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# Protecting the past for the future: How does law protect tangible and intangible cultural heritage in armed conflict?

**Christiane Johannot-Gradis***
Christiane Johannot-Gradis worked at the ICRC for many years as a delegate and jurist in the field and at headquarters. She also co-founded and co-directs an international non-governmental organization, Traditions for Tomorrow, which works to protect intangible cultural heritage in Latin America, in particular in conflict or post-conflict situations.

## Abstract

*In war, individuals are vulnerable not only physically but also in terms of their cultural identity, and the obliteration of cultural heritage often becomes a central issue. This is particularly the case in armed conflicts with an ethnic, cultural or religious character. In some regions, cultural heritage consists more of monuments and objects; it is a "tangible" heritage, mostly protected by the law of armed conflict. Elsewhere, where structures are impermanent, cultural heritage is mainly expressed through orality, gestures, rituals, music and other forms of expression that individuals create using various media and instruments. Such heritage is mainly "intangible". This essay aims to show that cultural heritage is both tangible and intangible, and that the law which protects such heritage is not limited to the*

* The author holds a PhD in law from the University of Geneva and is the author of *Le patrimoine culturel matériel et immatériel: Quelle protection en cas de conflit armé?*, Schulthess, Geneva, 2013.

*law of armed conflict. Cultural heritage also benefits from the protection of other applicable instruments, such as human rights treaties and the UNESCO cultural heritage conventions.*

**Keywords:** law of armed conflict, international human rights law, UNESCO cultural conventions, tangible cultural heritage, intangible cultural heritage, cultural property, conduct of hostilities, misappropriation and illicit traffic, different types of harm to cultural identity, indigenous peoples, military occupation, non-international armed conflict.

## Introduction

In September 1914, one month after the outbreak of the First World War, Reims Cathedral in France was heavily bombed in an attack that endangered the building's very existence. In July 2014, mosques and sanctuaries in Iraq – including the prophet Jonah's tomb, a Muslim pilgrimage site – were destroyed along with other cultural property. In both cases, what was attacked was the cultural and religious heritage of the people affected by these conflicts. Through the destruction of their places of worship, thereby hindering them from celebrating their rituals and traditions, it is their both tangible and intangible heritage that was harmed. A century separates these two events – a period that has seen innumerable conflicts whose nature has continually changed, both in terms of the parties to the conflict and of the stakes involved, as these two examples illustrate. This century has also seen a major evolution in science and technology, and in their application to military means, which have become more and more sophisticated and accurate; and, at the same time, it has seen an important development in the law. Indeed, while in 1914 the law on cultural heritage was confined to a few rules of warfare, there is now a law of armed conflict that offers a vast array of norms, including those that protect cultural heritage in its many dimensions.

The recent events in Syria, coming on the heels of similar upheavals in Iraq and Mali, highlight the paradox that such conflicts now pose for the protection of cultural heritage. Exceptional components of these countries' heritage – most of them inscribed on the United Nations Economic, Social and Cultural Organization (UNESCO) World Heritage List – were deliberately destroyed, although the law that applies to them nowadays would provide a hitherto unequalled normative framework for their protection in these circumstances. Among many others, the destruction of Jonah's tomb[1] and the Arch of Triumph in Palmyra, Syria,[2] unquestionably illustrates the deliberate character of Islamic

1 UNESCO, "A Call to Save Iraq's Cultural Heritage", 30 September 2014, available at: www.unesco.org/new/en/unesco/about-us/who-we-are/director-general/singleview-dg/news/a_call_to_save_iraqs_cultural_heritage/ (all internet references were accessed in December 2015).

2 UNESCO, "UNESCO Director-General Condemns the Destruction of the Arch of Triumph in Palmyra: 'Extremists Are Terrified of History'", 5 October 2015, available at: http://en.unesco.org/news/unesco-director-general-condemns-destruction-arch-triumph-palmyra-extremists-are-terrified.

State Group's destruction of the heritage of these countries. Such acts seem to reflect its members' intention not only to erase forever these vestiges of the region's past, but in so doing also to obliterate all traces of the cultural and spiritual identity of the populations concerned. This poses a major challenge to the international community, for it signifies a refusal to implement norms – many of which now have the status of customary rules – aimed at protecting both cultural heritage and people exposed to conflict.[3]

In the string of wars throughout human history, the emergence of such trends in armed conflict is not, however, a new phenomenon. The obliteration of Carthage by the Roman troops, the sack of Constantinople by the Crusaders and the dismantling of the statuary ornamenting the cathedrals during the wars of the Reformation – as well as, more recently, the destruction of synagogues during the Second World War and of mosques during the conflict in the Balkans at the end of the last century – similarly reflect the attacking forces' intention to eradicate all traces of the cultural and spiritual identity of enemy populations by destroying their cultural heritage, the symbol of that identity.[4]

Hence it must be recognized that in conflicts with a strong ethnic, cultural and religious character, the destruction of cultural heritage frequently becomes an issue. This cultural heritage is multiform. Where it exists mainly in the form of sites, buildings and objects, the heritage that comes under attack is largely "tangible". Elsewhere, however, where structures are impermanent and the heritage is expressed more through orality, gesture and other forms of expression that individuals create using various media and instruments, the heritage is mainly "intangible". In the latter case, it is not so much objects that are targeted but the individuals who are the bearers or interpreters of this heritage. The solutions that the law must provide to ensure the protection of cultural heritage must therefore also have multiple elements.

The law of armed conflict, a *lex specialis* in time of war, expressly regulates the protection of cultural property – that is, mainly "tangible" cultural heritage – through the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Convention).[5] This instrument, adopted shortly after the Second World War, enshrined the measures that the law must provide to prevent a recurrence of the unprecedented destruction and pillage to which the world's cultural heritage had been subjected during this conflict. It thus filled major gaps in the previous regulatory frameworks. The protection conferred in the event of armed conflict by – to this date – the only convention devoted exclusively to cultural property is of course essential. However, the Convention's impact is insufficient to protect the cultural heritage exposed to contemporary conflicts, which also includes its "intangible" dimension.

3 See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), in particular Rules 38, 39, pp. 127–132.

4 ICTY, *The Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-T, Judgment, 2 March 2000, paras 227–228.

5 Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954 (entered into force 7 August 1956) (1954 Convention).

The "intangible" dimension of cultural heritage cannot in fact be protected solely on the basis of the 1954 Convention. To that end, other instruments must be applied, whether they belong to the law of armed conflict or to other legal regimes, such as international human rights law, the numerous conventions adopted within UNESCO's framework for the protection of cultural heritage, or the various relevant norms of instruments developed by the International Labour Organization (ILO) or even the World Intellectual Property Organization (WIPO). The material scope of application of these various treaties now makes it possible to extend the concept of cultural heritage to elements other than purely cultural property, which in fact is only one of its components. The definition of legally protected cultural heritage, both tangible and intangible, has thus been enriched by the major regulatory development seen in recent decades, particularly within the United Nations (UN) system, even if its exact contours are still left to a certain extent to the discretion of States.

In addition to the different facets of cultural heritage, the various types of harm to which such heritage may be subjected should be emphasized. Such harm differs considerably depending on the phases of the armed conflict. Indeed, the effects of active hostilities on cultural heritage concern more specifically the tangible heritage like Reims Cathedral, which was directly affected by the fighting.[6] This type of harm is distinguished from that which the heritage may also suffer in enemy hands, when the weapons have gone silent. Such situations, especially in the form of military occupation, can alter the daily life of the concerned population and may thereby also affect the expressions of a cultural heritage that is of a more intangible dimension. The disappearance of the practice of rituals in the sacred sites of Timbuktu during the Malian conflict in 2012 is one example among many.[7] The distinctions between the various types of harm that can affect the different components of cultural heritage are similarly reflected in the norms aimed at preventing them.

The purpose of this article is to demonstrate that cultural heritage as a whole continues to enjoy legal protection in all phases of an armed conflict, regardless of its character. This statement is not only based on the applicable legal norms, which are discussed below, but is also supported by the case law of the international criminal tribunals, State practice and doctrine. The article begins with a historical overview revealing the existence, since time immemorial, of customary norms under which belligerents are required to spare cultural heritage in such situations. This is followed by a discussion of the applicable law which protects that heritage, both during hostilities and once the heritage has fallen under the control of enemy forces. Such legal framework consists of the law of armed conflict and other norms affirmed in human rights instruments and

6 Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict*, Cambridge University Press, Cambridge, 2006, p. 39.

7 UN, "Mali: Deux experts de l'ONU dénoncent les 'violations des droits culturels et de la liberté religieuse'", UN News Centre, 10 July 2012.

UNESCO cultural heritage conventions, the applicability of which can also be claimed in the event of armed conflict.

## History of the protection of cultural heritage in armed conflict

The obligation to protect cultural heritage in the event of armed conflict preceded the adoption of any regulations agreed upon by nations to preserve it. The prohibition against attacking a given site, building or object in such circumstances stemmed from the dictates of authorities, who were usually prompted by religious or sacred considerations.[8] This phenomenon is found in many civilizations that have shaped human history.

In view of the activities undertaken in armed conflict, particularly during the phase of active hostilities, which can lead to the destruction or burning of property, the obligation to protect cultural heritage focused mainly on buildings that were symbols of the values to be preserved or that housed ceremonies, festivals and rituals, together with the media and instruments required to perform them. The prohibition against harming such property therefore applied to the container, but by the same token, it often aimed to preserve the content as well.[9] Cultural heritage, then, formed a whole that was made up of tangible as well as intangible elements, the latter of which gave it life and ensured the transmission of the knowledge and components of the cultural identity of the populations affected by conflict.

The prohibition against harming cultural heritage has been handed down through the centuries, from one end of the globe to the other. Evidence of this in the West includes the protection often granted to the sacred sites of the ancient Mediterranean, or the temples and Christian churches spread throughout the Roman Empire and elsewhere, among other sites whose destruction would have met no military need, as Cicero emphasized.[10] During the Middle Ages, the obligation to protect such property was further formalized. On the initiative of the Christian Church in Europe, various codifications of measures to be respected by belligerents were adopted and enshrined in oaths taken by knights[11] or in the

8 In ancient Greece, for example, sacred sites such as Delphi, Delos and Mount Olympus were recognized as inviolable in the event of armed conflict. No acts of hostility were allowed on these sites, and fleeing enemies could take refuge in them. These prohibitions had a spiritual and religious basis, and similar rules are found in many civilizations. See Pierre Ducrey, *Guerres et guerriers dans la Grèce antique*, Payot, Paris, 1969, p. 243.

9 As an example, the first Caliph, Abu Bakr Siddiq, gave this instruction to his soldiers fighting in Iraq and Syria: "You will come upon a people who live like hermits in monasteries, believing that they have given up all for Allah. Let them be and destroy not their monasteries." See François Bugnion, "The Origins and Development of the Legal Protection of Cultural Property in the Event of Armed Conflict", 14 November 2004, available at: www.icrc.org/eng/resources/documents/article/other/65shtj.htm.

10 M. Tulli Ciceronis, *Actionis in C. Verrem secundae liber quartus (De signis): De officiis ad Marcum filium*, cited in Stanislaw Edward Nahlik, "Des crimes contre les biens culturels", *Annuaire de l'Association des auditeurs et anciens auditeurs de l'Académie de droit international de La Haye*, Vol. 9, 1959, p. 14.

11 Such as the "Peace of God" and the "Truce of God", which enshrined the commitment by belligerents to obey numerous rules, some of which also protected cultural heritage, both tangible and intangible. Michel

capitularies signed by military leaders before entering battle; these agreements dictated that what was sacred must be preserved, be it tangible, intangible or human, and also prohibited the unnecessary (in relation to the main goals of a given conflict) destruction of property belonging to civilians who didn't take part in combat.[12] With the Renaissance, works of art – including those with no sacred character[13] – and, when nation States arose, also buildings, such as historical monuments and property that symbolized the national values and history, were added to the category of such protected objects.[14]

These rules, constituting customs of war and stipulated frequently in agreements between belligerents, were not set down in universally binding regulations until the end of the nineteenth century. By then, many international conferences had been held – such as in Saint Petersburg in 1868 and in Brussels in 1874 – that had culminated in declarations or draft conventions formalizing these rules.[15] It was only in 1899 that States formally adopted the first treaties on the law of war, of which some norms prescribe binding obligations with regard to cultural heritage in particular. These were the 1899 Hague Conventions, revised in 1907. While the norms they prescribe, which vary with the different phases of an armed conflict, refer mainly to tangible property – "buildings dedicated to religion, art, science, or charitable purposes" – the intangible element is clearly also present, even if only implicitly.[16] Thus, the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land, and its annexed Regulations (1907 Hague Regulations), definitively introduced into positive international law the customary rule that the elements of cultural heritage must be preserved. Under its provisions, furthermore, the heritage in question is shown to be both tangible and intangible.

Balard, Jean-Philippe Genet and Michel Rouche, *Le Moyen Âge en Occident*, Hachette Superieur, Paris, 2003, pp. 104–105, 175.

12 These bodies of rules setting down prohibited conduct – the "capitularies", or covenants – were binding on men in armed conflict, not on the States in question. The rules, moreover, formally protected not only sacred property but also private property, in accordance with the principle of military necessity. If the destruction of such property did not meet the requirement of conferring military advantage, it was unnecessary and therefore prohibited. See Theodor Meron, *War Crimes Law Comes of Age*, Oxford University Press, New York, 1998, p. 13.

13 This development grew out of the writings of various jurists and thinkers of the time, in particular those of Alberico Gentili. In his view, among the private property to be preserved in armed conflict, cultural property should also and especially be protected. See Alberico Gentili, *De Jure Belli Libri Tres*, cited in R. O'Keefe, above note 6, p. 6.

14 Thus, in France, on the initiative of a deputy, the Abbé Grégoire, a commission on historical monuments was established in 1830 aimed at countering the "vandalism" that had raged during the French Revolution of 1789 and after. See "Rapport sur les destructions opérées par le vandalisme, et sur les moyens de le réprimer", in *Œuvres de l'Abbé Grégoire*, Vol. 2: *Grégoire, député à la Convention nationale*, KTO Press and EDHIS, Nendeln and Paris, 1977, p. 257.

15 For example, the 1868 Declaration of Saint Petersburg or the 1874 Brussels Declaration. The latter expressly regulated the treatment of property likely to be part of the cultural heritage.

16 Such property is expressly mentioned in Article 27 of the Regulations Annexed to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907 (1907 Hague Regulations). Article 56 of the Regulations adds "education". The choice of these buildings shows clearly that it is not only the property itself – the tangible heritage – that is protected, but the activities carried out and the knowledge transmitted in the property – the intangible heritage – as well.

These were the instruments that governed the two major conflicts which ravaged the globe in the twentieth century,[17] but after the Second World War the law of armed conflict underwent a major development, in particular with the adoption of the four Geneva Conventions of 1949, supplemented in 1977 by the two Additional Protocols.[18] This was complemented by the 1954 Convention,[19] which gave complete protection to cultural property and was in turn followed by the 1954 and 1999 Protocols.[20] This body of law is not, however, limited to preserving only the tangible elements of the cultural heritage – that is, cultural property. Indeed, many provisions of the law of armed conflict also contribute, particularly in conjunction with the 1949 Geneva Conventions, to protecting the intangible dimension of this heritage.[21] Such protection also derives from instruments developed under different legal regimes and subsequently adopted, such as the human rights treaties,[22] and the numerous UNESCO conventions on cultural heritage.[23] Together, these provisions constitute a formal codification expressly ensuring the protection of cultural heritage, both tangible and intangible, in armed conflict. The material scope of this normative framework

17 The attacks on cultural heritage during these two major wars were considerable; some are emblematic, such as the attack on the Louvain university library during the First World War and on the Montecassino Abbey during the Second World War. The vagueness of the regulations, coupled with the imprecision of the weaponry of the time, greatly contributed to the large number of sites affected by these armed conflicts.

18 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), applicable in the event of international armed conflict, profoundly transformed the regulation of the conduct of hostilities in relation to that prescribed by the 1907 Hague Regulations; Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), applicable in the event of non-international armed conflict, further developed the applicable law in such situations, which up to then had been governed only by Article 3 common to the four Geneva Conventions of 1949. Each of these two instruments contains a provision expressly prescribing the obligation of belligerents to ensure the protection of the "cultural or spiritual heritage of peoples".

19 See above note 5.

20 The Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954 (entered into force 7 August 1956) (1954 Protocol), deals with the protection of cultural property in the event of military occupation; the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999 (entered into force 9 March 2004) (1999 Protocol), incorporated more recent developments in the law of armed conflict, such as those relating to the conduct of hostilities, into the system for protecting cultural property.

21 This applies in particular to Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV).

22 Like the UN covenants – i.e., the International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966 (entered into force 23 March 1976) (ICCPR), and International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3, 16 December 1966 (entered into force 3 January 1976) (ICESCR).

23 According to UNESCO's mandate, which is to promote culture in particular, several instruments regarding cultural heritage have been adopted under its initiative, such as the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970 (entered into force 24 April 1972) (1970 Convention); the Convention Concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972 (entered into force 17 December 1975); the Convention for the Safeguarding of the Intangible Cultural Heritage, 17 October 2003 (entered into force 20 April 2006) (2003 Convention); and the Convention on the Protection and the Promotion of the Diversity of Cultural Expressions, 20 October 2005 (entered force 18 March 2007).

now covers cultural heritage in its totality and is no longer limited solely to cultural property.

## Cultural heritage during the conduct of hostilities

During any armed conflict, active hostilities[24] cause harm to the cultural heritage of the belligerents. At first sight it is the tangible heritage that is primarily affected by the fighting, but the damage caused to museums, theatres, cathedrals and other cultural sites can also affect the intangible dimension of this cultural heritage. The effects on cultural heritage during the conflict in Mali in 2012 illustrate this. While the international community remembers the physical destruction of the Timbuktu mausoleums, this was accompanied by the simultaneous, less visible harm caused to the intangible heritage at these sites.[25] The abrupt halt during the conflict to the practices and rituals, both cultural and spiritual, that had gone on in these places demonstrates this.[26] While some performances and ceremonies that have been deprived of their usual settings can be held elsewhere temporarily, this may not be true for others. Certain rituals and celebrations, like those that were practised in the mausoleums, have to be held in specific places.

The conduct of hostilities is regulated exclusively by the law of armed conflict, the only body of law that prescribes in precise form the conduct in which belligerents are forbidden or permitted to engage under these circumstances. Therefore, it unquestionably constitutes a *lex specialis* in this area. The codification that this legal regime provides is built around four fundamental principles relating to the conduct of hostilities in armed conflict. These are the principles of military necessity, distinction, proportionality and precaution. The International Court of Justice (ICJ) has described them in its jurisprudence as "cardinal" principles.[27] These four principles will be discussed in turn below.

### The principle of military necessity

The principle of military necessity represents a customary norm contained in the 1868 Declaration of Saint Petersburg, according to which only such military force as the belligerents need to attain their objective is lawful.[28] It is therefore a restrictive

24 An armed conflict can consist of several phases: the hostilities phase, when fighting takes place between the adverse parties, followed by a phase in which one party falls into the power of the opposing party. This situation may stem from a military occupation, depending on the circumstances in each case. During this second phase, other provisions of the law of armed conflict govern situations of this type.

25 See UNESCO, "World Heritage Committee Calls for End to Destruction of Mali's Heritage and Adopts Decision for Its Support", 3 July 2012, available at: www.unesco.org/new/en/media-services/single-view/news/world_heritage_committee_ calls_for_end_to_destruction_of_malis_heritage_and_adopts_decision_for_its_support/#.VgPwpsuqpHw.

26 UN, above note 7.

27 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, para. 78.

28 The Declaration recognizes "[t]hat the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy" and "[t]hat this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men"; therefore, where the means

principle aimed at limiting the right of belligerents to conduct all-out war. First codified in a binding instrument of the law of armed conflict, namely the 1899 Regulations that would be revised in 1907, it was, along with the principle of humanity, one of the two principles out of which this body of law grew. However, the simultaneous inclusion in one set of regulations of both principles, those of military necessity and humanity, led to the introduction into positive law of a formal reservation to some of its prescriptions. In this way, the principle of military necessity, which began as a restrictive doctrine, then became more of a permissive exception. In a ruling issued in the wake of the Second World War, a British judge recalled in this regard that the requirement relating to the implementation of this principle involved military "necessity" and not military "advantage".[29]

In the law governing the protection of cultural heritage in armed conflict, the exception of military necessity, which puts a strain on several provisions, does indeed mitigate the prohibition against committing an act of hostility during combat, regardless of the regime protecting the object in question. Moreover, in both the 1907 Hague Regulations and the 1954 Convention, the application of this legal reserve is left largely to the discretion of the belligerents. The attacks on cultural heritage during the conflict in the Balkans in the 1990s, such as the destruction of the Old Bridge in Mostar and the partial destruction of the Old City of Dubrovnik, demonstrated once more to the international community that various provisions of the 1954 Convention needed to be revised without further delay. A second protocol to that Convention, the 1999 Protocol, was adopted shortly after the end of this conflict. It now clarifies, among other questions, the implementation of the principle of military necessity by restating, in its Article 6, the rule contained in Article 52(2) of Additional Protocol I (AP I) concerning "military objectives".[30] From now on, the invocation of this exception with regard to cultural property must comply with clearly defined conditions,[31] and the belligerents have considerably less discretion to assess its legitimacy.

## The principle of distinction

The second principle is that of distinction, whereby belligerents must at all times distinguish components of cultural heritage from other property. This principle is essential to preserving cultural heritage, as it prohibits the parties to the conflict both from committing acts of hostility against these components and from using

and methods envisaged prove "useless" with regard to the outcome of military operations, military necessity ceases to exist.

29 See United Kingdom, Military Court at Hamburg, *A. D. Case*, 19 December 1949, p. 522, cited in Éric David, *Principes du droit des conflits armés*, Bruylant, Brussels, 2002, p. 270.

30 AP I, Art. 52(2), stipulates: "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."

31 1999 Protocol, Art. 6(a), provides that, in order for military necessity to be invoked lawfully, the property in question must have "by its function, been made into a military objective", on the one hand, and there must be "no feasible alternative available to obtain a similar military advantage", on the other.

them for military purposes. The initial prohibition against hostile acts has been clarified by incorporating the regulations in AP I into the 1999 Protocol, which confers greater protection on cultural heritage.[32] From now on, the obligation to distinguish is no longer limited solely to differentiating components of the heritage from other property; rather, for an act of hostility to be lawful, the property in question must also have been turned into a military objective.[33] The 1999 Protocol also dictates additional conditions in this regard;[34] in order to make a valid distinction, the parties to the conflict have various obligations, such as the obligation to verify, assess and take precautions, whose demands increase with the importance of the object in question.[35]

Secondly, the principle of distinction also prohibits belligerents from "using" components of cultural heritage for military purposes. Indeed, in many cases, such use harms the property in question and can constitute the precondition and principal motive for the subsequent launching of an attack.[36] This prohibition, which was absent from the 1907 Hague Regulations, was introduced in Article 4(1) of the 1954 Convention and further strengthened by the 1999 Protocol. In addition to the specific conditions laid down in this instrument with regard to the possibility of such property becoming a military objective, Article 6 of the 1999 Protocol also places the belligerents under additional obligations, such as the obligation for the attacking forces to ensure that there is "no feasible alternative available to obtain a similar military advantage".[37]

The case of the Church of the Nativity in Bethlehem, Palestine, illustrates this, even though the 1999 Protocol was not formally applicable under the circumstances. Having been used in 2002 as a refuge by troops of the Palestine Liberation Organization during clashes with Israeli forces – hence for military purposes, thereby violating the principle of distinction – the church potentially became a military objective. An attack could therefore be considered by the Israeli army, if various other conditions were met. Among the specific conditions laid down in the

32 Under the regime of the 1907 Hague Regulations, the principle of distinction chiefly concerned the differentiation between "defended" and "undefended" cities and towns; Article 27 of the Regulations nonetheless provides that, even in the case of defended cities and towns, certain property – i.e., "buildings dedicated to religion, art, science, or charitable purposes" – must be spared "as far as possible". Even in these circumstances, therefore, the principle of distinction must be observed.

33 The adoption of the concept of "military objective" in AP I was aimed at differentiating such objectives from civilian objects. Thus, even before an attack is launched, Article 52 of AP I requires belligerents, in accordance with the principle of distinction, to differentiate military objectives from civilian objects. Under this provision, therefore, civilian objects are, for the first time, expressly protected.

34 The 1999 Protocol specifies the conditions under which an object can be turned into a military objective by requiring that it be so transformed "by its function"; this requirement implies an immediate use of the object for military purposes, thereby enhancing its protection.

35 Depending on whether the object in question enjoys "general" protection, according to both the 1954 Convention and the 1999 Protocol, or "special" or "enhanced" protection, respectively regulated by Articles 8–11 of the 1954 Convention and Articles 10–14 of the 1999 Protocol.

36 Among the causes for an object's transformation into a "military objective", Article 52 of AP I expressly refers to the object being "used" in such a way as to "make an effective contribution to military action".

37 1999 Protocol, Art. 6(a)(ii); Article 7 of this instrument also dictates various precautions that constitute means of implementing the obligation to comply with the principle of distinction.

1999 Protocol with which the Israeli forces would have had to comply, there is one that would have proved decisive in this context, namely that in these circumstances there would have been "no feasible alternative available to obtain a similar military advantage" other than attacking the building.[38] In fact, the decision to lay siege to the church rather than attack it – an approach that the Israelis adopted because of the major international pressure aroused by the situation – undoubtedly contributed to its preservation.[39]

## The principle of proportionality

The third principle, that of proportionality, is a general principle of law.[40] It signifies the search for a balance between military considerations and the concern with ensuring respect for fundamental values, a search that belligerents must constantly engage in as part of the conduct of hostilities. It reflects the very essence of the law of armed conflict, the purpose of which is to reconcile military necessity with the requirements of humanity. This principle was expressly enshrined in positive law only through Article 57(2)(a)(iii) and (b) of AP I, and also, in terms of instruments protecting cultural heritage, by Article 7(c) and (d)(ii) of the 1999 Protocol.

However, the observance of this principle by belligerents poses problems of implementation. In order to determine whether a contemplated military action is or is not lawful, a party to a conflict must evaluate a ratio between two hypothetical values related to a cultural property, i.e. the "direct and concrete advantage" resulting from attacking that property, on the one hand, and the "excessive damage" that it might be expected to cause, on the other hand. While battle-hardened soldiers are generally prepared to assess the first term of this ratio, the same is not so true of the second. Indeed, assessing the probable severity of the damage that may be caused to a cultural property is indeed particularly complex, for it requires a precise knowledge of the property in question, its quality and its value. These are subjective judgements, which differ, among other relevant factors, according to the degree of training of the forces present. Moreover, information concerning the object may be unavailable or incomplete, or exceptional components of the heritage may be found there, unbeknown to those whose task it is to make the proportionality assessment. Hence, judging whether the damage would be excessive is complicated, especially as the decision to attack must frequently be taken at a moment's notice.

The case of the Temple of Ur in Iraq during the First Gulf War in 1991 illustrates the two terms of the ratio. Military officials had placed an Iraqi military aircraft next to the Temple, giving the aircraft a kind of protection against enemy

38 As the 1999 Protocol did not apply to this scenario, this analysis is hypothetical.
39 See Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict,* Cambridge University Press, Cambridge, 2004, p. 163.
40 ICRC Customary Law Study, above note 3, p. 47.

attack.[41] The aircraft could unquestionably have been defined as a military objective, but the military advantage anticipated from its destruction was negligible; it was completely isolated and far from any landing strip, and its destruction did not therefore offer any "concrete and direct military advantage" to the coalition forces. As for the "excessive damage" to the temple that destroying the aircraft could be expected to cause, it too was easily assessable. Destroying the aircraft would certainly have entailed major damage to the property, which was more than 2,000 years old. That the damage could be expected to be excessive was also easily recognizable: the loss of a well-known important cultural property, identified on military staff maps as requiring protection, was clearly excessive in relation to the slight military advantage to be gained from its destruction. The special nature of this situation, and the exceptional quality of the property, facilitated the coalition forces' compliance with the principle of proportionality. However, this is not always the case; the "excessive damage" consideration is often not easily quantifiable, usually because the people who have to make such decisions lack the requisite knowledge of the enemy's cultural heritage, especially when it comes to cultural property that is less well known.[42]

## The principle of precaution

The fourth and final principle, that of precaution, strengthens compliance with the principle of distinction and the principle of proportionality by clarifying many aspects of their implementation. The measures it prescribes are intended to limit and minimize the damage resulting from the conduct of hostilities. As is true of the principle of distinction, the conduct dictated by the obligation to respect this fourth principle varies according to whether it applies to the attacking or the defending party. With regard to cultural heritage, once again, the legal development embodied in AP I[43] and restated in the 1999 Protocol confers considerably greater protection on the components of this heritage.[44] Such protection is expressed through a series of measures that differ according to whether the heritage is or is not in the hands of a given party. These cover the need for belligerents to pay particular attention during hostilities to their choice of means and methods of warfare and the need for certain decisions to be taken by

41 See US Department of Defense, "Report to the Congress on the Conduct of the Persian Gulf War, Appendix O: The Role of the Law of War", *International Legal Materials*, Vol. 31, 1992, p. 626, cited in R. O'Keefe, above note 6, p. 219.

42 The existence of a specific emblem whose purpose is to facilitate the identification of protected cultural property by belligerents in the event of an armed conflict is prescribed in particular by Articles 16 and 17 of the 1954 Convention. The use of this emblem, the blue shield, is compulsory only for cultural property that has been granted the status of "special" protection.

43 The prescriptions in Part IV, Section I of AP I, and specifically in its Articles 52, 57 and 58, are restated in Articles 6 and 7 of the 1999 Protocol concerning cultural property. The purpose of the latter two norms was to clarify Article 4 of the 1954 Convention, according to which the obligation to "respect" cultural property could be lifted with only one condition, that of military necessity.

44 AP I, Art. 57, and 1999 Protocol, Art. 7, respectively.

senior officers, and also specific actions such as deadlines to be observed and warnings to be given.

Mention can be made, for example, of two cities which experienced heavy bombing in different conflicts and eras, namely Isfahan, Iran, in 1985 and Dubrovnik, Croatia, in 1991. These two cases illustrate the obligations of the attacking party and the defending party, respectively, with regard to the principle of precaution.

During the Iran–Iraq War (1980–86), the Iraqi air force carried out a missile attack on Isfahan, where large petroleum refineries were situated. This severely damaged the Jameh (Friday) Mosque, one of the oldest mosques in the Islamic world. It appears that numerous measures dictated by the principle of precaution were not complied with at the time; for instance, there was no verification of the military objective targeted and no monitoring, either of the presence of a component of cultural heritage or of whether the means and methods deployed were appropriate in view of the situation at the site.[45] This attack could therefore be described as indiscriminate and thus unlawful.[46]

The attacks on the Old City of Dubrovnik during the Balkan conflict (1991–95) illustrate the obligations of the defending party. According to the Serbs, the attacks were justified by the alleged presence of a munitions depot on the outskirts of the city. Yet one of the obligations of parties holding components of cultural heritage is to move military objectives away from such property.[47] The proximity of military objectives to cultural property – formally proscribed by law – is indeed liable to dissuade the enemy forces from launching an attack against the military target. In the event of conflict, military equipment is frequently stored next to cultural objects so that the latter can serve as shields, as in the case of the Temple of Ur. In this case, during the years preceding the conflict, the competent authorities had scrupulously evacuated from the Old City of Dubrovnik any object or activity liable to be identified with a military objective.[48] The complete demilitarization that had been carried out there was aimed at preventing any attack, and no attack could therefore be justified on those grounds. The attack launched in December 1991 was thus clearly illegal, as the International Criminal Tribunal for the former Yugoslavia (ICTY) concluded in the 2005 *Strugar* judgment.[49]

The different situations described above show that in the hostilities phase of a given conflict, the greatest risks to cultural heritage result most frequently from its use for military purposes and the battles to which this leads. They also result from choices of means and methods of warfare that are frequently unsuitable and which can often cause indiscriminate attacks against such property. Compliance by the armed forces

45 AP I, Art. 57(2)(a)(i) and (ii).

46 See UNESCO, "Information on the Implementation of the Convention for the Protection of Cultural Property in the Event of Armed Conflict", The Hague, 1954, *1989 Reports*, Doc. CC/MD-11, December 1989, notes 4–8.

47 AP I, Art. 58(b).

48 Clémentine Bories, *Les bombardements serbes sur la vieille ville de Dubrovnik: La protection internationale des biens culturels*, Pedone, Paris, 2005, pp. 41, 47.

49 ICTY, *The Prosecutor v. Pavle Strugar*, Case No. IT-01-42, Judgment (Trial Chamber), 31 January 2005, para. 295.

engaged in combat with the four principles defined above is therefore an essential firewall against such harm. While the current state of technological development of armaments enables certain corrections to be made to the risks associated with the choice of means and methods of warfare, the human factor is still fundamental to the protection of cultural heritage in the event of armed conflict, as shown in particular by the principle of proportionality. Indeed, the knowledge required to assess and differentiate the components of cultural heritage, particularly in order to comply with the principles of distinction and proportionality, results from the perception of duly trained individuals when they are faced with situations of this kind.

## Tangible cultural heritage fallen into enemy hands

Harm to cultural heritage when it is under the control of enemy forces occurs mainly in situations of military occupation and of non-international armed conflict. Such harm usually results from violations of the said forces' obligations to ensure the protection of both the people and the property that have fallen into their power. These obligations are based on a more diverse range of instruments than those governing the conduct of hostilities alone. The components of cultural heritage that are affected in these situations are then likely to increase in scope, and the intangible dimension of the heritage, which is sometimes given a lower priority during hostilities, proves to be particularly at risk when fallen into the enemy's power.

Indeed, a military occupation, or any other similar situation,[50] can, because it is frequently long-lasting, involve profound changes to the economic and social fabric and to the lifestyles and behaviour patterns of the societies concerned. These changes are liable to undermine the cultural identity of individuals. Moreover, internal armed conflicts may often have a religious, cultural or ethnic character which can contribute to endangering not only cultural property but also the cultural and spiritual expressions linked to it, as shown by the Malian example mentioned above. As the applicable legal instruments focus on one or another dimension of cultural heritage, the analysis of the protection they confer deals first with the tangible heritage and then with the intangible heritage. The premise that any component of cultural heritage is bidimensional nonetheless still stands, and is underscored in the discussion below. Across different armed conflicts, cultural heritage may suffer different types of harm, and three of these will be discussed here.

### Harm resulting from destruction of components of cultural heritage

The first type of harm is "destruction". It differs from the destruction resulting from combat during hostilities, in that it involves the demolition, dismantlement or

50 The "similar situations" referred to here are those in which the cultural heritage is in the hands of enemy forces, but no military occupation has been formally recognized; aside from contested cases of military occupation, these situations also include non-international armed conflicts, in which the parties having control over the territory are also in control of its cultural heritage.

abandonment – and subsequent deterioration due to lack of maintenance – of property. Examples include the demolition of the Mughrabi Quarter in East Jerusalem,[51] the Orthodox churches in ruins in the occupied part of Cyprus and, more recently, the wrecking of the Hatra archaeological vestiges in Iraq by forces of Islamic State Group. The law applicable to cultural heritage differs considerably depending on whether an international armed conflict, a military occupation or an internal conflict is involved. While the first two situations are largely regulated by the law of armed conflict, the same is not true for the third, particularly when the property concerned does not meet the definition of cultural property under the 1954 Convention. The instruments belonging to regimes other than the law of armed conflict – some of whose provisions nonetheless remain applicable in such situations – are then likely to constitute an additional source of legal protection that can sometimes prove essential.

In the event of military occupation, as in two of the examples above, the law of war expressly forbids "destruction",[52] and the *lex specialis* concerning cultural property, namely Article 5 of the 1954 Convention, prescribes the occupying forces' abstention requirements, thereby maintaining the primary jurisdiction of the national authorities assigned to protect cultural heritage. In so doing, Article 5 *a fortiori* also proscribes all types of harm to this heritage. In an internal conflict, however, it is only cultural property – as defined by the 1954 Convention, or that which represents what Article 16 of Additional Protocol II (AP II) describes as the "cultural and spiritual heritage of peoples" – that formally enjoys protection under the law of armed conflict.

Thus, in circumstances such as the civil war that tore Guatemala apart (1960–92), the destruction of the cultural heritage of the Rabinal Mayan communities in Guatemala – i.e., the masks, costumes and musical instruments essential to their celebrations of the Rabinal Achí[53] – was not formally prohibited by the applicable provisions of the law of armed conflict.[54] These objects were not considered by the military forces into whose power they had fallen as meeting the definitions of cultural property or the cultural and spiritual heritage of peoples under Article 1 of the 1954 Convention and Article 16 of AP II respectively. To confer a form of protection on those objects, therefore, it would have been necessary to resort to other norms, such as those concerning intangible cultural heritage in the 2003 Convention (had it been applicable at the time),

51 See UNESCO Executive Board, "Report of the UNESCO Technical Mission to the Old City of Jerusalem", Doc. 176 EX/Special Plenary Meeting/INF.1, 12 March 2007.

52 Among the applicable provisions in this regard, mention can be made of Article 56 of the Hague Regulations and Article 52 of GC IV, as well as Article 5 of the 1954 Convention and Article 9 of the 1999 Protocol, specifically for "cultural property".

53 The Rabinal Achí is a cultural and spiritual celebration held in Rabinal, Guatemala. It has been recognized by UNESCO as one of the Masterpieces of the Oral and Intangible Heritage of Humanity.

54 These objects were regarded as mere civilian property by the Guatemalan armed forces in whose power they were being held. Hence, their destruction was not prohibited by common Article 3, the only one of the norms of the four Geneva Conventions that applies to internal armed conflicts. Nor does AP II expressly forbid the destruction of such property; its Article 16 alone proscribes all attacks against the "cultural and spiritual heritage of peoples", to which, in the eyes of the soldiers present, these objects did not belong.

those of the 1989 ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), or the cultural rights provisions of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[55]

## Harm resulting from changes in the function of components of cultural heritage

The second type of harm involves a "change of function" of property or sites belonging to the cultural heritage. Examples include the Oued Hanin mosque near Ramallah,[56] which was turned into a synagogue; certain Angkor temples, which were used as warehouses under the Khmer Rouge regime;[57] and the Saint Anastasia Church in the village of Lapithos, Cyprus, which became a hotel.[58] There are no norms expressly prohibiting such actions, but such a prohibition can be inferred, implicitly or indirectly, from certain provisions of the law of armed conflict concerning situations of military occupation, such as those prohibiting the seizure or appropriation of cultural property.[59] It should be emphasized, furthermore, that this type of harm not only affects the property or sites so transformed. A change in function is also liable to destroy the intangible components of the heritage concerned, such as the knowledge and history linked to the property, which gives it meaning and value, and the events, ceremonies and rituals which take place in the property. Such components can indeed be affected or even destroyed by the changes made to an object or a site, as evidenced by the above examples of different places of worship.

Some episodes of the 2003 Iraq War offer an illustration of these types of harm to cultural heritage in its various dimensions, such as the conversion of the Babylon archaeological site into a military base in 2003, decided on by US forces and then continued by Polish forces up to 2004.[60] Such a change in function involved considerable damage, both tangible and intangible. The construction at this site of a military base with a helicopter landing pad not only led to the destruction of numerous vestiges dating back thousands of years, but also, because of massive additions of soil from elsewhere, caused intermingling of sands at the site that had not yet been studied. These sands contained countless pieces of information on past civilizations, which are now lost forever. The history that their study would have revealed was thus obliterated. The damage resulting from the

55 For example, ICESCR, Art. 15, which enshrines everyone's cultural rights; and ICCPR, Art. 27, which protects the cultural rights of "ethnic, religious or linguistic minorities".

56 M. Abou Khalaf, "Profanation des sites islamiques en Palestine", in *Protection des sanctuaires chrétiens et islamiques en Palestine,* Islamic Educational, Scientific and Cultural Organization, 2000; Amira Samir, "Mosquées transformées en autre chose que leur objectif naturel", *Al-Ahram Hebdo*, 17–23 March 2010.

57 Etienne Clément and Fabrice Quinio, "La protection des biens culturels au Cambodge pendant la période des conflits armés, à travers l'application de la Convention de La Haye de 1954", *International Review of the Red Cross*, Vol. 86, No. 854, 2004, p. 395.

58 "Anastasia Resort Hotel (Lapithos)", press release, Embassy of Cyprus in Paris, 21 June 2008.

59 Namely, 1907 Hague Regulations, Art. 56(2), and 1954 Hague Convention, Arts 4(3), 5.

60 Rory McCarthy and Maev Kennedy, "Babylon Wrecked by War", *The Guardian*, 15 January 2005.

change in the function of the Babylon site by the occupying forces therefore caused severe harm to the Iraqi cultural heritage in its multiple dimensions.

The law of military occupation, as regulated by the 1907 Hague Regulations, the only instrument formally applicable in this instance,[61] unconditionally forbids such action, mainly through the prohibition against "seizure" and "destruction" of such property contained in Article 56 of the Regulations. The 1954 Convention, in imposing an abstention requirement on the occupying forces,[62] would also have prevented such action. But the 1999 Protocol, had it been applicable, would specifically have proscribed this type of conversion. Whereas the protection furnished by the preceding instruments was only implied, the 1999 Protocol now marks a clear breakthrough in the application of the law of armed conflict to such situations. In fact, its Article 9 expressly forbids, in paragraph (1)(b), "any archaeological excavation" and, in paragraph (1)(c),[63] the destruction of "cultural evidence", thereby ensuring the preservation of cultural heritage in both its tangible and intangible dimensions.

## Harm related to the removal of components of cultural heritage

Cultural heritage can also be harmed by the "removal", in various forms, of its components. This occurs frequently in armed conflict when the national authorities exercising oversight of cultural property are disorganized or even non-existent. Such circumstances encourage pillage, theft and all other forms of appropriation or diversion of property. These acts are usually followed by illicit transfers of movable cultural property from war-torn countries to third States, where it is sold, thereby fuelling a market in works of art that can be contrary to the applicable law, both international and national.

Unlike the other acts mentioned above, acts of pillage are prohibited by the law of war in all cases of armed conflict, regardless of the conflict phase in which they occur.[64] Furthermore, this prohibition applies to all property, not only to cultural property. The situation is different with regard to theft or any form of unlawful appropriation: such conduct is not proscribed by the law of armed conflict unless it involves components of cultural heritage duly recognized as such. Instruments such as the 1954 Convention and its two Protocols (1954 and 1999) regulate such actions, and the prohibition against this type of harm is laid down mainly in the

61 Neither the United Kingdom nor the United States were party to the 1954 Convention. The United States did not ratify it until 2008.

62 In addition to Article 5 of the 1954 Convention, which imposes on the occupying forces an abstention requirement, Article 4(1) prohibits "any use … likely to expose [the objects] to destruction or damage". This provision also applies in the event of military occupation.

63 1999 Protocol, Art. 9(1)(c), requiring in particular the condition of intent, could not have applied in this scenario.

64 In particular, Articles 28 and 47 of the 1907 Hague Regulations, Article 33(2) of GC IV and, in the event of internal armed conflict, Article 4(2)(g) of AP II; for cultural property alone, Article 4(3) of the 1954 Convention prohibits such acts in all armed conflicts, and Article 19(1) specifically in armed conflicts not of an international character. To this is added, in the event of any armed conflict, the Article 15(e) of the 1999 Protocol, criminalizing such acts and thus facilitating the implementation of the prohibition against pillage.

event of military occupation.[65] The law of armed conflict sometimes seems patchy in this regard, mainly in internal armed conflicts, when the property in question does not have the status of cultural property or is not recognized as such by enemy belligerents.

In some cases, it may be necessary to resort to other instruments under legal regimes other than the law of war. With regard to cultural property, the 1970 UNESCO Convention and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects[66] can sometimes fill certain gaps in the law of armed conflict, e.g. by providing additional mechanisms for the return or restitution of cultural property, especially when it is in private hands. Other gaps arise from the absence of norms applicable in non-international armed conflicts that would ensure the protection of property which does not have the status of cultural property.[67] Only norms of the law of armed conflict aimed at protecting such property, such as the provisions of the 1907 Hague Regulations governing international armed conflicts, which are applicable as customary rules, seem to be able to be invoked in the event of non-international armed conflict, based in particular on the jurisprudence of international judicial bodies, which enshrine their applicability in such situations as well.[68]

One illustration of the need to resort to different instruments in connection with the removal of cultural property is the case of the Dead Sea Scrolls. These objects, discovered in the 1950s in the Qumran Caves on the West Bank, were exhibited at the Palestine Archaeological Museum in East Jerusalem until 1967. They were then withdrawn from that museum and transferred to the Shrine of the Book in Israel.[69] This act was contrary to various norms of the law of armed conflict applicable in the event of military occupation, such as Article 56(1) of the 1907 Hague Regulations, which prohibits the "seizure" of property by the

65 Article 4(3) of the 1954 Convention expressly prohibits "theft", "misappropriation … of cultural property", "acts of vandalism" and "requisitioning movable cultural property situated in the territory of another High Contracting Party". The 1954 Protocol, which is applicable in the event of military occupation, prohibits the exportation of such property from an occupied territory, even if the latter is not party to the Protocol. The 1999 Protocol reiterates this prohibition in its Article 9(1)(a), proscribing "any illicit export, other removal or transfer of ownership of cultural property".

66 International Institute for the Unification of Private Law (UNIDROIT), Convention on Stolen or Illegally Exported Cultural Objects, Rome, 24 June 1995.

67 It should be noted that, within the framework of the 1954 Convention, the designation of property as cultural property falls under the jurisdiction of the State holding the property. However, in armed conflicts, it is the enemy forces that are required to spare cultural property, especially in the context of hostilities. If these forces have not been previously notified by the holding State or by an authority such as UNESCO of the presence of protected cultural property, it is nevertheless their responsibility to identify such property. In the event of armed conflicts with a religious, ethnic or cultural character, such identification may prove difficult, and there is a risk that the property in question may then be considered mere civilian property. Even in such cases, the property nonetheless continues to enjoy the protection due to it under the law of armed conflict, which is applicable under both treaty law and customary law.

68 ICRC Customary Law Study, above note 3, Rules 38–39 and 7–10 recognize the prohibition (subject to certain conditions) against attacks and damage by belligerents on both civilian and cultural property as a rule of customary law, applicable in the event of both international and non-international armed conflict.

69 AFP, "UNESCO: Plainte jordanienne sur la propriété des manuscrits de la mer Morte", press release, *Le Point.fr*, 11 January 2010.

occupying forces. In this instance, therefore, the withdrawal of the Scrolls was unlawful. These objects, which were indisputably cultural property, were covered by the 1954 Convention. Article 5 of the 1954 Convention imposes an abstention requirement on the occupying forces; seizure, in particular, is incompatible with this obligation. Paragraph 1 of Part I of the 1954 Protocol further requires such forces to prevent the exportation of property from occupied territories; hence, this obligation, too, was breached. Moreover, during an exhibition of the Scrolls in Canada in 2009, the Palestinian Authority and Jordan, citing paragraphs 2 and 3 of the 1954 Protocol, asked that they be sequestered and then returned. The request was not complied with. If the 1970 Convention or the 1995 UNIDROIT Convention had been applicable, the mechanisms they establish might have encouraged the return of this property.

## Intangible cultural heritage fallen into enemy hands

Intangible cultural heritage includes various forms of cultural expression and events, such as dance, music and theatre, as well as beliefs, rituals and know-how, which reflect the traits of a given group and convey its cultural and spiritual identity. Individuals give life to this heritage, using instruments, tools, costumes and other objects. The protection of this property has been addressed above; this section deals only with the protection of individuals. The primary protection that the law must provide is clearly to safeguard the life and physical well-being of every person, and the law of war prescribes such protection in all circumstances of armed conflict. Nevertheless, giving life to intangible cultural heritage requires the individuals concerned to fulfil many other functions, which must also be legally protected in order to safeguard their heritage. War harms people and disrupts the pattern of their lives, and this section focuses on three types of harm that show how an armed conflict can hinder the expression and preservation of intangible cultural heritage in such circumstances.

### Harm to the realization of intangible cultural heritage

Intangible cultural heritage comes to life, first and foremost, through its "realization" by interpreters or bearers. Such people may be actors, musicians or dancers; writers, painters or poets; or officiants, clergy or spiritual leaders. With regard to the latter, the law of armed conflict ensures the specific protection of "ministers of religion" and their function, regardless of the nature of the armed conflict.[70] The same cannot be said, however, for the functions of actors and creators. The protection that the law affords them breaks down into two stages: first the "knowledge" connected with the cultural expression is preserved, and then the actual "activity" is guaranteed. Yet the law of armed conflict proves deficient with regard to protecting the functions of actors and creators, and the necessary legal protection

70 For example, among other provisions, see GC I, Art. 24; AP I, Art. 15(5); AP II, Art. 9.

must therefore be sought in other bodies of law, such as international human rights law, in particular the ICCPR and ICESCR,[71] as well as the UNESCO cultural property conventions.[72]

The fate of the performers of Sbek Thom, a Cambodian shadow theatre decimated during the civil war that took place under the Khmer Rouge regime in the 1970s, can be mentioned as an example. Given the state of the law of armed conflict applicable at the time, only common Article 3 to the four Geneva Conventions could be invoked. While it conferred protection on the lives and physical well-being of the performers, none of its provisions could really be interpreted in such a way as to extend that protection to the functions of the performers, whether they were musicians, puppeteers or storytellers, as the Sbek Thom performers were. Hence, other legal bases had to be found to protect these functions, such as international human rights law, which provides broad protection for freedom of thought and expression and cultural rights in general. And among the conventions adopted under the auspices of UNESCO that enshrine the protection of cultural heritage, the 2003 Convention would probably have been able, had it been applicable at the time, to confer protection not only on individuals but also on the knowledge they embodied and the actions they performed to give life to the component of intangible cultural heritage that was the Sbek Thom theatre.

## Harm to participation in expressions of the intangible cultural heritage

The second function of intangible cultural heritage that armed conflict can also harm is the free "participation" of groups and communities in events related to this heritage. This implies, in particular, the ability to move, to get together and to have access to places where the heritage is expressed. The law of armed conflict prescribes various norms ensuring that the populations concerned have the right to maintain their daily lives and to have their "habits and customs" respected, but this applies mainly to situations of military occupation. In other contexts of armed conflict, such as internal armed conflicts, the law of armed conflict has gaps that must be filled by resorting to other applicable provisions, such as human rights norms.[73]

The difficulties that Palestinians face in gaining access to some of their spiritual ceremonies held in the Old City of Jerusalem, such as those that take place during Holy Week, are a clear illustration of the constraints that occupying

71 It should be recalled in this regard that there are only a few of the freedoms enshrined in international human rights law, such as freedom of thought, conscience and religion (ICCPR, Art. 18), from which no derogation is permissible in times of armed conflict; other rights, like freedom of expression (ICCPR, Art. 19), may be derogated from and/or restricted if the requisite conditions are met, including the emergence of situations similar to an armed conflict. Nevertheless, while the application of these provisions may be restricted, such restrictions cannot undermine these rights.

72 The purpose of these various instruments' stipulations protecting cultural heritage and the human rights relating thereto is not only to prohibit constraints on the manifestations of that heritage, but also, in some cases, to require that they be supported to ensure the heritage's continuation.

73 Such as freedom of movement (ICCPR, Art. 12) and freedom of assembly (ICCPR, Art. 21).

forces can place on the participation of the populations concerned in expressions of their cultural heritage. The law of armed conflict applicable in the event of military occupation or similar situations specifically prescribes these forces' obligation to respect people's freedom to practise both their religion[74] and their customs, which includes the celebration of feasts or rituals belonging to their own cultural and spiritual heritage.[75] Many norms protecting human rights that are in any event applicable as *lex generalis* guarantee the same rights with regard to participation in such celebrations. It should be recalled in this regard that the ICJ confirmed the applicability of such norms in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, as well as the impossibility of any abrogation or limitation of these provisions in the case in question.[76]

## Harm to the transmission of intangible cultural heritage

A third type of harm liable to seriously affect intangible cultural heritage is the obstruction of its "transmission" to future generations. While the Angkor Wat temples have managed, despite the vicissitudes of history, to remain standing through the centuries, the same is not true, for example, of the Sbek Thom theatre, which because of its intangible character could survive only by being handed down from one generation to the next. It is in fact a living heritage, staged by some individuals so that others can absorb its content, become its repositories and hand it down in turn. Yet, in situations of armed conflict, the transmission of intangible cultural heritage, which necessarily involves encounters between qualified individuals and the populations concerned, as well as conditions conducive to the ability to teach, exhibit and produce, is frequently hindered. This is seen in family, educational, professional and other environments, for war usually sows chaos in everyone's life. The law of armed conflict has no specific answers for countering this type of harm; they must be sought mainly in its norms ensuring respect for family rights and people's daily lives, customs and beliefs, or for their means and ways of producing their art and craftwork.

The provisions of the law of armed conflict that are the most specific in this regard belong to the law of military occupation. The Sufi masters' transmission of religious practices to their pupils during the Soviet occupation of Afghanistan in the 1980s benefited from the protection afforded by various norms of this body of law

74 The obligation to respect "religious convictions and practice" is set out in Article 46 of the 1907 Hague Regulations. For its part, Article 27(1) of GC IV provides that persons in the power of enemy military forces "are entitled … to respect for … their religious convictions and practices".

75 Various provisions of the law of armed conflict lay down the obligation to respect the daily lives of people who are in the power of enemy military forces. Among them, Article 27(1) of GC IV requires the military forces in whose power enemy civilian populations are held to respect their "manners and customs". Article 43 of the 1907 Hague Regulations further requires that the "laws in force" in a militarily occupied country also be respected, and Article 46(1) states that "family honour and rights [and] the lives of persons" shall be respected.

76 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, paras 108, 112.

that were applicable in this instance. The situation would have been different in other circumstances of armed conflict, such as internal armed conflicts, where it must be acknowledged that there are certain gaps in the legal instruments belonging to the law of armed conflict that might otherwise ensure the effective transmission of intangible cultural heritage. The gradual disappearance of the ceremonies conducted by shamans among the indigenous communities on Mindanao Island in the Philippines can serve as one example of this. Having been denied access to the forest because of the armed conflict, the shamans could no longer go there to search for the plants they needed for their rituals. The transmission of this knowledge to succeeding generations was deeply impaired as a result. Only the application of other provisions under different legal regimes could have safeguarded these components of Mindanao's intangible cultural heritage. Such provisions include, in addition to certain human rights norms applicable in these circumstances, those whose aim is to preserve intangible cultural heritage, such as the provisions of the 2003 Convention, as well as some norms of the 1989 ILO Convention No. 169 and possibly of the instruments whose elaboration is currently in progress at WIPO and which are designed to protect traditional cultural expressions, traditional knowledge and genetic resources.[77]

## Conclusion

Recent armed conflicts – like the one in Mali, in which the attack on the Timbuktu mausoleums cannot be separated from the impediment to the ceremonies that were held there – illustrate in particular the multidimensional character of any component of cultural heritage, although the predominance of the tangible or intangible dimension varies from one case to the next. The protection that the applicable law in such situations must provide to cultural heritage cannot, therefore, be limited to one or another of its components. The law of armed conflict only partially meets this requirement through the system of the 1954 Convention and its two Protocols, which aim mainly to ensure the preservation of cultural property; the protection of intangible cultural heritage that these instruments prescribe is at best implicit or indirect. The law of armed conflict, the *lex specialis* in these circumstances, is not, however, deficient in this regard. Various norms of the 1949 Geneva Conventions and their Additional Protocols confer protection on individuals as regards both their physical well-being and their human dignity, and in particular, their cultural and spiritual identity; in so doing, they too help ensure the preservation of the "living" cultural heritage of the populations concerned, which is constituted by their intangible cultural heritage.

77 The binding norms protecting intangible cultural heritage, along with various rights related to the cultural identity of indigenous peoples, appear in the 2003 Convention and in ILO Convention No. 169. As for WIPO, deliberations are now taking place within that body on the possible adoption of regulations concerning traditional knowledge, traditional cultural expressions and genetic resources.

Having said that, these norms are not always precise enough to afford the best protection to the intangible cultural heritage at risk. Indeed, the protection that they offer is sometimes only inferred, and it also often derives from a broad interpretation of the provisions in question, one based mainly on their aim, which is to ensure respect for human dignity. Furthermore, while several of these provisions can be invoked in the event of military occupation, the same is not true of internal armed conflicts, in which frequently only common Article 3 and the relevant provisions of the law of armed conflict (viewed as customary norms) are applicable. Resorting to the protection that other legal regimes, such as international human rights law and the UNESCO cultural conventions – various norms of which are *lex generalis* – might offer in these circumstances, and invoking the applicability of these norms, seems therefore to be both possible and necessary.[78] Indeed, their application, complementing that of the law of armed conflict, would ensure the effective protection of cultural heritage, both tangible and intangible, in any armed conflict situation.

Such an approach is, moreover, currently being discussed at UNESCO, in the Committee for the Protection of Cultural Property in the Event of Armed Conflict, where various States have supported the implementation of synergies between the 1954 Convention and other UNESCO instruments, particularly the 2003 Convention,[79] that aim to ensure the protection of cultural heritage.[80] This consensus, which can also be found in other bodies such as the Committee for the Safeguarding of Intangible Cultural Heritage,[81] reflects the international community's recognition of the existence of a law protecting cultural heritage, both tangible and intangible. Nevertheless, the accession by a large number of States to these legal instruments does not negate the challenge of applying them, and the current destruction of the Syrian and Iraqi cultural heritage is an issue to which there has been no response up to now.

78 The applicability of such norms in the event of armed conflict is extensively analyzed and demonstrated in the author's research work. See Christiane Johannot-Gradis, *Le patrimoine culturel matériel et immatériel: Quelle protection en cas de conflit armé?*, Schulthess, Geneva, 2013, pp. 149–184.

79 During its 10th session (10–11 December 2015), the Committee for the Protection of Cultural Property in the Event of Armed Conflict adopted Decision 10.COM 4 para. 6, whereby the Committee expressly invites its Bureau to develop synergies with the 2003 Convention, parallel to those with the 1970 and 1972 Conventions.

80 See UNESCO Committee for the Protection of Cultural Property in the Event of Armed Conflict, "Development of Synergies with Other Relevant UNESCO Normative Instruments and Programmes and Strengthening Partnerships", Doc. CLT-14/9.COM/CONF.203/7, 18–19 December 2014.

81 The Committee for the Safeguarding of Intangible Cultural Heritage, at its 10th session (Windhoek, 30 November–4 December 2015), emphasized the necessity of promoting the application of the 2003 Convention "including in situations of armed conflict": Decision 10 COM/15a, Annex para. 5.