to be used, in order to minimize incidental damages to cultural property. In relation to the effects of hostilities, Article 8 prescribes that the parties to the conflict shall “to the maximum extent feasible” remove movable cultural property from the vicinity of military objectives and to avoid locating military objectives near cultural property.

Besides that, Article 15 brings the issue of serious violations and declares that it is the case when the property, under enhanced protection, is the object of attack and is used, alongside with its immediate surroundings, in support of military action. It also proclaims that extensive destruction or appropriation of cultural property protected under the convention and the protocol is a serious violation. Theft, pillage,

⁴³ Ibid., Art. 8(5).

⁴⁴ Ibid., Art. 6.

⁴⁵ Ibid., Art. 16(1).

⁴⁶ Ibid., Art.12.

⁴⁷ Ibid., Art. 13.

⁴⁸ Toman, Jirí, *The Protection of Cultural Property in the Event of Armed Conflict* (1996), (n.40), pp.45-57

⁴⁹ Toman Jirí, “*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 Confl*”, (n.40, 48), pp.45-57

misappropriation and acts of vandalism directed against cultural property appear in the text of the article as well.

The Hague Regulations on Cultural Property of 1954 and its Additional Protocols (1954 and 1999) enhanced the importance of the protection of cultural property in a way that takes into account the myriad of situations that may occur within the reality of armed conflict, considering the different situations that armed forces on the field may face themselves with.

2.2 Protection of Intangible Heritage under the Hague Regulations on Cultural Property

In armed conflicts, with special consideration to conflicts of ethnic, cultural and religious character, tangible elements such as monuments, churches and places of worship shall be protected. However, other aspects of cultural heritage should also be considered, such as the intangible aspects of such heritage.

Intangible cultural heritage relates to the cultural background of peoples through their spiritual identity and ethnicity. In this sense, the individuals who are the bearers or interpreters of such ethnicity pass their knowledge to the newer generations through orality and gestures.⁵⁰ The Hague Regulations on Cultural Property mainly regulate tangible cultural heritage. However, even if the intangible scope of cultural heritage is not the main subject of this Convention, this aspect is indirectly mentioned and recognized.

Article 36 of the Hague Regulations on Cultural Property details its relation to previous conventions, citing the Hague Convention IV (1907), that concerns the Laws and Customs of War on Land, and that the Convention of 1954 shall be supplementary to the former ones. In this sense, we can also look for the protection of intangible heritage in the IV Hague Convention, that adds “education” in its text when relating to the protection of cultural property⁵¹, showing that it is not only the cultural property itself that should be protected but also what it represents, relating to the activities that are carried in such property and that the protection of intangible aspects is given through the implementation of the knowledge that is transmitted in those buildings.

Furthermore, relating to law of armed conflict in the event of military occupation, Convention IV specifies the obligation to respect religious convictions and practice⁵² and not only the location where such rituals are held. It demonstrates a concern for the religious customs of peoples and its spiritual heritage.

All things considered, it is clear that the tangible aspects are much more embodied in the Hague Regulations in relation to the intangible ones. Hence, the Geneva Conventions of 1949 have a fundamental role when relating to the issues of the intangible aspects, as it was in its text that the protection to individuals, regarding both

⁵⁰ Johannot-Gradis C, “*Protecting the Past for the Future: How Does Law Protect Tangible and Intangible Cultural Heritage in Armed Conflict?*” 97 *International Review of the Red Cross* 1253, (2015), P.1272,1273.

⁵¹ Hague Regulations IV, Laws and Customs of War on Land, signed at The Hague October 18, 1907, with annex of regulations, Art.56.

⁵² *Ibid*, Art.46.

their physical well-being and their human dignity, and, relating to the protection of “living cultural heritage”, their cultural and spiritual identity was directly mentioned.⁵³ It constitutes an addition to the rules adopted in the 1954 Hague Conventions and in the Hague Convention IV because the intangible cultural heritage is clearly acknowledged.

3. The Protection of Cultural Heritage in the Geneva Conventions and its Additional Protocols

During the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (also known as the conference of the reform of the Geneva Conventions), which took place from 1974 to 1977, the topic of protection of cultural property did not have a special status in the agenda. By the time, the International Committee of the Red Cross stated that the norms of the Hague Convention of 1954 had no need for alteration. Nevertheless, both Additional Protocols to the Geneva Conventions of 1977 have specific provisions for protection of cultural property. This happened partially because many diplomatic representatives proposed the insertion of articles under Geneva Law for creating a special regime for cultural property, in order to emphasize the importance of the protection of cultural heritage. Therefore, the scope of the Additional Protocols is broader than the one of the 1954 Hague Convention, as it reflects the progressive understanding of the definition of cultural property, which innovates by also encompassing the notion of spiritual heritage.

The Additional Protocol I (AP I) comprises the main normatives on cultural property in times of international armed conflicts (IACs). It defines three levels of protection for cultural property: the special regime; the protection of civilian objects; and the protection from incidental damage. The most protective level is the special regime established by its **Article 53**:

Article 53 — Protection of cultural objects and of places of worship

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property 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.⁵⁴

Under the provisions of Article 53, targeting cultural property is prohibited, and has no derogation in cases of “military necessity” - differently from the provisions of the Hague Convention of 1954. Nevertheless, if the Opposing Party uses a cultural object “in

⁵³ Additional Protocol I to the Geneva Conventions of 1949, Art. 53(a), Additional Protocol I to the Geneva Conventions of 1949, Geneva, 8 June 1977, United Nations Treaty Series vol. 1125, no. 17512, p. 3, Art. 5, available from <https://treaties.un.org/doc/Publication/UNTS/Volume%201125/volume-1125-I-17512-English.pdf> accessed 30 March 2021; Additional Protocol II to the Geneva Conventions of 1949, (adopted 8 June 1977, entered into force 7 December 1978), United Nations Treaty Series vol. 1125, no. 17512; Art.16, available from <https://www.ohchr.org/en/professionalinterest/pages/protocolii.aspx>, accessed 30 March 2021.

⁵⁴ Ibid, Additional Protocol I to the Geneva Conventions of 1949, Art. 5.

support of the military effort” (Article 53, b), it precludes the immunity of such objects - releasing the other Party from the obligations of Article 53 (a). The meaning of “military effort” has multiples interpretations, but the ICRC defines it in the Commentaries to the AP I, para. 2078, **as:**

[...]a very broad concept, encompassing all military activities connected with the conduct of a war. It is prohibited to benefit from protected objects (passive support), as well as to use them (active support), for example, by including them in a defence position.

Therefore, when Article 53 (b) is violated, the next level of safeguard of cultural property that the Opposing Party needs to comply with is the protection of civilian objects, provided in Article 52. Civilian objects, as stated in Article 52 (2), may only be targeted if the attack “offers a definite military advantage”⁵⁵. If both requirements for waiving the obligations of Article 53 (a) and for applying Article 52 (2) are met, the protection of cultural property still has to comply with the principle of proportionality and precautions, as stated by the para. 2079 of the ICRC Commentaries⁵⁶. This is summarized **by O’Keefe:**

“As applied to cultural property, proportionality implicates qualitative as much as quantitative factors. In other words, the extent of incidental loss occasioned by damage to or destruction of historic monuments, works of art or places of worship is a question not just of square metres but also of the cultural value represented thereby.”⁵⁷

For its turn, the Additional Protocol II (AP II), which concerns the rules on non-international armed conflicts (NIACs), provides for the the protection of cultural property in Article 16⁵⁸⁵⁹. While AP I recognizes the applicability of other international treaties on the protection of cultural property, AP II only acknowledges the applicability of the Hague Convention of 1954. This restrictive provision precludes, for example, the application of the Roerich Pact⁶⁰ to NIACs.

4. Limits and Possibilities of the 1954 Hague Convention and of the Additional Protocol I to the Geneva Conventions of 1977

According to the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict, all cultural property must be afforded, at minimum,

⁵⁵Ibid, Art. 52 (2)

⁵⁶ International Committee of the Red Cross, “*Commentary of 1987 Protection of Cultural Objects and of Places Of Worship*” (Treaties, States Parties and Commentaries, 1987), <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/501d619ba5e17158c12563cd00434af5>> accessed 30 March 2021.

⁵⁷ Roger O’Keefe, *op cit* p. 219.

⁵⁸ The provisions of Article 16 of AP II resembles Art. 53 of AP I.

⁵⁹ Additional Protocol II to the Geneva Conventions of 1949 (Art. 16), Geneva, 8 June 1977, United Nations Treaty Series vol. 1125, no. 17513, p. 609, available from <https://treaties.un.org/doc/Publication/UNTS/Volume%201125/volume-1125-I-17512-English.pdf> accessed 30 March 2021

⁶⁰ Sponsored by the Russian Nicholas Röerich, the Roerich Pact was presented at the League of Nations in 1930, and also in the Panamerican Union, in 1933. The Roerich Pact is still valid up to today in the 21 signatory States of the Americas, fully protecting cultural property and workers from cultural and historical institutions in times of peace and war. Nicholas Roerich Museum, “The Roerich Pact and the Banner of Peace”, <<https://roerich.org.br/pacto-roerich/>> accessed 10 April 2021.

“general protection,” as described in the Convention, applicable to all movables and immovables. Moreover, the convention introduced the special protection regime.

Under the 1954 Convention, the obligation to respect all cultural property may be waived on the basis of imperative military necessity. The Convention has wide material jurisdiction, it applies in peace time, in case of armed conflict and in occupation. Pursuant to Article 3 of the 1954 Convention, States undertake to prepare in time of peace for the safeguarding of cultural property against the foreseeable effects of an armed conflict “by taking such measures as they consider appropriate”. But the Convention does not provide any further details on measures States should take, however the second protocol to the convention tackled this point.

The Second Protocol to the Hague Convention 1999 aims to provide more guidance in this respect, as it provides specific examples of concrete measures to be taken in time of peace. The adoption of the Second Protocol is an important step forward in the legal protection of cultural property in armed conflict. The Protocol addresses the weaknesses of the 1954 Convention and offers adequate solutions. Its main achievements are that it:

- Clarifies the obligations to take precautionary measures and disseminate the Convention and the Second Protocol
- Updates the 1954 Convention by introducing concepts contained in Additional Protocol I of 1977
- Offers the opportunity to make the regime of “special protection” effective by replacing it with a new and improved system of “enhanced protection”
- Improves the enforcement mechanism by defining serious violations which have to be punished with a criminal sanction and by imposing a duty upon States to establish jurisdiction over those violations
- Develops humanitarian law by defining those serious violations and by extending the scope of application to non-international armed conflicts.

Another beneficial effect of the Second Protocol is that more attention has been given to the 1954 Convention itself. As a result, a considerable number of States have ratified the 1954 Convention since the review process started and more are in the process of ratification. Much remains to be done, especially as far as marking of cultural property and dissemination are concerned, but at least awareness of the problems has been heightened.

The Convention ‘shall also apply to all cases of partial or total occupation⁶¹ of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance’. While under the Geneva Convention Additional Protocol I the obligation is stricter than that imposed by the 1954 Hague Convention, since it does not provide for any derogation, even “where military necessity imperatively requires such a waiver”.⁶² As

⁶¹ 1954 Convention, Article 8(1).

⁶² When the Parties to the Protocol are also Parties to the Hague Convention of 1954, these derogations continue to apply, though it is understood that an attack may never be launched against an objective which is not a military objective in the sense of the Protocol. If one of them is a Party to the Protocol and not to the 1954 Hague Convention, no derogation is possible. The prohibition on attacking objects which are not military objectives, as well as the definition of the latter given in Article 52, para. 2, also apply when the Hague Convention of 1954 is applicable: thus the effect of Article 52 of Protocol I is to limit the possibilities of derogations allowed by the Hague Convention. This is an important development for the protection of cultural objects.

long as the object concerned is not made into a military objective by those in control - and that is not allowed - no attack is permitted. As there are no exceptions, the obligation must be considered to apply to all objects concerned, regardless of the territory where they are situated.

5. Principles to be considered

As per the principle of the sovereignty of States, a State shall not be obliged to do or to refrain from doing anything except when it binds itself through its unilateral will. Consequently and unlike in domestic law, public international law is not hierarchical with respect to the relationship between legal norms, but horizontal,⁶³ since there is no single code of public international law and no hierarchy between the different sources,⁶⁴ including between one treaty and another. As a result of this loose organization in the international legal order, some conflicts between different norms arise. However, in international law there are some techniques for dealing with such a conflict, such as *lex specialis*, *lex posterior*, and others.⁶⁵ These shall be further developed upon in the following pages.

5.1. *Lex posterior*

Lex posterior derogat legi priori (lex posterior) means the later in time obligation is favoured over the earlier obligation if certain elements are fulfilled. This principle was not meant to place any kind of hierarchy between sources of international law, it only provides an ad hoc solution to solve conflicts that arise between international norms. It was applied previously by the Permanent Court of International Justice (PCIJ) in numerous cases including the Mavrommatis Concession cases and the Electricity Company of Sofia case.⁶⁶ yet now it is rarely applied whether nationally, regionally, internationally.⁶⁷

The applicability of the principle is implied in the context of article 30 (VCLT) which implies that when all the parties to a treaty are also parties to an earlier treaty on the same subject, the earlier one would only apply to the extent that its provisions are compatible with those of the later treaty. Hence prioritizing the application of the later

⁶³ Cassese, Antonio, *International Law*, (2nd ed, Oxford University Press, 2005, p. 198.

⁶⁴ It is worth mentioning that there is a special class of rules, referred to as *jus cogens*, to which the international community attributes a special legal force. These norms are peremptory in nature. Any newly established rules that seek to derogate from them are, as such, to be declared null and void. So, it may be considered that such norms hold a superior rank and status in comparison to the other rules present in international law.

⁶⁵ *Lex posterior*, *lex specialis* and other concepts that will be mentioned in this article are commonly referred to as principles. We recognize them as techniques rather than principles, for they were posteriorly devised in order to solve specific problems rather than laid out at the foundation of international law. However, in respect to common name conventions and in order to avoid confusion, hereinafter they shall be eventually referred to as principles.

⁶⁶ Mavrommatis Palestine Concessions, (*Greece v UK*), (1924), PCIJ, Rep Series B No 2, 31; Jurisdiction of the European Commission of the Danube (Advisory Opinion) [1927] PCIJ Rep Series B No 14, 23; Electricity Company of Sofia and Bulgaria (*Belgium v Bulgaria*), (1939), PCIJ, Rep Series A/B No 77, 92.

⁶⁷ de Wet, Erika and Vidmar, Jure, Conflicts between International Paradigms: Hierarchy Versus Systemic Integration (March 30, 2013). *Global Constitutionalism*, 2013, Forthcoming, pp. 305–6, Available at: <https://ssrn.com/abstract=2269703>

in time treaty.⁶⁸ In other words it considers the parties' evolving intent and favours the most recent treaty by the same parties.

In 1952 a more elaborative criteria for the principle applicability was set by scholars.⁶⁹ It required the fulfillment of 5 requirements for the later in time treaty to apply: (1) the same subject as the earlier treaty; (2) the later treaty covers the same parties as the earlier treaty; (3) the later treaty is on the same level or a higher level as the earlier treaty; (4) the scope of the later treaty is of the same degree of generality as the earlier treaty; and (5) the legal effects of the later treaty are different from the earlier.⁷⁰

The same subject as the earlier treaty

Scholars argued that the same subject matter of a treaty should not be strictly interpreted.⁷¹ The notion "subject-matter" focuses on the object that is being regulated by the treaty, and it is dependent on an abstract characterization of an issue as for example "human rights issue", "environmental issue", etc. Hence the test of whether two treaties deal with the "same subject matter" depends on whether the fulfilment of the obligation under one treaty affects the fulfilment of the obligation of another. And this "affecting" might then take place either as strictly preventing the fulfilment of the other obligation or undermining its object and purpose in one or another way.⁷²

Notable that sometimes the notion of the subject matter is confused with treaties' regimes whose primary focus is on the intent of the States parties and the institutions they have established. As it points to the institutional arrangements that may have been established to link sets of treaties to each other.

The later treaty covers the same parties as the earlier treaty

If the parties of the treaties are not the same, it is doubtful if *lex posterior* will play any important role.⁷³ Furthermore if one or more of the above five requirements are met only in part, the extent to which the earlier treaty is superseded by the later treaty is to be determined based on different considerations: (1) Whether and to what extent a later treaty concluded by two or more parties to a multilateral treaty without consent of all the original parties is valid; (2) Whether and to what extent a treaty of the higher level prevails over a treaty of the lower level, e.g., the United Nations Charter over

⁶⁸ United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Article 30 (1), available at https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=en;

⁶⁹ Hans Aufricht, *Supersession of Treaties in International Law*, 37 Cornell L. Rev. 655, (1952), p.700, Available at: <http://scholarship.law.cornell.edu/clr/vol37/iss2/6/>

⁷⁰ Ibid

⁷¹ Christopher J. Borgen, "Resolving Treaty Conflicts", *George Washington International Law Review*, vol. 37, (2005), pp. 611-615.

⁷² International Law Commission "Fragmentation of International Law: Difficulties Arising From The Diversification And Expansion of International Law" (2006), pp. 254, available at: https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf

⁷³ International Law Commission "Fragmentation of International Law: Difficulties Arising From The Diversification And Expansion of International Law" (2006), pp. 118–119, available at: https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf

arrangements inter se of the members of the United Nations; (3) Whether and to what extent a later treaty whose scope is less general than the original treaty (*lex specialis*) conflicts with an earlier treaty which is broader in scope.

Finally, it is to be noted that the latter treaty would be invalid if the departure from the terms of the prior treaty is such as to interfere seriously with the interests of the other parties to that treaty or seriously impair the original purpose of the treaty.⁷⁴ Hence in brief the applicability of the *lex posterior* rule is limited if all parties to the earlier treaty are parties to the later treaty and if *lex posterior* was the general rule, the specific conflict clause would provide for its inapplicability in the particular case as in the principle of *lex specialis*.

In conclusion, *lex posterior* is not applicable in our case because simply both the Hague Protocol and API are not of the same level of generality. API has a higher cultural property protection threshold than the Hague regulation, and that encounters the very essence of the principle leading to its inapplicability.

5.2. *Lex specialis*

Lex specialis derogat legi generali. This maxim, which means that the most specific law derogates the general law, dates back to Roman law, as found in the *Corpus Iuris Civilis*. However, what concerns us here is the manner in which this interpretative principle has been employed in modern international law. Much of this practice is owed to the International Court of Justice⁷⁵, which has made a distinction between general and particular international conventions ever since the publication of its Statute, in its Article 38 (1) (a).⁷⁶

The application of the *lex specialis* principle, however, is not restricted to the relations between two international conventions. The International Law Commission's Study Group on the Fragmentation of International Law has concluded that the principle also remains applicable between two provisions within the same convention or when one or more norms of a nature other than conventional (that is, customary law and general principles of law) is involved.⁷⁷

A large portion of the International Court of Justice's application of the principle of *lex specialis* has occurred whilst dealing with the relationship between international humanitarian law and international human rights law.⁷⁸ The first instance of this application was in the *Legality of the Threat or Use of Nuclear Weapons* advisory

⁷⁴ International Law Commission "Fragmentation of International Law: Difficulties Arising From The Diversification And Expansion of International Law" (2006), pp.258, available at: https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf

⁷⁵ Marko Milanovic, "The Genesis of Lex Specialis" (*EJIL: Talk!*, 30 April 2014) <<https://www.ejiltalk.org/the-genesis-of-lex-specialis/>>. Accessed 29 September 2021.

⁷⁶ United Nations, Statute of the International Court of Justice, art. 38 (1) (a), 18 April 1946. <<https://www.icj-cij.org/en/statute>>. Accessed 9 October 2021.

⁷⁷ ILC, 'Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law', para. (5), (1 May-9 June and 3 July-11 August 2006), A/CN.4/SER.A/2006/Add. 1 (Part 2).

⁷⁸ Marko Milanovic, *op. cit.*

opinion of 1996.⁷⁹ This rationale was then repeated in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* advisory opinion of 2004⁸⁰ and in the *Armed Activities on the Territory of the Congo* case of 2005.⁸¹ However, it is not unequivocal that the technique applied in such cases corresponds to *lex specialis* as it is originally understood.

5.3. Systemic integration

Some scholars have defended the position that, in all such cases, the Court has used the term *lex specialis* improperly as, in practice, no derogation had occurred.⁸²⁸³ In the *Nuclear Weapons* advisory opinion, for example, the Court stated that the International Covenant on Civil and Political Rights continued to apply during wartime, but that whether a loss of life should be considered arbitrary or not must be decided by reference to international humanitarian law.⁸⁴

Thus, the Court attempted to avoid conflict, seeing a relationship of complementarity between the two bodies of law. Even when the Court considered that one body of norms should be interpreted in a manner conditioned to another body of norms, creating a form of hierarchy between them, this may be better expressed as an act of integration between two normative systems. Another study performed by the ILC's Study Group on the Fragmentation of International Law has pointed out this approach by the Court⁸⁵, which was considered by the European Court of Human Rights in the *Hassan v. UK* case⁸⁶, solidifying this position. The aforementioned scholars have

⁷⁹ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), para. 25. 1996. <<https://www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>>. Accessed 07 October 2021.

⁸⁰ *Legal Consequences of the Construction of a Wall* (Advisory Opinion), para. 106. 2004. <<https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>>. Accessed 07 October 2021.

⁸¹ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Judgement), para. 206. 2005. <<https://www.icj-cij.org/public/files/case-related/116/116-20051219-JUD-01-00-EN.pdf>>. Accessed 07 October 2021.

⁸² Silvia Borelli, "The (Mis)-Use of General Principles of Law: Lex Specialis and the Relationship between International Human Rights Law and the Laws of Armed Conflict", p. 8, in L. Pineschi (ed.), *General Principles of Law: The Role of the Judiciary* (Springer, 2015). <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2575076>. Accessed 30 September 2021.

⁸³ Vito Todeschini, "The ICCPR in Armed Conflict: An Appraisal of the Human Rights Committee's Engagement with International Humanitarian Law", p. 206. (2017). 35 (3) *Nordic Journal of Human Rights*. <<https://www.tandfonline.com/doi/abs/10.1080/18918131.2017.1353213?journalCode=rnh20>>. Accessed 30 September 2021.

⁸⁴ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), para. 25. 1996. <<https://www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>>. Accessed 07 October 2021.

⁸⁵ ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi', para. 103-104 (1 May-9 June and 3 July-11 August 2006), UN Doc A/CN.4/L.682.

⁸⁶ *Hassan v. United Kingdom*, App no 29750/09, para. 38 (Grand Chamber, ECtHR, 16 September 2014).

thus suggested that the Court's rationale was befitting of another principle entirely: that of systemic integration.⁸⁷

The root of systemic integration as an interpretive principle in international law allegedly lies within the Vienna Convention on the Law of Treaties, in its article 31 (3) (c), which states that “[t]here shall be taken into account [...] any relevant rules of international law applicable in the relations between the parties”⁸⁸. This has been considered by international legal scholars to mean that the interpreter of the law must consider all rules relevant to the matter at hand, even when they originate in different legal regimes, as part of a cohesive system of obligations.⁸⁹⁻⁹⁰

The aforementioned ILC Study Group has also referred to the principle of systemic integration as the principle of harmonization, which calls for the presumption that the parties to a convention intend to develop upon the existing norms of international law, not to contradict them. This form of presumption, of course, is only possible when the conflict is only apparent and the norms do not point toward completely different directions, one stating the complete opposite of the other.⁹¹ However, if one norm is understood as creating an exception or conditions for the application of the other, such as in the *Nuclear Weapons* advisory opinion, a compromise may be reached in which both norms continue to apply. As demonstrated above, this has been adopted as the primary means to resolving apparent conflict between norms, instead of the derogation of one in favor of another.⁹²

5.4. A “most protective rule” principle

As part of the phenomenon of fragmentation of law, both domestic and international, law is developed in separate spheres with the intent of protecting specific objects. In some of those bodies of law, when two norms offer different thresholds of protection to this aforementioned object, in many cases, jurisprudence follows a principle which favors the one that grants the recipient the broadest scope of protection.

In international human rights law, such a concept exists in the form of the *pro homine* or *pro personae* principle. This principle seeks to put the individual at the center of the normative order, granting extensive interpretation to norms that guarantee them rights and restrictive interpretation to norms that could limit their rights. In the case of

⁸⁷ Alonso Gurmendi Dunkelberg, “The Soleimani Case and the Last Nail in the Lex Specialis Coffin” (*Opinio Juris*, 13 January 2020). <<http://opiniojuris.org/2020/01/13/the-soleimani-case-and-the-last-nail-in-the-lex-specialis-coffin/>>. Accessed 30 september 2021.

⁸⁸ Vienna Convention on the Law of Treaties, art. 31 (3) (c) (adopted on 23 May 1969, entered into force on 27 January 1980). 1155 UNTS 331 (VCLT).

⁸⁹ Vito Todeschini, *op. cit.*, p. 207.

⁹⁰ Alonso Dunkelberg Gurmendi, *op. cit.*

⁹¹ ILC, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi’, para. 37-43 (1 May-9 June and 3 July-11 August 2006), UN Doc A/CN.4/L.682.

⁹² Silvia Borelli, *op. cit.*, p. 9.

normative conflict, this same principle demands the application of a norm that favors the human person in lieu of a norm that is more favorable to the State.⁹³

The *pro personae/pro homine* principle was first referred to in separate opinions to two cases in the Inter-American Court of Human Rights (hereinafter referred to as IACHR): Judge Rodolfo E. Piza's Separate Opinion to the *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* Advisory Opinion from 1985, and; Judge Sergio García Ramírez's Separate Opinion to the *Bámaca-Velasquez v Guatemala* case from 2002.⁹⁴ Since then, the principle has found its way to the IACHR's mainstream understanding as it has been stated as a driving principle of the IACHR's work in its Strategic Plan of 2011-2015,⁹⁵ and has also been referred to in the work of the United Nations' Human Rights Committee, giving the principle a presence outside the American regional context.⁹⁶

This mentality of having human rights in a constant progression in favor of the individual seems to be present in certain clauses of multiple human rights treaties. The International Covenant on Civil and Political Rights, in its article 5, precludes States from restricting or derogating rights recognized by domestic law and other international treaties on the basis that the Covenant recognizes them to a lesser extent or does not recognize them entirely.⁹⁷ Likewise, article 29 of the American Convention on Human Rights,⁹⁸ and article 17 of the European Convention on Human Rights hold similar provisions.⁹⁹

In cases relating to the application of other bodies of law, particularly international humanitarian law, the Inter-American Court of Human Rights has previously applied what has been called the *lex protectior*¹⁰⁰ principle, or that of the most protective rule. It has been considered an extension of the *pro homine/pro personae* principle to relations between human rights law and other *corpus juris*.¹⁰¹

The application of this principle, however, is described as having been limited to the tenure of Judge A. A. Cançado Trindade in the Inter-American Court of Human Rights. As of recently, with cases such as the *Santo Domingo* case and the *Cruz Sánchez*

⁹³ Hayde Rodarte Berbera, "The *Pro Personae* Principle and its Application by Mexican Courts", p. 9. (2017). 4 (1) Queen Mary Human Rights Review. <<https://www.qmul.ac.uk/law/humanrights/media/humanrights/news/hrlr/2018/Hayde-Rodarte-Berbera.pdf>>. Accessed 03 October 2021.

⁹⁴ *Ibid.*

⁹⁵ Inter-American Commission on Human Rights, 'Strategic Plan 2011-2015', p. 7. (15 September 2010). <<https://www.oas.org/en/iachr/docs/pdf/IACHRStrategicPlan20112015.pdf>>. Accessed 10 October 2021.

⁹⁶ UNHRC, 'Communication no 1536/2006' in *Elgueta v Chile* (Individual Opinion of Ms Helen Keller and Mr Fabián Salvioli) (7 September 2009) UN Doc CCPR/C/96/D/1593/2006, para. 11.

⁹⁷ International Covenant on Civil and Political Rights, art. 5 (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

⁹⁸ Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", art. 29, Costa Rica, 22 November 1969. <https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights.pdf>. Accessed 11 October 2021.

⁹⁹ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, art. 17, 4 November 1950, ETS 5. <https://www.echr.coe.int/documents/convention_eng.pdf>. Accessed 11 October 2021.

¹⁰⁰ Dr. Alonso Gurmendi Dunkelberg uses the term "*lex protector*", but we adopt the term "*protectior*" as a more suitable translation of the concept into Latin.

¹⁰¹ Alonso Gurmendi Dunkelberg, "There and Back Again: The Inter-American Human Rights System's Approach to International Humanitarian Law", p. 11-12. (2017-2018). 56 *The Military Law and the Law of War Review*. <<http://www.ismlw.org/REVIEW/2017-2018%20ART%20Gurmendi%20Dunkelberg.php>>. Accessed 03 October 2021.

case setting the Inter-American Court in another track, most similar to the International Court of Justice's aforementioned systemic integration approach on the relation between these two fields.¹⁰² Beyond this brief period of limited use, which was insufficient for the crystallization of the *lex protectior* principle, it appears that there is no basis for the application of a "most protective rule" principle in other areas of public international law besides international human rights law.

6. Application

The 1954 Hague Convention and its Protocols and the 1977 Additional Protocols to the Geneva Conventions provide two important bodies of law regarding the protection of cultural property in - international and non-international - armed conflicts. Nevertheless, as stated in section 4, in some cases the normatives of these bodies of law collide, especially when it comes to derogations in case of military necessity - while the 1954 Hague Convention allows derogations, the 1977 Additional Protocols to the Geneva Conventions do not. Therefore, cases of derogation of the protection of cultural property in armed conflicts create a conflict of norms, which can only be solved by the application of principles of PIL. As analyzed in the last section, this paper focused on the application of three principles to such cases: *lex specialis* and systemic integration; *lex posterior*; and the principle of the most protective rule.

The *lex posterior* principle points to the application of the last approved normative, in chronological order, provided that the treaties are on the same subject and with the same State-parties. Although at first glance this principle may seem applicable to solve this conflict of norms, as the 1977 APs entered into force after the 1954 Hague Convention, the level of generality of these bodies of norms is very different, in a sense that the principle of *lex posterior* is derogated by the principle of *lex specialis*.

The most protective rule principle (or *lex protectior*), for its turn, is commonly applied in international human rights law - as the *pro homine/pro personae* principle. Consolidated in the Inter-American Court of Human Rights and in the European Human Rights Court, the principle favors the application of the norms with the broader scope of protection to the persons under the State power. In this regard, the *lex protectior* principle points to the application of the 1977 APs normatives in case of conflict of norms, since they have a higher level of protection of the cultural property, given that any attack is prohibited to such targets - unless the opposing party uses it in support of "the military effort" -, while the 1954 Hague Convention allows derogations in cases of military necessity. Nonetheless, this principle is not fully observed in IHL judicial reasoning and has been derogated by the principle of systemic integration in case law.

The *lex specialis* principle, if understood with its purported classical function of derogating from the general law, provides that the applicable norm should be determined by the evaluation of which norm is most specific to the case, not only between branches of PIL or conventions but also within them. In this sense, the principle of "*lex specialis derogat legi generali*" may be understood in cases of conflict of norms between the 1954 Hague Convention and the 1977 APs as a mechanism of waiving the

¹⁰² *Ibid*, p. 17-21.

latter, as the former is considered the *lex specialis* because the protection of cultural property is its precise scope of normatization, while the 1977 APs have a broader agenda regarding IHL.

However, considering the form of application of this principle which has been established by international jurisprudence, which is closer to the idea of systemic integration, the relation between the norms contained in both conventions should be seen as one of complementarity rather than of conflict. By all means, this principle asserts that the States which are party to numerous treaties must be able to balance all the provisions they are bound by, complying with all norms. This interpretation is favored by the wording of the 1977 APs when they assert that they should be interpreted “[w]ithout prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954”. In this sense, the norm contained in the APs should be understood as a general rule, whereas the Hague Convention of 1954’s provisions complement it, specifying the correct procedure in the case of strict military necessity.

7. Conclusion

The importance of the protection of cultural property in armed conflicts has only risen during the last decades, becoming one of the main topics of discussions on IHL. Despite its importance, up to today the conflict of norms between the 1954 Hague Convention on the Protection of Cultural Property and the 1977 Additional Protocols to the Geneva Conventions regarding the different approaches to derogation to the protection of cultural property has not been formally addressed by any judicial body.

In this regard, this paper provides important insights on how the principles of PIL can help reach a solution to this conflict of norms. While the most protective rule principle can favor the protection of cultural property with no derogation, as stated by the 1977 APs, it has no previous case law to support its application to IHL. On the other hand, the principle of systemic integration or *lex specialis* would point to the application of the norms of the 1954 Hague Convention, allowing the targeting of cultural property in armed conflicts in case of military necessity - a lower threshold of protection.

In conclusion, the most likely solution to the conflict between norms on the possibility of derogation the protection of cultural property in armed conflicts is the application of the *lex specialis* principle. Withal, the discussion brought in this paper is still nascent and requires further research as the IHL branch of protection of cultural property evolves.

Annex Chart 1

Treaty	The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) or 1977 APs
Publication date	14 May 1954	8 June 1977
Entry into force	7 August 1956	7 December 1978
Scope	The Convention has wide material jurisdiction covering the protection of cultural property in peacetime, in case of armed conflict (international and non-international), and in occupation.	The Additional Protocols to the GCs of 1977 comprise a set of general provisions for the protection of victims (including civilian objects) in international and non-international armed conflicts. Each AP has a specific article on the protection of cultural property, nevertheless they are not considered treaties focused on this subject.
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, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are	“historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples” (Art. 53, a, AP I; Art. 16, AP II) Highlights: The 1977 APs present a shorter definition of cultural property - opened to case by case interpretation-, but they add the dimension of spiritual heritage, thus including objects representative in the belief of peoples which are not institutionalized- as in a religion-, under protection as a cultural property.

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) centres containing a large amount of cultural property as defined in subparagraphs (a) and (b), to be known as "centres containing monuments".

Highlights: this convention proposes a very broad definition for cultural property, including many different concrete objects that are representative in terms of religious, artistic, historical, archeological, cultural,

	or scientific importance, which are described in a non-taxative list in the same paragraph.	
Exception	Under the 1954 Convention, the obligation to respect all cultural property may be waived on the basis of imperative military necessity.	<p>“Article 53 — Protection of cultural objects and of places of worship Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property 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.”</p> <p>The obligation is stricter than that imposed by the 1954 Hague Convention, since it does not provide for any derogation, even "where military necessity imperatively requires such a waiver". As long as the object concerned is not made into a military objective by those in control - and that is not allowed - no attack is permitted. As there are no exceptions, the obligation must be considered to apply to all objects concerned, regardless of the territory where they are situated.</p>

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