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The Role of Public International Law in the Protection of Cultural Property during Armed Conflicts

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This research article aims to throw light on the role of Public International Law in the protection of Cultural property during armed conflicts. The world has witnessed disastrous armed conflicts in the 20th century, in the form of world wars. The world continues to experience armed conflicts in several parts of it. Cultural Heritage has always been subject to the hostilities of war. This article seeks to explain the need for the protection of Cultural property during armed conflicts and also to delve into the aspect of ‘Collateral Damage’ involved in it. The Concerned matter is governed by two major conventions. The Hague Convention of 1954¹ and the Second Protocol of 1999² are entirely dedicated to the issue of protection of cultural heritage during armed conflicts, however Articles 52 and 53 of the Geneva Convention of 1977 [Additional Protocol (I)]³ ⁴ deal with this issue. Article 52 of the said convention explains the concept of ‘Military Objective’ which plays a crucial role in understanding the legality of these treaties in the matter of destruction of cultural property during wars.

The Judgment of the International Criminal Court in the case of ‘The Prosecutor v Ahmad Al Faqi Al Mahdi’⁵ is of extreme importance. It is the flagship case that dealt with the destruction of Cultural property as a ‘War Crime’ and the defendant was convicted. Thus, the focus of this article is to explore the intricacies of the conventions, and their applicability to state and non-

¹ The Hague Convention 1954

² The Second Protocol 1999

³ Additional Protocol (I) to the Geneva Convention 1977, art 52

⁴ Additional Protocol (I) to the Geneva Convention 1977, art 53

⁵ *The Prosecutor v Ahmad Al Faqi Al Mahdi* [2016] ICC-01/12-01/15

State parties involved in armed conflicts. This article also focuses on the role of the International Criminal Court in adjudicating such matters with the help of relevant cases.

Keywords: *cultural property, armed conflict, collateral damage, war crime, military objective.*

INTRODUCTION

The Concept of Cultural Property and the need for its protection during armed conflict

To understand the meaning of Cultural Property, one must not separate the two terms from each other. The meaning of cultural property must always be understood in the context of 'Culture' as a broad term. UNESCO defines culture as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group that encompasses not only art and literature but also lifestyles, ways of living together, value systems, traditions, and beliefs.⁶ Cultural Property majorly contributes to the material features of the social group. It is as important as civilian property since it holds value to an entire community.

The Hague Convention of 1954 defines cultural property as movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or reproductions of the property defined above.⁷

As stated in the Preamble of The Hague Convention 1954, when damage is inflicted to a cultural property, irrespective of its ownership, is to be considered as damage to the cultural property of an entire humanity.⁸ Armed conflicts cause damage to humanity. State or non-state parties involved in an armed conflict may a times cause intentional damage to the cultural property of the opposite party to endanger their cultural identity. Many times, it is used as a tool for

⁶ 'Cultures' (UNESCO) <<https://policytoolbox.iiep.unesco.org/glossary/cultures/>> accessed 07 April 2024

⁷ The Hague Convention 1954, art 1

⁸ *Ibid*

perpetrating genocide against a particular community. Cultural Property is an embodiment of the beliefs and identity of a community thus targeting attacks against cultural property can be used as a technique of psychological and emotional torture. Cultural monuments can also be used to facilitate illegal activities like smuggling and illicit trade. ⁹The damage to cultural property may also be unintentional and has been performed as a part of military necessity, but there is a need for the protection of cultural property during armed conflict, to foster the development of a tolerant world community.

RESEARCH METHODOLOGY

Public International Law is a vast field that provides scope for a researcher to carry out in-depth research. This article aims to analyze the role of Public International Law in the Protection of Cultural property during armed conflicts. This research is based on various secondary sources such as case studies, blogs, and journal articles.

LEGAL FRAMEWORK FOR CULTURAL PROPERTY PROTECTION

Mass Destruction of Cultural Heritage was observed during two consecutive world wars. Taking into consideration the need to protect the cultural heritage from destruction, damage, pillage, and misappropriation happening during armed conflicts, UNESCO observed a need to address this issue. Thus, the first codified principles were formulated in the form of the Hague Convention of 1954. The Second Protocol to the Hague Convention 1999 was launched to enhance the functionality of the first protocol. In total 135 sovereign states have acceded to the Hague Convention of 1954.

Analysis of the Hague Convention Protocol 1954 and Second Protocol of 1999

As per The Hague Convention of 1954 (Hereinafter called First Protocol)¹⁰ and the Second Protocol of 1999 (Hereinafter called Second Protocol), both the high contracting parties involved in an armed conflict must make utmost efforts to protect the cultural property situated within

⁹ Margherita Corti, 'Cultural Heritage Protection in Armed Conflicts' (2022) 4 The CoESPU MAGAZINE- The Online quarterly Journal of Stability Policing <<https://www.coespu.org/articles/cultural-heritage-protection-armed-conflicts>> accessed 07 April 2024

¹⁰ The Hague Convention 1954

their territory and the territory of the other party. Contracting Parties must prevent and stop the theft, pillage, vandalism, and misappropriation of cultural property. In case of military occupation over other contracting parties' territory, the occupying power must make efforts, along with the competent national authorities, to preserve and protect the cultural property. The Military attack must not be directed against the cultural property unless it is a military necessity.¹¹ The Concept of Military necessity plays a contentious role in a legal regime concerning this issue.

In the First Protocol the idea of 'Special protection' has been explained in a detailed manner. The centers of Immovable cultural property or movable property must be kept at a distance from military objectives and should not be used for military purposes. Special Protection must be granted to the cultural property upon its entry into the 'International Register of Cultural Property under Special Protection.'¹² When the Movable Cultural property is sheltered in an isolated place it is easy to maintain an adequate distance from military objectives, but in the case of an immovable property situated in cities, possibly it can be surrounded by military objectives. This practical difficulty limits the scope of special protection. There is a possibility in such cases that the cultural property may fall prey to the military necessity of the opposite contracting party involved in the armed conflict. This becomes an issue in the implementation of the conditions mentioned under Article 8 of the First Protocol of 1954.¹³

The first Protocol talks about Special Protection and the use of distinctive emblems to denote cultural property. The Emblem plays a significant role in clarifying the distinction between cultural property and civilian property, military Objects. No act of hostility must be directed against such Property with Special Protection during transit and otherwise, unless there is an inevitable military necessity. According to Article 16 of the First Protocol 1954, 'The distinctive emblem of the Convention shall take the form of a shield, pointed below, per saltire blue and white (a shield consisting of a royal-blue square, one of the angles of which forms the point of

¹¹ Second Protocol to The Hague Convention 1999, art 9

¹² The Hague Convention 1954, art 8

¹³ Noel Lee, 'International Law and Cultural Property in Wartime' (*The Lawyers' Committee for Cultural Heritage Preservation*, 27 January 2022) <<https://www.culturalheritagelaw.org/International-Law-and-Cultural-Property-in-War>> accessed 07 April 2024

the shield, and of a royal-blue triangle above the square, the space on either side being taken up by a white triangle).¹⁴

The Second Protocol talks about the idea of ‘Enhanced Protection’ in its article 10. The Cultural Property of exceptional cultural and historic value and great importance to mankind must be granted enhanced protection as per Article 10 of the Second Protocol 1999.¹⁵ The cultural property with enhanced protection is denoted with a red shield around the emblem. The parties seeking the enhanced protection for a cultural property must not use the cultural property for military objectives, when the parties are found violating this condition mentioned in Article 12 of the Second Protocol the Director-General shall suspend the enhanced protection granted to that cultural property upon sending notification to the United Nations Secretary-General and all parties to the protocol.¹⁶

MILITARY NECESSITY AND PROPORTIONALITY

The First Protocol does not define the concept of ‘military objective’ and ‘military necessity’ clearly. Additional Protocol (I) to the Geneva Convention 1977 in article 52 clearly defines the Concept of military objective as ‘Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage.’¹⁷

The First Protocol and the Second Protocol to the Hague Convention prevent the use of cultural property for military objectives and prevent attacks against cultural property. The only exception to both conditions is military necessity. When any of the contracting parties involved in an armed conflict uses the cultural property for a military objective then the Cultural property

¹⁴ The Hague Convention 1954, art 16

¹⁵ Second Protocol to The Hague Convention 1999, art 10

¹⁶ Second Protocol to The Hague Convention 1999, art 12

¹⁷ Additional Protocol (I) to the Geneva Convention 1977, art 52

can only be legitimately targeted since there is an absolute military necessity and it can be sought by no means other than attacking the cultural property.¹⁸

The major noteworthy factor in the case of Military necessity is that the attack can either be intentional or unintentional. If the immovable or movable Cultural property is placed near the military objective, the cultural property also suffers as a part of an attack on the military objective. In this case, the attack becomes inevitable and incidental although there may be no intention of another party to attack the cultural property per se. Therefore it is important to clearly distinguish the cultural property from the military objectives and civilian property. The Principle of proportionality must also be followed vigilantly in case of a military necessity. The damage to the cultural property must be in proportion to the military advantage that a party wants to gain by attacking the cultural property. The excessive and disproportionate damage to the Cultural Property must be avoided. The Second Protocol of 1999 throws light on the concept of military necessity and the principle of proportionality in Article 7¹⁹. But one must note that, after seeking the exception of Military necessity to attack the military objective either placed within the center sheltering the cultural property or placed near the cultural property, the opposite party must respect the cultural property and try to mitigate the losses.

PROSECUTIONS, SANCTIONS AND WAR CRIME

The First Protocol to the Hague Convention 1954 states that in case of an international armed conflict or war-like situation, the High contracting parties must abide by the convention even when the opposite power in the conflict is not a party to the convention. In Article 18 of the First Protocol, '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.'²⁰ The Second Protocol of 1999 in the article describes five

¹⁸ Ashlyn Milligan, 'Targeting Cultural Property: The Role of International Law' (2008) 19 Journal of Public and International Affairs <<https://jpia.princeton.edu/sites/g/files/toruqf1661/files/2008-5.pdf#:~:text=In%20accordance%20with%20the%20Hague,achieved%20by%20any%20other%20means>> accessed 07 April 2024

¹⁹ Second Protocol to The Hague Convention 1999, art 7

²⁰ The Hague Convention 1954, art 18

kinds of ‘serious violations’ considered under this convention and suggests every party take measures to establish the acts committed under this act as criminal and punishable offences.²¹²²

The Hague Convention of 1954 and the Second Protocol of 1999 attempted to establish an international brotherhood for the protection of cultural property during international and non-international armed conflict. However, it is concerned with the state actors involved in the armed conflict, especially those who are parties to the convention. Additional Protocol (I) to the Geneva Convention 1977, article 53 prohibits the act of hostilities against the cultural heritage and places of worship.²³

The Rome Statute of the International Criminal Court 1998 is significant in bringing all state and non-state actors under its ambit. The destruction and atrocities committed against cultural property in the event of armed conflict are categorized as war crimes and fall under the original jurisdiction of the International Criminal Court to adjudicate the matter.²⁴

The judgment delivered by the International Criminal Court (Hereinafter called ICC) in the case of *The Prosecutor v Ahmad Al Faqi Al Mahdi* is significant in many ways.²⁵ In this particular case, the defendant was proven guilty of intentionally damaging the cultural property of Mali. This case is significant in many. In this case ‘war crime’ committed against cultural property was considered to be the primary issue. It is noteworthy that the defendant is the first member of an Islamist militant group to appear before the ICC and has made an admission of guilt. The defendant individually and jointly targeted intentional attacks against several monuments and buildings of historical and cultural significance in Mali.²⁶

These matters are difficult to investigate since there may not be enough evidence found to prosecute the accused. The ICC has launched a policy for the protection of Cultural heritage during international and non-international armed conflicts. It states the process adopted by the

²¹ Second Protocol to The Hague Convention 1999, art 15

²² Lee (n 13)

²³ Additional Protocol (I) to the Geneva Convention 1977, art 53

²⁴ Rome Statute of the International Criminal Court

²⁵ *The Prosecutor v Ahmad Al Faqi Al Mahdi* (2016) ICC-01/12-01/15

²⁶ Mark S. Ellis, ‘The ICC's Role in Combating the Destruction of Cultural Heritage’ (2017) 49(1) *Journal of International Law* <<https://scholarlycommons.law.case.edu/jil/vol49/iss1/5>> accessed 07 April 2024

ICC in investigating such matters. The Policy also seeks to create awareness regarding the need for the protection of cultural heritage. The ICC in collaboration with UNESCO and the UN aims to effectively implement the policy.²⁷

CONCLUSION

In today's turbulent time, when the world is experiencing an armed conflict in several parts, it is important to look seriously at the issue of the destruction of cultural property during armed conflict. Because cultural property is an embodiment of the cultural identities of people and a connecting link between their past and future, there is a need for its protection during armed conflict. The intermingling of Treaty law in the form of The Hague Convention of 1954, the Second Protocol of 1999, and the Rome Statute has led to a strong legal framework for addressing this issue. The Hague Convention of 1954 and The Second Protocol of 1999 established a regulatory framework and code of conduct for all the parties to the convention. The norms of special and enhanced protection and the use of distinctive emblems to denote cultural property are extremely important. The use of an emblem helps in distinguishing cultural property from military objectives and civilian property. This convention is kind of limited only to the states who are parties to the convention, the convention appeals to the contracting party states to impose the sanctions on entities causing the breach of the convention.

The First Protocol to the Hague Convention does not discuss the concepts of 'Military Objective' and 'Military Necessity' which are of core importance. This limits the scope and functionality of the First Protocol. The second protocol discusses the concept of military necessity in brief. Whenever parties to the conflict make use of cultural property for military purposes, it becomes a military objective. This is a clear breach of convention therefore if the opposite party is left in a situation where there is no option but to attack the cultural property for expected 'military advantage' it becomes a 'legitimate' attack. Here it is noteworthy that the party causing an attack over cultural property must be in a position to provide evidence for it being a military necessity and the destruction of cultural property must be proportional to the 'military advantage'.

²⁷ 'Policy on Cultural Heritage' (*International Criminal Court*, June 2021) <<https://www.icc-cpi.int/sites/default/files/itemsDocuments/20210614-otp-policy-cultural-heritage-eng.pdf>> accessed 07 April 2024

Otherwise, it must be considered as an ‘intentional destruction’ of cultural property. The party destroying cultural property must also take responsibility for its protection and must restrict it from getting vandalized and stolen.

When the cultural property situated near the military objective gets targeted as a part of Military necessity, the damage to the property may become inevitable. It creates a dilemma, whether to protect the cultural property from getting attacked or to protect the national interest.

This article also sought to explain the relevance of the International Criminal Court in addressing this issue. As per the Rome Statute of International Court, intentional attacks against cultural property are treated as ‘war Crimes’. In this case, the opposite parties often plead before the court that the attack on cultural property was a part of bilateral damage and not intentional. Thus, it becomes important from the side of the ICC to carry out an unbiased investigation. But it is often observed that while prosecution and investigation the international community gives primacy to the violations of human rights and killings of civilians that are certainly required as well. However, the issue of intentional damage to cultural property must also be equally addressed since it creates a long-term impact on the morale of that particular community and international community as well. International and Regional Non-Governmental Organisations must step in and join hands together to address this issue at a global scale, by creating awareness among people and expanding its scope beyond the realm of legal regime.