



UNIVERSITÀ DEGLI STUDI DI FERRARA
DIPARTIMENTO DI GIURISPRUDENZA
Corso di Laurea Magistrale in Giurisprudenza

TESI DI LAUREA IN DIRITTO INTERNAZIONALE

THE INTERNATIONAL PROTECTION OF CULTURAL
HERITAGE IN ARMED CONFLICTS:
THE DESTRUCTION OF PALMYRA

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Anno Accademico 2016-2017

ABSTRACT

Lo Stato Islamico dopo aver conquistato vaste aree del territorio Iracheno e Siriano nel 2014, ha dato inizio ad una vera e propria campagna distruttiva contro il patrimonio culturale e religioso di questi due paesi. In particolare la città siriana di Palmira, patrimonio mondiale dell'UNESCO, è stata vittima di ripetuti e devastanti attacchi che l'hanno ridotta un ammasso di rovine. La distruzione di Palmira mira a colpire non solo la popolazione siriana, ma anche l'intera comunità internazionale per la quale la salvaguardia del patrimonio culturale è un valore fondamentale. Fondamentale in un'epoca in cui l'Iconoclastia continua a mietere nuove vittime, è l'analisi degli strumenti internazionali sulla salvaguardia della proprietà culturale per comprendere se questi possano o meno applicarsi all'ISIS, e in più in generale ai gruppi armati non statali. L'impostazione tradizionale del diritto internazionale come diritto degli stati deve ormai essere abbandonata. L'attuale contesto internazionale obbliga il diritto internazionale ad evolversi in base alle nuove realtà per il raggiungimento dei suoi obiettivi primari: garantire la pace e la sicurezza e la minor sofferenza alle popolazioni civili colpite dai conflitti. Sarebbe inutile e irragionevole lasciare impuniti i crimini culturali dell'ISIS solo perché commessi da un'entità non statale. La distruzione dei beni culturali perpetrata dall'ISIS colpisce al contempo sia il popolo siriano, privato della propria identità culturale e religiosa, sia l'intera comunità mondiale privata del contributo culturale della comunità colpita. La distruzione intenzionale dei beni culturali si rivela essere un crimine contro le persone, per questo la protezione dei civili e del patrimonio culturale e religioso devono risolversi in un'unica lotta volta a tutelare le popolazioni colpite.

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INTRODUCTION

Since antiquity, the intentional destruction of cultural heritage has been used as a weapon to conquer one's enemy. Cultural heritage represents the "core identity" of each population and its destruction annihilates the identity and self-pride of each community, undermining its sense of belonging¹. In the words of Director-General UNESCO, Irina Bokova, "damage to the heritage of a country is damage to the soul of its people and its identity"². Many examples can be cited about this practice, but the most striking are surely the Nazi campaign during WWII against cultural property and the extensive devastations occurred during the Balkan Wars. Contemporary history, instead, shows how cultural heritage has become a primary objective of non-state armed groups (NSAG) who are religiously motivated and engaged in internal wars against established governments. Just to mention the most recent events, there was the devastation of Timbuktu's cultural and religious patrimony carried out by affiliate of Al-Qaeda in Mali³, Ansar-Dine, and the Taliban's destruction of the huge statues of the Buddhas of Bayman in Afghanistan⁴. Apart from these examples, it is the recent and ongoing conflict in the Middle-East that has mostly risen the international concern for the destruction of Syrian and Iraqi cultural heritage perpetrated by the Islamic State since 2014⁵. ISIS, which adheres to a strict interpretation of Koran, is deliberately striking Syrian and Iraqi cultural and religious heritage to "purify" these territories from

¹ Kristin Hausler, *'Culture Under Attack: The Destruction of Cultural Heritage by Non-State Armed Groups'* (2015) Vol. 2 No. 1, 117, 118.

² Director-General of UNESCO appeals for protection of Syria's cultural heritage (30 March 2012) <http://whc.unesco.org/en/news/862/> (last accessed on 11 September 2017).

³ 'Malian Islamists attack world heritage site mosques in Timbuktu', The Guardian (2 July 2012) <https://www.theguardian.com/world/2012/jul/02/mali-islamists-attack-world-heritage-mosques-timbuktu> (last visited on 22 September 2017), see also Francesco Francioni, James Gordley, *Enforcing International Cultural Heritage Law*, (Oxford University Press, 2013) 59-62

⁴ Taliban blow apart 2,000 years of Buddhist history, The Guardian (3 March 2001) <https://www.theguardian.com/world/2001/mar/03/afghanistan.lukeharding> (last visited on 22 September 2017) and

Francesco Francioni and Federico Lenzerini, *'The destruction of the Buddhas of Bamiyan and International Law'* (2014), Vol. 14 No. 4 European Journal of International Law 619- 651.

⁵ Federica Mucci, *'Intentional destruction of cultural heritage by Isis: the reaction of the International Community against the specific aspect of the aggression to peace and human rights'* (2016) Vol 2 N. 1 Peace Processes Online, 1, 2.

idolatry through the eradication of any icon or idol that diverts from the worship of God⁶. Idolatry constitutes one of the gravest sins according to the severe Salafist version of Islam embraced by this group.

This work will focus on the destruction of Palmyra, because of its particular cultural significance for the Syrian population and for all mankind. This city, which is a symbol of multiculturalism, was specifically targeted by ISIS's fury and is the most devastated archaeological site in Syria. It suffered multiple attacks and now the damages are countless⁷. Syrian people and all mankind have lost irreplaceable traces of human creativity that cannot be recreated in their original form.⁸

Thus, this work intends to examine the challenge to international law posed by the current war in Syria and in particular the ongoing of a non-international conflict (NIAC) and the involvement of non-state actors in cultural crimes⁹. The aim of this work is to highlight the necessity of prosecuting ISIS for its cultural crimes by outlining the legal international basis for such prosecution. The principal issue to solve is to clarify whether and to what extent NSAG as ISIS can be considered bound to International Law (IL). The problem thus turns into understanding whether NSAG must comply with IL and in particular with International Humanitarian Law (IHL) applicable to armed conflicts. A short part is also dedicated to NSAG obligations under international human rights law (IHRL). The First Chapter presents a short analysis of the various passages that contributed to the rise of the Syrian conflict, its evolution¹⁰ and its regional and global

⁶ Claire Smith, Heather Burke, Cherrie de Leulien and Gary Jackson, *'The Islamic State's symbolic war: Da'esh socially mediated terrorism as a threat to cultural heritage'* (2015) Vol. 16 No. 2 Journal of Social Archeology, 164, 168.

⁷ Paul Veyne, *Palmira, Storia di un tesoro in pericolo*, (Garzanti Libri, 2016), 51.

⁸ Federica Mucci, *'Intentional destruction of cultural heritage by Isis: the reaction of the International Community against the specific aspect of the aggression to peace and human rights'* (2016) Vol 2 N. 1 Peace Processes Online, 1, 2.

⁹ Giuliana Capaldo, *Diritto Globale: il Nuovo Diritto Internazionale* (Giuffrè, 2010), 57.

¹⁰ The Syrian conflict started as peaceful demonstrations against Assad's government that turned into a real civil conflict in June 2012, according to the International Committee of the Red Cross's statement. The Syrian civil war can actually be considered also an "internationalized conflict" or a "proxy war" for the involvement of many foreign states and US-led coalition. Although an internal conflict is still occurring between Assad's troops and the Syrian rebels, and between the Assad's troops and ISIS militias.¹⁰ Global Centre For Responsibility to Protect, *R2P Monitor: Issue 5* (September 2012)

<http://www.globalr2p.org/media/files/ce6f68d47496a46af5b723baf59db6e.pdf> (last visited

implications¹¹. The last part, instead, describes a few aspects of the Islam State and the factors that favoured its birth. In particular, its ideology, its use of terror and the strong rejection of international order are thoroughly handled. This terrorist organization rapidly replaced Al-Qaeda's leadership over all Middle-East jihadist groups. It succeeded in the establishment of a "Caliphate" that aspires to become the home country for all Muslims, an objective that has never been reached by any other extremist Islamic group¹². ISIS is not only killing every person who seeks to oppose its power, but it is also conducting an "overall attack" against Syrian culture¹³. This destructive campaign is carried out through the use of indiscriminate violence against peoples and their cultural expressions. Thanks to the control gained over many areas, this terrorist group was able to carry out its iconoclastic plan against the cultural and religious heritage of these territories. An example of this practice is Palmyra, which was reconquered by Assad's forces only in March of this year¹⁴.

The Second Chapter presents an overview of the main international instruments that regulate the states' obligation of protecting¹⁵ cultural heritage during armed conflicts. In particular, the work focuses on the progressive development of this discipline, starting from antiquity to nowadays. The most important instrument dedicated exclusively to the protection of cultural property is the Convention on the Protection of Cultural Heritage in the Event of Armed Conflict, adopted by UNESCO on 14th May 1954¹⁶. The weak points of this Convention are also addressed, such as the concept of military necessity and the lack of a compulsory

on 31 January 2015) and Gideon Rachman, *Siria, Un Incubo Chiamato «Proxy War»*, *La Guerra Per Procura*, *Il Sole 24 Ore* (7 October 2015)

¹¹ Ted Galen Carpenter, *Tangled Web: The Syrian Civil War and Its Implications*, *Mediterranean Quarterly* (2013) Vol. 24 No. 1, 1-11.

¹² Donald Holbrook, *Al-Qaeda and the Rise of ISIS*, *Survival* (2017) Vol. 57 No 2, 93, 94.

¹³ Mucci, *'Intentional destruction of cultural heritage by Isis*, 7.

¹⁴ *Palmyra: Syrian forces 'completely retake' IS-held town*, *Bbc News* (2 March 2017), <http://www.bbc.com/news/world-middle-east-39147612> (last visited on 19 August 2017)

¹⁵ In particular states are obliged to protect both their cultural heritage both the enemy's one.

¹⁶ 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted on 14 May 1954, entered into force on 7 August 1956) 249 UNTS 240 <http://www1.umn.edu/humanrts/instree/1954b.htm> (last visited 21 August 2017).

universal jurisdiction for the punishment of cultural crimes¹⁷. Equally relevant are the provisions on the individual responsibility contained in the statutes of the Military Tribunal of Nuremberg (Nuremberg Tribunal)¹⁸, of the international Criminal Tribunal for the Former Yugoslavia (ICTY)¹⁹ and of the International Criminal Court (ICC)²⁰ that provide the criminalization of the intentional destruction of cultural heritage. The study of these statutes is essential to understand how deliberate attacks against cultural property have been sanctioned within the international jurisprudence and to analyse the case studies. Finally, even the 2003 UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage²¹, drafted as a response to the destruction of the Buddhas, restated the seriousness of this crime and reflects today's renewed concern of the international community for this theme²². The last part of this chapter outlines which provisions analysed in the first part have reached a customary status and thus can be considered as fundamental and absolute rules which bind every entity within the international context.

The last chapter focuses on the possible legal basis that would allow to hold ISIS responsible (both as a group and its members individually) for the massive wilful destruction of Palmyra. Initially, a brief comparison with the destructions occurred

¹⁷ Patrick J. Boylan, *Review of the Convention for the Protection of Cultural Property in the Event of Armed conflict* (1993), available at <http://unesdoc.unesco.org/images/0010/001001/100159eo.pdf>; at 51-57; and Roger O'Keefe, *Protection of Cultural Property in International Criminal Law*, Melbourne Journal of International Law (2010), 339, 345.

¹⁸ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, London (adopted on 8 August 1945) 82 UNTS 279 IHL Database ICR <https://ihl-databases.icrc.org/ihl/INTRO/350?OpenDocument> (last visited on 21 June 2017).

¹⁹ Statute of the International Criminal Tribunal for the Former Yugoslavia: UNSC Res 827, UN SCOR, 48th sess, 3217 hmtg (25 May 1993) UN Doc S/RES/ 827, IHL Database ICR <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/555> (last visited on 17 June 2017).

²⁰ Rome Statute of the International Criminal Court (adopted on 17 July 1998, entered into force on 1 July 2002) 2187 UNTS 3 (Rome Statute).

²¹ Resolution 15 adopted by the General Conference at its 32nd session General Conference of 17 October 2003, in Paris. <https://ich.unesco.org/en/convention> (last visited on 21 August 2017) (2003 UNESCO Declaration).

²² Mucci, *'Intentional destruction of cultural heritage by Isis*, 8-9.

in Mali²³ and Afghanistan²⁴ is provided to underline the brutal and widespread character of ISIS action. In particular, ISIS is conducting an indiscriminate attack against Syrian cultural and religious heritage and even Islamic sites are not spared²⁵. Furthermore, the chapter analyses the qualification of the destruction of cultural property as a war crime or crime against humanity in the jurisprudence of the International Military Tribunal (IMT), ICTY and ICC. In particular, this work explains why the incrimination under the category of crimes against humanity would actually “upgrade” the protection granted by IL to cultural heritage²⁶. Subsequently this section presents the international legal basis on which it is possible to hold NSAG members accountable for cultural sites’ devastation. This chapter outlines the legal international fundament according to which international humanitarian rules may apply to the Syrian civil conflict and therefore to NSAG²⁷. It is fundamental to find out if also NSAG, that did not participate in the drafting of international treaties, can be considered bound to some IL norms in order to punish their crimes, and in particular their cultural crimes²⁸. A necessary precondition to hold ISIS accountable for the devastation of cultural property is to find out if this terrorist organization bears or not a sort of international personality and consequently if it must comply with some international obligations²⁹. In particular this aspect is addressed comparing the traditional structure of IL, as an inter-state law, and the emergency of NSA. Given the increasing role of NSA in the

²³ Francesco Francioni and James Gordley, *Enforcing International Cultural Heritage Law*, (Oxford University Press, 2013) 51-62.

²⁴ Francesco Francioni and Federico Lenzerini, ‘*The destruction of the Buddhas of Bamiyan and International Law*’ (2014), Vol. 14 No. 4 *European Journal of International Law*, 619-627 and Bren Whitney, ‘Lessons from the Destruction of the Bamiyan Buddhas, Current Isis Aggression, and a Proposed Framework For Cultural Property’ (2016) Vol. 34, *Cardoso Arts and International Law Journal* 215, 232

²⁵ Mucci, ‘*Intentional destruction of cultural heritage by Isis*, 4-5.

²⁶ Mucci, *ibid*, 7.

²⁷ Liesbeth Zegveld, *Accountability of armed opposition groups in international law* (Vol 24, Cambridge University Press, 2002), 111- 117.

²⁸ Marco Pedrazzi, *The status of organized armed groups in contemporary armed conflicts*, 74-77 and Orla Marie Buckeley, ‘*Unregulated Armed Conflict. Non-State Armed Groups, International Humanitarian Law, and Violence in Western Sahara*’ (2012) Vol. XXXVII *North Carolina Journal of International law & Commercial regulation*, 792-845.

²⁹ William Thomas Worster, ‘*Relative International Legal Personality of Non State Actors*’ (2006) Vol. 42 N. 1 *Brooklyn Journal of International Law*, 207, 239.

international context, IL cannot avoid dealing with these entities and must evolve to support the new exigencies. Leaving their crimes unpunished would frustrate IHL's purpose of protecting civilian population and properties and would allow the occurrence of other crimes in the wrong belief that they would not be condemned³⁰. The final part of the chapter is dedicated to the most adequate judicial body to hold ISIS militants accountable for the cultural devastations³¹ they ordered and executed.

³⁰ Buckeley, *ibidem*.

³¹ Andrew Solis, 'Only[] can Judge: Analysing Which Courts have Jurisdiction over Isis', (2010) Vol. 40 Southern Illinois University Law Journal, 69-89 and Gerald Waltman III, '*Prosecuting Isis*' (2014), Missouri Journal of International Law (2016) Vol. 85 No. 3, 817- 856.

CHAPTER 1

THE SYRIAN SITUATION: FROM THE ARAB UPRISING TO THE CIVIL WAR AND THE RISE OF ISIS

Summary: 1.1 THE SYRIAN UPRISING; - 1.1.1 The Arab Springs: a brief overview; - 1.1.2 The uprising within Syrian territory: the inefficiency and the corruption of the Assad regime; - 1.1.3 The second phase of the rebellion: the rise of civil conflict; - 1.1.3.1 The notion of Non-International Conflict and its discipline; - 1.1.3.2 Syrian Army Forces; - 1.1.3.3 The opposition faction: the Free Syrian Army; - 1.1.3.4 Other rebel groups; - 1.1.4 Proxy war: the involvement of third parties; - 1.1.4.1 Russia's involvement; - 1.1.4.2 The Us-led Coalition; - 1.1.4.3 Syria's role in the geopolitical structure of the Middle East; - 1.1.4.4 The international implications of the Syrian conflict; - 1.1.4.5 The current situation of the Syrian conflict; - 1.2 THE ISLAMIC STATE OF SYRIA AND IRAQ; - 1.2.1 The rise of ISIS; - 1.2.2 The split between Al-Qaeda and ISIS; - 1.2.3 The war of terror; - 1.2.4 ISIS'S ideology; - 1.2.5 The Islamic State; - 1.2.6 ISIS'S financial resources; - 1.2.7 ISIS's rejection of international legal order; - 1.2.8 The current situation.

1.1 THE SYRIAN UPRISING

1.1.1 THE ARAB SPRING: A BRIEF OVERVIEW

The expression “Arab Spring” appeared for the first time in early 2011 on the main newspapers all over the world and identifies a series of riots which upset the autocratic structure of the Middle-East. Arab peoples began to organize demonstrations against their authoritarian leaders, asking for more freedom, democracy, justice, the end of corruption and poverty. These revolts rapidly turned into internal armed conflicts and paved the way to democratic changes, even if in most cases these did not last.

Three principal factors led to the rise of the “Arab Spring”: autocratic policies, media innovation and socio-economic failure. Most of the Arab leaders had promised democratic reforms when they came to power, but actually, they further restricted

freedoms and the number of human rights violations rose¹. People's concerns were only partially listened to and public resentment began to spread thus undermining governments' legitimacy². At the same time, these dictators demanded absolute acceptance and subjugation, refusing any democratic opening towards their opponents who were violently suppressed. Arab leaders were not able to represent people's needs, and this further increased the distance between governments and peoples. Moreover, they adopted ever-shifting ideologies to maintain the control of each different group within society, manipulating them and creating ideological confusion³. This situation brought a sense of "political confusion" and increased people's exasperation⁴. The reluctance towards more democratic instances affected also the Middle-East economy, ruined by an ever-growing public debt. The Levant before the advent of the "Arab Spring" was marked by "economic stagnation" and "lassitude", as elites strongly denigrated and refused capitalism⁵. Global recession had undermined Arab economy since mid-1980s and the unemployment was rampant. Thus, these countries had progressively lost their competition on the international market and poverty was growing incessantly⁶. All these factors did not attract foreign investments and brought to economic isolation⁷. Furthermore, corruption was affecting many economic sectors: government elites were engaged in "new private business" characterized by a complete lack of transparency, increasing people's dissatisfaction. Widespread social injustices led to the rise of groups of young, educated individuals ready to fight to change the current situation⁸. The advent of media revolution facilitated the aggregation and organization of these groups against the governments⁹. States' attempts to maintain the control of all radio and television news through a strict censorship, to prevent any leak not in

¹ Daniel Brumberg, *Liberalization versus Democracy* (2003) No. 37, Carnegie endowment for International Peace, 15.

² Brumberg, *ibid*, 130.

³ Brumberg, *ibid*, 29.

⁴ Brumberg, *ibidem*.

⁵ Brumberg, *ibid*, 131.

⁶ Brumberg, *ibid*, 132.

⁷ Brumberg, *Liberalization versus Democracy*, 132.

⁸ Brumberg, *ibid*, 299.

⁹ Ilan Pappè, *The Modern Middle-East* (2 edn, Routledge, 2005), 291.

accordance with the governments' policies, did not succeed in stopping media potentialities. Internet facilitated the call upon people to act; it favored "mass communication"¹⁰. Arab regimes were strongly disadvantaged by the spread of Internet as new spaces of confrontation and discussions arose highlighting the corruption of Arab political life¹¹. It can be said that the "Arab Spring" were fought not only in the cities, but also on social networks¹². New interactive platforms such as Facebook and Twitter permitted the spread of real information worldwide without the interference of the Arab governments that would have surely distorted the reality in their favor¹³.

TUNISIA¹⁴

The country from which the wave of "Arab Spring" started, inspiring subsequent revolts in the neighboring countries, was Tunisia. This country has been ruled by the President Zine al-Abidine Ben Ali for twenty-three years¹⁵. He was appointed after two elections occurred between many perplexities; he won with more than 99.44% votes in favour¹⁶. He also amended the Tunisian Constitution twice to allow for his re-election; in total, he won five elections, the last one in 2009¹⁷. Although under Ben Ali's guide the country's economy was stable, a high level of unemployment was affecting the younger strata of the population. Moreover, the President adopted strict measures against any sort of opposition, anyone could be a potential suspect, political discussion was completely banned and many human rights abuses were

¹⁰ Pappè, *ibid*, 295.

¹¹ Pappè, *ibid*, 302.

¹² Pappè, *ibidem*.

¹³ Many videos on the demonstrations were released by Arab activists. Cutis Ryan, *The New Arab Cold War and the Struggle for Syria*, in Mer262- Pull of the Possible (Vol. 42, Springer, 2012).

¹⁴ The uprising in Tunisia is also known as the Jasmine Revolution, jasmine, in fact is the symbol of this country.

¹⁵ Profile: Zine al-Abidine Ben Ali, BBC (15 June 2011).

<http://www.bbc.co.uk/news/world-africa-12196679> (last visited on 05 September 2017).

¹⁶ Profile: Zine al-Abidine Ben Ali.

¹⁷ Profile: Zine al-Abidine Ben Ali.

perpetrated against the opposing forces¹⁸. In January 2010¹⁹ a young man, Mohammed Bauazizi, burned himself because a state officer had prevented him to sell his goods without a specific permission²⁰. After this event, the masses began to mobilize to protest against the President's repressive and discriminatory policy. The government employed violent methods to quell the revolt generating further demonstrations. Although on 12th January 2011 Ben Ali was forced to announce his resignation and to declare that new elections would have taken place²¹. Hamadi Jebali obtained the office of Prime Minister and a coalition government was established between the majority party, Nidda Tounes, the Islamic party Ennahada and other smaller groups²². Tunisia can be considered as the model of revolution to be emulated to establish a more democratic regime²³.

EGYPT

Egypt had been ruled by Muhammad Mubarak for over 30 years. Throughout his office, he maintained the 'emergency status' that consented the limitation of many fundamental rights among which were arbitrary detentions and other HR serious violations. He won four elections without any real opponent; there were many doubts on the validity of the election procedures²⁴. As Ben Ali did, Mubarak conducted a harsh repression of all opponents, he decided upon a close system of censorship, torture and a complete block of the Internet²⁵. He demanded absolute obedience, he did not respect civil freedoms and corruption was dominant in all

¹⁸ A strict censorship was established to prevent any criticism against the regime; all the pages against Ben Ali's policy were obscured. Sami Ben Hassine, *We Finally Have Revolution in Our Minds*, The Guardian (13 January 2011) <https://www.theguardian.com/commentisfree/2011/jan/13/tunisia-youth-revolution> last visited on 01 September 2017).

¹⁹ Ryan, *The New Arab Cold War*.

²⁰ *Arab Uprising: Country by Country – Tunisia*, BBC (7 December 2013) <http://www.bbc.co.uk/news/world-12482315> (last visited on 01 September 2017).

²¹ He was sentenced to life imprisonment for the assassination of the protesters; Q & A: *Tunisia Crisis*, BBC (January 2011) <http://www.bbc.co.uk/news/world-africa-12157599> (last visited on 01 September 2017).

²² *Arab Uprising: Country by Country – Tunisia*, BBC, ibidem.

²³ Francesca Baronio, *Per le primavere arabe, la Tunisia è un esempio*, Limes, (6 May 2014) <http://www.limesonline.com/per-le-primavere-arabe-la-tunisia-e-un-esempio/60780> (last visited on 7 September 2017).

²⁴ *Profile: Hosni Mubarak*, BBC (May 2015) <http://www.bbc.co.uk/news/world-middle-east-12301713> (last visited on 07 September 2017).

²⁵ *Profile: Hosni Mubarak* ibidem.

sectors. Democracy in Egypt was only a cover of Mubarak's unlimited power²⁶. Thus on 25th January 2011, a series of demonstrations began in many Egyptian cities: Cairo, Alexandria, Suez and several more. In May 2015, the Vice-President Omar Suleiman made a declaration announcing that Mubarak would have resigned in favour of the Supreme Council of the Armed Forces²⁷. After the unconstitutional declaration of the first parliamentary election, on 25th June Mohammad Morsi won the election for the Presidency. However, in June 2013, after a *coup d'etat*, the Minister of Defence General Abdul Fattah al-Sisi became the new President. He posed several restrictions on the newly conquered public freedoms. It can be said that the "Arab Spring" did not lead to a major democratization of this country.

YEMEN

Ali Abdullah Saleh had governed Yemen since 1978. The country was affected by numerous fights between the North and the South, although he always presented himself as the "only who could hold together a unite Yemen"²⁸. The South aimed at the secession because of the North- dominated government disinterest, though the President had succeeded in preserving the unity of the country²⁹. In the aftermath of 9/11 attacks Saleh became one of the major allies of the US allowing US airstrikes within Yemen territory to destroy Al-Qaeda bases in exchange for "10 million dollars in aids"³⁰. The uprising broke out in January 2011 caused by the rampant poverty, government corruption and indifference for the population's condition³¹. Even if the President sought to quell the protests, the clashes intensified with hundreds of people killed, and even Saleh himself was seriously injured and was forced to go to the US to find medical aids³². After useless government's attempt at negotiation, the

²⁶ Lewillein Rockwell, *A People's Uprising against Empire*, Al-Jazeera English (6 February 2011). <http://www.aljazeera.com/indepth/opinion/2011/02/20112312504969243.html> (last visited on 01 September 2017).

²⁷ *Profile: Hosni Mubarak*, ibidem.

²⁸ *Profile: Yemen's Ali Abdullah Saleh*, BBC (19 September 2011). <http://www.bbc.co.uk/news/world-middle-east-13179385> (last visited on 07 September 2017).

²⁹ Gregg Carlstrom, *Profile: Ali Abdullah Saleh*. Al-Jazeera English (2011). <http://www.aljazeera.com/indepth/spotlight/yemen/2011/02/201122812118938648.html> (last visited on 01 September 2017).

³⁰ Carlstrom, ibidem.

³¹ Carlstrom, ibidem.

³² Carlstrom, ibidem.

Security Council of the United Nations imposed the resignation of the current government³³. Abd Rabbuh Mansur Hadi, Saleh's vice, became the new President, a choice that was not positively welcomed by the population for Hadi's involvement in the violent repression of the protests. Although the protests succeed in the overthrow of the oppressive regime, the country is currently experiencing another civil war between the government troops and Houthi rebels³⁴. A military coalition, headed by Saudi Arabia, was established to defeat the Houthi, supported by Iran³⁵.

LIBYA

The guide of the Libyan government was attained for 42 years by General Muhamad Gaddafi³⁶. He exploited the sectarian divisions of the population, inciting each group against the other to maintain the control all over the country. His government was characterized by "patronage and strict censorship"³⁷. Every opponent was captured, tortured and, in the worst cases, murdered. He limited many fundamental freedoms thanks to a campaign of intimidation³⁸ and many human rights organizations accused Gaddafi of several human rights violations³⁹. The Libyan revolution started in February 2011, in Benghazi, but rapidly spread all over the country. The government sought to suppress the riots using heavy weapons and the release of many ex-convicted that joined government's security forces in exchange for money⁴⁰. The struggle rapidly transformed into a civil war between government troops and the rebels. Thanks to NATO assistance, that provided airstrikes and later

³³ *Arab Uprising: Country by Country – Yemen*, BBC (16 December 2013)

<http://www.bbc.co.uk/news/world-12482293> (last visited on 07 September 2017).

³⁴ Laura Canali, *Lo Yemen Conteso*, Limes (7 July 2017) <http://www.limesonline.com/lo-yemen-conteso-2/98316> (last visited on 1 September 2017).

³⁵ Canali, *ibidem*.

³⁶ *Libya: The Fall of Gaddafi*, BBC (20 October 2011)

<http://www.bbc.co.uk/news/world-africa-13860458> (last visited on 01 September 2017).

³⁷ Tarik Kafala, *Gaddafi's Quixotic and Brutal Rule*, BBC (28 October 2011)

<http://www.bbc.co.uk/news/world-africa-12532929> (last visited on 1 September 2017).

³⁸ Tarek Y. Ismael, *Middle East Politics Today: Government and Civil Society* (University Press of Florida, 2001), 201

³⁹ He banned any political discussion and militancy, "freedom of speech" and association were seriously limited and violent acts of repression were perpetrated by Mubarak security forces against any form of opposition. Kafala, *Gaddafi's Quixotic and Brutal Rule*.

⁴⁰ *Colonel Gaddafi: Rise and Fall*, BBC (20 October 2011).

<http://www.bbc.co.uk/news/world-africa-14593695> (last visited on 1 September 2017).

units on the ground, the rebels conquered Tripoli after six months of fights⁴¹. Gaddafi was forced to abandon the city and on 31st October 2010 was arrested and murdered. In November, the National Transitional Council, established by the opponent faction to replace Gaddafi government, announced the liberation of Libya⁴². Until 2013, the country experienced a period of relative political stability, interrupted by the outbreak of a new civil war⁴³. The country is currently divided between the legitimate government exiled in Tobruk, recognized as the sole legitimate by the international community, and the Islamist government in Tripoli⁴⁴.

What had started as pacific demonstrations rapidly transformed into brutal civil wars with hundreds of people dead or wounded. These uprisings were caused by the unsustainable economic and social conditions that were affecting the majority of the peoples, under the evident disinterest of the governments⁴⁵. Arab leaders had exploited the presence of religious and ethnic divisions to reinforce their power, thus creating sectarian and fragmented societies. The Middle-East has always been marked by different groups with diverse features and opposing views, any of which has always tried to prevail on the others⁴⁶. Nevertheless, these revolts had the capacity to unite different and opposite groups to overthrow existing governments. These social movements cannot be considered as ideologically inspired; they rather aimed at overthrowing the authoritarian regimes that had ignored people's concerns for so long and made corruption rampant⁴⁷. Of all these uprisings, only Tunisia effectively experienced a real democratic change. The persistent divisions within Arab societies worsened the internal conflicts among peoples of each country after the victories of the Arab Spring, and led to further fights. The Middle- East is

⁴¹ In March 2011, the UN SC issued a resolution allowing the use of all means necessary to protect civilians in Libya; UN SC Res 1973 (17 March 2011) UN Doc S/RES/1973.

⁴² *Arab Uprising: Country by Country – Libya*, BBC (September 2014)
<http://www.bbc.co.uk/news/world-12482311> (last visited on 1 September 2017).

⁴³ Hamid Dabashi, *The Arab Spring: The End of Post-colonialism* (2edn, Books Ltd, 2012), 208.

⁴⁴ Leonardo Bellodi, *La Libia resta un campo di battaglia*, Limes, Mediterranee No. 6 (4 June 2017)
<http://www.limesonline.com/cartaceo/la-libia-resta-un-campo-di-battaglia> (last visited on 7 September 2017).

⁴⁵ Frank Gardner, *Arab Spring: Where It Is Now and Where It May Be Going*. BBC (10 July 2011).
<http://www.bbc.co.uk/news/world-middle-east-14080126> (last visited on 1 September 2017).

⁴⁶ Gardner, *Arab Spring*.

⁴⁷ Dabashi, *The Arab Spring*, 238- 239.

currently facing another wave of conflicts in which the opposing parts are always changing. This “multi-faced” struggle involves not only the revolutionary fronts and the regime supporters, but reflects also the old contrast between Shiite, supported by the West, and Sunni, helped by jihadist groups⁴⁸.

1.1.2 THE UPRISING WITHIN THE SYRIAN TERRITORY: THE INEFFICIENCY AND THE CORRUPTION OF THE ASSAD REGIME

After many years of instability, in 1970 the Minister of Defense, General Hafez al-Assad, conquered power and the following year he became the new Syrian President⁴⁹. He began to acquire more and more prerogatives, favoring his family and the Alawite community, of which he was member⁵⁰. Alawite in Syria have always been a small minority belonging to the Shiite community. They constitute about the 13% of the entire population⁵¹. Thus, Alawites attained the control of the “security, military and intelligence positions” and of the most lucrative economic sectors. Al-Assad gave overextended powers to the Presidency, which could block any government decision. When he died, his son, Bashar al-Assad succeed (Assad). Bashar was presented as a “reformer” mostly for his young age, but eventually he maintained the authoritarian policy line of his father. He was presented as the new face of modern Syria, but this proved only a big lie. The Assad family’s regime kept out the Sunni majority from any political office, as Sunni have always been considered secondary to the Alawite elite. They were also excluded from the little economic growth that was involving the Syrian market⁵². This exclusion provoked the dissemination of discontent among the Sunni. It exacerbated the ancient rivalry

⁴⁸ Dabashi, *ibidem*.

⁴⁹ Arnav Mariwala, *The Syrian Civil War, Regime of Bashar al-Assad*, Stanford Model United Nations Conference 2014, 1.

⁵⁰ Mariwala, *ibidem*.

⁵¹ Mariwala, *ibid*, 5.

⁵² Sunni consider Alawite, such as other Shiite Muslims heretic, because they recognize Mouhammad’s nephew as his successor; Mariwala, *ibid*, 6.

between Shiite and Sunni that has always been an endless element of tension within the Middle-East⁵³.

It was this context of internal rivalry and widespread dissent that paved the way to the “Arab Spring” also in Syria. The event that triggered the current Syrian conflict was the arrest of 12 young Syrian students that had wrote anti-government graffiti in the city of Der’ra⁵⁴. The students were detained for many hours without any warning to their families, they were probably tortured and one of them likely died for the brutality of security forces. On 15th March 2011, demonstrations against Assad’s government began in Damascus and Aleppo inspired by the recent victories obtained by the demonstrators in the neighboring countries⁵⁵. These early “pro-democracy” protests⁵⁶ were absolutely peaceful, although the government carried out a harsh repression to quell the uprisings⁵⁷. The Syrian forces used heavy weapons against the protestors and this provoked only more anger, so much that the protests quickly began to spread in many other cities⁵⁸. Thousands of demonstrators were “extra judicially murdered, injured and detained” without any legal authority⁵⁹. The tensions increased when the Syrian army shot against those who were attending the funerals of the protestors killed during the first turmoil. Assad sent army tanks and assassins into residential zones, justifying these actions with the theory of “Western conspiracy”⁶⁰ that was seeking to destroy the integrity of Syria. As the protests continued to increase, Assad was forced to reconsider his strategy. He announced

⁵³ Mariwala, *ibidem*, 6.

⁵⁴ Der’ra is a small town in the South of Syria; *Tutte le tappe del conflitto siriano dal 2011 a oggi*; TPI NEWS (16 December 2016) <http://www.tpi.it/mondo/africa-e-medio-orientale/siria/tappe-conflitto-siriano-2011-2016/> (last visited on 7 September 2017).

⁵⁵ Damascus is the Syrian capital, Aleppo instead was the centre of Syrian economic affairs; *Tutte le tappe del conflitto siriano dal 2011 a oggi*, *ibidem*

⁵⁶ The slogan of the demonstrations was: “Allah, Suriyye, Hurriyye ou bas”; *Tutte le tappe del conflitto siriano dal 2011 a oggi*.

⁵⁷ Elayne Hannon and Hanna Russell, *From Peaceful Demonstrations to Armed Conflict: Considering Humanitarian Intervention in the Case of Syria*, Al- Marsad- Human Rights Centre in Golan Heights (April 2013), 8

⁵⁸ Homs, Hama, Raqqa and other urban centers; *Tutte le tappe del conflitto siriano dal 2011 a oggi*.

⁵⁹ Hannon and Russell, *From Peaceful Demonstrations to Armed Conflict*, 8

⁶⁰ The theory of the “Western conspiracy” was exploited by Assad and other Arab leaders such as Mubarak to justify many human rights violations or restrictions and to maintain the control over the population; Waleed Hazbun, *A History of Insecurity: From Arab Uprising to ISIS* (2015), Middle East Policy, Vol XXII, No. 3, 55, 57.

that a series of reforms would have been implemented⁶¹. He removed the “emergency status” that had been established by the Baath party in 1936, and had never been revoked. The emergency law suspended several fundamental rights rendering lawful any human rights abuse perpetrated by the government security forces⁶². Moreover, this law granted the government further extraordinary powers, restricting even more individuals’ freedoms, such as the freedom to travel, of expression and assembly⁶³. The improvements obtained with these reforms were not sharp, on the contrary the possibility of “detention without charge or trial for up to two months”⁶⁴ was introduced. The tenuous reforms proved that Assad was only seeking to keep the power by limiting even more individual liberties. When his intent became evident, the peaceful protests turned into a real “armed resistance” against the Syrian forces⁶⁵. The violent clashes entailed a huge number of killed or injured people, the majority of which were civilians that were not taking active part in the protests⁶⁶. The regime opponents were brutally abused or tortured and widespread disappearances were decimating the population⁶⁷. Even activists, soldiers that had refused to comply with the President’s orders, and journalists were not spared⁶⁸. HR violations were countless, their scope was extensive, systematic and they were committed according to a state policy, therefore these violations can be considered war crimes or crimes against humanity⁶⁹. By truth, international law (IL) was not violated only by the Syrian forces, but by the rebels, too⁷⁰. These, in turn, engaged in torture, killings and other breaches of HR. These crimes were favored by the rise of

⁶¹ Hannon and Russell, *From Peaceful Demonstrations to Armed Conflict*, 9.

⁶² Hannon and Russell, *ibidem*.

⁶³ Hannon and Russell, *From Peaceful Demonstrations to Armed Conflict*, 9.

⁶⁴ Hannon and Russell, *ibidem*.

⁶⁵ Hannon and Russell, *ibid*, 10.

⁶⁶ Amnesty International reported that injured demonstrators were denied medical treatments; Amnesty International, *Annual Report 2012: The State of World’s Human Rights* (2012), 45 <http://www.amnesty.org/en/region/Syria/report-2012> (last visited on 3 October 2015).

⁶⁷ Security forces repression involved not only the protestors, but also their relatives and neighbors; Amnesty International, *Annual Report 2012: The State of World’s Human Rights*, 45.

⁶⁸ Hannon and Russell, *From Peaceful Demonstrations to Armed Conflict*, 11.

⁶⁹ According to Article 7 and 8 of the Rome Statute of the International Criminal Court (1998); Hannon and Russell, *ibid*, 12.

⁷⁰ *Press Conference on Independent International Commission of Inquiry on Syria*, UN News Centre (16 October 2012) http://www.un.org/News/briefings/docs/2012/12106_Syria.doc.htm (last visited on 25 February 2015).

different and opposing factions within the opposition front. As the regime's oppression became "more indiscriminate", the armed resistance of the civilian population intensified⁷¹. In June 2012, the International Committee of the Red Cross (ICRC) stated that the Syrian territory was experiencing a civil conflict⁷² due to the intensity of the clashes and the diffusion of hostilities all over the country.

1.1.3 THE SECOND PHASE OF THE REBELLION: THE RISE OF CIVIL CONFLICT

In June 2012, the ICRC sought to explain the situation that was going on in Syria saying: "in a climate of unrestrained hostilities the government is openly engaged in a military fight for survival". It also added that since June the conflict had transformed into "continuous combat, involving more brutal tactics and new military capabilities on both sides"⁷³. This conflict entailed a huge number of civilian casualties⁷⁴. In July 2017, the Syrian Observatory for Human Rights⁷⁵ reported that more than 475,000 people, including 99,600 civilians, have been killed since the breaking out of the protests against Assad⁷⁶. Moreover, the incessant clashes provoked a humanitarian crisis with a high number of people who try tried to escape from their towns. This crisis is still affecting the neighbor countries, in particular Lebanon and Jordan⁷⁷. The UN declared that more than 3 million Syrians have been

⁷¹ Hannon and Russell, *From Peaceful Demonstrations to Armed Conflict*, 13.

⁷² Global Centre For Responsibility to Protect, *R2P Monitor: Issue 5* (September 2012) <http://www.globalr2p.org/media/files/ce6f68d47496a46af5b723baf59dbe6.pdf> (last visited on 31 January 2015).

⁷³ Global Centre For Responsibility to Protect, *R2P Monitor: Issue 5* (September 2012) <http://www.globalr2p.org/media/files/ce6f68d47496a46af5b723baf59dbe6.pdf> (last visited on 31 January 2015).

⁷⁴ The exact number of dead is not available due to the inaccessibility of many areas of conflict and the contradictory reports from the various parties to the war; Hannon and Russell, *From Peaceful Demonstrations to Armed Conflict*, 19.

⁷⁵ a UK-based monitoring group established to investigate and report HR violations in Syria; Syrian Observatory for Human Rights https://en.wikipedia.org/wiki/Syrian_Observatory_for_Human_Rights (last visited on 7 September 2017).

⁷⁶ *Islamic State and the crisis in Iraq and Syria in maps*, BBC (1 September 2107) <http://www.bbc.com/news/world-middle-east-27838034> (last visited on 7 September 2017).

⁷⁷ "About 950,000 Syrians have applied for asylum in Europe since April 2011, according to UN figures"; *Islamic State and the crisis in Iraq and Syria in maps*, *ibidem*.

forced to abandon their homes and are currently displaced⁷⁸. Many United Nations Security Council Resolutions (UN SC Res) were drafted to condemn the widespread HR violations committed by all the parties of the conflict. Even if many of these Resolutions were blocked by Russian and Chinese vetoes, they demonstrate the severity of the current situation that is exhausting the Syrian population⁷⁹. For this reason in August 2011, the Human Rights Council established the Independent Commission of Inquiry on the Syrian Arab Republic (IICSAR) with the task to investigate the HR violations perpetrated in Syria since March 2011⁸⁰. Even if Assad did not authorize the IICSAR access into the Syrian territory, the Commission provided four reports in which it was reported that “murders, rapes, sexual violence, torture and force displacement” were occurring daily. The Commission ended its office on in March 2013, but its work confirms how bloody the Syrian conflict is. The Syrian civil war is evolving and it is hard to find out what faction has control over a determined territory⁸¹. Nonetheless, the qualification of the Syrian conflict as a NIAC involves that all the parties are subject to international humanitarian law (IHL) and to international human rights law (IHRL)⁸².

1.1.3.1 THE NOTION OF NON-INTERNATIONAL ARMED CONFLICT AND ITS DISCIPLINE

The humanitarian discipline of NIAC has only recently found its regulation with the drafting of common Article 3⁸³ and Additional Protocol II to the Geneva

⁷⁸ The battle to conquer Mosul provoked the highest number of people that left their houses to reach refugee camps; *Islamic State and the crisis in Iraq and Syria in maps*, *ibidem*.

⁷⁹ On October 2011 UN SC adopted a Resolution to sanction the Syrian regime, but its adoption was blocked by Russia and China vetoes; [S/2011/612](#) (4 October 2011) UN Doc S/PV/6627. The next year on February, the UN failed another time the adoption of a Resolution “authorizing” intervention in Syria, that was prevented by China and Russia votes against the Resolution UN SC 77/2012 (4 February 2012) UN Doc S/2012/77.

⁸⁰ The IICSAR was tasked with the identification of the possible responsible of the crimes against the population to hold them accountable.

⁸¹ Hannon and Russell, *From Peaceful Demonstrations to Armed Conflict*, 15.

⁸² Hannon and Russell, *From Peaceful Demonstrations to Armed Conflict*, 15.

⁸³ Article 3, [Convention \(III\) relative to the Treatment of Prisoners of War](#), 75 UNTS 135 (adopted on 12 August 1949, entered into force on 12 October 1950) (hereafter Article 3).

Conventions⁸⁴. Before this codification, no international instrument regulated this kind of conflict, making this discipline incomplete and therefore still in evolution⁸⁵. This delay is due to the fact that traditionally civil wars fell under each state's reserved domain⁸⁶. Civil war has long been considered an issue that did not involve IL but only domestic law. This perspective explains why a complete equivalence between NIAC and IAC has not been already reached. States are still reluctant to abandon this approach for the fear that IL, recognizing some grants to organized armed groups, would somehow legitimate the revolts against established governments⁸⁷. As I said before, the IL sources which can be evoked in case of NIAC are common Article 3 and in the Additional Protocol II (AP II) to the Geneva Convention. Article 3 stipulates the minimum humanitarian standard that all the parties involved in a civil conflict have to respect. This Article in particular aims at protecting the civilian population that is the first victim of military operations. Article 3⁸⁸ sets forth a series of prohibitions against the "use of torture, cruel and degrading treatments, taking of hostages and sentences without a fair trial" that cannot be waived⁸⁹. Although the wording of this Article does not provide a definition of NIAC, AP II does. Article 1 AP II defines NIAC as a conflict, which takes place "in the territory of the High Contracting Parties between its armed forces and dissident armed forces of other organized groups". AP II excludes that "internal disturbances and tensions such as riots, isolated and sporadic acts of violence and other acts of similar nature" can be considered civil wars. Thus, NIAC notion provided by AP II requires a certain degree of protracted violence⁹⁰. Only "large-

⁸⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (AP II) 1977, 1125 UNTS 609 (adopted on 8 June 1977, entered into force on 7 December 1978).

⁸⁵ Natalino Ronzitti, *Diritto Internazionale dei conflitti armati* (Giappichelli, 2014), 357.

⁸⁶ Ronzitti, *ibidem*.

⁸⁷ Ronzitti, *ibidem*.

⁸⁸ Article 3 can be considered as a "Convention in miniature" which sets forth elementary considerations of humanity; Jan Klubbers, *International Law* (Cambridge University Press, 2015), 208.

⁸⁹ "Common Article 3's mandatory provisions expressly bind and apply equally to both parties to internal conflicts"; *Abella v. Argentina*, Inter-American Commission on Human Rights, Case 11.137 (13 April 1998), Report No. 55/97, OEA/Ser.L./V/II.98, doc. 6 rev, para. 174.

⁹⁰ "This threshold only applies to large-scale conflict", *Prosecutor v. Tadic*, IT-94-1-AR72, Appeals Chamber (2 October 1995), para. 65 and Marco Sassòli, 'Transnational Armed Group', 136.

scale conflicts” are covered by this provision, which has a narrower aim than Article 3, which on the contrary does not require a certain threshold⁹¹. AP II claims that the group must act “under responsible command, exercise such control over a part territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”⁹². Moreover, AP II also demands that the conflict occurs “in the territory of a High Contracting Parties”, but according to the most accepted theories, nothing hinders the outbreak of a NIAC in the territory of States that did not ratify AP II⁹³. Met the threshold just mentioned a conflict to be considered of non-international character has not to be of international character⁹⁴. Both Article 3 and AP II apply to the Syrian conflict. A part of the international community believes that the few and simple provisions of Article 3 and AP II do not provide a sufficient regulation for the complexity of NIAC⁹⁵. From a humanitarian point of view, civilians deserve the same degree of protection regardless the type of conflict that threatens their lives and properties. For this reason, the International Tribunal for the Former Yugoslavia (ICTY) held that the separation between NIAC and IAC “should gradually loose” its relevance⁹⁶.

⁹¹ These two legal instruments require, although, a different level of organization within the armed groups, that is lower in common Article 3 that demands only a conflict of non-international character⁹¹. This approach is restated in Article 8(2)(f) of the Rome Statute ; Rome Statute of the International Criminal Court, 2187 UNTS 90 (adopted on 17 July 1998, entered into force on 1 July 2002).

⁹² Article 1 of AP II; IAC definition does not include the presence of NSA, because involves only fights between two or more States; Kristin Husler, *‘Culture Under Attack : The Destruction of Cultural Heritage by Non- State Armed Groups*, (2015) Vol.2 No. 1 Santander Art and Culture Law Review, 117, 129 .Article 3 does not require a certain organization of the group for its application, instead AP II demands a “certain level of organization capacity” for its application, William Shabas, *‘Punishment of Non- State Actors in Non- International armed conflict’* (2003) Vol. 26 Fordham International Law Journal.

⁹³ Syria did not ratify AP II. Article 1(1) only requires that the state involved in the conflict is a party of the Protocol, Marco Pedrazzi, *‘The status of organized armed groups in contemporary armed conflicts’*, in International institute of Humanitarian Law , *Non-State Actors and International Humanitarian Law. Organized armed groups: a challenge for the 21st century* (1 edn, Franco Angeli, 2010), 75.

⁹⁴ NIAC have not to involve necessary the territory of a single state, but on the contrary can cover the territory of more States; Marco Sassòli, *‘Transnational Armed Groups’*, 6.

⁹⁵ Orla Marie Buckeley, *‘Unregulated Armed Conflict. Non-State Armed Groups, International Humanitarian Law, and Violence in Western Sahara’* (2012) Vol. XXXVII North Carolina Journal of International law & Commercial regulation, 792, 795.

⁹⁶ This Court also added that not all the international rules established for IAC can be applied to NIAC, but only the “general essence” of these principles may apply, not all the “detailed

After this brief introduction on the notion of NIAC it is fundamental to define the parties involved in the conflict to understand the evolution of the Syrian civil war into a “proxy war” and to figure out how the Islamic State of Syria and Iraq (ISIS) inserted in this context.

1.1.3.2 SYRIAN ARMY FORCES

When the revolt out broke the Syrian army was one of the most powerful armed forces of the entire Middle-East⁹⁷. The government forces counted approximately 1.7 million fighters and a huge availability of battle tanks.⁹⁸ However, a series of defections during the first phase of the conflict decimated Assad’s availability of combatants⁹⁹. The President could deploy only 1/3 of his militias, composed principally by Alawite members closed to the regime¹⁰⁰. Because of the strong opposition, the government had strong difficulties in finding new soldiers and for this reason it took advantage of local mercenaries and foreign fighters¹⁰¹. These local militias employed by Assad are the Sahbiha and Jaysh-al Sha’bi¹⁰². The former ones, also called “Arabic for ghosts” are mostly expert criminals belonging to the President’s Alawite community and are headed by Assad’s family. This group was formed by many “ex- convicts” freed in exchange for their allegiance to the regime and were deployed to perpetrate the most brutal attacks against the rebels¹⁰³. The latter group, also known as “people’s army”, was formed under the influence of the Baath party and was deployed mostly for the defense of Alawite, Christian and

regulation”⁹⁶. In this sense the four Geneva Conventions and their Additional Protocol I (AP I) can be deemed as a “guide in interpreting and applying IHL to NIAC; Buckeley, *ibid*, 796.

⁹⁷ Brian Michael Jenkins, *The Dynamics of Syria's Civil War*, Comparative Politics, Vol. 44 No. 2 (2014) 127, 133.

⁹⁸ Jenkins, *ibidem*.

⁹⁹ Hannon and Russell, *From Peaceful Demonstrations to Armed Conflict*, 17.

¹⁰⁰ Instead some Sunni unites were even put in jail for the fear that they would have enjoyed the rebels’ cause; Brian Michael Jenkins, *The Dynamics of Syria's Civil War*, 133.

¹⁰¹ Such as those from Lebanon provided by Hezbollah; Jenkins, *ibidem*.

¹⁰² Jenkins, *ibidem*.

¹⁰³ Jenkins, *ibid*, 134.

Druze communities¹⁰⁴. Local militias can be deemed as “weapons of mass destruction” as they disseminate terror and violence among civilians¹⁰⁵. They carry out the most brutal attacks against the Sunni community; therefore, they would not survive under a Sunni government, granting their allegiance to the President.

Syrian security forces can rely on Russian and Iranian support as these two countries provide financial support, military assistance and “political cover”¹⁰⁶. Syria is Iran’s most important ally in the region and Assad’s fall would favor Saudi Arabia, the first Iranian enemy, in the control of the Middle-East area¹⁰⁷. Instead, between Russia and Syria there is a long-standing alliance that has never been interrupted¹⁰⁸. The Syrian government can rely also on the support of Hezbollah militias (Lebanon)¹⁰⁹.

1.1.3.3 THE OPPOSITION FACTION: THE FREE SYRIAN ARMY

In July 2011 the Colonel Riad al-Asad declared the formation of the Free Syrian Army to “liberate the country” from Assad’s authoritarianism¹¹⁰. The Free Syrian Army comprises many organizations included in the Syrian National Council¹¹¹ that should have replaced Assad’s government¹¹². The FSA uses a “guerilla-style hit-and-run-attacks”, but its actions are local and not coordinated and there has never been a defined strategy from the top¹¹³. The opposition has always appeared disorganized

¹⁰⁴ Jenkins, *ibidem*.

¹⁰⁵ They are also known as “regime shock troops” and were designated to prevent further defections within the Syrian Army; Jenkins, *ibidem*.

¹⁰⁶ Jenkins, *ibidem*.

¹⁰⁷ Jenkins, *ibidem*.

¹⁰⁸ Jenkins, *ibidem*.

¹⁰⁹ They are very expert combatants, they achieved new skills thanks to the experience acquired during the two Lebanon wars against Israel; Jenkins, *ibidem*.

¹¹⁰ *Tutte le tappe del conflitto siriano dal 2011 a oggi*, TPI.

¹¹¹ This political entity was strongly criticized for not being effective, neither representative of all oppositions. In particular, the US Secretary of State Hilary Clinton stated that the SNC was “too fragmented” and that many minorities were not included. Thus in November 2012, in Qatar was established the National Coalition for Syrian Revolutionary and Opposition Forces. This body was generally well received aiming to reach peace for every component of the Syrian population, and it constitutes the most credible alternative to Assad; Hannon and Russell, *From Peaceful Demonstrations to Armed Conflict*, 17.

¹¹² Michael Jenkins, *The Dynamics of Syria's Civil War*, 135.

¹¹³ Jenkins, *ibidem*.

and incapable of creating a credible alternative government for the Syrian people. The rebels' front has consisted, since the outbreak of the uprising, of several groups with different ideologies and aims. Rebel fighters' set-up changes rapidly because new groups continue to form¹¹⁴. Even if the leadership of the FSA is secular, the majority of the members have Islamic ambitions¹¹⁵. The principal schism in fact arose between the more secular and the jihadist factions, some of these linked to Al-Qaeda, such as Jabhat al-Nusra and ISIS¹¹⁶. In mid-September 2013, with the rise of ISIS, the disagreements between these two factions turned into an open struggle¹¹⁷. Rather than a two-faced conflict, the Syrian civil war rapidly became a "kaleidoscope" of internal fights favoring the advance of extremist religious factions.¹¹⁸

The rebels enjoy the support of Saudi Arabia and Qatar, which provide military and financial assistance since the outbreak of the civil conflict¹¹⁹. Moreover, the opposition front can count on the US support. The US were initially cautious to openly give their assistance to the rebels and provided only "non-lethal and humanitarian aids". However, in June 2013, after Syrian forces' small chemical attack against the civilians, Washington began to supply also military aids to the most moderate factions of the FSA¹²⁰. In August, after a UN Report that confirmed the government forces' use of sarin gas against the population, Obama's administration began to supply the rebels with "weapons, ammunitions and intelligence and communication support"¹²¹. Nevertheless, in December 2013, the US suspended their support in the Northern Syria for the engagement of Jihadist components within the FSA¹²².

¹¹⁴ Jenkins, *ibidem*.

¹¹⁵ *Tutte le tappe del conflitto siriano dal 2011 a oggi*, TPI.

¹¹⁶ Jenkins, *The Dynamics of Syria's Civil War*, 137.

¹¹⁷ Jenkins, *ibidem*.

¹¹⁸ Jenkins, *ibidem*.

¹¹⁹ Jenkins, *ibid*, 140.

¹²⁰ Jenkins, *The Dynamics of Syria's Civil War*, 140.

¹²¹ Jenkins, *ibidem*.

¹²² Jenkins, *ibidem*.

1.1.3.4 OTHER REBEL GROUPS

The sectarian nature of the Syrian NIAC emerges also from the presence of other rebel organizations that did not join the FSA, such as the Islamic Front and the Army of Islam¹²³. These groups share a strict vision of Islam, known as Salafism, according to which only the literal reading of the Koran is permitted¹²⁴. Moreover, these entities share a strong rejection and disregard for Western political and social values¹²⁵. Salafists believe in the uniqueness of God and fight for the imposition of the only legitimate law, Sharia. The Islamic Front presents itself as the moderate¹²⁶ alternative to Jihadist groups and as the legitimate successor of the Prophet to distinguish itself from the FSA¹²⁷.

The Syrian conflict is one of the most bloody and long-lasting conflicts that has ever occurred. This war is not an easy phenomenon to be analyzed and understood, many variables are influencing the continuous change of the tide of the conflict. The rise of ISIS further complicates a close and peaceful resolution of the conflict¹²⁸. What is blatant is that this war has assumed in these years a sectarian feature, in which Islamic extremism made its appearance. Moreover, the Syrian civil war involves also global implications that will be analyzed in the next part of this paragraph.

¹²³ Jenkins, *ibid*, 141.

¹²⁴ Salafism is a deep and sincere religious movement that fights for the recovery of the first Islam, purified from the traditionalism of the Official Islam, it brought added value to the *Batin*, the inner meaning of Koran, instead of the *Zahir*, the exterior one. Accordingly this vision Official Islam and its religious practices are associated to the Western invaders, Paolo Gonzaga, *Chi sono I salafiti?*, Arab media Report, Dialogues on civilization (2013) <http://arabmediareport.it/chi-sono-i-salafiti/> (last visited on 7 September 2017).

¹²⁵ Jenkins, *The Dynamics of Syria's Civil War*, 141.

¹²⁶ The term “moderate” has a relative meaning in the jihadist context.

¹²⁷ That in reality is not entirely secular.

¹²⁸ In January 2012 the Geneva Talks took place. It was an attempt to find a pacific solution to the bloody clashes that were decimating the Syrian population and creating a huge humanitarian crisis that still lasts, unfortunately these peace meetings completely failed. This failure was due principally to the Assad’s intransigent behaviour.

1.1.4 PROXY WAR

Even if the majority of states qualify the Syrian conflict as a civil war, it suffices to look at the various actors that joined the conflict to understand that this qualification is now outdated. The Syrian territory is now experiencing a “proxy war” or an “internationalized conflict”¹²⁹. The presence of multiple third parties prevents the consideration of the Syrian conflict as a simple internal war. The conflict exists between Assad’s forces and the rebels, between ISIS and the US-led coalition, between Turkish forces and Kurds, between ISIS and the rebels, and finally between Russia and Assad’s opponents. What had started as another Arab spring against the regime authoritarianism has transformed into a violent proxy war¹³⁰. This transformation has worsened the clashes, transforming the Syrian war in one of the most long and cruel conflicts in history. Although the international dimension of this war has not to overshadow the internal dimension of the Syrian conflict¹³¹. A NIAC still is taking place between Assad’s troops and the rebels, between ISIS and the government securities forces and also between the rebels and ISIS militants¹³².

1.1.4.1 RUSSIA’S INVOLVEMENT

As before, Russia has provided military and financial support to Assad’s army since the beginning of the protests. In September 2015 the Russian Parliament consented to aerial bombardments in Syria against ISIS targets¹³³. Even if the Parliament’s approval regarded a military operation against the Islamic State, it soon appeared

¹²⁹ Ronal Popp, *The Syrian Civil War: Between Escalation and Intervention* (2012) CSS Analysis in Security Policy, No. 124, 1, 3.

¹³⁰ Gideon Rachman, *Siria, Un Incubo Chiamato «Proxy War»*, *La Guerra Per Procura*, *Il Sole 24 Ore* (7 October 2015) <http://www.ilsole24ore.com/art/mondo/2015-10-06/siria-incubo-chiamato-proxy-war-guerra-procura-213006.shtml?uuid=ACbfKIBB> (last visited on 22 September 2017).

¹³¹ As’ad Abukhalil, *The 8 Proxy Wars Going On in Syria Right Now*, *Huffington Post* http://www.huffingtonpost.com/asad-abukhalil/syria-proxy-wars_b_5874488.html (last visited on 25 September 2017).

¹³² The Syrian conflict presents a strong internal dimension.

¹³³ *Russia joins war in Syria: Five key points*, *BBC* (30 September 2015) <http://www.bbc.com/news/world-middle-east-34416519> (last visited on 7 September 2017).

evident how in reality Russian airstrikes targeted zones where Isis presence was almost inexistent¹³⁴. The US and its allies found out how the primary Russian objective was to strike Assad's opponents and not ISIS strongholds¹³⁵. Russia's entry into Syrian civil war changed the outcome of the conflict. Assad celebrated the Russian military intervention in accordance with an alliance that lasts for four decades. Assad is the last Russian ally in the Levant: Syria is the major consumer of Russian weapons, and it "hosts the last Russian navy base on the Syrian Mediterranean coast"¹³⁶. This naval base is the last Russian chance to stop the US preeminence in the Middle-East. Russia is therefore not only providing military support to Syrian army forces, it also supports Syria within the Security Council. President Putin vetoed many UN SC Resolutions that condemned the unjustifiable use of chemical weapons and "mass-killing" of Assad's troops¹³⁷. Furthermore, Russia and China prevented the agreement on UN sanctions against Assad's regime for the commission of crimes against humanity¹³⁸.

1.1.4.2 THE US-LED COALITION

As ISIS rapidly succeeded in conquering about 30% of Syrian and Iraqi territory, thus a coalition, headed by the US, was formed to stop its advance¹³⁹. The US- led coalition

¹³⁴ *Russia joins war in Syria: Five key points*, BBC.

¹³⁵ From the bases located in Latakia, Jabla and Tartus Moscow launched multiple airstrikes against rebels' military installations; Laura Canali, *I Russi in Siria*, Limes (9 October 2015) <http://www.limesonline.com/i-russi-in-siria/87236?prv=true> (last visited on 22 September 2017).

¹³⁶ The navy base is located in the port of Tartou; *Russia joins war in Syria: Five key points*, ibidem.

¹³⁷ Russia and China vetoed a UN SC Res condemning Syrian in October 2011; In February 2012 these two countries blocked a UN SC Draft Resolution on Syrian situation that imposed harsh sanctions to Assad's use of chemical weapons; *Siria, veto Russia e Cina a sanzioni, All'Onu, per le bombe al cloro. Usa con gli europei*, Ansa (28 February 2017) www.ansa.it/sito/notizie/mondo/nordamerica/2017/02/28/siria-veto-russia-e-cina-a-sanzioni_83c28e1e-9282-4a1f-9fcf-6e8803dcfcc4.html (last visited on 05 September 2017).

¹³⁸ Russia vetoed also the UN SC Res of May 2014 which condemned the responsible of crimes against humanity perpetrated by both side of the conflict; Ewan McKirdy, *8 times Russia blocked a UN Security Council resolution on Syria*, CNN (13 April 2017) <http://edition.cnn.com/2017/04/13/middleeast/russia-unsc-syria-resolutions/index.html> (last visited on 11 September 2017).

¹³⁹ <http://theglobalcoalition.org/en/mission-en/> (last visited on 05 September 2017).

was established in September 2014 with the aim of “degrading and ultimately defeating” ISIS¹⁴⁰. In particular, the coalition is committed to targeting ISIS on all fronts, destroying its networks, its sources of funding and its international aspirations¹⁴¹. It is also engaged in preventing the access of foreign fighters (FF) in Syria and Iraq. At the same time, it is committed in the restoration of stability and security safety in the territories released from ISIS control¹⁴². On 19th September, France joined the coalition in Iraq, as the United Kingdom did two weeks later¹⁴³. At present, the coalition has been joined by 73 countries united in fighting the Islamic State¹⁴⁴. The US-led coalition airstrikes in Syria began in September 2014. Since that moment, about 11,200 airstrikes have been carried out by coalition forces, which include “Australia, Bahrain, France, Jordan, the Netherlands, Saudi Arabia, Turkey and the UK”¹⁴⁵.

There are many doubts about the legitimacy of this military intervention. Even after the adoption of UN SC Res 2249¹⁴⁶ which calls upon the members to “take all necessary measures” to defeat ISIS two sides are still confronting within the UN SC. On the one hand, some states believe they have endorsed the Responsibility to protect and thus to provide the necessary intervention when a state is “unable and unwilling” to stop a terrorist threat. On the other hand, other states firmly claim the principle of no-intervention¹⁴⁷. This issue is of very particular importance to

¹⁴⁰ The first US airstrikes was launched on August 2014 to protect the Yazadi community (Kurdish minority) that were victims of Isis’s ethnic cleansing. Steve Hopkins, *Full horror of the Yazadis who didn’t escape Mount Sinjar: UN confirms 5000 men were executed and 7000 women are now kept as sex slaves*, Daily Mail (14 October 2014) (last visited on 05 September 2017).

¹⁴¹ To this aim the coalition “trained and equipped Iraqi security forces and moderate rebels in Syria” <http://theglobalcoalition.org/en/mission-en/> (last visited on 05 September 2017).

¹⁴² <http://theglobalcoalition.org/en/mission-en/> (last visited on 05 September 2017)

¹⁴³ Ben Smith, *Isis and the Sectarian Conflict in the Middle east*, House of Commons Library Research paper 15/16 (19 March 2015), 24.

¹⁴⁴ Russia is not part of the coalition. Most attacks have been carried out by US aircraft, but also Australia, Belgium, Denmark, France, Jordan, the Netherlands and the UK have participated; *Islamic State and the crisis in Iraq and Syria in maps*, BBC (1 September 2017) <http://www.bbc.com/news/world-middle-east-27838034> (last visited on 07 September 2017).

¹⁴⁵ The number of strikes each month increases in Iraq until January 2016 and then began to fall. On the contrary, the airstrikes in Syria rose steadily, reaching the sum of 880 in June 2017; *Islamic State and the crisis in Iraq and Syria in maps*, ibidem.

¹⁴⁶ UN SC Res 2249 (20 November 2015) UN/RES/2249.

¹⁴⁷ In particular Iraq had previously gave its consent to the airstrikes, on the contrary Syria did not.

understand the future behavior of the entire international community; we are now experiencing a huge change in the international framework¹⁴⁸, but this argument cannot be here analyzed.

1.1.4.3 Syria's role in the geopolitical structure of the Middle-East

The regional context of the Syrian civil war reflects the long-standing local rivalries for the preeminence in the Middle-East among Turkey, Saudi Arabia and Iran¹⁴⁹. The rivalry among Saudi Arabia and Iran for the control of the region explained why Saudi Arabia and its Gulf allies hoped in a possible Syrian government's overthrow that would change the geopolitical order of the entire region¹⁵⁰. Saudi Arabia aspirations are not due to Assad's brutal policy, but due to the alliance between Iran and Syria, which in fact is Iran's last ally in the Levant¹⁵¹. Western countries align with the Saudi Arabian position, further encouraging Iran's isolation. Western countries' aversion to Iran is due to both nuclear Iranian position and Iran's support for groups that threaten the ruling elites of the Arab World that have always been supported by the West¹⁵². The regional tensions also involve Iraq. It is not a secret that Saudis support Sunni factions in Iraq providing them with funds and arms, exacerbating the struggle against Shiite Al- Maliki's government¹⁵³. In supporting Syrian rebels' cause, Saudi Arabia seeks to disrupt the closeness between Iraq and Iran. The Syrian conflict, thus, can be considered as a "microcosm of regional struggle between Sunni Arabia and Shiite Iran"¹⁵⁴. In addition, the role of Turkey in this context cannot be omitted. Initially, President Erdogan sought a reconciliation with Tehran than changed its attitude because of Iranian inflexible position on nuclear weapons¹⁵⁵. Thus, even the Turkish President started to support Assad's fall. Actually, a religious motive stood behind this political shift. When the Syrian

¹⁴⁸ Michael Scharf, *How Isis Changed International Law*, Cases Research Paper Series in Legal Studies (2016), 1-52.

¹⁴⁹ Ted Galen Carpenter, *Tangled Web: The Syrian Civil War and Its Implications*, Mediterranean Quarterly (2013) Vol. 24 No. 1, 1- 3.

¹⁵⁰ Laura Canali, *Le Sirie degli Altri*, Limes (1 April 2016) <http://www.limesonline.com/le-sirie-degli-altri/90668> (last visited on 7 September 2017) and Carpenter, *ibid*, 4.

¹⁵¹ Carpenter, *ibidem*.

¹⁵² Carpenter, *ibidem*.

¹⁵³ Carpenter, *ibidem*.

¹⁵⁴ Carpenter, *ibidem*.

¹⁵⁵ Carpenter, *ibid*, 5.

protests turned into a civil war, the Sunni oriented Turkish government could not remain impassible to the Shiite massacre of Sunni rebels¹⁵⁶. Today Ankara provides “sanctuaries” within Turkish territory, financial resources and other aids to Syrian rebels. Erdogan and its Sunni party are now in open contrast with both Shiite regimes of Iraq and Syria¹⁵⁷. Even the position of Israel is relevant, though this country had many contrasts with Assad’s family, a Sunni Syrian regime would be a worse threat for Israel’s stability¹⁵⁸. Assad’s fall would likely affect Lebanon balance, favoring the advance of the Palestine Liberation Organization¹⁵⁹. The Syrian sectarian strife could involve the neighboring countries destabilizing Lebanon, Iraq and Turkey¹⁶⁰. Moreover, the presence of ethno-religious divisions within the region displays the unresolved contrast between Sunni and Shiite communities¹⁶¹. The Syrian civil war therefore appears to be a “larger sectarian, geopolitical feud”¹⁶².

1.1.4.4 THE INTERNATIONAL IMPLICATIONS OF THE SYRIAN CONFLICT

The Syrian situation is negatively affecting the European Union and US relationship to Russia and China¹⁶³. On the one hand, Western states guided by the US advocate the doctrine of the “Responsibility to Protect”¹⁶⁴ that entails the necessary

¹⁵⁶ Carpenter, *ibidem*.

¹⁵⁷ Actually also the Kurds’s position is relevant, but will not be addressed here, being not directly relevant to the aim of this work; Carpenter, *ibidem*.

¹⁵⁸ Franck Salameh, *An Alawite State in Syria?*, National Interest (10 July 2012) <http://nationalinterest.org/commentary/alawite-state-syria-7173> (last visited on 7 September 2017).

¹⁵⁹ That is committed in the restoration of a Palestine country against Israel.

¹⁶⁰ Damascus supported PKK (Marxist Kurdish Workers Party) which are fighting for the secession from Turkish central government; Laura Canali, *Le Sirie degli Altri*.

¹⁶¹ that was one of the reason that led to the first Syrian protests on March 2011

¹⁶² Halil Karavely, *Why Dose Turkey Want Regime Change in Syria?*, National Interest (23 July 2012) nationalinterest.org/commentary/why-does-turkey-want-regime-change-syria-7227 (last visited on 7 September 2017).

¹⁶³ China was the major trading partner of Syria in 2004, and “a major participant” in Syrian oil business; Carpenter, *Tangled Web*, 9.

¹⁶⁴ Also known as “R2P” according to which, every state has the responsibility to protect oppressed people, even against their own governments; The term ‘Responsibility to Protect’ was promulgated by the International Commission on Intervention and State Sovereignty (ICISS) and entails “intervention for human protection purposes” (ICISS Report 2001) Jan Klabbers, *International Law* (Cambridge University Press, 2015), 197 and Carpenter, *Tangled Web*, 9

international intervention to protect the Syrian civilian population and the self-defense against terrorist attacks. On the other hand, Russia and China claim the principle of “non-intervention”, based on national sovereignty¹⁶⁵. This contrast is mirrored in the multiple vetoes posed by Moscow and Beijing to several United Nations Resolutions¹⁶⁶, which condemned the numerous IHL violations committed by Assad’s security forces. Of course only egoistic interests on both sides lie behind these dynamics. Russia and China believe that Assad’s overthrow would let the advancement of US in the Middle-East, a policy project that dates back to the Balkan wars, and the invasion of Iraq and Libya.

Moreover, Syrian conflict’s global repercussions also involve the natural gas market¹⁶⁷. The contrast between the European Union besides the US and Russia reflects their struggle for natural gas supply. At the moment, ¼ of Europe source of gas comes from Russia and this obviously favors Moscow in political meetings¹⁶⁸. To nullify this advantage EU needs another option and the best one could be Qatar. However, Assad prevented Qatar’s installation of a pipeline gas that should have passed through Saudi Arabia and Syria¹⁶⁹. Assad hindered this construction because the new gas pipeline would have surely damaged the Russian position¹⁷⁰. This explains also Qatar’s support for FSA. As a consequence, for the reasons just mentioned, Syria plays a key role in this fight for European gas market.

This is surely not a complete analysis, but it shows why the destiny of Syria means so much for the future set-up of the international community. Assad’s overthrow

¹⁶⁵ They support the “general prohibition” against any foreign interference in each state’s affairs. This approach derives from the traditional international system established since the Peace of Westphalia; Carpenter, *Tangled Web*, 9.

¹⁶⁶ Russia blocked 8 UN SC Resolutions, China 5. The former Secretary of State Hilary Clinton and the US representative to the UN openly labelled these vetoes as a disgusting behaviour; Luis Martinez, *US Disgusted by Russia, China Veto of UN Resolution to End Violence in Syria*, ABC News (4 February 2012) abcnews.go.com/blogs/politics/2012/02/us-disgusted-by-russia-china-veto-of-un-resolution-to-end-violence-in-syria/ (last visited on 7 September 2017) and see also the complete list of UN SC RES blocked by Russia and China in McKirdy, *8 times Russia blocked a UN Security Council resolution on Syria*.

¹⁶⁷ Mariwala, *The Syrian Civil War*, 8.

¹⁶⁸ Mariwala, *ibidem*.

¹⁶⁹ Qatar was forced to transport its gas through the Straits of Hormus, that is controlled by Iran, making gas’s cost higher; Mariwala, *ibidem*.

¹⁷⁰ Also for Syria’s dependency from Russian gas; Mariwala, *ibidem*.

could lead to “regional instability” and “international implications” that would upset the international balance¹⁷¹.

1.1.4.5 THE CURRENT SITUATION OF THE SYRIAN CONFLICT

Now Russia maintains its control on the city of Palmyra, rich of gas and phosphates, and Damascus¹⁷². Iran controls directly the whole border area that expands from Syria and Lebanon and the South-West of Syria. The US are focused on the fight against the Islamic State, for this reason they are supporting the Kurds Syrian faction (PKK) located in the Northern- East and in West Syria. The conflict between the Syrian rebels and Assad’s forces sees a distinct advantage of the government security forces thanks to Russian and Iranian support.

1.2 THE ISLAMIC STATE OF SYRIA AND IRAQ.

1.2.1 THE RISE OF ISIS

The unexpected victory over the Iraqi forces in summer 2014¹⁷³ led to the affirmation of the jihadist fight against the Arab and Western governments. ISIS finds its roots in the aftermath of the US disastrous invasion of Iraq¹⁷⁴ and at the end of the multi

¹⁷¹ Carpenter, *Tangled Web*, 11.

¹⁷² Laura Canali, *Siria, 6 anni dopo*, Limes (17 April 2017) <http://www.limesonline.com/siria-6-anni-dopo/97679> (last visited on 11 September 2017)

¹⁷³ Isis on January 2014 conquered the city of Raqqa that in July became the capital of the Islamic State. It also conquered the gas field in Homs province, Tirkat and Baiji; *Tutte le Tappe del Conflitto Siriano dal 2011 ad oggi*, TPI (16 December 2016) <https://www.tpi.it/mondo/africa-e-medio-orient/siria/tappe-conflitto-siriano-2011-2016/> (last visited on 11 September 2016).

¹⁷⁴ George W. Bush Jr invaded Iraq in response to the terrorist attacks of 11 September 2001 that targeted the World Trade Center in New York and the Pentagon in Washington. The conflict was very short, although the long post-war provided a fertile ground that consent the thriving of Islamic terrorist groups.

decadal Ba'ath regime of Saddam Hussein¹⁷⁵. The strategic military and political mistakes committed during and after the second Gulf War favored the rise of this terrorist movement, a franchise of Al- Qaeda in Iraq, formed by Abu Musab al-Zarqawi in Afghanistan in the '80s¹⁷⁶. Within few months al-Zarqawi became the head of the most renowned and dangerous al-Qaeda formation of the entire Middle-East, known as "Al- Qaeda in Iraq- AQI"¹⁷⁷. Al-Zarqawi's strategy consisted in exacerbating the contrasts against the Shiite Iraqi majority through an indiscriminate use of violence. Fierce attacks were perpetrated not only against Western militaries or Iraqi security forces, but also and mostly against Shiite Iraqi civilians¹⁷⁸. This movement imposed a radical and dogmatic interpretation of Sharia in the Sunni released areas¹⁷⁹. This strict Islamic vision began to spoil the relationship with Al-Qaeda's leadership and led to the disavowal of al-Zarqawi's conducts. With al-Zarqawi's death¹⁸⁰, AQI progressively weakened and was abandoned by the Sunni population that was opposed to its brutality. This fact and the loss of even more consent entailed a reorganization that made the group more cohesive inside and favored the ascent of Abu Back al- Baghdadi as the new leader¹⁸¹. In 2006 the AQI changed its nature and name proclaiming the rise of the Islamic State of Iraq (ISI). This group exploited the sectarian feature of the Syrian conflict and the failure of Iraqi Prime Minister policies to expand its control also over the Syrian territory¹⁸², becoming in 2013 the organization currently known as the Islamic State of Iraq and Syria (ISIS)¹⁸³.

¹⁷⁵ Riccardo Radaelli, *L'ascesa dell'ISIS e del nuovo Califfato*, Vita e Pensiero (2015) Vol. 98 No. 1, 44, 44.

¹⁷⁶ Al-Zarqawi was a Jordan common criminal, radicalized in jail that established a training camp in Jordan for the Osama Bin Laden follower; Daniele Scalea, *Daesh: Origini e Sviluppo* (2016) Rivista Marittima, 16, 20.

Radaelli, *ibid*, 45.

¹⁷⁷ This organization was also known as "al-Qaeda in the Land of the two Rivers" Radaelli, *ibidem*.

¹⁷⁸ AQI blooded the principal Iraqi cities with several suicide attacks against Shiite Islamic symbols.; Radaelli, *ibid*, 46

¹⁷⁹ Radaelli, *ibid*, 45.

¹⁸⁰ He died during a US airstrikes on 7 June 2006; Scalea, *Daesh: Origini e Sviluppo*, 21.

¹⁸¹ Radaelli, *ibidem*.

¹⁸² Radaelli, *ibidem*.

¹⁸³ *Lo Stato Islamico un anno dopo*, Istituto per gli Studi di Politica Internazionale (29 June 2015) <http://www.ispionline.it/it/articoli/articolo/mediterraneo-medio-oriente/lo-stato-islamico-un-anno-dopo-qa-13594> (last visited on 17 June 2017).

Multiple factors contributed to the reinforcement of this terrorist association, especially the never-ending contrast between Sunni and Shiite, aggravated by Iraqi Prime Minister Al-Maliki's anti-Sunni policy and the rise of the Syrian civil war¹⁸⁴. As stated before in this work, the fragmented character of the Syrian opposition consented the rise of jihadist components within the opposition front ranks and ISIS rapidly became the biggest armed group against Damascus. Al- Baghdadi learnt from his predecessors' mistakes. The Iraqi experience of 2007-2008 unveiled how decisive the local population's support was that had failed for AQI violent dogmatism that initiated its crisis¹⁸⁵. Therefore, al-Baghdadi began a public-relation campaign among the Arab-Sunni tribes and the local peoples and ISIS in Syria assisted the population exhausted by incessant hostilities¹⁸⁶. Furthermore, Al-Baghdadi succeeded in attracting many combatants belonging to the melted down forces of Saddam Hussein and to the Syrian security forces that refused to fight for Assad¹⁸⁷. Between July and June 2014, the Islamic State militias obtained many victories against Assad's superior forces also thanks to the population's support. Its best tactic was to present ISIS as the protector of Sunni interests in Syria and Iraq frustrated by Shiite oriented governments that had excluded Sunni from economic and political life for decades¹⁸⁸. ISIS thus took advantage of the long-standing rivalry between Sunni and Shiite communities exploiting years of Sunni's marginalization. Foreign support was another factor that contributed to the affirmation of this movement as the most powerful terrorist organization of the entire Middle-East. In particular, Saudi Arabia did not hesitate to provide financial assistance to Sunni extremist groups in Syria and Iraq to hinder the geo-political role of Iran in the Levant¹⁸⁹. In this way, Saudi Arabia had exacerbated the ethnic and religious regional fragmentation, promoting the formation of Salafist groups, deeply intolerant to any deviation from their strict interpretation of Islam¹⁹⁰. Furthermore,

¹⁸⁴ Radaelli, *L'ascesa dell'ISIS*, 46.

¹⁸⁵ Radaelli, *L'ascesa dell'ISIS*, 46.

¹⁸⁶ Radaelli, *ibid*, 47.

¹⁸⁷ Radaelli, *ibidem*.

¹⁸⁸ Radaelli, *ibid*, 48

¹⁸⁹ Saudi Arabia financed anti-Shiite movements favouring the outbreak of the Sunni revolts in Iraq and Syria; Radaelli, *ibid*, 49.

¹⁹⁰ Radaelli, *L'ascesa dell'ISIS*, 49.

Riyadh¹⁹¹ supported the military revolt in Egypt against the government of the President Morsi and interfered in Yemen and Qatar, strong supporters of “political Islam”¹⁹². Saudi Arabia therefore played a substantial role in the proliferation of radical Islamic groups¹⁹³, though after the proclamation of the Caliphate¹⁹⁴ in June 2013, Riyadh prohibited his citizens to finance ISIS¹⁹⁵. Even Qatar and Turkey supported the more extremists groups in Syria and Iraq financially, militarily and politically to reduce Iran’s influence in the region, thus aggravating its internal contrasts¹⁹⁶.

1.2.2 THE SPLIT BETWEEN AL-QAEDA AND ISIS

At first, ISIS was born as an Iraqi cell of Al-Qaeda, known as AQI. Rapidly the contrasts between these two groups began to increase up to a complete fracture. In few months ISIS had become the most powerful jihadist organization replacing, *de facto*, Al-Qaeda leadership in the jihadist fight that dated back to the 90’s. ISIS in fact achieved within few years results that Al-Qaeda had never been able to obtain in more than twenty years¹⁹⁷. Al-Qaeda, threatened by the growing rise of ISIS, made several statements remarking its leadership over all jihadist entities and arguing ISIS’s subjection to Al-Qaeda¹⁹⁸. Al-Zawahiri¹⁹⁹, Osama Bin Laden’s successor,

¹⁹¹ Riyadh is Saudi Arabia capital.

¹⁹² Radaelli, *ibidem*.

¹⁹³ Kamel Daud, *Le vere radici del gruppo Stato islamico sono in Arabia Saudita*, The New York Times, Traduction of Federico Ferrone (25 November 2015) <https://www.internazionale.it/opinione/kamel-daoud/2015/11/25/terrorismo-stato-islamico-arabia-saudita> (last visited on 7 September 2017).

¹⁹⁴ In 2013 ISIS conquered a huge portion of Syrian and Iraqi territory and on 19 June 2013 proclaimed the birth of a new Caliphate in the city of Mosul. Mosul that was conquered without any difficult because Assad’s armed forces surrendered without fighting.

¹⁹⁵ Brooke Satty Charles, *Funding Terrorists: The Rise of ISIS*, Security Intelligence (10 October 2014) <https://securityintelligence.com/funding-terrorists-the-rise-of-isis/> (last visited on 7 September 2017).

¹⁹⁶ To a deeper comprehension of the Syrian conflict regional implications see paragraph 2.2.3.2 of this Chapter; Radaelli, *L’ascesa dell’ ISIS*, 50.

¹⁹⁷ Donald Holbrook, *Al-Qaeda and the Rise of ISIS*, Survival (2017) Vol. 57 No 2, 93, 94.

¹⁹⁸ Holbrook, *ibid*, 95.

¹⁹⁹ He became the new of al-Qaeda on 16 June 2016, after Osama Bin Laden’s death; https://it.wikipedia.org/wiki/Ayman_al-Zawahiri (last visited on 7 September 2017).

claimed that ISIS was acting under his command and that he had received many declarations in which Al- Baghdadi affirmed his subservient position²⁰⁰. These first declarations were later contradicted by Al-Qaeda's subsequent change of attitude. Al- Zawahiri began to underline the aspects that negatively differentiated his group from ISIS, seeking to delegitimize the latter. He presented Al- Qaeda as "mission before an organization"²⁰¹ in respect of ISIS that was labelled as a more materialist group. He also argued that the excessive and brutal methods of ISIS were not in accordance with the principles of Sharia²⁰². He sought to present Al- Qaeda as a moderate jihadist alternative²⁰³. Even if at the beginning also al-Qaeda's actions were characterized by an indiscriminate use of violence, this attitude was subsequently revisited. Al- Zawahiri understood that population's support was a decisive factor in achieving the organization's goals²⁰⁴. Thus, mass-killings were declared not to be in line with the Islamic law and consequently discouraged²⁰⁵. Moreover, he insisted on the fact that jihad must focus on the defeating of the US and its allies and not on "peripheral battles"²⁰⁶. Al-Qaeda endorsed the "preservation of blood", discouraging bloody attacks within urban centers²⁰⁷. He condemned ISIS's attacks because "no precautions were taken to protect innocent lives"²⁰⁸, thus emphasizing Al-Qaeda more human approach. Al-Qaeda leader's attempts to isolate ISIS did not give the expected results²⁰⁹. Many Islamic groups in Egypt, Libya and South Asia decided to join Al-Baghdadi's cause, becoming "provinces" of the Islamic State²¹⁰.

²⁰⁰ Holbrook, *Al-Qaeda and the Rise of ISIS*, 94

²⁰¹ Ayman al-Zawahiri, The Seventh Interview with Sheikh Ayman al-Zawahiri, As-Sahab (18 April 2014) <http://jihadology.net/2014/05/02/as-sa%E1BA%93awahiri-the-seventh-interview-the-reality-between-pain-and-hope/>.

²⁰² Holbrook, *ibid*, 95.

²⁰³ Radaelli, *L'ascesa dell' ISIS*, 46.

²⁰⁴ Holbrook, *Al-Qaeda and the Rise of ISIS*, 95.

²⁰⁵ Holbrook, *ibidem*.

²⁰⁶ Holbrook, *ibidem*.

²⁰⁷ These guide-lines were included in the "General Guidelines for the Work of Jihadi" of September 2013; Ayman al-Zawahiri, General Guidelines for the Work of a Jihadi, statement issued by As-Sahab, on 14 September 2013 <http://archive.org/details/jihadGuidelines> (last visited on 7 September 2017).

²⁰⁸ Holbrook, *Al-Qaeda and the Rise of ISIS*, 96.

²⁰⁹ The efforts to exclude ISIS from the rightful holy war were dictated mostly by desperation; Holbrook, *ibidem*.

²¹⁰ Holbrook, *ibid*, 97.

Al- Qaeda leadership was further undermined when an Al- Zawahiri's letter, in which he revealed that both ISIS and Jabhat al-Nusra were acting by themselves²¹¹ was published. Al-Qaeda accused ISIS of being a "deviant organization" that had abandoned the Islamic true path in favor of an all-around tyranny²¹². Another difference between these two organizations is that Al-Qaeda is seeking to unite all Muslims of the world, while ISIS is ready to kill everyone that refuses to align with their strict Islamism, and it does not matter if they are Muslims or not²¹³. It cannot be denied that the Islamic State overcame Al- Qaeda's theorizations; it succeeded in establishing a real Caliphate, while Al- Qaeda never did. Furthermore, Al-Zawahiri's most recent statements condemning indiscriminate attacks contradict Al-Qaeda's former strategy of justifying mass murder perpetrated by his militants, increasing his loss of credibility within the Muslim Community²¹⁴.

1.2.3 THE WAR OF TERROR

ISIS's strategy sets on the dissemination of terror using media as a weapon. The jihadist militias act with incredible savagery against everyone who seeks to oppose to ISIS advance²¹⁵. They are carrying out an "ethnic cleansing" against non-Sunni peoples, forcing women to become women of pleasure and the youth to become new recruits²¹⁶. The use of terror has become a cornerstone of ISIS propaganda, it being able to attract all Islamic extremist groups. Thanks to Western communication experts, Al-Baghdadi's proclaims and victories occupy all news networks and

²¹¹ This letter ordered to ISIS to disband and gave Al- Baghdadi 12 months to prove its loyalty to Al- Qaeda; Ayman al-Zawhiri, untitled letter, published by Al-Fair, 9 June 2013; Basma Atassi, *Qaeda Chief Annuls Syrian-Iraqi Jihad Merger*, Al-Jazeera (9 June 2013) <http://aljazeera.com/news/middleeast/2013/13/06201369945657882.html> (last visited on 7 September 2017).

²¹² Holbrook, *Al-Qaeda and the Rise of ISIS*, 97.

²¹³ "Our approach is to bring together the Ummah and to unify it around the message of unity, and work towards the return of the rightly guided caliphate which is founded on the consultation and agreements of Muslims"; Holbrook, *ibid*, 103.

²¹⁴ Holbrook, *ibid*, 103.

²¹⁵ In particular the captured enemies are tortured and brutally killed.

²¹⁶ Radaelli, *L'ascesa dell'ISIS*, 47.

newspapers worldwide²¹⁷. The videos which testify the beheading of the two American journalists, J. Foley and S. Sotloff, and of the British humanitarian operator, D. Haynes, were broadcast all over the world to remind the enemies ISIS's invincibility and cruelty²¹⁸. The skillful use of social media makes ISIS the "premium brand" of jihad²¹⁹. This provokes a sense of mimesis that encourages and invites jihadist sympathizers to commit terrorist attacks in their home country or join the conflict in Syria²²⁰. ISIS battle is fought not only in the Iraqi and Syrian territory, but also on blogs, forums and other Internet resources²²¹. Within the conquered territories, the Islamic State imposes a strict observance of Sharia and everyone who opposes it is ruthlessly tortured and killed. ISIS media propaganda shows how individual executions happen almost daily and mass killings weekly²²². This propaganda has a double nature: at international level it is characterized by violence and brutality; on the contrary, at local level, ISIS presents itself as the protector of the poor and oppressed²²³. This reflects how ISIS is seeking to establish its supremacy in a double way: through the policy of terror against the Western countries and through the promise of a more stable political situation that seems to be the dream of Syrian and Iraqi people exhausted by endless conflicts. In this way, ISIS's project assumes

²¹⁷ Tuccari, Isis, *Lo Stato Islamico*, Zanichelli, ibidem.

²¹⁸ The video on the beheading of J. Cantlie was the last one. Through these videos ISIS is seeking to relaunch the nationalization of Ummah, the Muslims community which did not know the territorial boundaries posed by the Western countries; Umberto de Giovannageli, *La strategia dei tagliagole: La scelta mirata delle vittime* (25 September 2014) http://www.huffingtonpost.it/umberto-de-giovannageli/la-strategia-dei-tagliagole-scelta-mirata-vittime_b_5881492.html?utm_hp_r (last visited on 7 September 2017).

²¹⁹ Alessandro Albanese Ginammi, *L'ISIS spiegato*, The Post Internazionale (1 March 2015) <http://www.tpi.it/mondo/iraq/l-isis-spiegato> (last visited on 7 September 2017).

²²⁰ They can be considered a real "brand"²²⁰, they donate "t-shirts, magazines, ice-creams and sweets for children to obtain local population's approval; Albanese Ginammi, *L'ISIS spiegato*, ibidem.

²²¹ Here lies the biggest paradox of ISIS action, on one hand they exploit Western social networks to find new volunteers on the other hand they have always proclaim a strong hatred for Western lifestyle.

²²² Medyan Dairich, *The Islamic State* (26 December 2014) <https://news.vice.com/video/the-islamic-state-full-length> (last visited on 7 September 2017).

²²³ Tuccari, Isis, *Lo Stato Islamico*.

a revolutionary feature because it tries to replace a certain form of government with another one²²⁴.

1.2.4 ISIS'S IDEOLOGY

The Islamic State rests on an “eschatological reading of Islam” which originates from the most severe Salafism²²⁵. ISIS's fury displays according to an extreme religious fanaticism which considers every worship site, even in memory of Islam Masters and heroes, an unforgivable sign of heresy, contrary to pure, original Islam²²⁶. This religious creed identifies in the teaching of the four orthodox caliphs, successors of the Prophet Muhammed and adhered to *shirk*, the complete rejection of polytheism²²⁷. The new caliph Al-Baghdadi is inspired by the first Caliphs²²⁸. He chose the name of “Abu Bakr”, who was Mohammed's father in law, to emphasize the symbolic relationship between him and the first Caliphs²²⁹. Salafism presents three core concepts. The first one is the “Tawid”: it affirms the existence of a unique God who is the sole creator and the sovereign of the whole Universe²³⁰ and the only entity who deserves worship. This religious belief derives from the teachings contained in the Koran that regulates every aspect of human life and defines the exact nature of Islam and its practice²³¹. The second concept which characterized

²²⁴ Stephen Martin Walt, *Isis as a Revolutionary State*, Foreign Affairs (November/December 2015) <https://www.foreignaffairs.com/articles/middle-east/isis-revolutionary-state> (last visited on 7 September 2017).

²²⁵ Adam Bazcko, Gille Dorronsoro, Athutr Quesnay and Maai Youssef, *The Rationality of an Eschatological Movement: The Islamist State in Iraq and Syria*, Yale Working Paper (2016) No. 7, 6.

²²⁶ Salafism dates back to Abd al- Wahhab (1707-1792) whose doctrine was centred on the rejection of every religious innovation; Scalea, *Daesh: Origini e Sviluppo*, 18.

²²⁷ Mohammad's succession provoked the biggest schism inside Islam between Sunni, who believe in the election of the Caliph, and Shiite who argue that only the Mohammad's descendants can become the new caliphs; Scalea, *Ibidem*.

²²⁸ Who were the early successors of Mohammed, known as “pius forefathers”; Gramae Wood, *What ISIS really Wants*, The Atlantic (2015) Vol. 315 No.2, 78, 81.

²²⁹ Wood, *ibidem*.

²³⁰ Salafism implies a rejection of secularism because nothing can have supremacy over divine governance; Quitan Wiktorowicz, *Anatomy of the Salafi Movement*, Studies In Conflict & Terrorism, 207-239, 2006.

²³¹ ISIS control mosques and imams to ensure the dissemination of pure Islam; Wiktorowicz, *ibid*, 207-239.

Salafism is “Bida”: it indicates any belief or action not in accordance with the Prophet’s teaching²³². Finally, Salafism asserts the existence of a unique interpretation of Kuran refusing any other interpretation, promoting a sort of ideological indoctrination²³³. Salafism strongly rejects Official Islam and its innovations that contradict the pure religion of Mohammed and therefore have be corrected and punished.²³⁴

ISIS aims to purify the conquered territories through the re-establishment of the first Islam, reproducing also its law of war. The return to the ancient Islamic values involves the destruction of archeological sites and museums that reflects Islam’s treason²³⁵. These actions evoke the destructions of idols perpetrated by Mohammed in the city of Mecca. Iconoclasm constitutes a historical strategy of removing agency and effective power of all monotheistic religions²³⁶. The veneration of saints and holy pictures led Islam to a period of ignorance that still persists. That is why the Official Islam is strongly condemned by ISIS militants and its followers are deemed unbelievers²³⁷. In order to isolate and delegitimize misbelievers²³⁸, ISIS largely uses the practice of *takfir* that is a sort of excommunication for anyone who does not pledge his loyalty to the Caliph.

Within a revolutionary fight, ISIS considers Western and Arab governments as heretic, therefore no compromise with them can be reached²³⁹. In this way, these

²³² Wiktorowicz, *ibidem*.

²³³ Salafism rejects any different Islamist school; Peter W. Singer, *Pakistan's Madrassahs: Ensuring a System of Education not Jihad*, Brookings Institution, (24 October 2014) <http://www.brookings.edu/research/papers/2001/11/pakistan-singer> (last visited on 2 September 2017).

²³⁴ Scalea, *Daesh: Origini e Sviluppo*, 17.

²³⁵ Anna Momigliano, *L'Isis contro l'Archeologia*, Rivista Studio (25 August 2015) <http://www.rivistastudio.com/standard/isis-palmira-ninive-mosul/> (last visited on 7 September 2017).

²³⁶ Claire Smith, Heather Burke, Cherrie de Leulien and Gary Jackson, ‘*The Islamic State’s symbolic war: Da’esh socially mediated terrorism as a threat to cultural heritage*’ (2015) Vol. 16 No. 2 *Journal of Social Archeology*, 164, 171.

²³⁷ Bazko et alia, *The Rationality of an Eschatological Movement*, 4.

²³⁸ Takfir (charge of misbelief) consists in the denunciation of all Muslims who venerate dead, saints or angels. It derives from Salafist Islam that bans “every prayer to saints and dead love ones and pilgrimages to tombs”. According this concept Shiite, Sufis and other Muslims are considered apostates and must be eliminated; Scalea, *Daesh: Origini e Sviluppo*, 19.

²³⁹ Stephen Martin Walt, *Isis as a Revolutionary State*, Foreign Affairs (November/December 2015) <https://www.foreignaffairs.com/articles/middle-east/isis-revolutionary-state> (last visited on 7 September 2017).

entities must be eliminated and replaced by the Caliphate. This objective can be reached only through jihad, the holy war that is a religious obligation for every Muslim. The Caliphate is not only a political structure, but the mean to reach salvation²⁴⁰. ISIS members carry out the holy war²⁴¹ according to a logic of complete sacrifice to the Islamic cause²⁴². Jihad is the only way to recreate the Islamic society and it is a duty of each believer²⁴³. Muslims will not be rewarded on earth, only the afterlife will provide them with salvation. This explains why suicide attacks are the first resource of this organization. ISIS militants believe that the Caliphate reflects God's will, thus making it the only legitimate government on earth²⁴⁴. Every action carried out by ISIS members is an "obligation inherent in God's law". The holy war to extend the Caliphate boundaries is also a duty of the Caliph, who is the "commander of the faithful"²⁴⁵.

1.2.5 THE ISLAMIC STATE

On 19th June 2014, ISIS announced to the world the birth of a new Caliphate headed by Al- Baghdadi who is the new caliph and the guide of all believers²⁴⁶. Even if actually the Islamic State cannot be considered a state, it can be deemed as a "state-like" entity. There are executive (*shura*) and military councils that assist the caliph in taking the most important decisions²⁴⁷. The Islamic State also has a "Security Office", an intelligence service tasked with the vigilance of its membership²⁴⁸. Furthermore, to maintain the control over peoples within the occupied territories ISIS can rely on

²⁴⁰ Bazko et alia, *The Rationality of an Eschatological Movement*, 6.

²⁴¹ Jihad has a double meaning, the first one indicates the internal struggle of every Muslim against sin, and the second regards the holy war to create a new Caliphate. Sunni embraced mostly this second interpretation of Jihad, instead Shiite are less sensitive to the holy war; Scalea, *Daesh: Origini e Sviluppo*, 19.

²⁴² Bazko et alia, *The Rationality of an Eschatological Movement*, 7.

²⁴³ Jihad (*fard al'ayn*) is an individual duty that must be carry out against the apostates Arab and Western governments; Scalea, *Daesh: Origini e Sviluppo*, 19.

²⁴⁴ Bazko et alia, *ibidem*.

²⁴⁵ Bazko et alia, *The Rationality of an Eschatological Movement*, 9.

²⁴⁶ Bazko et alia, *ibid*, 4.

²⁴⁷ Bazko et alia, *ibidem*.

²⁴⁸ Bazko et alia, *ibid*, 13.

a real “judicial system and a policy force”²⁴⁹. Sharia is the law that rules ISIS action and is the ground of Islamic State legitimacy. ISIS courts apply severe penalties such as “amputation for theft, stoning for adultery, executions for homosexuals, beheading, crucifixion and many others”²⁵⁰. Their sentences are publicly issued and dead or maimed bodies are exposed in the streets to deter further Sharia violations²⁵¹. Islamic tribunals’ condemnations enforce ISIS rule. This articulate system consents the eradication of any internal dissent through the spread of intimidation. These courts bring justice only to safeguard the control over peoples and are not true judicial bodies to which people can refer their complaints²⁵². The order within the occupied territories is maintained through a strict system of surveillance, and even children are used as spies²⁵³.

To increase its population, the Islamic State prohibited emigration and incentivized Sunni immigration²⁵⁴. The Caliphate in fact aspires to become the home state for all-Muslims²⁵⁵. On the contrary, Shiite and Alawite are considered “heretics and apostates” and they are killed without any possibility to convert²⁵⁶. Yazidis, instead, being polytheists, have the possibility to convert and they are murdered only in case of rejection²⁵⁷. Christians, on their turn, are more or less tolerated because they are monotheist as Muslims. Nevertheless, their survival is subject to the payment of a high tax, *jizya* and they are sometimes forced to convert²⁵⁸. No elections are allowed as ISIS rests on individualism to establish God’s reign on earth. The only relationship that can exist is the one with God²⁵⁹. This organization recognizes only individuals who are directly responsible in front of God. Moreover, there is a religious army to

²⁴⁹ Bazko et alia, *The Rationality of an Eschatological Movement*, 14.

²⁵⁰ Bazko et alia, *ibidem*.

²⁵¹ For instances in Mosul twenty two homosexual were killed in front of a crowd of people; Bazko et alia, *ibidem*.

²⁵² Bazko et alia, *The Rationality of an Eschatological Movement*, 16.

²⁵³ Bazko et alia, *ibidem*.

²⁵⁴ “It is banned to abandoned the Islamic State for good”, Bazko et alia, *ibidem*.

²⁵⁵ Bazko et alia, *ibid*, 19.

²⁵⁶ Bazko et alia, *ibidem*.

²⁵⁷ Bazko et alia, *ibidem*.

²⁵⁸ Many Christian churches were razed to the ground When Christians they abandon their houses their possession are seized by the Islamic State; Bazko et alia, *The Rationality of an Eschatological Movement*, 20.

²⁵⁹ Bazko et alia, *ibidem*.

prevent and punish any swerve from the moral code, rooted in the Koran teachings²⁶⁰.

Strict rules are also imposed on the way of living, in particular towards women who cannot leave their house without the company of a relative man²⁶¹. They also must wear a burka, which leaves only eyes visible. Men cannot shave their beard, and the sale of alcohol, smoking, and taking drugs are strongly sanctioned and entail the charge of apostasy²⁶².

1.2.6 ISIS'S FINANCIAL RESOURCES

The Islamic State can be considered as the wealthiest terrorist organization that has ever existed. It is reported that it had increased its revenues from 1 million of dollars a month in 2008/2009 up to one million and three thousands in 2014²⁶³. Its financial resources derive mainly from incomes of criminals operations, extortions, sale of oil²⁶⁴ and antiquities trade²⁶⁵. ISIS fortune rests on a differentiated economy, because when a founding source is closed up, it can rely on other sources to generate new incomes²⁶⁶. The primary source actually is surely the sale of oil, as ISIS's oil fields produce between 25.000 and 40.000 barrels of oils daily²⁶⁷. For this reason, the Obama administration focused his first attack on oil installations to reduce ISIS's funds²⁶⁸. ISIS was able to create a real "war economy": they gained the control over many

²⁶⁰ Bazko et alia, *ibidem*.

²⁶¹ They must be her Father, husband or son.

²⁶² Bazko et alia, *ibid*, 21.

²⁶³ Ana Swansown, *How the Islamic State makes its money*, The Washington Post (19 November 2015) https://www.washingtonpost.com/news/wonk/wp/2015/11/18/how-isis-makes-its-money/?utm_term=.d26e9846bdf9 (last visited on 7 September 2017).

²⁶⁴ Extracted from the conquered oil fields in Northern Iraq and Eastern Syria; Swansown, *ibidem*.

²⁶⁵ Since ISIS obtained the control of Mosul it has exploited also the hydroelectric resources of the city; Swansown, *ibidem*.

²⁶⁶ Swansown, *ibidem*.

²⁶⁷ Brooke Satty Charles, *Funding Terrorists: The Rise of ISIS*, Security Intelligence (10 October 2014) <https://securityintelligence.com/funding-terrorists-the-rise-of-isis/> (last visited on 7 September 2017).

²⁶⁸ In October 2014, the U.S. reported the destruction about "half of the group's refining capacity"; Swansown, *How the Islamic State makes its money*, *ibidem*.

fertile grounds gaining also the control of Iraqi wheat production²⁶⁹. It also imposes high taxations on peoples and confiscates the government properties of the conquered territories²⁷⁰.

ISIS does not need foreign financial supports to survive, but it receives few donations mostly from privates of Qatar, Saudi Arabia and Kuwait. Even if at the beginning some states had provided funds to the Islamic State²⁷¹, no state is currently openly financing ISIS²⁷².

1.2.7 ISIS'S REJECTION OF THE INTERNATIONAL LEGAL ORDER

ISIS has always labelled Western societies as the devil's reign. It has always rejected the current international legal order²⁷³ and consequently any compliance with international rules on the basis of elements such as citizenship and territoriality²⁷⁴. By refusing these two principles it is conducting an everlasting fight against the rest of the world. ISIS's aim is to subvert the whole international order to establish God's order. It condemns the Westphalian order based on the states' sovereignty that prevents the establishment of a "Universal Islamic State"²⁷⁵. The aversion to "the borders of Sykes-Picot" is mirrored in the destruction of the border between Syria and Iraq²⁷⁶. God's will cannot be restrained within Western boundaries. The fact that Muslims are forced to live within States constitutes a Western trick to weaken the unity of the Muslim community²⁷⁷. By refusing the cornerstones of International

²⁶⁹ Satty Charles, *Funding Terrorists: The Rise of ISIS*, ibidem.

²⁷⁰ Satty Charles, ibidem.

²⁷¹ I have addressed this issue briefly in paragraph 2.2.1 of this Chapter.

²⁷² Satty Charles, ibidem.

²⁷³ This rejection of international order is also endorsed by Al- Qaeda.

²⁷⁴ Bazko et alia, *The Rationality of an Eschatological Movement*, 26.

²⁷⁵ Barak Medelson, *The jihadi threat to international order*, The Washington Post (15 may 2015) https://www.washingtonpost.com/news/monkey-cage/wp/2015/05/15/the-jihadi-threat-to-international-order/?utm_ (last visited on 11 September 2017).

²⁷⁶ Medelson, ibidem.

²⁷⁷ The Islamic community is identified by the term "Ummah".

Law, they also deny it any legitimation²⁷⁸. International rules are “man-made law” and violate the rule according to which only God can impose duties and grant rights²⁷⁹.

ISIS criminal actions are not confined to Iraqi and Syrian territories. The organization is responsible of many terrorist attacks in the West and other Asian countries, the last one a few weeks ago in Barcelona²⁸⁰. Western civilians cannot be considered innocent because they are not fighting the international order; on the contrary, they are its accomplices²⁸¹. ISIS suicide attacks are facilitated by the presence within its militias of Foreign Fighters (FF)²⁸² who are radicalized in their home countries or in the Syrian battlefield, and instructed to sacrifice themselves in God’s name. FF are foreign volunteers who join the project of a “global jihad”. Many of these come from Chechnya or Northern Caucasus, areas in which Islam is the predominant religion, but a good portion comes from France, Belgium, Germany and the Netherlands²⁸³. These combatants are attracted by an alternative to the selfish societies of the Western World where Muslims are often ghettoized. FF often travel to Syria to join the conflict and after their return to their home country they become a serious problem for national security.

To conclude, the Islamic State demonstrated a remarkable ability in turning a terrorist group into a “State-like entity” establishing the control over portions of Iraqi and Syrian territories and their peoples, a result that no other terrorist organization

²⁷⁸ The Islamic State is now engaged in an “offensive Jihad”, that is carried out in contempt to the principle of no aggression which is one of the most important principle to maintain the international peace

²⁷⁹ Tawhid; Medelson, *The jihadi threat to international order*.

²⁸⁰ ISIS has targeted 51 times the Western countries and the US, the first one occurred in France in January 2015 when the newspaper office of Charlie Hebdo was targeted for having published satirical stips on Mohammad and the last on 17 August 2017, in the most famous street of Barcelona, the Rambla, where a van killed 13 people, injuring other 85 people; Simona Casalini, *Attentato a Barcellona, furgone sulla Rambla: 13 vittime. Presi 2 terroristi, autista in fuga. Secondo attacco nella notte a Cambrils* (17 August 2017). http://www.repubblica.it/esteri/2017/08/17/news/barcellona_furgone_sulla_folla_in_pieno_centro_feriti-173241407/ (last visited on 7 September 2017).

²⁸¹ They are seeking to weaken Western fundamental values trough the dissemination of fear

²⁸² Bazko et alia, *The Rationality of an Eschatological Movement*, 26.

²⁸³ Ray Sherlock et alia, *Al-Qaeda training British and European Jihadists' in Syrian and Iraq to set up a terror cell at home*, The Telegraph (19 January 2014) <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/10582945/Al-Qaeda-training-British-and-European-jihadists-in-Syria-to-set-up-terror-cells-at-home.html> (last visited on 7 September 2017).

was able to reach. This group cannot be simply defined as a terrorist group, it has become much more. It is well-organized in every aspect, it is financially independent and has affiliated cells in the Western continent, in Libya, in Egypt, in Tunisia, Afghanistan and other States ready to attack western people²⁸⁴. ISIS is a new phenomenon that changes with the passing of time. Its project takes on a revolutionary feature because it intends to replace a certain form of government with another one²⁸⁵. The Islamic State presents a double nature: on the one hand, it embodies a revolutionary movement which seeks to overthrow the current regimes to establish the Caliphate. On the other hand, it uses the traditional terrorist methods to destroy the Western world²⁸⁶. Western countries are mainly responsible for the rise of this terrorist threat, as the US invasion of Iraq and the constant relationship between Western states and Arab leaders that have always relied on foreign support to maintain their power have progressively distanced people and governments²⁸⁷. Arab countries carried out a policy exclusively centered on the preservation of power, ignoring peoples' concerns and fomenting resentment and anger²⁸⁸. Furthermore, Arab leaders exploited the sectarian internal struggles to maintain the control over the population, adopting a confused policy with no unique direction. Only time can tell us what will happen.

1.2.8 THE CURRENT SITUATION

In the last few months, ISIS has been losing control over many territories conquered three years ago. In particular the Iraqi city of Mosul was released after nine months

²⁸⁴ Even in Somalia, Nigeria (Bokho Haram), Bangladesh, Pakistan and Russia; *Isis, la mappa dell'espansione dei jihadisti* (7 March 2016) <http://www.lettera43.it/it/articoli/politica/2016/03/07/isis-la-mappa-dellespansione-dei-jihadisti/162563/> (last accessed on 7 September 2017).

²⁸⁵ Stephen Martin Walt, *Isis as a Revolutionary State*, Foreign Affairs (November/December 2015). <https://www.foreignaffairs.com/articles/middle-east/isis-revolutionary-state> (last visited on 7 September 2017).

²⁸⁶ Walt, *Isis as a Revolutionary State*, Foreign Affairs.

²⁸⁷ Waleed Hazbun, *A History of Insecurity: From Arab Uprising to ISIS* (2015), Middle East Policy, Vol XXII, No. 3, 55, 57.

²⁸⁸ Brumberg, *Liberalization versus Democracy*, 130.

of air and ground offensives carried out by the Iraqi forces supported by the US-led coalition²⁸⁹. At the end of August, also the Iraqi province of Nineveh was liberated from the Islamic State's control²⁹⁰. In March this year, even the Syrian city of Palmyra was reconquered thanks to a coordinate action between Assad's forces and Russia. In June 2017, the IHS Conflict Monitor reported that ISIS has lost more than 60% of the territories conquered in January 2015²⁹¹. ISIS is now experiencing a crisis in Iraq and Syria, although it continues its terrorist actions against Western and other Asian countries²⁹². According to ISIS's expansion plan, many jihadist groups from Libya, Egypt, Afghanistan and Pakistan, have joined the Islamic State and are now fighting by its side²⁹³.

²⁸⁹ *Islamic State and the crisis in Iraq and Syria in maps*, BBC (1 September 2017) <http://www.bbc.com/news/world-middle-east-27838034> (last accessed on 7 September 2017).

²⁹⁰ *Islamic State and the crisis in Iraq and Syria in maps*, ibidem.

²⁹¹ *Islamic State and the crisis in Iraq and Syria in maps*, ibidem.

²⁹² In 2016, the Islamic State claimed terrorist attacks in Egypt, Turkey, Indonesia, France, Belgium, Germany, the US and Bangladesh. In 2017 he was responsible for the attacks occurred in UK and Barcelona. Tim Lister, Ray Sanchez, Mark Bixler, Sean O'Key, Michael Hogenmiller and Mohammed Tawfeeq, *ISIS goes global: 143 attacks in 29 Countries have killed 2043*, CNN (13 August 2017) <http://edition.cnn.com/2015/12/17/world/mapping-isis-attacks-around-the-world/index.html> (last accessed on 13 September 2017).

²⁹³ *Islamic State and the crisis in Iraq and Syria in maps*, ibidem.

CHAPTER 2

THE SOURCES OF INTERNATIONAL LAW ON THE PROTECTION OF CULTURAL HERITAGE

Summary: 2.1 PROTECTION OF CULTURAL HERITAGE IN INTERNATIONAL LAW FRAMEWORK; - 2.1.1 From antiquity to the eighteen century; - 2.1.2 The Lieber code, 1863; - 2.1.3 The Hague Conventions of 1899 and 1907 on the Law of Costumes of War on Land and the Regulations Annexed to the Conventions; - 2.1.4 The 1919 Nob Report and the 1923 Hague Rules; - 2.1.5 The Roerich Pact, 1935; - 2.1.6 The 1949 Geneva Convention and the 1977 Additional Protocols; - 2.1.7 The 1954 Hague Convention on the Protection of Cultural Heritage in Event of Armed Conflict ; - 2.1.7.1 The First Protocol to the 1954 Hague Convention; - 2.1.7.2 Exemptions to the 1954 Convention: the military necessity and the conduct of the opposing party ; - 2.1.7.3 The failure in the protection of cultural property and the Second Protocol; - 2.1.7.4 Individual responsibility;; - 1) Article 28, 1954 Hague Convention; - 2) Some; - 3) Chapter IV of the Second Protocol; - 2.1.7.5 The Military Manual an important guideline for the concrete implementation of the 54' Hague Convention;; - 1) Preparatory Measures: military regulations and instructions; - 2) Protection of cultural property during hostilities; - 3) Incidental damage to cultural property; - 4) Use of cultural property or its surroundings; - 5) Threats to cultural property resulting from military operations ; - 6) Misappropriation and vandalism of cultural properties; - 7) Reprisals against cultural property ; - 2.1.8 UNESCO Convention on the Protection of Cultural and Natural World Heritage (1972, Paris); - 2.2 PROTECTION OF CULTURAL HERITAGE IN THE SATUTES OF INTERNATIONAL CRIMINAL TRIBUNALS; - 2.2.1 The Charter of the International Military Tribunal; - 2.2.2 The Statute of the International Tribunal for the Former Yugoslavia; - 2.2.3 The Statute of International Criminal Court; - 2.3 THE DECLARATION ON THE INTENTIONAL DESTRUCTION OF CULTURAL HERITAGE ; - 2.3.1 The destruction of cultural heritage: general notes; - 2.3.2 The UNESCO Declaration concerning the intentional destruction of cultural heritage; - 2.3.3 State and individual responsibility; - 2.3.4 The limits of the Declaration; - 2.4 PROVISIONS ON THE PROTECTION OF CULTURAL HERITAGE AS CUSTOMARY RULES

2.1 PROTECTION OF CULTURAL HERITAGE IN INTERNATIONAL LAW FRAMEWORK

2.1.1 FROM ANTIQUITY TO THE EIGHTEENTH CENTURY

Throughout history, the looting, pillaging and destruction of cultural heritage have constituted one of the most powerful weapons to humiliate the cultural identity of a conquered population¹. The ancient law of nations provided that all enemy's property was subject to capture and confiscation in time of war, and it was the Romans who first codified this practice, as they with their fine legal minds understood the ownership of the property of conquered people perfectly and absolutely². The ancient world shows us innumerable examples of destruction and plundering of properties in time of conflict, such as the burning and looting of Troy, Persepolis by Alexander the Great and the devastation of Corinth and Carthage³. It was only in the Renaissance that a new perspective on cultural property began to emerge due to the rediscovery of the importance of art for the civilization and the progress of all humanity. A unique artwork could not be replaced after its destruction, and plunder and destruction constituted only barbaric acts and an evidence of lack of culture. Despite the Renaissance view of cultural heritage as a universal legacy of all humankind, the Nations did not consider destruction or looting of cultural works prohibited by the *jus gentium* (law of nations)⁴.

¹ Federico Lenzerini, *'La distruzione intenzionale del patrimonio culturale come strumento di umiliazione dell'identità dei popoli'*, in Zagato Lauso (a cura di), *Le identità culturali nei recenti strumenti UNESCO: un approccio nuovo alla costruzione della pace'* (Cedam, Venezia, 2008), 5.

² Cicero (106-43 BCE) asserted this concept by saying: 'Victory made all the sacred things of the Syracusans profane.' Henry Wheaton, *Elements of International Law* (2 edn, London, 1864), 596-597.

³ The most famous example was the destruction of Carthage, the historical enemy of Rome, where no temples and no graves were spared by the brutality of the Roman troops; Francois Bugnion, *The origins and development of the legal protection of cultural property in the event of armed conflict*, in International Red Cross (14 November 2014), 2 www.icrc.org/web/Eng/siteeng.nsf/htmla/65SHTJ.

⁴ Geert Verhoeven, *'Imaging The Invisible Using Modified Digital Still Cameras For Straightforward And Low-Cost Archaeological Near-Infrared Photography'* (2008) Vol.35 No. 12 *Journal of Archeological Science*, 3087, 3087-3088.

Jakub Pryluski was the first who supported the cause of protecting cultural heritage in times of armed conflict, asserting that “in addition to objects of worship, outstanding works of art and literature should be exempted from the right to take spoils of war”⁵. Furthermore, the international jurist Hugo Grotius maintained that destroyed or looted cultural items, within an unjust conflict⁶, must be restored to their lawful owners, not only by those who have taken them, but also by other into whose hands they may have fallen⁷. Grotius also added that cultural items that could not support the war effort had to be spared during the heat of the battle, in particular he claimed to spare religious objects and icons. During the same period, Jean-Jacques Rousseau likewise argued that private property of civilians and public property not serving a direct military purpose, like places of worship or education, libraries, and art collections should not be involved in the ongoing of the conflict. He wrote: “War ... is not a relation between men, but between states; in war individuals are enemies wholly by chance, not as men, not even as citizens, but only as soldiers; not as members of their country, but only as its defenders”⁸. Another jurist, Emer de Vattel, stated that “although it’s lawful to take property of an unjust enemy in order to weaken or punish him”⁹, cultural items should be protected from deliberate destruction and damage due to their incomparable significance for all the people worldwide¹⁰. These first calls for the need to protect cultural property were completely ignored at that time, as can be easily figured out by the pillaging practice occurred during the Seven Years War and the Napoleonic Wars when the Louvre’s

⁵ Jakub Pryluski, *Leges seu statuta ac privilegia Regni Poloniae* (1edn, Cracoviae, 1553), 230

⁶ To have a “just war” we have to reference to two factors: the cause and the conduct of the war, according to Grotius a war could be considered as just when, and only ‘it serves right, so in response to a wrong not yet committed, or to wrongs already done’; Hugo Grotius, *De iure Belli ac Pacis* (The rights of war and peace), Translated from the original Latin of Grotius, with Notes and Political and Legal Writers Archibald C. Campbell (Vol. III, edn 1901, first publication 1625), 1314.

⁷ Hugo Grotius, *ibidem*.

⁸ Jean J. Rousseau, *Le Social Contract* (France, 1762, reprinted in 1916), 56–57.

⁹ Emer de Vattel, *The Law of Nations, or, Principles of the Law of Nature, Applied to the conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural law and on Luxury* (Liberty Found, Indianapolis, 2008) 1 edn of 1883, para. 161-162.

¹⁰ de Vattel, *ibidem*.

collection was enriched with artworks plundered from Italy, Russia, Egypt, Prussia, Spain and Netherlands¹¹.

2.1.2 THE LIEBER CODE, 1863

The Lieber Code¹² provides the instructions for the government of the US Army on armies' conducts within armed conflicts. It was drafted by the jurist Francis Lieber during the US civil war to be the first manual on the protection of cultural heritage, and it constitutes the first effort to issue formal guidelines for the conduct of US military troops in the battlefield. It was adopted in 1863 under the will of the President Abraham Lincoln and can be considered as a codification of Western military customs¹³.

The Lieber Code defined the special role and the necessary protection of charitable institutions, collections and works of art, distinguishing such "public property" from other types of movable property that could be used as war booty. This is clearly expressed in Article 34¹⁴ that stipulates as a "general rule"¹⁵ that churches, hospitals, charitable organizations, places of education and learning, museums of fine arts or science have to be deemed private properties, unless they were used for military purpose. Furthermore, it states that cultural property must be secured against all avoidable injury, even when contained in besieged or bombarded fortified places.¹⁶

¹¹ Nicholas Biton et alia, '162 Stepping Stones Across the Lihir Islands: Developing Cultural Heritage Management in the Context of a Gold-Mining Operations' (2011) Vol 18 No. 1 International Journal of Cultural Property, 81, 92 and Verhoeven, 'Imagine the Invisible Using', 3089.

¹² Instructions for the Government of armies of the United States in the Field. Original issued as General Orders no. 100, Adjutant General's Office(1863)(Government Printed Office, 1989) (entered into force on 14 April 1863) International Humanitarian Database of the ICRC (hereafter IHL Database of ICR), available at ihl-databases.icrc.org/ihl/INTRO/110 (last visited on 10 June 2017)

¹³ Ana F. Vrdojiak, 'Cultural heritage in human rights and humanitarian law' (2009), 5.

¹⁴ Article 34, Lieber Code.

¹⁵ Vrdojiak, *Cultural Heritage*, 5.

¹⁶ Article 35 Lieber code, 1863, Peter Maguire, *Law and War: an American Story* (Columbia University Press, New York,2000) and John H. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford University Press,1985) at 833-842.

The Code thus defines cultural property as a form of “private property”¹⁷ subject to higher standards of protection and preservation than other public or governmental properties¹⁸. This instrument not only requires Union Commanders to reconsider attacks against cultural sites, but also places an affirmative duty on the United States Commanders to “acknowledge and respect” cultural objects and sites in occupied territories¹⁹. This was the first time that the protection of cultural heritage was addressed in an official document and after its provisions, a series of declarations and treaties were drafted on that theme. Though it never entered into force, “The 1847 Brussels Declaration”²⁰ prohibited any destruction or seizure of enemy’s property, unless imperatively demanded by the necessity of war²¹. The Lieber Code also inspired the Laws of War on Land commonly known as “The 1880 Oxford Manual” drafted by the Institut de Droit International in 1880 that incorporates the Brussels Declaration’s rules²².

2.1.3 THE HAGUE CONVENTIONS OF 1899 AND 1907 ON THE LAW OF CUSTOMS OF WAR ON LAND AND THE REGULATIONS ANNEXED TO THE CONVENTIONS

¹⁷Article 34, Lieber Code; Brussels Declaration, Article 8 and 38; Article 53, Oxford Manual; Pasquale Fiore, *Trattato di diritto internazionale pubblico*, (Vol. III, Turin, 1884), para. 1664 and 1747; Fedor F. Martens, *Traité de Droit International* (vol. II, Paris, 1883), 261 and Henry S. Maine, *International Law* (London J. Murray, 1890), 194.

¹⁸ Article 36 increases this protection by adding: ‘in no case shall they be sold or given away, if captured by the armies of the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured’.

¹⁹ Jiri Toman, *The Protection of Cultural Property in the Event of Armed Conflict* (Routledge, 2017), 7-8.

²⁰ International Declaration concerning the Laws and Customs of War (27 August 1874, not ratified) IHL Database of ICR, available at <https://ihl-databases.icrc.org/ihl/INTRO/135>;

²¹ Article 8 expresses the necessity of prosecuting the responsible of the destruction, damage or seizure of institutions dedicated to religion, charity, education, art and science by the competent authorities, Toman, *The Protection*, 9.

²² The Laws on War on Land(adoption 9 September 1980) IHL Database of ICR, available at <https://ihl-databases.icrc.org/ihl/INTRO/140?OpenDocument>; and Jiri Toman and Dietrich Shindler, *The Laws of armed conflict. A collection of Conventions, Resolutions and Other Documents* (Brill, 1988), 3-5.

The rules on the protection of cultural objects during armed conflicts are codified in the IV Convention on the Law and Customs of War on Land adopted in 1907²³. The main articles of the Convention are Article 23, 27 and 47 of the 1907 Convention Annex²⁴. The first one sets an overall rule on the treatment of enemy property during an armed conflict²⁵. Under lit. g)²⁶ it prohibits both the destruction and seizure of enemy property unless these actions are requested by the necessity of war. Thus the destruction and seizure of enemy's properties are allowed only if and to the extent that it is necessary for military efforts²⁷. Article 25 is concerned with bombardment which is permitted only against defended towns, villages or buildings; this rule is completely in accordance with the idea of bombardment as a last resort that cannot be used to conquer undefended towns, constituting an indiscriminate attack²⁸. The most important provision to the aims of this work is set forth in Article 27 which is strictly connected to the Articles previously analysed, and defines the obligation to avoid damages to particular structures. It asserts that during hostilities "all necessary steps should be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected", as long as they are not used for military purposes. Moreover, the above mentioned buildings have to be marked with a distinctive sign and notified to the enemy²⁹. The same is reaffirmed in Article 2 in the 1907 IX Convention on Bombardment by Naval Forces in Times of War³⁰, claiming that a

²³ IV Hague Convention Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (18 October 1907, entered into force 26 January 1910) 75 UNTS 31 <http://www1.umn.edu/humanrts/instree/1907c.htm> (last visited on 22 August 2017).

²⁴ Schilder e Toman, *The Laws of Armed Conflict*, 55.

²⁵ Article 23, IV Hague Convention Respecting the Laws and Customs of War on Land and Its Annex.

²⁶ Roger O'Keefe, *The protection of cultural heritage in armed conflict* (Cambridge University Press, 2009), 20.

²⁷ O'Keefe, *ibid*, 20.

²⁸ O'Keefe, *ibid*, 24.

²⁹ The verb 'to spare' includes both direct injury and avoidable incidental damage due to the bombing of nearby targets; James E. Edmonds and Lassa Oppenheim, *Land Warfare: An Exposition of the Laws and Usages of War on Land, for the Guidance of Officers of His Majesty's Army* (HM Stationery Office, 191), para 122.

³⁰ IX Hague Convention concerning the Bombardment by Naval Forces in Time of War (adopted on 18 October 1907, entered into force on 26 January 1910). IHL Database of ICR databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?ahl-

naval commander who bombs a military objective will not be held responsible for the attack. Thus the Article³¹ requires an essential precondition for the protection of cultural heritage: it should not be used for “military purposes”. The text does not specify what the expression “military purposes” includes, but it is generally accepted as addressing the use of buildings or sites as offices and quarters of the army forces or, signalling station or observation sites to help target artillery³². Another aspect that is not clarified by the wording of the Article is that, even if used for military purposes, the destruction of cultural property will be justified only when imperatively required by the necessity of war and only to this extent³³. This means that the military use does not suffice to revoke the protection previously afforded. Using cultural property for military aims is not a violation of the Hague Rules, as it does not pose on the defending party a positive duty to refrain from this use³⁴. Even if Article 27 regards only air bombardment, it is reasonable to assume that the rule involves both bombardment from the air and by land³⁵. This article contains another central provision: the obligation of marking the buildings with a distinctive sign, in fact it poses “a duty of the besieged to indicate the presence of such buildings or sites by distinctive and visible signs, which shall be notified to the enemy beforehand”³⁶. The violation of this rule does not release the other party to spare cultural property when its location is acknowledged.

Another relevant Article is 56 that addresses the case of military occupation. Contrary to Article 27, in this provision the obligation to protect institutions of religious, charitable, educational, historic and artistic character from intentional destruction during military occupation is absolute³⁷. The most important contribute offered by this article lies in its second part which forbids the seizure, destruction or

ction=openDocument&documentId=F13F9FFC628FC33BC12563CD002D6819(last visited on 12 August 2017)

³¹ Article 27, IV Hague Convention Respecting the Laws and Customs of War on Land and Its Annex.

³² Edmonds and Oppenheim, *Land Warfare*, para. 122.

³³ O’Keefe, *The Protection*, 30.

³⁴ This provision presents a strong limit in the words “as far as possible” and so this obligation will fail because of the exigencies of warfare; Article 27, IV Hague Convention.

³⁵ O’Keefe, *The Protection*, 31.

³⁶ Article 27, Annex to the Hague Conventions 1907.

³⁷ No exemption for military purposes is provided, Article 56, IV Hague Convention.

wilful damage to these buildings and monuments and finally adds that these crimes must be prosecuted.

This provision³⁸ is complement to Article 55 that provides an obligation to preserve and safeguard the value of immovable properties. Despite the widespread acceptance and recognition of these Conventions by the European Nations, they failed in protecting cultural property during the two World Wars. In fact, during the I World War, the humanity witnessed the bombing of the Cathedral of Reims, the burning of the library of the Belgian University of Louvain, and the looting of many European museums; all these destructions are concrete examples of the Conventions' ineffectiveness³⁹. Moreover, these Conventions are informed by the *si omnes* clause⁴⁰, according to which the application of a treaty is "subject to the condition that all States concerned are Parties of it", thus excluding its application when the opposing party did not ratify the treaty.

Nevertheless, the Hague rules served to grant either restitution or restoration⁴¹ of looted cultural objects in the Treaty of Versailles (28 June 1919) (Article 245 in favour of France and 247 in favour of Belgium) and in the Treaty of Berlin (24 April 1926). This failure and the fact that no German was prosecuted for having damaged cultural property during WWI notwithstanding, destructions such as these were strongly condemned, constituting violations of the laws of war. The Hague Regulations were recognized by all nations and were regarded as being declaratory of the laws and customs of war by the International Military Tribunal during the Nuremberg proceedings⁴². In the same way, also the ICTY⁴³ recognized these rules as part of

³⁸ Article 56, IV Hague Convention Respecting the Laws and Customs of War on Land and Its Annex.

³⁹ Patrick j. Boylan, *Review of the Convention for the Protection of cultural Property in the event of armed conflict* (1993).

⁴⁰ The *si omnes* clause, thus, is one of the most important limit to the protecting cultural heritage; Philippe Gautier, *General Participation Clause (Clausola si omnes)*, Max Plank Encyclopaedia of Public International Law (April 2016).

⁴¹ When restitution was not possible.

⁴² *The Trial of German Major War Criminals before the International Military Tribunal Sitting at Nuremberg, Germany*, (14 November 1945- 1 October 1946) Vol 1, 241; available at <http://www.nizkor.org/hweb/imt/tgmwc/> (last visited 22 May 2017).

⁴³ *Prosecutor vs Tadic* (Decision on Defence Motion for Interlocutory Appeal on Jurisdiction) It-94-1-AR72 (2 October 1995) para. 27 and 98; see also *Prosecutor v. Strugar* (Trial Chamber II) IT-01-42/1 (31 January 2005), para. 230.

customary international law (CIL), thus implicitly acknowledging they bind also States which are not parties to them.

2.1.4 THE 1919 NOB REPORT AND THE 1923 HAGUE AIR RULES

Although the Hague Regulations remain the essential core of the protection of cultural property within international humanitarian law, the lack of enforcement of this normative framework during the hostilities of WWI led to a renewed concern about the necessity of creating a stronger framework

In 1918, after the devastation provoked by the German troops in France and Belgium during their retreating, the Netherlands Archaeological Society (NOB) called for the establishment of an Intergovernmental Conference in Netherlands to strengthen the protection of cultural property by the Hague Rules . The next year the Nob issued a report which claimed that the destruction or damage to cultural property affected “humanity as a whole”⁴⁴ and not only the owners or the interested states. The report recommended the creation of ‘demilitarized zones’⁴⁵ around cultural sites and buildings to which an “international status” that would have been established by all states together” had been previously attributed. Equally relevant was the imposition on the occupying power not to use cultural sites and buildings for military purposes⁴⁶.

The Report also provided for the establishment of an international office responsible for the compliance of these “demilitarized zones”⁴⁷. However, it did not address the issue of criminal proceedings in case of breach of the obligation of demilitarising⁴⁸.

⁴⁴ ‘Pays- bas. La protection des monumentes et objtes historiques et artistique contre les destructiones de la guerre. Proposition de la Societè Neeerlandaise d’archeologie’, Vol. 26 Revue general de droit international public, 329, 331.

⁴⁵ The NOB Report regarded both movable and immovable properties and opted for a geographical isolation of sites and monuments of cultural significance; Vrdoljack, ‘*Cultural Heritage*’, 355

⁴⁶ Charles De Visscher, *International Protection of Works of Art and Historic Monuments* (Department of State, 1949), 838.

⁴⁷ De Visscher, *International Protection of Works of Art*, 838.

⁴⁸ De Visscher, *ibid*, 385, and O’Keefe, *The protection*, 42-43.

Notwithstanding this lacuna and its not binding nature, the NOB Report strongly inspired the work of the Commission of Jurists that led to the drafting of the Hague Rules concerning the Control of Radio in Time of War and Air warfare (Hague Rules)⁴⁹. The Hague Rules, accomplished in 1923, set forth a special regime for the protection of monuments of greater historic importance that was separated from the general protection afforded to civilian properties by the 1907 Hague Regulations⁵⁰. The most significant contribution provided by this set of rules was the replacement of the concept of “defended and undefended towns” with the notion of “military objective”⁵¹. Article 24, specifically, substituted the distinction between undefended and defended towns with the obligation to distinguish between military objectives and civilian population. According to paragraph 1, aerial bombardment would be “legitimate only when directed at a military objective”, that is to say, an object whose destruction or injury would constitute a distinct military advantage for the belligerent. Paragraph 2 gives a list of what facilities can be considered as lawful military objectives to be bombed⁵². Instead Article 25 defines all the dutiful steps to spare, as far as possible, cultural property in case of bombardment by aircraft, as long as it is not used for military purpose at the relevant time⁵³. Moreover, it presents two relevant changes: the establishment of a “neutralized zone”⁵⁴ near important historic monuments to protect them from bombardment when not used for military purposes and the creation of an international system of inspection on neutralized sites⁵⁵. Although the 1923 Air Rules were not formally adopted by the states, they

⁴⁹ De Visscher, *ibid.* 839; and ‘*Commission of Jurists to consider and report upon the revision of the rules of Warfare*’ General Report. (1938) Vol. 32 No. 1 *American Journal of International Law*, 23.

⁵⁰ Article 27, 1923 Hague Rules; Shindler and Toman, *The Law of Armed Conflict*, 315.

⁵¹ Article 24, 1923 Hague Rules.

⁵² The aerial bombardment had to be considered lawful “only when directed exclusively at the following objectives: military forces; military works; military establishments or depots; factories constituting important and well-known centers engaged in the manufacture of arms, ammunition or distinctively military supplies; lines of communication or transportation used for military purposes”; Article 24, 1923 Hague Rules.

⁵³ Article 25, 1923 Hague Rules.

⁵⁴ A zone of protection had to be established around these monuments up to 500 meters of width, conferring to this zone the immunity from bombardment, ‘*Commission of Jurists*’, *supra* note 49, 26-27 and De Visscher, *International Protection*, 842 and O’Keefe, *The Protection*, 49.

⁵⁵ ‘*Commission of Jurists*’, 26-27 and De Visscher, *International Protection*, *ibidem*.

enjoyed a considerable status and were considered as reflecting international law by few states⁵⁶.

2.1.5 THE ROERICH PACT, 1935

The “Roerich Pact”⁵⁷ was first agreed to by twenty-one nations of the Americas and signed as a treaty in the White House, at the presence of President Franklin Delano Roosevelt, by all the members of the Pan-American Union⁵⁸, in 1935. It was drawn up by the Pan-American Union under the name of Treaty for the Protection of Artistic and Scientific Institutions and of Historic Monuments⁵⁹. It states that historic monuments, museums, scientific, artistic, educational and cultural institutions have a neutral status and that the personnel of those institutions should be respected and safeguarded⁶⁰. According to Article 5, the protection will cease only when the above mentioned sites are used for military purposes.⁶¹ The treaty was signed by the representatives of twenty-one American governments and the Banner of peace was adopted as the official symbol of cultural property to distinguish the properties under its protection. The treaty is still in force across all North America and in most countries of Central and South America.

Article 36(2) of the 1954 Hague Convention explicitly states that for those powers that are bound to the “Roerich Pact” and are also Parties in the 54’ Hague

⁵⁶ O’Keefe, *The Protection*, 49.

⁵⁷ This Treaty owes its name from Nicholas Roerich who was a Russian painter and philosopher who initiated the movement for the protection of cultural objects according to the idea of “Peace of Civilizations” Roerich Pact, Treaty for the Protection of Artistic and Scientific Institutions and of Historic Monuments (adopted in 15 April 1935) 167 LNTS 90 <http://www.roerich.org/roerich-pact.php>. (last visited on 27 May 2017).

⁵⁸ Later was signed by other countries also.

⁵⁹ In the 1933, the Seventh International Conference of American States recommended the adoption of this document.

⁶⁰ Article 1 and 3, Roerich Pact.

⁶¹ The organization designated to administer lists of protected institutions and monuments was the Pan-American Union; Coleman Philipson, *International Law and the Great War* (Unwin, London, 1915), 168.

Convention, the latter Convention does not replace the Roerich Pact but is supplementary to its provisions⁶².

2.1.6 THE 1949 GENEVA CONVENTION AND THE 1977 ADDITIONAL PROTOCOLS

The four Geneva Conventions⁶³ which ended in 1949 are the main humanitarian law conventions regulating armed conflicts⁶⁴. These Conventions do not specifically protect cultural property since this issue was not considered as serious and grave as other war crimes involving loss of many lives⁶⁵. In them, a dividing line between cultural heritage protection and other aspects of international humanitarian law⁶⁶ was first drawn. The guidelines over cultural heritage were added only subsequently in 1977 in the Additional Protocol I (AP I)⁶⁷ and II (AP II)⁶⁸, and for the most they reflect the 1954 Hague Convention for the Protection of Cultural Property for the Event of Armed Conflict. The most important provisions of this legal framework are surely embodied in Article 53 of AP I. It applies to IAC and prohibits any act of hostility directed against historic monuments, works of art, or places of worship⁶⁹. This rule was declared to be part of customary international law by the jurisprudence

⁶² Article 36(2), 1954 Hague Convention For The Protection of Cultural Objects in the Event of Armed Conflict, International Committee of the Red Cross, IHL Database of ICR, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=EE57F295093E44A4C12563CD002D6A3F&action=openDocument> (last visited 30 May 2017).

⁶³ Here comes at stake only the IV Convention Relative to the Protection of Civilian Persons in Time of War, Annex (adopted on 12 August 1949) 75 UNTS 287 <http://www.refworld.org/docid/3ae6b36d2.html> (last visited on 21 August 2017).

⁶⁴ Vrdoljak, 'Cultural Heritage in Human Rights and Humanitarian Law', 257.

⁶⁵ Patty Gerstenblith, 'The destruction of cultural heritage: a crime against humanity or a crime against people?' (2016) Vol. 15 The John Marshall Review of Intellectual Property Law, 336, 344.

⁶⁶ Gerstenblith, *ibidem*.

⁶⁷ Additional Protocol I (adopted on 8 June 1977, entered into force on 7 December 1978) 1225 UNTS 3 <http://www.refworld.org/docid/3ae6b36d2.html> (last visited on 21 August 2017).

⁶⁸ Additional Protocol II (adopted on 8 June 1977, entered into force on 7 December 1978) 1125 UNTS 60 <http://www.refworld.org/docid/3ae6b37f40.html> (last visited 21 August 2017).

⁶⁹ According to Article 48 of the civilian population and combatants, and between civilian goods and military objectives; Natalino Ronzitti, *Diritto internazionale dei conflitti armati* (Giappichelli, 2016), 260.

of the ICTY.⁷⁰ Article 53 establishes that only military objectives could be targeted⁷¹. The Protocol does not include any list of military objectives⁷², but it provides a definition, pursuant to Article 52(2)⁷³: a military objective “has to be a thing that for its nature⁷⁴, location⁷⁵, purpose or use⁷⁶ effectively contributes to the military action; moreover, its total and partial destruction, conquer, or neutralization must offer a concrete military advantage”⁷⁷. In case of doubt, when the destination of the item or site is not clear, a presumption in favour of its immunity takes place⁷⁸.

Thanks to the distinction between civil and military objectives, AP I⁷⁹ contributes to surpass the impasse caused by the tendency of states to turn simple military convenience in military necessity⁸⁰, violating also the proportionality principle.⁸¹

⁷⁰ *Prosecutor v. Kupreskic* (Trial judgement) IT-95-16 (14 January 2000).

⁷¹ Article 53, AP I.

⁷² The ICRC Commentary give an explicative list of potential military objectives; note (3) [(3) p.632], ICRC Commentaries to Article 52 of AP I(1987), 634 <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=5F27276CE1BBB79DC12563CD00434969> (last visited on 22 August 2017)

⁷³ Article 52(2), AP II.

⁷⁴ Such as: “weapons, equipment, transports, fortifications, depots, buildings occupied by armed forces, staff headquarters, communications centres etc.”; ICRC Commentary to Article 52, para 2, point 2020, 363.

⁷⁵ For example, “a bridge or other construction, or it could also be a site which is of special importance for military operations in view of its location, either because it is a site that must be seized or because it is important to prevent the enemy from seizing it, or otherwise because it is a matter of forcing the enemy to retreat from it”; ICRC Commentary to Article 52, para 2, point 2021, 363

⁷⁶ “Use” is intended as the present function of the objects, instead “purpose” indicates its future use; because of their destination can be considered military objectives as: “schools or a hotels that are a civilian objects, when they are used to accommodate troops or headquarters staff become military objectives”; ICRC Commentary to Article 52, para 2, point 2022, 363

⁷⁷ Only material and tangible goods can be considered as military objective for instance the enemy’s moral can’t be considered a military objective; Ronzitti, *Diritto internazionale dei conflitti armati*, 258.

⁷⁸ Article 52(3), AP I; the presumption established here constitutes an important step forward in the protection of the civilian, ICRC Commentary to Article 52 AP I, Para. 3, point 2030, 637.

⁷⁹ With the insertion of the definition of military objective every attack to be lawful must fulfill 3 requirements: only military objectives can be targeted, methods and means of war have to be chosen to reduce at minimum the collateral damages to population and civilian goods and finally the attack must be proportionate. These rules have to be followed both by those who plan the attack and by the executors. Ronzitti, *Diritto Internazionale*, 265.

⁸⁰ Attacks against cultural properties are permitted in 1954 Hague Convention in case of military necessity, that, therefore renders the attacks lawful; Article 4(3), 1954 Hague Convention

⁸¹ Article 57 of AP I referring to the proportionality principle states that when there is the possibility of making a choice between different military objectives giving a similar military advantage, it has to be selected the one from whom a lesser danger for civilians’ lives and items; Ronzitti, *Diritto Internazionale* , 265.

Military necessity involves measures that are vital to achieve the aims of war and that are lawful pursuant to the laws and customs of warfare. On the contrary, the principle of proportionality entails a balance between the damage foreseen and the expected military advantage, a rule that has always to be respected⁸². Thus the general justification for military necessity cannot be used to justify attacks against cultural objects, unless they are military objectives⁸³. Likewise Article 53, Article 16 bans the targeting of cultural sites or items and their use as a military objectives. Differently from the wording of Article 53, this norm does not forbid reprisal, but in exchange Article 4(2)(g)⁸⁴ establishes the prohibition of pillaging. It is of great significance how some states among those that did not ratify AP I, in particular the United States, Turkey and India, claimed the customary nature of Article 52.⁸⁵

2.1.7 THE 1954 HAGUE CONVENTION ON THE PROTECTION OF CULTURAL HERITAGE IN THE EVENT OF ARMED CONFLICT

Due to the ineffectiveness and the insufficiency of the international framework to protect cultural property during the I and II World War from the pillaging and looting of Nazi forces (which created trophy brigades to locate and seize specific pieces of art to bring back to Germany), the international community began to focus on the preservation of cultural heritage.

This specific historical context led to the drafting of the main instrument to protect the cultural heritage during armed conflicts, namely the Hague Convention⁸⁶ on the

⁸² Maja Sersic, 'Protection Of Cultural Property in Time of Armed Conflict' (1996) New York Journal of International Law, Vol 27, 2, 13-16.

⁸³ It is important to say that Article 53 of AP I does not modify the existing regime on the cultural heritage, because it applies without any prejudice for the provision contained in the 1954 Hague Convention and in other international relevant instruments; According to Article 30(2) of the Vienna Convention on the Law of Treaties, in case of conflict between the AP I and the 1954 Hague Convention the latter provision will prevail; Ronzitti, *Diritto Interanzionale*, 70.

⁸⁴ Article 4(2)(g), AP II

⁸⁵ Jean Marie Henckaerts and Luise Doswald-Beck, *Customary International Humanitarian Law* (Vol. 1, Cambridge University Press, 2005), 601.

⁸⁶ 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted on 14 May 1954, entered into force on 7 August 1956) 249 UNTS 240 <http://www1.umn.edu/humanrts/instree/1954b.htm> (last visited 21 August 2017).

Protection of Cultural Property in the Event of Armed Conflict with a separate optional Protocol⁸⁷, which was adopted by UNESCO on 14 May 1954. It is the first agreement completely dedicated to cultural heritage and UNESCO⁸⁸ considers it as the sequel of the fourth Hague Rules. It was developed by UNESCO to supplement and build upon the many international agreements already in place regarding cultural property protection, and can be considered as a reaction to the events of the II World War⁸⁹. It acknowledges that “cultural property has suffered grave damages during recent armed conflicts” and tries to fix the inadequacies of the Hague Regulations⁹⁰.

The preamble itself claims that damage to cultural property belonging to any people implies damage against cultural property of the whole humankind⁹¹. As such, this property deserves a system of international protection. For the first time in history, these words enshrine the “internationalist cultural approach” within a compulsory international instrument⁹². The text uses the term people instead of ‘states’ to emphasise the anthropological character of heritage which is built in a specific social context.

In the final recital, the High Contracting Parties claim the necessity of taking measures to protect cultural heritage both at national and international level in time of peace to make the protection during hostilities effective. First of all, attention has to be focused on the definition of cultural property offered by this Convention to understand the object of this protection. The drafters of the Convention believed that the failure in the protection afforded by the Hague Rules depended on their “over-ambitious definition”⁹³. In their opinion, it was counterproductive to extend the

⁸⁷ Protocol I to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted on 14 May 1954, entered into force on 7 August 1956) 249 UNTS 215 <http://www1.umn.edu/humanrts/instreet/1954b.htm> (last visited 21 August 2017).

⁸⁸ UNESCO: United Nations Educational, Scientific and Cultural Organization, established 4 November 1946.

⁸⁹ There are currently 123 parties to the main Convention and 104 to the First Protocol, 68 to the Second Protocol, the United Kingdom is now the only major military power that has not ratified at least the main Convention.

⁹⁰ David Keane, *The failure to protect cultural property in wartime* (2004) Vol XIV No. 1 De Paul Journal of Art Technology & Intellectual Property Law, 1, 12.

⁹¹ Preamble of the 1954 Hague Convention, Keane, *ibidem*.

⁹² Keane, *ibidem*.

⁹³ O’Keefe, *The Protection*, 101.

protection to every building dedicated to religion, art, science or charitable purpose and every historic monuments during armed conflict. For this reason they realised that application of the Convention would be more effective with a selective and restrictive approach⁹⁴. The Convention thus protects only cultural sites of outstanding universal value; it is the first time cultural heritage is protected for itself, because of its intrinsic value and importance to all humanity⁹⁵.

Article 1 gives a broad definition of cultural property as immovable and movable property of great importance for all mankind⁹⁶. It includes monuments of historic or artistic importance, buildings dedicated to religion, art, science and charitable purposes and others objects of art, but the list is not to be intended as exhaustive⁹⁷.

In contrast to the Roerich Pact, this instrument protects both movable and immovable property and, according to the wording of Article 1, the protection arises independently from the "origin or ownership"⁹⁸. The extent of this definition is tempered by the requirement that the property has to be of "great importance" to all peoples, not just to the people of the state involved in the conflict, thus reflecting the internationalist approach that outlines cultural property as the heritage of all humankind. Analysing this concept in depth, the expression "every people" can be read in two different ways: as all peoples collectively or of each respective people⁹⁹.

⁹⁴ O'Keefe, *ibidem*.

⁹⁵ Andrea Gioia, 'La protezione dei beni culturali nei conflitti armati', in Francesco Francioni, Angela Del Vecchio, Paolo De Caterini, *Protezione internazionale del patrimonio culturale: interessi nazionali a difesa del patrimonio e della cultura atti del Convegno*, Roma, 8-9 maggio (Giuffrè, 2000), 78.

⁹⁶ Article 1, 1954 Convention presents a very detailed description of what falls into the definition of cultural property, independently from their origin or owner:

- the objects of great importance for the cultural heritage of the people, such as the architectural, artistic, historic, religious or secular monuments; the archaeological sites; complex construction that together, offer an artistic, historic, religious interest; the works of art, manuscripts, book and other objects of artistic, historic or archaeological interest; the scientific collections, the important collection of books and archives or reproduction of the objects above mentioned;

- the buildings with a main and effective destination for the conservation or exposure of the cultural objects defined in the lit. a), such as the museums, the big libraries, the stores stock, the shelters to protect the cultural items mentioned in lit. a)

- the centres including a huge number of cultural object defined by lett. a) and b), named monumental centres

⁹⁷ O'Keefe, *The Protection*, 101.

⁹⁸ The Roerich pact protects only immovable, in fact Article 1 concerns only monuments and cultural institutions; David Keane, *supra* note 79, 9 .

⁹⁹ Hanna Saba and Nabil G. Salamè, *The protection of movable cultural property. Compendium of legislative texts, 2 volume* (vol. 1, Unesco, 1984), 17.

The latter interpretation is a better one and covers movable and immovable property of great importance to the national cultural heritage of each of the Contracting Parties¹⁰⁰. This vision is consistent with the preamble which refers to the contribution of each people to culture worldwide¹⁰¹. Article 1 allows each Party to figure out the precise property located in its territory that will go under the protection afforded by the Convention¹⁰². Although the competence to select what constitutes cultural property resides in the authorities of each Party, this evaluation has to be accomplished in good faith and reasonably¹⁰³, in accordance with Article 26 in the Vienna Convention on the Law of Treaties. As stated in Article 3, the Parties have to notify the identity and position of the property will have to be spared in case of armed conflict in advance and they can do this through: the distinctive emblem¹⁰⁴, maps or inventories.¹⁰⁵

Article 2 defines the “protection of cultural property” as composed of two main obligations:

- safeguarding cultural property
- respect for such property.

The safeguard obligation is set forth in Article 3 which states that: “The High Contracting Parties undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate.”

In this way, it poses a positive duty to take measures to protect cultural property already in peacetime to limit the “foreseeable effects of armed conflicts”. The duty

¹⁰⁰ O’ Keefe, *The Protection*, 104, line 5.

¹⁰¹ In fact in the text is used the expression “any people” and “each people” rather than “all mankind”; O’ Keefe, *The Protection*, 104, lines 5-11.

¹⁰² This approach involves discretionary choices of every State Party as confirmed by the travaux préparatoires providing for the selective judgment of each Party according to its own criteria based on cultural significance; Information on the implementation of the Convention for the protection of cultural property in the Event of Armed Conflict, The Hague 1954, *UNESCO Report, International Instruments For The Protection Of Monuments, Groups Of Buildings And Sites* (30 June 1971) , UNESCO Doc. SHC/MD/6.

¹⁰³ O’ Keefe, *The Protection*, 135.

¹⁰⁴ Article 6, 1954 Hague Convention.

¹⁰⁵ to make aware the other Parties on which property will have to be spared in case of armed conflict To make aware the other Parties on which property has to be spared in case of armed conflict; O’Keefe, *The Protection*, 111.

of safeguarding rests on the territorial State and also on the occupying state. The latter is the state which exercises, de facto, its authority over the enemy's territory, only if this authority is effectively established and can actually be exercised. The content of the safeguard duty resides in the pre-emptive adoption of all necessary measures to grant the protection of cultural objects located in the territory scene of conflict¹⁰⁶, involving all conceivable measures and the eventual technical assistance of UNESCO in the organisation of this protection¹⁰⁷. Article 3 allows parties to choose between the most adequate measures to take to achieve this aim. In particular, Article 5 delineates the general duty imposed both on occupying and the occupied state to cooperate to the aim of safeguarding; when this cooperation lacks, the occupying state has the duty to take the most urgent conservative measures. An example of this cooperation can be found in the behaviour of the Wehrmacht military command in 1940 which decided to blow up the buildings around the Cathedral of Rouen in order to save it from the flames of the fire which had been set on to conquer the city¹⁰⁸.

The duty to respect, on the other hand, regards the event of armed conflict and concerns the actions that a nation must take during hostilities to protect both its own cultural property and the enemy's cultural property. The notion of respect involves four different aspects: refraining from any use of cultural property and its immediate surroundings for purposes which probably would expose it to destruction or damage within an armed conflict; refraining from any act of hostility directed against such property; prohibition, prevention and, if, necessary, the stop of any form of pillaging, theft, misappropriation and vandalism of such property and finally

¹⁰⁶ An example of fulfilment of this obligation is traceable in the relocation of museums and galleries to a safer place or the measures taken to protect works of art in situ in Croatia in the early 1990s under the decision of the Ministry of Culture and Education, UNESCO Doc. 7/C/PRG/7, Annex I, 6.

¹⁰⁷ One of the most spread and useful practice of safeguarding measures is the drafting of inventories of immovable cultural heritage to be distributed among the other Parties as stated in Article 23(1), 1954 Hague Convention.

¹⁰⁸ Another example is traceable in the behaviour of the Director of monuments of Bratislava¹⁰⁸ at the time of the Soviet occupation of Czechoslovakia on August 1968. He sent a memorandum to the armies of the five parties of the Warsaw Pact that had invaded the country, to remember them the responsibilities rested on the occupying powers accordingly to 1954 Hague Convention; Lauso Zagato, *La protezione dei beni culturali in caso di conflitto armato all' alba del Protocollo del 1999* (Giappichelli, 2007), 37, note 67.

refraining from reprisals against such property¹⁰⁹. This obligation as a negative connotation as opposed to the duty of safeguarding, and rests on both parties of the conflict according to Article 4.¹¹⁰ In particular the territorial state has to refrain from the direct use of cultural heritage for military purpose and has to abstain from any activity and behaviour that could put these properties in danger during ongoing hostilities. In the same way the adversary state has to abstain purely and simply from any operations that could endanger the integrity of the cultural heritage¹¹¹. The obligations of respect therefore involve both cultural property located within a Party's own territory and cultural property located in the opposing Party's territory¹¹². Article 4 applies both to NIAC and to IAC, in fact according to Article 19 "each party of the conflict shall be bound to apply, as minimum, the provision of the... Convention which relate to respect for cultural property", among which there is Article 4¹¹³. It must be specified that the first two obligations laid down in Article 4(1) and 4(2), to refrain respectively from any use of cultural property and its immediate surroundings for goals that might expose it to destruction or damage within an armed conflict and from any act of hostility directed against such property, are not absolute. They fail in case of imperative military necessity and only in this case, indicating the extreme prudence with which this waiver may be invoked¹¹⁴. But this exemption will be discussed more in depth later in this work.

¹⁰⁹ O'Keefe, *The Protection*, 120.

¹¹⁰ Article 4, 1954 Hague Convention:

1. The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility, directed against such property.
2. The obligations mentioned in paragraph 1 of the present Article may be waived only in cases where military necessity imperatively requires such a waiver.
3. The High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property. They shall refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party.
4. They shall refrain from any act directed by way of reprisals against cultural property.

¹¹¹ O'Keefe, *The Protection*, 119.

¹¹² O'Keefe, *ibidem*, 120.

¹¹³ Article 19, 1954 Hague Convention.

¹¹⁴ O'Keefe, *The Protection*, 121.

Paragraph 3¹¹⁵ provides for the prohibition, prevention, and ending of any stealing, plundering, looting or theft of cultural heritage and any act of vandalism or misappropriation of movable cultural property. This duty obviously rests only on the Contracting Parties and in specifically involves the conducts of their armies, even if it is not established by the text¹¹⁶. This prohibition includes not only the responsibility of the armed forces but also of the local population, as argued in the text of the Military Manual¹¹⁷. Likewise, paragraph 4 fixes an important rule¹¹⁸ which states that both parties in a conflict have to abstain from any reprisal against the enemy's cultural heritage. This obligation is absolute and it is not subject to the principle of reciprocity as clearly expressed by Article 4(5)¹¹⁹.

As mentioned above, one of the measures that can be taken in peacetime to promote respect for cultural property is to mark it with a special emblem¹²⁰ to facilitate its recognition pursuant Article 6. The emblem encompasses a shield and implies general protection when used alone. Unfortunately, this practice is not so widespread because "an authorization duly dated and signed by the competent authority of the High Contracting Party" is necessary to place the emblem¹²¹.

Article 7 requires State Parties to undertake measures to educate their military troops and to introduce regulations concerning the observance of this Convention. This demonstrates how armed forces are therefore one of main addressees of the Convention's provisions because they are involved in the hostilities in the front line. Moreover, Article 17(2)¹²² sets the obligation to establish services or to train specialist

¹¹⁵ Article 4(3), 1954 Hague Convention.

¹¹⁶ The second part of the Article instead prohibits requisition of movable property located within the enemy's territory, this obligation reaffirms in the context of cultural property the obligation imposed on the Occupying State set forth in Article 43 of the Hague Regulations to take all measures in its power to restore and grant, as far as possible, public order and safety, considered a rule of customary international law; O'Keefe, *The Protection*, 133.

¹¹⁷ This rule is linked to the one provided in Article 64 of the IV Geneva Convention, which consents the Occupying State to promulgate the necessary provisions to restore the public order, Article 64, IV Geneva Convention.

¹¹⁸ Article 4(4), 1954 Hague Convention.

¹¹⁹ Meaning that this obligation has to be carried out even in the case in which the Party in whose territory the cultural object or site is located had not taken the safeguarding measures provided by Article 3.

¹²⁰ It is not a compulsory measure to take; O'Keefe, *The Protection*, 116.

¹²¹ Article 17(4), 1954 Hague Convention.

¹²² Article 17(2), 1954 Hague Convention

personnel within armed forces to ensure the protection of cultural heritage also through the cooperation with the civilian authorities to achieve the best solutions to comply with the safeguarding duty.

Article 8 to Article 14 deal with the “special protection” which may be accorded to certain categories of cultural property under specific conditions. This kind of protection may be granted to a restrictive number of shelters dedicated to the protection of movable artworks in case of armed conflicts or to monumental centres and other immovable cultural properties of the greatest importance. However, it is subject to two conditions: first, the shelters have to be located at an adequate distance from any industrial installation, communication centre or a crossroads of transport and, secondly, they can’t be used for military purposes. As the whole process has always been too complicated¹²³, these provisions have rarely been used. Only the Vatican City as a monumental centre and few refuges in Austria, Netherlands and Germany have been registered. Since 1978, the process has not been activated anymore and some of the registered centres asked for the cancellation from the register, in particular Netherlands and Austria. This was due to excessive procedural bureaucracy¹²⁴ but also for the addition in the Second Protocol of the “enhanced protection” that is definitely less bureaucratic and more effective. Nevertheless, the Second Protocol opts for the requalification of the double level of protection, providing in particular the enforcement and the graduation of individual criminal responsibility. In fact one of the main critics to the Hague Convention concerns the lack of provisions over the punishment of those who violate its terms while relying only on domestic law to establish criminal liability¹²⁵.

2.1.7.1 THE FIRST PROTOCOL TO THE 1954 HAGUE CONVENTION

¹²³ Because of the possible objection of the other contrasting states to the application for the registration; Zagato, *La Protezione*, 44

¹²⁴ The main reasons for this lack of use were the requirement of the distance from places that could be used for military purposes and also political; Zagato, *ibidem*

¹²⁵ Zagato, *ibid*, 52

The First Optional Protocol to the 1954 Hague Convention¹²⁶ is centred on the restitution of movable cultural objects stolen from territories under military occupation¹²⁷.

The provisions about restitution had to be included in the conventional test, but according to the report of Unidroit¹²⁸ of 19th January 1954, the radical differences between the State Parties on essential points made it impossible to regulate the matter in the main text¹²⁹. The proposed projects provided that the former owner of the transferred and exported object could revenge from the actual owner before a national judge in a maximum span of 10 years. However, the United States rejected this solution¹³⁰ and expressed the intention not to sign the final text. For this reason, an independent instrument with a separate ratification was preferred¹³¹. There is a *iuris tantum* and strong presumption that the transfer had occurred due to pressure and menaces, although it would be possible for the actual owner to prove the otherwise proof¹³². Part I¹³³ and II¹³⁴ impose a series of obligations and rights on the restitution matter both to the occupying power and to the Contracting Parties. Another sign of the difficulties met during the conference is that para. 9 (part III) allows the parties, at the moment of the ratification of the Protocol, to declare they must not to be bound to its I and II part¹³⁵.

In part I¹³⁶, the main provision establishes that all the contracting parties have to prevent the exports of cultural objects from occupied territories and to return any

¹²⁶ Protocol I to the 1954 Hague Convention (adopted on 14 May 1954, entered into force on 7 August 1954) 249 UNTS 215 <http://www.icrc.org/ihl.nsf/INTRO/400> (last visited on 21 August 2017)

¹²⁷ Zagato, *La Protezione*, 48.

¹²⁸ The International institute for the unification of private law, in Thoams Fischen, '*Licit international Art Trade on Times of Armed Conflict?*', (1996) Vol. 15 No. 1 International Journal of Cultural Property, 127, 130.

¹²⁹ Guido Carducci, *L'obligation de restitution des biens culturelles et des objets d'art en cas de conflit armés: droit coutumier et droit conventionnel avant et après la Convention de La Haye de 1954*, (2000) Vol. 104 *Revue Generale de Droit International Public*, 332-335 and Fischen, *ibid*, 127-132.

¹³⁰ The US are now exempted by this provision, Zagato, *La Protezione*, 51.

¹³¹ Zagato, *ibid*, 49.

¹³² Zagato, *ibid*, 50.

¹³³ Paragraph 1-4, Protocol I.

¹³⁴ Paragraph 5, Protocol I.

¹³⁵ Paragraph 12, Protocol I.

¹³⁶ Part I, I Protocol I.

exported objects¹³⁷. If a State is not able to return the objects immediately, it has to return it at the end of the hostilities to the competent authorities of the occupied territories where the movable object was unlawful stolen during the occupation¹³⁸. It also requires that any cultural property removed from one State Party and placed in the territory of another one for safekeeping during armed conflict must be returned at the end of the hostilities.

Part 3 provides that in no case these objects can be kept as reparation¹³⁹ and the Party that owns the object has the duty to restore the good faith owner. Moreover, each of the Contracting Parties has the obligation not to confiscate cultural objects belonging directly or not to the occupied territory. This Protocol is not completely satisfactory because it is not centred on the position of the private owners¹⁴⁰; the only exception in their favour is the duty of the occupying power to grant the third possessor in good faith the right to restoration. The right of restitution lies with the status of occupied country, the modalities of the exportation and the place where the object is found¹⁴¹ being irrelevant. Thus, the First Protocol provides only for a system of restitution between States. It privileges the interests of the apparte-state to the restoration of the integrity of its cultural heritage, entailing that the State previously occupied is the one entitled with the right of restitution that rests on all other Parties of the Protocol, regardless of their involvement or not in the occupation of the territory where the object was exported¹⁴².

Nevertheless, this system easily turns out to be ineffective because of the reticence of the States to its enforcement helped by the vagueness of the instrument that does not

¹³⁷ Part 1, I Protocol I.

¹³⁸ Part 3, Protocol I.

¹³⁹ Part 3, I Protocol; Marquez C. Carrasco, *La Proteccion internacional de los bienes culturales en tiempo de conflicto armado*, in Fabrizio Marella, *Le Opere d' Arte tra Cooperazione internazionale e conflitti armati* (Cedam, 2006), 213-257.

¹⁴⁰ Zagato, *La Protezione*, 50.

¹⁴¹ S. Nahilick, *La protection*, 137, the restitution is compulsory even against the contrary will of the former owner; as in the words of the Conference President answering to a German delegate.

¹⁴² Emblematic of this difficulties is the judgment of the District court of Rotterdam against the greek-ortodox church of Cyprus¹⁴² for the restitution of icons from the north of Cyprus, stolen during the Turkish occupation of '74 and subsequently sold in Netherlands. The Court based its decision (mistaking) on para.4 of the First Protocol, regarding the duties imposed to the occupying power and not on para. 3 that provides for the due restitution by Netherlands¹⁴² to Cyprus for not having taken internal measures¹⁴² for the enforcement of the Protocol; Maria Costanza, *Commercio e Circolazione delle Opere d' Arte*, (Cedam, 1999) 46.

indicate what measures the occupying state has to take to obstacle the exportation of cultural objects. For that reason, nowadays the matter of restitution is mainly addressed through bilateral agreements¹⁴³ between the interested States rather than on the background of the First Protocol.

2.1.7.2 EXEMPTIONS TO 1954 HAGUE CONVENTION: THE MILITARY NECESSITY AND THE CONDUCT OF THE OPPOSING PARTY

The obligations set forth in Article 4 and 2 fail¹⁴⁴ for the conduct of the opposing party and for military necessity¹⁴⁵.

The derogation for military necessity limits both the general protection and the special protection. In case of general protection Article 4(2) allows the Parties to invoke the exemption from the duty of respecting cultural property only in case of imperative military necessity, being held the prohibition to steal and plunder movable cultural objects and the prohibition of reprisal against them¹⁴⁶. Special protection instead fails only for unavoidable military necessity ascertained by a Division Commander and only for the necessary span of time¹⁴⁷. In this case, the decision to take advantage of this clause is only provisional and has to be notified as soon as possible to the General Commissioner for the cultural heritage, and if it is possible also to the opposing party¹⁴⁸.

The drafters of the Convention did not want to provide a more specific definition of these terms: they felt that military necessity was already an internationally-recognized principle of warfare which required a military objective could not be conquered by any other means. Therefore, any damage to cultural property would

¹⁴³ In the specific case of the dispute between Germany and States born from the URSS dissolution, in Kurt Siehr, *'Return of Cultural Treasure to Germany'* (1997) Vol 1 International Journal of Cultural Property, 130, 134 and Zagato, *La Protezione*, 54

¹⁴⁴ Article 4: duty of respect; Article 2: duty of safeguard; 1954 Hague Convention.

¹⁴⁵ Zagato, *La Protezione*, 71.

¹⁴⁶ Article 4(2), 1954 Hague Convention.

¹⁴⁷ Article 11(2), 1954 Hague Convention.

¹⁴⁸ Manlio Frigo, *La Protezione dei beni culturali nel diritto internazionale* (Giuffrè, 1986), 98-99.

have been restrained to what was absolutely necessary to achieve this objective¹⁴⁹. To this regard, the Boylan report highlighted the key problems of 1954 Hague Convention, and among them, in particular, the lack of a definition of what situations the expression “military necessity” covers, and recommended the entire elimination of this exemption¹⁵⁰.

The derogation for the conduct of the opposing party, instead, finds its application only with regard to special protection. Indeed, any of the Parties is exempted from the obligation of securing the immunity of cultural objects belonging to the opposing part included in this special type of protection, when the latter does not respect the duties accepted at the moment of the inscription in the International Register of Cultural Heritage. This is permitted but only as a limited amount of time and with the duty to require previously to the opposing part, as far as possible, the end of the conduct that violates the Convention¹⁵¹. Immunity fails if cultural objects which fall within this kind of protection are used for military purpose by the territorial state. This norm therefore provides the breach of the duty of protection¹⁵². The Boylan report (1993) was strongly critical about this waiver because the use for military purposes of a cultural site would make it vulnerable to further destruction, reducing *de facto* the level of protection afforded by the 1954 Hague Convention. Moreover, the military necessity exemption was not included in the 1899 and 1907 Hague conventions, so according to Prof. Boylan’s opinion, this kind of derogations vanquish the purpose of having any protection during armed conflict¹⁵³. In particular the United States, the UK and Turkey pushed for the insertion of this derogation, and *de facto* imposed it to the majority of the states participating in the Hague Conference, making this demand a condition *sine qua non* for the

¹⁴⁹ O’Keefe, *The Protection*, 123.

¹⁵⁰ Patrick J. Boylan, *Review of the Convention for the Protection of Cultural Property in the Event of Armed conflict* (1993), available at <http://unesdoc.unesco.org/images/0010/001001/100159eo.pdf>, at 51-57.

¹⁵¹ Zagato, *La Protezione*, 73 and Manlio Frigo, *La Protezione dei beni culturali nel diritto internazionale*, 102-103.

¹⁵² Frigo, *La Protezione*, 98-99.

¹⁵³ Although the derogation for military necessity was already present both in the Annexed Regulation to the IV Hague Convention of 1907 and in Article 23 (g) of the IX Convention on naval bombardment in time of war and also in Article 14 of the Lieber Code.

ratification¹⁵⁴. There are many different readings of this waiver, but it remains nevertheless one of the worst compromises ever concluded¹⁵⁵. The Convention does not make any mediation between two exigencies, military necessity and the protection of cultural heritage, and it only privileges the military interests of states¹⁵⁶. On the contrary, a better compromise is realized within the regime of special protection that involves the exemption for the conduct of the opposing Party¹⁵⁷, precisely for those objects that would require a more extended protection.

The weaknesses of the conventional text is worsen by the fact that neither Article 4(2) or Article 11(2) give a precise definition of imperative and unavoidable military necessity¹⁵⁸ and this means that the State Parties possess total discretion in such a delicate matter¹⁵⁹.

To solve this issue, we have to focus on the solution offered by AP I in which Article 48¹⁶⁰ provides a general rule with the aim to ensure the respect and protection of civilian population and civilian objectives. The parties of the conflict have to discern, at any moments, the civilian population from combatants and at the same time civilian objects from military objectives and subsequently have to direct their war operations only against military forces and military objectives. More specifically, the Articles 52 to 56 provide for the protection of civilian objects. Article 52(2), for example, states that the attacks have to be closely limited to military objectives¹⁶¹. These, defined by par. 3, are configured as objects which by their nature, location, destination or use, effectively contribute to military action, and whose total or partial destruction, conquer or neutralization, offers, in a concrete case, a precise military

¹⁵⁴ Toman, *International Protection*, 93.

¹⁵⁵ blaming critics for failing in taking in account the exigence of an adequate balance between the protection of cultural heritage and military necessities; Frigo, *La Protezione*, 103 and Antonio F. Panzera, *La tutela internazionale dei beni culturali in tempo di Guerra* (Giappichelli, 1993) ,36.

¹⁵⁶ Zagato, *La Protezione*, 75.

¹⁵⁷ Andrea Gioia, *La protezione dei beni culturali nei conflitti armati*, 71-99.

¹⁵⁸ The conditions for the functioning of the unavoidable military necessity verify automatically in case of nuclear attack; Keith V. Erinberg, 'The United States reconsiders the 1954 Hague Convention' (1994) Vol. 3 No. 1 *International Journal of Cultural Property*, 27, 29-30.

¹⁵⁹ Zagato, *La Protezione*, 76.

¹⁶⁰ Article 48, AP I

¹⁶¹ Zagato, *La Protezione*, 78.

advantage.¹⁶² Paragraph 1 sets the definition of civilian objectives, i.e. those that don't constitute military objectives.

Moreover, Articles 53, 54 and 56 fix the prohibition to attack particular categories of objects. Article 53¹⁶³ in particular prohibits any act of hostility against historic monuments, works of art and buildings dedicated to religion that constitute the cultural and spiritual heritage of people¹⁶⁴. Thanks to this distinction, these provisions help to cross the situation created by the continuous trend of States to transform the military convenience into military necessity. In fact, according to the AP I provisions, generic military necessity cannot justify attacks against cultural objects, but only its identification as military objectives can. The principle of distinction set by these Articles is now considered as a norm of customary international law and this is confirmed by the statements of many States that did not ratify the I Protocol of 1977 such as the US, Turkey and India¹⁶⁵.

2.1.7.3 THE FAILURE IN PROTECTING CULTURAL PROPERTY IN WARTIME AND THE SECOND PROTOCOL

Although the notion that certain properties should not be attacked during wartime dates back to antiquity, the events that took place during WWI and WWII, as well as the conflicts in former Yugoslavia led to the codification of protection of cultural heritage and its development as one of the most important fields of International Law (IL).

Even if these major developments constitute a response to instances of serious damages to cultural property, every time protection has increased, the increase has subsequently proven inadequate¹⁶⁶. Due to the inefficacy of the 1954 Convention to protect the cultural heritage during the Balkan conflict, the Iraq-Iran conflict in the

¹⁶² Article 52(2), AP I.

¹⁶³ Article 53, AP I.

¹⁶⁴ Article 53, AP I.

¹⁶⁵ Jean- Marie V. Henckaerts, *'New rules for the protection of cultural property in armed conflict'* (1999) Vol. 81 No. 835 International Review of the Red Cross, 593, 600-601.

¹⁶⁶ Keane, *'The Failure'*, 6.

1980s, and also during the Iraq's invasion of Kuwait, a Second Protocol was drafted in 1990¹⁶⁷.

The main aspects addressed in the Second Protocol are a narrower definition of military necessity, the introduction of an "enhanced protection" regime and the creation of a new body to monitor the implementation of the Protocol, the intergovernmental Committee for the Protection of Cultural Property in the Event of armed Conflict¹⁶⁸.

The exception for military necessity is better defined in Article 1(f)¹⁶⁹, which recalls the notion of military objective set forth in I AP¹⁷⁰. Regarding the cultural properties under general protection, Article 6(a) specifies in which occasions the waiver for imperative military necessity can be evoked to justify the attack. This justification works only if the cultural object has become by a military objective the virtue of its function and there are no alternatives that can grant comparable or equivalent military advantages to the one expected by attacking the cultural object¹⁷¹. In both cases the imperative military necessity can be evoked only by a Commander with the equivalent degree of a Commander with the highest role.

The provisions of Article 6 are integrated by those contained in Article 7 which establishes a series of duties on the belligerents: they have to make any effort to spare cultural heritage, take any precaution to avoid collateral damages to these objects and finally stop the attack when there is the reasonable risk of verifying such

¹⁶⁷ Another sign of strong criticism against the protection system afforded in the Convention was that no one example about a real implementation of the Hague provisions could be reported; Patrick J. Boylan, Review, 7; Second Protocol II to 1954 Hague Convention (26 March 1999, entered into force on 9 March 2004) 2253 UNTS 12 http://portal.unesco.org/en/ev.php-URL_ID=15207&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited on 21 August 2017).

¹⁶⁸ Moreover the Second Protocol provides for additional penalties, jurisdiction on territorial, nationality basis for all 'serious violation' and on universal jurisdiction basis for the violations contained in Article 15; A. Bos, 'Words of Welcome', in Nout van Woudenberg and Liesbeth Lijnzaad, *Protecting Cultural Property in Armed Conflict, an Insight into the 1999 Second Protocol to the 1954 Hague Convention for the Protection of Cultural Heritage in Armed Conflict* (Brill, 2010), xvi.

¹⁶⁹ Henckaerts, *New Rules*, 533, and Jan Hladik, 'The 1954 Hague Convention for the protection of cultural property in the event of armed conflict and the notion of military necessity' (1999) Vo. 81 No. 835 *International Review of the Red Cross*, 621, 626.

¹⁷⁰ Article 52(2), AP I.

¹⁷¹ This is valid both for the attacker state both for the territorial State as stated by lit. b); Henckaerts, *New Rules*, 599, and Jan Hladik, 'The 1954 Hague Convention and Military Necessity', 626.

consequences¹⁷². Article 8 deals with more specific provisions about safeguard duties¹⁷³: the Parties have to remove all the cultural objects located nearby military objectives or have to provide for their adequate protection *in situ*; moreover they must avoid locating military objectives in the proximity of cultural objects. In case of enhanced protection the immunity is absolute and there is no space for the exception of military necessity as long as the item is not used for military purposes¹⁷⁴. The positive solution¹⁷⁵ provided by the Second Protocol aligns the definition of military necessity with the evolution of the international law warfare. Thus military necessity is not a justification for an action otherwise forbidden, but a general limit to the war action. The belligerents subsequently have to apply only the necessary force to fight the enemy as set forth in the Manual of the Law of Conflict at point 2(2)¹⁷⁶.

The Second Protocol, moreover, introduced the “enhanced protection” that is not intended to replace the special protection ensured by the 1954 Convention, but to provide a triplex level of protection. However, when at one time a cultural object enjoys both the special and the enhanced protection, only the latter finds application¹⁷⁷. This kind of protection applies to any cultural objects as long as they satisfy the three conditions required by Article 10 of this Protocol:

- it has to be part of the cultural heritage of maximum importance for humankind.
- it has to be a cultural object that enjoys an adequate protection in the domestic and administrative jurisdiction for its exceptional cultural and historical value.
- finally, it is not used for the military purpose of hiding military installations¹⁷⁸.

The procedures outlined in Article 11 are more realistic and agile than those set forth in Article 8 of the Convention¹⁷⁹. After being put on the list of cultural heritage under enhanced protection, the cultural object becomes immune from attacks and cannot

¹⁷² Zagato, *The Protection*, 81.

¹⁷³ With respect to Article 3 of the Convention text.

¹⁷⁴ Zagato, *La Protezione*, 82.

¹⁷⁵ Umberto Leanza, *La protezione dei beni culturali e il concetto di Patrimonio comune dell'umanità*, in *Scritti in onore di Angelo Falzea*, (Giuffrè, 1991) ,483 33-34 and Andrea Gioia, *la Protezione dei Beni Culturali*, 96.

¹⁷⁶ Ronzitti, *Diritto Internazionale*, 195.

¹⁷⁷ Zagato, *La Protezione*, 44.

¹⁷⁸ Article 10, Protocol II.

¹⁷⁹ Zagato, *La Protezione*, 46.

be used in support of military activities¹⁸⁰. This kind of protection waives in the case of suspension or cancellation from the list¹⁸¹, when the object does not fulfil the conditions stated in Article 10 anymore or because of its transformation into a military objective for its use by the controlling state¹⁸². The exemption for military necessity is only temporary and its invocation for a long time can lead to the suspension or the cancellation from the list¹⁸³. If a cultural object is under this kind of protection it cannot be used by the territorial State for military purposes because it would constitute a crime and entail directly the individual criminal responsibility for the use (differently from Article 8 of the 1954 Hague Convention)¹⁸⁴.

2.1.7.4 INDIVIDUAL RESPONSIBILITY

1) ARTICLE 28, 1954 HAGUE CONVENTION

The perceived need to create a prosecution compulsory system for the destruction, damage or plunder of cultural property during hostilities is clearly the main reason of the drafting of the 1954 Hague Convention. This was explicit in the UNESCO Secretariat first report to the Organization's General Conference. While stating reparation as the basic sanction in case of destruction, the report claimed that the civil reparation was not enough to replace the loss of property that has an irreplaceable inherent value.¹⁸⁵ It was in this perspective that individual responsibility was addressed in Article 28 according to which the High Contracting Parties have "to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal and disciplinary sanctions upon

¹⁸⁰ Article 12, Protocol II.

¹⁸¹ Article 14, Protocol II.

¹⁸² Zagato, *La Protezione*, 47.

¹⁸³ Article 13, Protocol II.

¹⁸⁴ Henckaerts, *Customary International Humanitarian Law*, 607.

¹⁸⁵ Measures for Ensuring the Co-operation of Interested States in the Protection, Preservation and Restoration of Antiquities, Monuments and Historical Sites; and Possibility of Establishing an International Fund to Subsidize Such Preservation and Restoration, UNESCO, *Report on the international Protection of Cultural Property, by penal measures, in the event of Armed Conflict*, Annex I(27 march 1950) UNESCO Doc 5 C/PRG/6, UNESCO.

these persons, of whatever nationality, who commit or order to be committed a breach of the Convention”¹⁸⁶. The wording of this provision does not clarify whether it applies both to IAC and NIAC; although the narrower interpretation of Article 19(1), according to which every party of the conflict should respect to a minimum the provisions of the present Convention concerning the respect of cultural property”¹⁸⁷, argues that only Article 4 applies also to NIAC, excluding Article 28. On the other hand, Article 28 is strictly linked to the respect of cultural property imposed by Article 4, which can be considered the primary rule on the protection of cultural heritage and Article 28 the secondary rule to apply in case of breach of the primary rule, thus the latter should apply also in NIAC.

2) SOME CRITICISMS

There are some criticisms to the wording of this article. First of all, state parties are the only ones responsible for taking all necessary measures to prosecute any violation of the Convention. Secondly, it does not really provide for criminal and disciplinary sanctions. Thirdly, it¹⁸⁸ does not address the forms of responsibility such as conspiracy, attempt and complicity and it does not envisage the requisite mental element or the maximum and minimum extremes for the penalties’ duration. The aim of the drafters seems to be the creation an “open-texture provision” to respect the peculiarity of each penal system to avoid the imposition of measures that would not have been consistent with each state’s principles of criminal law¹⁸⁹. Although the text does not cover the mental element, customary international law requires intent and knowledge, i.e. “awareness that a circumstance exists”¹⁹⁰, for the commission of war crimes. The problem lies in understanding the meaning of “related circumstance” which might denote the awareness that the object is a “monument of

¹⁸⁶ Article 28, 1954 Hague Convention.

¹⁸⁷ Article 19(1), 1954 Hague Convention.

¹⁸⁸ Article 28, 1954 Hague Convention.

¹⁸⁹ O’Keefe, *Protection of Cultural Property*, 345

¹⁹⁰ Article 30(3), Rome Statute and *Prosecutor v. Blaskic* (Judgment) IT-95-14 (3 March 2000) para. 28, in which is stipulated that the requirement that the object targeted ‘may be clearly identified’ as cultural property meaning that the accused should been aware of the special configuration of the property.

architecture, religious, art of history, an archeological site or any other works of art”¹⁹¹. In addition, Article 28 gives states a wide discretion in choosing the best manner to prosecute the alleged violators and this has always been seen as a clear step back with regard to the Law of Nuremberg and the Hague Convention of 1907¹⁹².

3) CHAPTER IV OF THE SECOND PROTOCOL

Some real improvements on this issue could be seen in the drafting of Chapter IV of the Second Protocol which is part of the body of IHL over the criminalization of war crimes.¹⁹³ The new system offers a double level of protection, distinguishing between grave violations, regulated in Article 15, and other violations set forth in Article 21. A similar division can also be found in the system of the Geneva Conventions¹⁹⁴. Article 15(2) stipulates that grave violations have to be punished with appropriate measures, according to the domestic law of the States parties and in accordance with the general principles of IL. The category of the grave violations is mandatory:

- a. making cultural property under enhanced protection the object of attack¹⁹⁵;
- b. using cultural property under enhanced protection or its immediate surroundings in support of military action¹⁹⁶;

¹⁹¹ According the definition provided in Article 1, 1954 Hague Convention.

¹⁹² Even if the provision gives states the competence of prosecuting the responsible, this formulation is less generic than the one contained in Article 28 of 1954 Convention. Zagato, *La Protezione*, 154, note 34.

¹⁹³ It applies as the entire II Protocol both to IAC and NIAC. The application to NIAC was hurdle by some delegates for the fear of a too much invasive incursion in their reserved domain, O’ Keefe, *The Protection*, 275, line 14-16.

¹⁹⁴ Article 50, I Convention; Article 51, II Convention, Article 130 III convention, Article 147, IV Convention.

¹⁹⁵ Lit. a) includes only the case of making the object of attack under enhanced protection, and does not encompasses any act of hostility against it, so demolitions cannot be considered to go under the provision of Article 15.1, lit. a), the opposite interpretation that is present in doctrine, is too weak and not so much shared. To overcome this gap the only way resides on the state parties which can legislate including other acts of hostility beyond the mere attack to provide a more broad protection. O’ Keefe, *The Protection*, 277.

¹⁹⁶ The criminal responsibility afforded in Article 15 applies regardless the consequences of the offensive acts against cultural property, independently from the fact that damage or destruction occurred or not.

- c. extensive destruction or appropriation of cultural property protected under the Convention and the Protocol¹⁹⁷;
- d. making cultural property protected under the Convention and this Protocol the object of attack;
- e. theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.

These grave violations have to be split into two groups: the letters c) and d) present a residual character and their insertion was required by the ICRC¹⁹⁸ to align the regime of the Second Protocol to the provisions of the Statute of the International Criminal Court¹⁹⁹.

Differently, lit. a), b) and c) correspond in substance to the grave breaches provided in Article 85²⁰⁰ of AP I, and have to be prosecuted by any State party of the Protocol in whose territory the alleged perpetrators are found, even if the violation was committed elsewhere. It is uncertain if Article 15(1) requires the knowledge that cultural property is under enhanced or general protection or if it is enough to prove the knowledge that the property is a “monument, an archeological site, or any another sort of movable and immovable property ex art. 1”²⁰¹. Article 16 imposes on the Parties the duty of undertaking the legislative measures that are necessary for the establishment of their jurisdiction over the offences in Article 15 on three basis: territoriality and nationality²⁰² that apply to all the five offenses, and the universal

¹⁹⁷ Since lit. a) and d) refer to making cultural property the object of attack, the destruction of lit. c) have to refer to destruction occurred with other means, such as demolitions or incidental damages. O’ Keefe, *supra* note 25, 278.

¹⁹⁸ The International Committee of the Red Cross.

¹⁹⁹ Henckarts, *Customary International Law*, 356.

²⁰⁰ Article 85 lit. a), b), c): In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health: a) making the civilian population or individual civilians the object of attack; b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 a) iii); c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 a) iii);

²⁰¹ Article 1, 1954 Hague Convention, Roger O’ Keefe, *The Protection*, 280, line 13-20.

²⁰² The principle of nationality regards extraterritorial acts and is also called ‘active personality’ principle.

jurisdiction that concerns only the crimes set out in lit. a), b) and c). The principle of universal jurisdiction works only “when the alleged offender is present in the territory of one Party”²⁰³, so only if the defendant is within the territory of the prosecuting state, without any reference to nationality or the place where the offence took place²⁰⁴. At the same time the inclusion of the expression “within the framework of their ordinary criminal jurisdiction” displays the non-compulsory nature of universal jurisdiction²⁰⁵. The state in whose territory the defendant is found has the alternative *aut dedere aut judicare*, and in the event that one of the parts refuses the extradition, the criminal judgment must be opened without any exception and delay.²⁰⁶ It is worth to say that the violations set forth in Article 15 have to be prosecuted only if committed intentionally and with grave violation of the Convention or of the Protocol²⁰⁷.

The Second Protocol does not preclude the incurring of individual criminal responsibility or the exercise of jurisdiction under national and international law, or affect the exercise of jurisdiction under customary international law²⁰⁸. The Protocol’s system therefore does not limit the right of States to legislate or criminalize the serious violations of Article 15²⁰⁹.

Chapter IV is surely a step forward compared to the system of the 1954 Convention; the provisions of the II Protocol strengthen the system functionality, in particular by reason of prosecuting the authors of grave violations against cultural heritage with more effectiveness.

Ultimately, we can state that the regulations offered by the II Protocol on the punishment of grave violations are an advancement towards universal jurisdiction

²⁰³ O’Keefe, *The Protection* 284, line 1.

²⁰⁴ Thus allowing the prosecution of non-nationals outside the territory of the forum state Roger O’ Keefe, ‘*Protection of cultural property under international criminal law*’ (2010) Vol. 11 Melbourne Journal of International Law, 339, 343.

²⁰⁵ O’Keefe, *ibidem*

²⁰⁶ A. R. Carneige, ‘*Jurisdiction over Violations of the Laws and Customs of War*’(1939) Vol. 39 British Year Book of International Law 402,409, and Roger O’ Keefe, ‘*Protection of cultural property*’, 324.

²⁰⁷ O’ Keefe, *The Protection*, 276.

²⁰⁸ As set forth in Article 16(2), Protocol II; O’ Keefe, *The Protection*, 284-285.

²⁰⁹ Final Act of the Diplomatic Conference, para. 11.

for grave individual crimes, but the way to give effect to this kind of jurisdiction is still a long one.

The Second Protocol was inspired by the scheme established by the Geneva Convention and in specific by Article 85 of AP I, even if the provisions of Protocol II are more detailed. Article 85(4)(d)²¹⁰, integrates the hypothesis of grave²¹¹violations the Geneva Conventions including also the “intentional attack against cultural or religious objects constituting the cultural or spiritual heritage of the communities” to which a particular protection according to a specific agreement²¹² is afforded. The importance of this integration is partly weakened by the requirement of particularly severe violations and by the fact that the Article covers only cultural objects enjoying exceptional protection given by special arrangement²¹³. The reading of this statement could lead to conviction that the provision would deal only with special regime protection, but on the other side it is more convincing to assume that it is a general norm including both general and special protection²¹⁴.

Only the Rome Statute of the International Criminal Court²¹⁵ expressly identifies among war crimes intentional attacks against buildings dedicated to religion, education, art, science o charitable purposes, hospitals and so on, unless they constitute military objectives as in Article 8(2)(b)(ix).²¹⁶ So intentional and unjustified attacks against cultural sites fall within war crimes committed during armed conflicts without any reference to special protection as stated in AP I²¹⁷.

2.1.7.5 THE MILITARY MANUAL

²¹⁰ Article 85, AP I.

²¹¹ Andrea Gioia, *La Protezione dei beni culturali nei conflitti armati*, (Bologna, 1995), 90.

²¹² Article 85 (4)(d) of AP I.

²¹³ Zagato, *La Protezione*, 104.

²¹⁴ O' Keefe, *'The Protection of Cultural Property under International Criminal Law'*, 29.

²¹⁵ Rome Statute of the International Criminal Court, adopted on 17 July of 1998.

²¹⁶ Anna M. Maugeri, *La Tutela dei Beni Culturali nel Diritto Internazionale penale* (Giuffrè, 2008),254.

²¹⁷ I will deeper analyse the wording of Article 8 in the paragraph 2.9.3 on the ICC Statute.

The *Military Manual* drafted by Roger O’Keefe, Camille Pèron, Tofiq Musayev and Gianluca Ferrari²¹⁸ can be considered as the logical further step to achieve a higher level of cultural property protection. Conventions and legal instruments surely constitute essential phases in this path, but at the same time they are not enough to face the increasingly more complex situation of conflicts nowadays. The manual is centred on the idea of cultural heritage as the frontline of tolerance and peace; as a result, its protection cannot be separated from the protection of human lives. In this perspective, a system based on a strong connection between cultural heritage protection and humanitarian rules must be sought²¹⁹. The destruction occurred in recent years in Mali, Libya, Yemen, Iraq or Syria testifies the fact that the attacks against cultural property are essential elements of a broader strategy of cultural purification set against diversity and peaceful coexistence²²⁰. In these countries, military forces play a leading role in plans and programs of protection: they have to comply with this new exigency by strengthening their tools, changing behaviour and skills, considering the protection of cultural property an essential part of strategies to restore peace and safety²²¹. This is the aim of the manual which can be considered as a useful guide for military operations because it embodies the concrete enforcement of the rules contained 1954 Hague Convention and its Second Protocol. The High Contracting Parties must integrate these guidelines and instructions in their military regulations with the assistance of UNESCO. I will hereby analyse a few passages of this manual:

1) PREPARATORY MEASURES: MILITARY REGULATIONS AND INSTRUCTIONS²²²:

Article 7 of the 1954 Convention obliges the Member States to incorporate into their military rules or instructions the necessary measures to ensure the respect of its provisions²²³. In addition, it requires them to promote within their armed bodies “a

²¹⁸ *Military Manual: Protection of Cultural Property*, UNESCO (Paris, 2006).

²¹⁹ Irina Bokova, Foreword of *Military Manual*, xiii.

²²⁰ *Ibidem*.

²²¹ *Ibidem*.

²²² Chapter III Preparatory measures, Para. A, points 56, *Military manual*.

²²³ Chapter III, Para A, *Military Regulations and Instructions*, Protection of cultural Property.

spirit of respect for culture and cultural property of all peoples”²²⁴. These words prove how much of the real implementation of the Convention resides in armed forces’ conducts. Subsequently, the manual focuses on the importance of the promulgation of “Rules of engagement” or, ROE, drafted by military authorities to delineate the conditions in which military forces have to be engaged and to pose some restraints for the achievement of their objectives²²⁵. There are various ways to foster cultural respect as for example desk of cards, used for instance by the United States Department of Defence, by Netherlands and the Netherlands National Commission for UNESCO, and also by the Norwegian Directorate for Cultural Heritage. These cards show photographs of movable and immovable cultural properties accompanied by many messages to achieve better awareness of their cultural significance²²⁶. Before the deployment, various forms of “cultural awareness training” should be supplied, in particular military personnel should be invited to cooperate with the local communities to improve their knowledge of local cultural property. Besides, according to the rules provided in the 1954 Convention²²⁷ and its Protocol II²²⁸, the manual requires the Parties to include the study of the Convention in their military training programmes²²⁹; States not parties should do the same²³⁰. All these commitments have to be realized under the guidance of UNESCO that has often distributed training materials to military forces. According to Article 7(2)²³¹, the manual lays down the establishment of specialised services or personnel²³²

²²⁴ This obligation is similarly restated in art 30(3)(a) of the II Protocol.

²²⁵ ROE must be drafted accordingly the LOAC and national law and provides for the authorisation and restrictions on the use of force, the location of forces and the employment of specific abilities; Chapter III Preparatory measures, Para. A, points 57, Military manual.

²²⁶ Another way is the display of posters instead of cards, or lectures and multimedia presentations on the most important cultural sites and objects, accompanied by the distribution of brochure on the history and cultural heritage of the country that was used for instance during the occupation of Iraq towards Polish Forces. Chapter III Preparatory measures, Chapter III, Para. A, points 60, Military manual.

²²⁷ Article 25, 1954 Hague Convention.

²²⁸ Article 30(3)(b), II Protocol to the 1954 Hague Convention.

²²⁹ Para B, Chapter III, point 62, Military Training, Military Manual 2016.

²³⁰ There are many examples on this duty, such as Austria with its Directive for the Military Protection of Cultural Property and the Military Safeguarding of Cultural Heritage, Belgium with its course on protected places and property for advisors on the law of armed conflict and to end Italy with its Directive on the Protection of Cultural Property in the Event of Armed Conflict.

²³¹ Article 7(2), 1954 Hague Convention.

²³² Chapter III Para C, points 66-69, Specialist Military Services or Personnel, Military Manual.

within the armed forces of every State with the task to cooperate with the civilian authorities responsible for the protection of cultural heritage. The most famous example of this practice was, of course, the American Commission for the Protection of Cultural Heritage and Historic in Europe, also known as “Monuments Men”²³³. In Italy there is a special unit within the *Arma dei Carabinieri*, “Carabinieri Tutela Patrimonio Culturale”. The unit is responsible for preventing pillage of cultural places in conflict areas and was successfully used in Kosovo and Iraq²³⁴.

2) PROTECTION OF CULTURAL PROPERTY DURING HOSTILITIES

Chapter IV focuses on the identification of cultural property’s location through the transmission of the position to those involved in the development and planning of military operations²³⁵. This is an unavoidable precondition for the effective protection of cultural property during the ongoing of the hostilities. The main duty of armed forces is to find out the existence and location of buildings, objects and sites of historic, artistic or architectural importance. The first step is to assess the presence of cultural property by identifying the distinctive emblems, by accessing to registers, schedules or inventories where a State may have listed its natural and cultural heritage or by accessing UNESCO registers. Moreover, a great help is provided by the discovery of the coordinates of any cultural site in the World Heritage Convention List²³⁶. The subsequent step is the communication of the geographic coordinates of the cultural site. Best practices in doing so include “no-strike lists”, available in any relevant database, and the distribution of detailed marked maps, as occurred in Afghanistan and Iraq thanks to US military archaeologists. All this information should be completed, if possible, with the historic, artistic or architectural value of the cultural site or object in order to evaluate whether the military benefit that could be gained with the attack, in case of collateral damages, would be

²³³ Ibid, point 68

²³⁴ Ibid, point 69

²³⁵ Chapter IV Para A, point 71, Protection of Cultural Property during Hostilities, Military Manual.

²³⁶ This does not include movable cultural property.

excessive compared to its cultural significance. This *modus operandi* implies the so called “collateral damages estimation”²³⁷ that influences the choices of the targeting decision-makers.

After the identification phase, there is another fundamental issue to solve, whether a specific cultural property may be targeted, taking in account that its attack is forbidden unless it constitutes a military objective and no feasible alternative exists to get the same military advantage²³⁸. In any other hypothesis, an attack against cultural objectives will not be justified and will constitute a war crime. Restating this fundamental rule set by Article 4²³⁹, the manual goes deeper to get the real meaning of this principle by showing the way in which it has to be interpreted. First of all, we have to focus on the meaning of the word “attack”²⁴⁰: within the LOAC framework, it is an “act of violence against the enemy”, whether in offence or defence, in the event that cultural property is not under the territorial or physical control of the attacking party. Secondly, we have to consider the expression “military objective” that covers any object which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction or neutralization, in the circumstances ruling at the time, offers a military advantage. This definition is binary: to constitute a military objective, cultural property must not only give an effective contribution to military operations, thanks to its location, purpose, nature or use, but its destruction, capture or neutralization, must promise a definitive military advantage to the attacking party. The words “effective” and “definite” mean that the contribution to military action and the military advantage has to be concrete, not only abstract and theoretical. In this sense, the attack against cultural property must, for the nature, location, purpose or use of the property, effectively contribute to the battle²⁴¹. To fully realize if the destruction, capture or neutralization of cultural property gives a definite military benefit it is necessary to

²³⁷ Chapter IV Para A, point 81, Protection of cultural property during hostilities, point 81, 25.

²³⁸ Chapter IV Para B, points 83-84, Targeting in relation to cultural Property; Protection of cultural Property, Military Manual.

²³⁹ Article 4, 1954 Hague Convention.

²⁴⁰ Chapter IV Para B, point 85, Targeting in relation to cultural Property, point 86, Military Manual.

²⁴¹ Para B, Chapter IV, point 87 Targeting in relation to cultural Property, Military Manual.

refer to the concrete circumstances at the time of the attack. The factors regarding the nature of an objective that can transform the cultural site into a military objective are very limited, but for example we can refer to historic fortresses, barracks or arsenals or any historic property created for military aims. The same can be said also for its location and purpose, in fact a great part of cultural property cannot, nowadays, offer an effective contribute to military operations²⁴². Therefore it is essentially the use of cultural property that can give an effective contribution to military operations. Consequently, the use of a cultural site in support of military plans represents the principal justification for its attack²⁴³. After all these clarifications what emerges is that the attack against cultural property constitutes the last resort when there are no feasible alternatives to obtain a similar military advantage.

Therefore, the parties of the conflict have to verify that any objective is not part of the enemy's cultural heritage by doing everything feasible to this end²⁴⁴. Military forces have to do everything possible -within the limit of rationality- to avoid the attack on cultural property unless the property turns into a military objective for the circumstances prevailing at the time. This means that the combatants have to gather and review all the accessible information regarding the target. An essential role is played by targeting processes that follow a standard, step-by-step procedure. In this operation a crucial phase is constituted by the "target development", by which militaries lay down a priori restrictions on target selection. No-strike lists (NLS) are set up to preclude attacks on particular sites or buildings, for example those protected by LOAC or ROE²⁴⁵.

When cultural property becomes a military objective and no feasible alternative exists, the parties must follow the indications laid down in Article 6 (c) of the Second

²⁴² The same assumptions have to be done about the location of cultural property, *ibidem*.

²⁴³ There are many ways in which this use can be actualized, the most frequent is by occupying an immovable property or using it to access to or to create an offensive or defensive position; Para B, Chapter IV, point 87, 31.

²⁴⁴ The implementation of this obligation depends on the real circumstances ruling at the time of attack.

²⁴⁵ For example, NLS were successfully used in Iraq, Libya, Syria and Mali. In reality, even the most developed target system can make mistakes, this process is not infallible because of the difficulties in gathering the necessary information in a quick way during the ongoing of the hostilities. Para B, Chapter IV, point 81, Targeting in relation to cultural Property, Military Manual

Protocol, according to which the determination of attacking cultural property must be taken by an officer commanding a force equivalent in size to at least a battalion²⁴⁶. Moreover, under this Article²⁴⁷ the Party which has decided to strike property of cultural significance has to alert the enemy whether the circumstances allow it. This rule has two main implications: the first one is that the warning permits the enemy, who is using cultural property for military purposes, to stop this use, rendering the attack unlawful; secondly, the warning allows the enemy to take appropriate measures to minimize the injury to cultural property²⁴⁸.

3) INCIDENTAL DAMAGE TO CULTURAL PROPERTY²⁴⁹

It is forbidden to launch an attack that might be expected to cause incidental damage to cultural property that could be excessive compared to the concrete and effective military benefit expected. This rule is strictly linked to the principle of proportionality that constitutes a rule of customary international law in LOAC framework. This reasoning involves at the same time qualitative and quantitative implications concerning the cultural value of the selected site. Furthermore, related to this duty, the parties of the conflict have to take all feasible precautions in choosing methods and means of attack to prevent or minimize incidental damages to cultural property²⁵⁰. Consequently, if it is probable that the attack may cause incidental damage to cultural property that would be excessive compared to the military advantage foreseen, the parties must refrain from the attack, suspending or cancelling the strike²⁵¹.

²⁴⁶ Chapter IV Subpar.(i) Making cultural property the object of attack,, point 102, Military Manual 2016.

²⁴⁷ Article 6 (c) of Protocol II.

²⁴⁸ Chapter IV Subpar. (i), point 102, Making cultural property the object of attack, Military Manual.

²⁴⁹ Chapter IV Subpar. (II), Incidental damage to cultural property in the course of attack, point 112-115, 34.

²⁵⁰ These choices depend on the circumstances ruling at the time; Chapter IV Subpar. (II), point 123, Incidental damage to cultural property in the course of attack, Military Manual.

²⁵¹ Chapter IV Subpar. (II), *ibidem*.

4) USE OF CULTURAL PROPERTY OR ITS SURROUNDINGS²⁵²

A general rule posed by the 1954 Hague Convention concerns the prohibition to make any use of cultural property and its immediate surroundings in operations that will probably expose it to damage or destruction unless it is imperatively required by military necessity. This rule implies no legal justification to any use of cultural property or its vicinity that would entail its probable damage or destruction whether a military advantage does not exist or, on the contrary, if there is a feasible alternative to gain a similar military benefit²⁵³.

5) THREATS TO CULTURAL PROPERTY RESULTING FROM MILITARY OPERATIONS²⁵⁴

The parties of the conflict have to take all the necessary precautions to protect cultural property to the maximum extent feasible under their control against the risk of damages resulting from military operations²⁵⁵. This implies a positive duty on each Party to take any necessary action to protect cultural heritage under their control from the risks posed by military operations conducted by each party's troops. This obligation is broader compared with the duty of safeguarding set forth in Article 3²⁵⁶. Indeed, here the Parties have to remove the cultural property located

²⁵² Chapter IV, Para. D, Use of cultural Property or its immediate surroundings, Military Manual.

²⁵³ The expression "to any use" involves both *de facto* and passive use of cultural property carried out in any manner. Regarding the cultural property immediate surroundings the rule implies a duty of refraining from landing helicopters, from using heavy vehicles and similar military action that could endanger the cultural structure; Chapter IV, Par. D, point, 137, Use of cultural Property or its immediate surroundings, Military Manual.

²⁵⁴ Chapter IV, Par E, Dangers to cultural property resulting from military operations, Military Manual 2016.

²⁵⁵ Chapter IV, Par E., point 142-147 Dangers to cultural property resulting from military operations, Military Manual 2016.

²⁵⁶ It goes further because it does not include only the cultural property within a state's own territory, and has a more general scope; Chapter IV, Par E, *ibidem*.

near military objectives or alternatively they have to grant its adequate protection *in situ*. The implementation of this duty regards only the civilian authorities, but militaries might be involved in the assistance of the competent authorities²⁵⁷. Another consequence of the prohibition of striking cultural properties is that parties must avoid locating military objectives near such properties to the maximum extent feasible. Thus, for instance, a Party must refrain from positioning any military target such as machine-gun nests, artillery pieces, tanks and so on²⁵⁸ near sites of cultural significance.

6) MISAPPROPRIATION AND VANDALISM OF CULTURAL PROPERTY²⁵⁹

Another important obligation that is binding for every part of the conflict is the one expressed in Article 4(3)²⁶⁰ dealing with the ban against any form of misappropriation and vandalism. Military forces are forbidden to engage in theft, pillage or other actions that lead to the same results. No justification for military necessity works in this case to exempt military personnel from this obligation, and consequently its breach involves responsibility for war crimes²⁶¹. To prevent the commission of these crimes, commanders must train their subordinates through specific procedures²⁶² and have to impose harsh disciplinary sanctions or refer to the relevant military or criminal justice authorities for the purpose of prosecution. This duty is a fundamental advance in the protection of cultural heritage because theft, pillage and vandalism constitute widespread practices that often give rise to resentment and anger in the local communities and consternation in the international

²⁵⁷ Here the UNESCO and ICRC play an important role: they can assist and advise the authorities to achieve the best solutions; Chapter IV, Par E, point 147-150, Military Manual.

²⁵⁸ Chapter IV, Par E, point 150, Dangers to cultural property resulting from military operations, Military Manual 2016.

²⁵⁹ Chapter IV Para. F, Misappropriation and vandalism of cultural property, Military Manual.

²⁶⁰ Article 4(3), 1954 Hague Convention.

²⁶¹ Chapter IV Para. F, Subparagraph (i), Misappropriation and vandalism of cultural property, Military Manual 2016.

²⁶² Such as the promulgation of general orders; Chapter IV Para. F, Subparagraph (i) Misappropriation and vandalism of cultural property, point 154-156.

community. To achieve this aim, soldiers should be advised to report any discovery or identification of movable property to the local competent authorities. Moreover, the parties of the conflict must prohibit, prevent and at last stop any form of theft, pillage, misappropriation or vandalism of cultural property committed by others, here included organized criminal groups²⁶³. This obligation is not only confined to the case of belligerent occupation, but on the contrary applies both to IAC and NIAC²⁶⁴. Furthermore, the duty to prevent and to stop vandalism and misappropriation are obligations of best endeavours and have to be fulfilled in due diligence²⁶⁵. Surely the reference to non- state organized groups was laid down because the looting of cultural property is one of their main sources of income, as demonstrated by the widespread looting of Isis²⁶⁶.

7) REPRISALS AGAINST CULTURAL PROPERTY²⁶⁷

As stated in the 1954 Convention, the manual highlights the prohibition of making cultural property the object of reprisals. By the time a reprisal was considered itself a violation of LOAC, but at the same time it was justified if it was taken to induce the adversary to respect the laws of war and only when carried out respecting the principle of proportionality. Over time, reprisals have gradually become illegal under LOAC²⁶⁸.

²⁶³ Chapter IV Para. F, Subparagraph (i), *ibidem*.

²⁶⁴ There is no excuse for a party not to forbid these activities by anyone within its controlled area.

²⁶⁵ The parties have not to take more than all necessary and reasonable measures within its power to prevent or stop these acts. So a party will be held responsible for the violation of these duties only in case it failed to do everything that was possible to respect them.

²⁶⁶ Chapter IV Para. F, Subparagraph (ii), Point 157-159, Military Manual 2016.

²⁶⁷ Chapter IV, Par F, Reprisal against cultural property, Military Manual 2016.

²⁶⁸ In many international texts on the Laws of armed conflict is stated this rule and no exemption of military necessity will permit these kind of attacks, that in many cases will be prosecuted as war crimes; Chapter IV, Par F, point 162, Military Manual 2016..

2.1.8 CONVENTION ON THE PROTECTION OF CULTURAL AND NATURAL WORLD HERITAGE: PARIS 1972

In the context of the international protection of cultural heritage in time of peace it is worth to mention the Convention on the Protection of Cultural and Natural Heritage drafted in Paris in 1972²⁶⁹. The Preamble evokes the concept of “cultural heritage of all humankind”²⁷⁰ and highlights the necessity to improve and make the protection of cultural and natural objects more effective at international level²⁷¹. Cultural and natural heritage are defined together because they are both threaten by the traditional causes of degradation, such as conflicts or evolutions of social and economic life. The 1972 Declaration is surely a step forward, but the protection afforded is tempered by the fact that it is limited to cultural and natural heritage of “exceptional interest” and “universal value”²⁷² that every state has the duty to identify within its territory²⁷³. The cultural and natural objects that own this exceptional value enjoy a double level of protection, both national and international, as set forth in Chapter II of the Convention.

Every state has to grant the identification, protection, preservation and the transfer to future generations of cultural and natural heritage located within its territory²⁷⁴. The Convention²⁷⁵ obliges the Parties to create a system of international cooperation

²⁶⁹ Convention On The Protection Of Cultural And Natural World Heritage adopted during the XII session of the General Conference of UNESCO (adopted on 16 November 1972 and entered into force on 17 December 1975) 1037 UNTS 152 <http://whc.unesco.org/en/conventiontext/> (last visited on 10 June 2017).

²⁷⁰ The preamble of the Convention identifies cultural heritage as an essential element for the enrichment and progress of the present and future generations²⁷⁰ of all the world; Francesco Francioni, *Principi e criteri ispiratori per la protezione internazionale del patrimonio culturale* (1999), 14 and James A. Mcneely: *The World Heritage Convention Protection cultural and Natural Wonders of Global Importance- a Slide Presentation*; in *National Parks, Conservation, and Development- The role of Protected Areas in Sustaining Society*, Smithsonian Institution Press (Bali, 1984).

²⁷¹ Memorandum I and V of the Preamble of the UNESCO Convention 1972.

²⁷² The concept of exceptional value has never been defined or traduced in specific and clear juridical precepts so belongs to the states' discretion; Umberto Lanza, *La protezione dei beni culturali e il concetto di Patrimonio comune dell'umanità*, in *Scritti in onore di Angelo Falzea*, (Giuffrè, 1991), 483.

²⁷³ Toman, *supra* note 19, 337 and Francesco Francioni, *Au-delà des traités: l'émergence d'un nouveau droit coutumier pour la protection du patrimoine culture* (European University Institute, 2008), 33.

²⁷⁴ Article 4, 1972 UNESCO Convention.

²⁷⁵ Article 7, 1972 UNESCO Convention.

and assistance to help states in their efforts to safeguard and identify the heritage to protect. For this purpose the Convention provides the constitution of an Intergovernmental Committee for the Protection of World Heritage²⁷⁶ composed by the representatives of the 21 States parties reunited in the General Assembly²⁷⁷. The main task of this Committee is to define, update and develop the World Heritage List²⁷⁸ and the List of World Heritage in Danger²⁷⁹. In particular, the sites inscribed in the latter list have the priority over sites in the former since they require immediate measures to avoid their destruction or damage²⁸⁰. With the inclusion of an item or site in the World Heritage List, every State undertakes a general duty of protection that derives directly from the general interest of humankind to their preservation²⁸¹. In fact since mid-1950 UNESCO claimed the recognition of the general interest of the whole international community in the protection and preservation of cultural heritage²⁸².

2.2 PROTECTION OF CULTURAL HERITAGE IN THE STATUTES OF INTERNATIONAL CRIMINAL TRIBUNALS

2.2.1 THE CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL

²⁷⁶ Chapter III, Article 8, 1972 UNESCO Convention. Its composition reflects a right proportion of different regions and cultures of the world.

²⁷⁷ Its composition reflects a right proportion of different regions and cultures of the world.

²⁷⁸ Chapter III, Article 11, Para.2, UNESCO Convention, 1972.

²⁷⁹ Chapter III, Article 11, Para.4, UNESCO Convention, 1972, in this list can be included only the items threatened by grave and precise dangers and the inscription on this list requires the activation of a particular intensive assistance towards the item in danger.

²⁸⁰ Chapter V, Article 22 of UNESCO Convention, 1972.

²⁸¹ Regardless the ratifications of 1954 Hague Convention; a part of the doctrine talks in this sense of a *erga omnes* duty deriving from the almost universal extent of the Convention, in fact the obligation of safeguarding the item or site inscribed in the HL is assumed towards the entire international community; Francesco Francioni, *Patrimonio comune della cultura. sovranità e conflitti armati*, in *Studi in ricordo di Antonio Filippo Panzera* (Vol 1, Cacucci, 1995), 385.

²⁸² Thus the Convention firmly endorses the internationalist approach; Anna M. Maugeri, *La protezione dei beni culturali nel diritto internazionale penale*, 42.

The Charter of the International Military Tribunal (Charter of Nuremberg), was signed by the Allied Forces after the end of the WWII on 8 August 1945²⁸³. It was annexed to the London Agreement for the prosecution and punishment of the major war criminals of the European Axis and was formally signed by the Government of United States of America, the provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the fair and prompt trial and punishment of those who were mainly responsible of war crimes committed by the European Axis during WWII²⁸⁴.

The jurisdiction of the International Military Tribunal at Nuremberg (IMT) is set forth in Article 6 of the Charter that delineates the Tribunal's power of prosecuting and convicting those who committed crimes against peace, war crimes or crimes against humanity²⁸⁵.

During WWII mankind witnessed the systematic plunder and destruction of galleries, museums, libraries and historic buildings carried out by the Nazis forces to eliminate the Jewish ethnicity and culture by pillaging their private, rich collections²⁸⁶. The Nazis carried out this seizure and confiscation plan by establishing a special unit within the German army forces, the "Einsatzstab Rosenberg"²⁸⁷, headed by Alfred Rosenberg with the aim at confiscating cultural objects from Austrian and German Jews and from the occupied territories²⁸⁸. This "criminal operation"²⁸⁹ lasted many years and could not be ignored by the international community. The Allied Powers at the end of the hostilities claimed that they would have tried individuals responsible of war crimes and would have not condemned

²⁸³ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, London (adopted on 8 August 1945) 82 UNTS 279 IHL Database ICR <https://ihl-databases.icrc.org/ihl/INTRO/350?OpenDocument> (last visited on 21 June 2017) (hereafter Nuremberg Charter).

²⁸⁴ IHL Database ICR <https://ihl-databases.icrc.org/ihl/INTRO/350?OpenDocument> (last visited on 21 June 2017).

²⁸⁵ O'Keefe, *The Protection*, 110.

²⁸⁶ O'Keefe, *ibidem*.

²⁸⁷ Lynn H. Nicholas, *The Rape of Europa: The Fate of Europe's treasures in the Third Reich and The Second World War* (Vintage, 2008), 67.

²⁸⁸ Nicholas, *ibidem*.

²⁸⁹ Indictment in Trial of the Major War Criminals of the European Axis, 85 UNTS 279, and 39 (sup) (1945) Vol. 1 No. 257 American Journal of International Law, 11-30.

the responsible abstract nation²⁹⁰. The Charter of Nuremberg, which constitutes also the Statute of the IMT, specifically addresses the issue of cultural heritage's destruction or plunder in Article 6(b), which among war crimes condemns "plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity"²⁹¹. Moreover, the IMT held that the war crimes provided in lit. b)²⁹² had already been criminalized as war crimes under IL, in particular by Article 46 about private property and Article 56 about municipalities and religious, charitable, educational, artistic and scientific institutions of the Hague framework²⁹³. In addition, for the entire ongoing of the WWII these war crimes were committed on wide scale and thus could be considered crimes against humanity²⁹⁴ instead of war crimes.

Even crimes against cultural property were not ignored by the national criminal courts, such as the Permanent Military Tribunal established under French jurisdiction²⁹⁵ that convicted a German civilian ²⁹⁶for the destruction of a French monument built to commemorate the victims of WWI and for the damage of a statue of Joan of Arc²⁹⁷.

It is worth saying that the Nuremberg Charter had a great influence in the codification of the 1954 Hague Convention, because with this instrument the prosecution of attacks against cultural heritage was introduced into positive IL²⁹⁸.

2.2.2 THE STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the

²⁹⁰ With the Moscow Declaration of German atrocities; In particular, I will analyze in the last chapter of my work some of the most Nuremberg famous convictions against Nazis.

²⁹¹ Article 6(b) of the Charter of the International Military Tribunal.

²⁹² Article 6(b), Nuremberg Charter

²⁹³ O'Keefe, *The Protection*, 110.

²⁹⁴ Nuremberg Judgement, at 65, O'Keefe, *ibidem*.

²⁹⁵ In the city of Metz; O'Keefe, *ibidem*.

²⁹⁶ Trial against Karl Lingerfelder, Law reports of Trials of War Criminals (1949) Vol. 9, 67.

²⁹⁷ Thus violating the rule fixed in Article 56 of Hague Regulations.

²⁹⁸ O'Keefe, *The Protection*, 113.

Former Yugoslavia since 1991, (ICTY)²⁹⁹, was established by Security Council Resolution 827 (1993)³⁰⁰ as a response to the atrocities committed in the territory of the former Yugoslavia from 1st January, 1991. It has its seat in The Hague and it is a subsidiary organ of the UN SC. Its main objectives are convicting the people responsible for the several and significant breaches of international humanitarian law (IHL) bringing justice to the victims, preventing further crimes and finally restoring peace.

This Tribunal has jurisdiction on the serious violations of the Geneva Conventions of 1949 about the laws and customs of warfare, as well as on the cases of genocide and crimes against humanity carried out in the territory of the former Yugoslavia. The Court has jurisdiction only over individuals, and not over organizations, political factions, administrative entities nor any other group considered as a legal entity. Its practice can be considered as an emblematic example of the application of rules on individual criminal responsibility for the profound attacks committed during the hostilities against cultural, religious and historical heritage. The Statute endorses the idea that religious and cultural sites constitute symbols of collective identity, that they are essential elements for the identification of a particular group as an aggregation of individuals within a community.³⁰¹ According to the ICTY Statute, the protection of cultural heritage develops in three different criminal cases: the first one concerning the serious violations of the Geneva Convention³⁰², the second the grave breaches of the laws and customs of warfare and lastly, the crimes against humanity in particular through the crime of persecution for racial, politic or

²⁹⁹ Statute of the International Criminal Tribunal for the Former Yugoslavia: UNSC Res 827, UN SCOR, 48th sess, 3217h mtg (25 May 1993) UN Doc S/RES/ 827, IHL Database ICR <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/555> (last visited on 17 June 2017); Maria C. Vitucci, *Il Tribunale ad hoc per la Ex Jugoslavia e il consenso degli Stati* Milano, Giuffrè, 1998), 82; Gianmaria Calvetti e Tullio Scovazzi, *Il Tribunale per la Ex-Jugoslavia: l'attività svolta e il suo prossimo scioglimento*, (Milano, Giuffrè, 2007), 78.

³⁰⁰ UNSC Res 827 (25 May 1993) UN Doc S/RES/827.

³⁰¹ Suzanne L. Schairer, *The intersection of human rights and cultural property issues under international law* (2001) Vol. 11 Italian Yearbook of International Law, 59, 71-99; Anna M. Maugeri, *La protezione dei beni culturali nel diritto internazionale penale*, 93.

³⁰² Henry Fisher, *Graves Breaches of the 1949 Geneva Convention*, in Gabrielle Kirk Mc Donald and Olivia Scott Goldman, *Substantive and procedural Aspects of international Criminal Law-The experience of International and National Courts*, vol. 1, Commentary (Brill, 2000), 67.

religious reasons.³⁰³ The Statute defines two kinds of protection, both direct and indirect, correspondent to the same scheme adopted in the ICC ³⁰⁴Statute. Article 3(d) punishes the “seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science”³⁰⁵ that constitute violations of the laws and customs of warfare.³⁰⁶ The attacks against both cultural and civilian objectives must fulfil some requirements to be considered as war crimes: there must be a clear nexus ³⁰⁷between the armed conflict and the attack, the perpetrator must be related to one party of the conflict, and the victim has to be neutral or related to the enemy part, but has not be actively involved in the hostilities³⁰⁸. Moreover, to prosecute these crimes pursuant Article 3(d), four requirements must be fulfilled: the necessary preconditions for the application of Article 3³⁰⁹, abovementioned, the destruction or damage to buildings dedicated to religion, to assistance, to education, to art or science, to historic monuments and works of art and science, the item must not be used for military purposes at the time of the attack and finally the perpetrator must have acted with the intent to destroy³¹⁰ the institution, monument or work of art³¹¹. The only justifications that could cover these acts are the use of cultural property for military necessity and, as stated in *Blaskic* case, the location in its “immediate surroundings of a military objective”. This latter too much broad exemption was overthrown in *Natelic* case, where, it was claimed that the mere vicinity cannot justify

³⁰³ Maugeri, *La protezione dei beni culturali nel diritto internazionale penale*, 189.

³⁰⁴ International Criminal Court, seats in The Hague.

³⁰⁵ Article 3(d), ICTY Statute.

³⁰⁶ This provision can be deemed as *lex specialis* with respect to the provisions on the crimes against civilian objectives *Prosecutor v. Kordic & Cerkez* (Appeals Chamber) IT-95-14/2, (17 December 2004), para. 361.

³⁰⁷ *Prosecutor v. Tadic*, (Appeals Chamber) IT-94-1(27 February 2001), para 67; *Prosecutor v. Hadzhasanovic-Kubura* (Trial Chamber Decisions on motions for acquittal) IT-01-47 (27 Septmeber 2006), para. 34; B. Kempen-C. Hillgruber, *Volkerrecht, Munchen* (2007), 347-348; there is war link when the alleged crimes are ‘closely related to the hostilities’, *Tadic*.

³⁰⁸ Antonio Cassese, *International Criminal Law: Cases and Commentary* (Oxford University Press, 2001), 47; Matcheled Boot, *Genocide, Crimes against Humanity, War crimes-Nulum crimen sine lege and the subject matter jurisdiction of the ICC* (2002) Vol. 12 Intersententia nv, 329, 537.

³⁰⁹ In order to configure the attacks against cultural properties as war crimes.

³¹⁰ *Prosecutor v. Natelic-Martinovic*, (Trial Chamber) IT-98-34 (31 March 2003) para. 703 and *Prosecutor v. Martić* (Trial Chamber) IT-95-11 (12 June 2007), para. 96.

³¹¹ Maugeri, *La protezione dei beni culturali nel diritto internazionale penale*, 136.

the attack against cultural properties³¹². As for the subjective requisite, the destruction or damage have to be perpetrated wilfully: this for someone requires *dolo directus*³¹³, instead for others a reckless conduct would be sufficient. Although in the opinion of the Trial Chamber cultural property has to enjoy at minimum the same protection afforded to civilian properties, so is required the intentionality accompanied with the estimate and will of the prohibited event or the inculpable reckless on the substantial probability of damage.³¹⁴

The protection of cultural property can also be achieved through the indirect protection afforded in Article 2(d) within the category of crimes against humanity³¹⁵. This provision punishes the “extensive destruction and appropriation of civilian property not justified by military necessity and carried out unlawfully and wantonly”³¹⁶. For its application, the norm requires an armed conflict, the existence of the war link³¹⁷, the extensive character of the destruction or appropriation³¹⁸ and finally, the targeted property has to be protected under the provisions of the Geneva Convention³¹⁹. The only exemption here provided is the military necessity.

Moreover the destruction or damage of cultural property can go under the provisions of Article 3, lit. b), c) and e) that punish the violations of laws and customs of warfare not expressly typified by other provisions. Lit. b) prohibits the “wanton destruction of cities, villages, towns, or devastation not justified by military necessity”, lit. c) bans the “attack, bombardment, by whatever mean, of undefended towns, villages, dwellings or buildings”, and finally lit. c) forbids the “plunder of public and private property”. These provisions refer to the protection of civilian objectives against unlawful warfare methods and were used in many proceedings³²⁰.

³¹² Here is endorsed the doctrine by which the location of cultural property nearby a military objective will justify only its use for military purposes and not the military intervention; Maugeri, *ibidem*, 143; Roger O’Keefe, *The Protection*, 344.

³¹³ *Prosecutor v. Blaskic* (Trial Chamber) IT-95-14 (3 March 2000), para 185.

³¹⁴ That requires “direct intent or indirect intent”; *Prosecutor v. Brdjanin*, (Trial Chamber) IT-99-36 (1 September 2014), para. 599 and *Martic*, para 97-99.

³¹⁵ Maugeri, *La protezione dei beni culturali nel diritto internazionale penale*, 146.

³¹⁶ Maugeri, *ibidem*.

³¹⁷ *Blaskic*, para 174.

³¹⁸ *Blaskic*, para 175.

³¹⁹ *Blaskic*, para 174.

³²⁰ In *Kordic* and *Cerkez*, *Blaskic*, and *Natelic –Martinovic*.

These rules apply both to IAC and NIAC. The existence of an armed conflict and the war link are necessary requirements for the application of these norms.³²¹ The protection of cultural heritage was provided also in crimes against humanity as attacks of this kind are often characterized by a persecutory intent. Article 5(h) prohibits the “persecution for racial, political and religious reasons, whether committed during an armed conflict and against civil population”³²². The crimes involved in Article 3(d) can be considered acts of persecution when done systematically and largely with a discriminatory intent³²³. Although the ICTY Statute does not expressly define the crime of persecution, it is clear how in the Tribunal’s conviction the attacks against cultural and religious objects target the population itself. These attacks were carried out to hurt and destroy its cultural identity and memory and cannot simply be considered war crimes. The ICTY went beyond this configuration³²⁴ by evoking the practice of the Nuremberg Tribunal and, in particular, of the sentences against Alfred Rosenberg and Julius Streicher³²⁵. This configuration can be found also in the Draft Code on the Crimes Against Peace and Security of Humankind³²⁶ which highlights that the systematic destruction of monuments and buildings representing a particular social, religious, and cultural group has to be included in the concept of persecution.³²⁷

2.2.3 THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT.

³²¹ Maugeri, *La protezione dei beni culturali nel diritto internazionale penale* 158.

³²² Article 5, (h), ICTY Statute.

³²³ For example in *Natelic*, the destruction of the Sovi mosque; *Natelic* para 713-705-706.

³²⁴ Micaela Frulli, ‘Distruzione dei beni culturali e crimine di genocidio: l’evoluzione della giurisprudenza nel Tribunale Penale Internazionale per la Ex-Jugoslavia’, in Paolo Benvenuti and Rosario Sapienza, *La tutela internazionale dei beni culturali nei conflitti armati* (Giuffrè, 1997), 263.

³²⁵ I will analyze these two sentences in the last Chapter, 4.

³²⁶ ILC, ‘Report of the International Law Commission on the Work of its forty-eighth Session’ (6 May- 26 July 1996) UN GAOR, 48TH sess, Supp No 10, UN Doc A/51/10.

³²⁷ ILC Report, *ibidem*.

The International Criminal Court (ICC)³²⁸ has its seat in the Hague and has jurisdiction to prosecute individuals for genocide, crimes against humanity, war crimes (the so called *crimina iuris gentium*) and crimes of aggression³²⁹. The ICC jurisdiction is complementary to the one of individual States, and can operate only if these latter³³⁰ cannot or do not want to proceed to punish international crimes or when the UN SC³³¹ or an individual nation refer investigations to the Court³³².

The Statute in the preamble claims that “all the people are united within closed constraints and that their cultures constitute a heritage shared by all, a delicate mosaic that in every moment risks of being destructed”³³³. The inclusion in the ICC Statute of the crimes against the cultural heritage demonstrates the determination of the international community to put an end to and to prevent these terrible acts that affect mankind. The Statute presents a direct and specific protection of cultural items³³⁴ within a general indirect protection of civilian objects. The attacks against cultural heritage are addressed in different paragraphs of Article 8 which includes both significant breaches of the Geneva Conventions³³⁵ that include only situations of IAC and the “serious violations” provided in common Article 3 to the four Geneva Conventions and in other international norms, regarding NIAC³³⁶; all these offenses have to be considered as war crimes³³⁷.

³²⁸ Rome Statute of the International Criminal Court (adopted on 17 July 1998, entered into force on 1 July 2002) 2187 UNTS 3 (Rome Statute).

<https://ihl-databases.icrc.org/ihl/INTRO/585?OpenDocument> (last visited on 17 June 2017) (Rome Statute).

³²⁹ On the contrary, states cannot held be responsible by this court.

³³⁰ Only States that have ratified the Statute.

³³¹ Article 13, Rome Statute.

³³² Article 14, Rome Statute.

³³³ Preamble of the Rome Statute.

³³⁴ Boeing so more incisive.

³³⁵ Article 8(2)(a), Rome Statute; Guido Lattanzi and Vito Monetti, *La Corte Penale Internazionale* (Giuffrè, 2006), 790; Roberta Arnold, *The ICC as a new instrument for repressing terrorism*, (Brill-Nijhoff, 2014), 168 and Stefano Mancini, *I crimini di Guerra, Diritto internazionale*, II Studi, (Gaipichelli, 2006-2007), 252.

³³⁶ Article 8(2)(b) and 8(2)(e), Rome Statute.

³³⁷ The indirect protection of cultural property is also contained in Article 7 on the crime of persecution.

These provisions constitute a step forward, first of all because the direct protection is applicable both to IAC and NIAC³³⁸ and secondly because a broad range of cultural properties that includes historic monuments, artworks, places of worship, but also buildings devoted to education, the science, humanitarian, hospitals and similar places is protected by these provisions. First of all, we have to focus on the direct protection afforded to cultural property in Article 8(2)(b)(ix)³³⁹ concerning IAC and 8(2)(e)(iv) concerning NIAC³⁴⁰, both considering intentional attacks against items as serious violations of the laws and customs of international warfare³⁴¹. The attacks are required to be large-scale, so any isolated attack against cultural property will not integrate the objective element of the crime and has to be prosecuted as a war crime³⁴². Moreover, the attacks must be punished regardless of damages as the wording deals with situations of danger and not of damage, creating a form of anticipatory justice due to the particular significance of this property.³⁴³ A criticism has to be done to the definition endorsed by the ICC statute that covers only monuments and historic buildings, excluding any other movable and immovable cultural object.³⁴⁴ In addition, the protection of cultural heritage provided in the Rome Statute does not take into account Article 53 of AP I that condemns not only the attacks against this property, but any act of hostilities³⁴⁵, thus including a wider range of conducts. Hence the framework of the ICC Statute offers an excessively limited protection to cultural heritage, punishing only the major hypothesis of attacks against buildings and historic monuments while leaving aside many equally regrettable conducts.³⁴⁶

³³⁸ The Statute, though eliminates the not satisfactory distinction between special and general protection, a system that often had revealed its inefficacy as seen in the AP I of 1907, Maugeri, *La protezione dei beni culturali nel diritto internazionale penale*, 248 and Guido Lattanzi and Vito Mainetti, *La Corte Internazionale*, 341.

³³⁹ The provision set forth in number (ix) is *lex specialis* with respect to let.(ii) that regards the attacks against civilian objectives.

³⁴⁰ Which are not military objectives according to art. 52.2 Geneva Convention.

³⁴¹ Art. 8(2) (b)(ix), Rome Statute.

³⁴² On the contrary, Maugeri argues that the attack will be punished even if not occurred in large scale, this requirement would work only for the establishment of the ICC jurisdiction; Maugeri, *La protezione dei beni culturali nel diritto internazionale penale*, 262.

³⁴³ Maugeri, *ibidem*.

³⁴⁴ Umberto Leanza, *Il rafforzamento della tutela internazionale*, 2059.

³⁴⁵ As stated in Article 16 of the Second Protocol to the 1954 Hague Convention.

³⁴⁶ Maugeri, *La protezione dei beni culturali nel diritto internazionale penale*, 259.

Nevertheless, the Statute provides for only one justification of these acts, the qualification of cultural property as military objective³⁴⁷. It excludes the exemption for military necessity and avoids any discretionary evaluation related to this justification too often invoked on the basis of convenience and not of necessity. As for the subjective profile, the norms require intentionality: it involves not only the decision of launching an attack, but it also requires the ascertaining of the particular intent to strike property of cultural significance.³⁴⁸

Cultural property is also protected by other provisions of the Rome Statute that provides for an indirect protection, as for example in Article 8(1) involving civilian objectives. Both intentional attacks and bombardments against civilian properties such as the plunder and destruction of enemy's property are here prohibited. Within these two categories the destruction and plunder of items not justified by military necessity, committed illegally and arbitrarily on large scale³⁴⁹ stand out. Another provision bans the attacks against civilian objectives which might lead to loss of lives among the civilian population, cause injuries to civilians or damages to civilian properties, or result in diffuse, lasting and serious damages to natural environment that are manifestly excessive compared to the concrete and direct military advantages expected³⁵⁰. Moreover, the Rome Statute forbids attacking or bombing cities, villages, houses and constructions that aren't defended and that cannot be classified as military objectives'.³⁵¹ Finally, the destruction and seizure of enemy properties³⁵², unless they are required by imperative military necessity³⁵³, constitute war crimes as serious violations of laws and customs of warfare applicable both to IAC and NIAC.

To complete this analysis, the emphasis has to be placed on the intensity of the protection reserved to cultural properties. First of all, targeting a cultural object always constitutes a war crime, independently of the fact that this destruction was

³⁴⁷ Military objectives ex Article 52.2, AP I.

³⁴⁸ Maugeri, *La tutela*, 259.

³⁴⁹ Article 8(2)(a)(iv), Rome Statute.

³⁵⁰ Article 8(2)(b)(iv), Rome Statute.

³⁵¹ Article 8(2)(b)(v), Rome Statute.

³⁵² And also the pillaging of cities or localities, Article 8(2)(b)(xvi).

³⁵³ Article 8(2)(b)(ii), Rome Statute.

total or partial. Cultural objects are always protected unless they are military objectives. To the consumption of war crimes, it is necessary that the attacks against cultural heritage are perpetrated during an armed conflict³⁵⁴ and there must be a war link. To show the existence of this nexus, it is sufficient to prove the awareness of the factual circumstances that entail the existence of an armed conflict.³⁵⁵

Even if the Statute does not endorse the solutions already stated in Protocol II, it creates a complementary mechanism to the States' jurisdiction capable of substituting their jurisdiction when their undertaken domestic measures prove to be insufficient to grant the concrete realization of the universal jurisdiction.³⁵⁶

2.3 THE 2003 UNESCO DECLARATION ON THE INTENTIONAL DESTRUCTION OF CULTURAL HERITAGE

2.3.1 THE DESTRUCTION OF CULTURAL HERITAGE: GENERAL NOTES

Culture is too often exploited by those who believe that it is necessary to annihilate other different cultures to protect one's identity and interests. Culture thus becomes a tool to separate and to justify wars and slaughters.³⁵⁷ It is not a surprise that wars involve attacks against monuments, places of worship and artworks. Sometimes the destruction is only accidental, but more often it is intentional and frequently justified by the destroyer invoking the military necessity exemption. The Declaration on the Intentional Destruction of Cultural Heritage deals with intentional and wanton

³⁵⁴ The case of military occupation is here included as specified by the note 34 on the elements of crime.

³⁵⁵ It is not necessary the knowledge of the legal meaning of 'armed conflict' and its international or non-international nature. The war link is a constitutive element of the crime and involves the subjective element within the Rome Statute, otherwise the principle of guilt would be violated; Maugeri, *La protezione dei beni culturali nel diritto internazionale penale*, 254, and K. Dormann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, 15 and Stefano Mancini, *I crimini contro l'Umanità*, in Enrico Mezetti, *Diritto penale internazionale*, II.Studi (Giappichelli, 2010), 251.

³⁵⁶ Leanza, *Il Rafforzamento della tutela internazionale*, 2063.

³⁵⁷ Francois Bugnion, *The origins and development if the legal protection of cultural property in the event of armed conflict*, (2004), 1

destruction carried out with the specific aim of damaging the expressions of the cultural identity of a community³⁵⁸.

The event that outraged the international community and led to the drafting of the Declaration was the destruction of the Buddhas of Bamiyan³⁵⁹, occurred in the first months of 2001 due to the Taliban's iconoclasm. Not only affected this attack the Afghan people spiritual and cultural traditions, but it also involved mankind and focused the attention of the international community on the necessity of strengthening the protection of cultural heritage³⁶⁰.

In all these types of destructions the most serious element is, of course, the selectivity of the target, as these devastations cannot be considered casual or accidental consequences of the hostilities. On the contrary, they represent a careful and well-planned destructive strategy to humiliate the identity and reduce the local communities' sense of belonging through the annihilation of their spiritual and cultural symbols³⁶¹.

2.3.2 THE UNESCO DECLARATION CONCERNING THE INTENTIONAL DESTRUCTION OF CULTURAL HERITAGE³⁶²

The Preamble portrays a strong link between cultural heritage and human rights, in

³⁵⁸ On the contrary the text does not address incidental damages to cultural property; Federico Lenzerini, *'La distruzione intenzionale del patrimonio culturale come strumento di umiliazione dell'identità dei popoli'*, in Lauso Zagato, *Le identità culturali nei recenti strumenti UNESCO, Un nuovo approccio alla costruzione della pace* (Cedam, 2008), 10.

³⁵⁹ I will analyze the destruction of the Buddhas in the last Chapter This destruction wasn't linked to any expected military advantages, but was inspired only by the will to eradicate all religious or spiritual expressions that do not correspond to the Taliban's vision of religion and culture; Federico Lenzerini, *ibid*, 5-6.

³⁶⁰ Francesco Francioni, Federico Lenzerini, *'The Destruction of the Buddhas the Bayiam and International Law'* (2003) Vol. 14 No. 4 *European Journal of International Law*, 619, 620-621.

³⁶¹ This *modus operandi* clearly reveals the discriminatory intent which is the ground of these devastations that amount to a cultural and ethnic clean by weakening the sense of belonging and identity, unity and pride of the targeted community Francesco Francioni and Federico Lenzerini, *'The Destruction of the Buddhas'*, 621.

³⁶² Resolution 15 adopted by the General Conference at its 32nd session General Conference of 17 October 2003, in Paris. <https://ich.unesco.org/en/convention> (last visited on 21 August 2017) (2003 UNESCO Declaration)

particular those with a collective character. It defines cultural heritage as “an important component of the cultural identity of communities, groups and individuals, and of social cohesion” and its intentional destruction “may have adverse consequences on human dignity and human rights”³⁶³. Article 1³⁶⁴ reaffirms the importance of protecting cultural heritage and of fighting its intentional destruction in every form, in the interest of the present and future generations. Article 2 claims that the Declaration regards the whole cultural heritage, movable, immovable, tangible or intangible, without any reference to its exceptional universal value. The second paragraph gives the definition of intentional destruction as “an act intended to destroy in whole or in part cultural heritage, thus compromising its integrity; in a manner which constitutes a violation of international law or an unjustifiable offence to the principle of humanity and dictates of public consciences, in so far as such acts are not already governed by fundamental principles of international law”³⁶⁵. The last part of the definition was proposed by the United States to mean that intentional destruction of cultural heritage would be lawful if already permitted by fundamental principles of international law³⁶⁶. Article 3 deals with the measures that the States should adopt to prevent, avoid, stop and suppress acts of intentional destruction of cultural heritage, wherever such heritage is located.³⁶⁷ Unfortunately, this provision is weakened by the use of the term “should”³⁶⁸ that results completely useless within the text of a Declaration that is, by definition, a soft-law instrument and cannot provide for mandatory obligations on the parties³⁶⁹. Furthermore, paragraph 2 recommends States to “adopt the appropriate legislative, administrative, educational and technical measures, within the

³⁶³ Paragraph V of the Preamble, UNESCO Declaration on intentional Destruction of cultural Heritage, 2003.

³⁶⁴ Article 1, 2003 UNESCO Declaration.

³⁶⁵ Article 2(2), 2003 UNESCO Declaration.

³⁶⁶ Tullio Scovazzi, *La Dichiarazione sulla distruzione intenzionale del patrimonio culturale*, in Paolo Benvenuti and Rosario Sapienza, *La tutela internazionale dei beni culturali nei conflitti armati* (Giuffrè, Milano, 2007), 176.

³⁶⁷ Article 3, 2003 UNESCO Declaration.

³⁶⁸ Federico Lenzerini, *‘The UNESCO Declaration concerning the International Destruction of Cultural Heritage: one step forward and two steps back’* (2003) *Italian Yearbook of International Law*, 131, 141 and Scovazzi, *La Dichiarazione sulla distruzione intenzionale*, 173-174.

³⁶⁹ This choice reflects the worry of reaffirming the non-binding nature of this document rather enforcing the protection of cultural objects, Federico Lenzerini, *‘2003 UNESCO Declaration’*, 21.

framework of their economic resource, to protect cultural heritage and to revise them periodically with a view to adapting them to the evolution of national and international cultural heritage protection standards”³⁷⁰. The Declaration also advises States to join the principal treaties on the international law of warfare and to promote the adoption of legal instruments that could guarantee a higher level of protection of cultural heritage³⁷¹. Article 5³⁷² contains a clarification that broadens the extent of the protection to any type of conflict and also to military occupation.

Article 8³⁷³ encourages States to take all the appropriate measures³⁷⁴, to cooperate with the other States involved, to define each one’s competences on the alleged people accused of having committed unlawful acts within their territory, and to exemplify the adequate criminal sanctions to punish them.

The provision established by Article 10 is also very important as it invites States to take every possible measure to spread and promote the present UNESCO Declaration on the intentional destruction of cultural heritage also among vulnerable communities³⁷⁵.

2.3.3 STATE AND INDIVIDUAL RESPONSIBILITY

Article 6 and 7 that deal with, respectively, state responsibility and criminal individual responsibility, are without any doubt the most significant provisions of this Declaration. Article 6³⁷⁶ affirms that the State which intentionally destroys cultural heritage of great importance for humanity or which intentionally abstain from taking the most appropriate measures to stop, prevent or obstacle every form of intentional destruction of cultural heritage takes responsibility in accordance with

³⁷⁰ Article 3.2, 2003 UNESCO Declaration.

³⁷¹ Article 3.4, 2003 UNESCO Declaration.

³⁷² Article 5, 2003 UNESCO Declaration; Lenzerini, *‘2003 UNESCO Declaration’*, 18.

³⁷³ Article 8, 2003 UNESCO Declaration.

³⁷⁴ According to IL.

³⁷⁵ Article 10, 2003 UNESCO Declaration.

³⁷⁶ Article 6, 2003 UNESCO Declaration.

international law³⁷⁷. In the final text of the Declaration it is stated that the obligations risen by a crime lie on all the States, regardless their UNESCO membership. appropriate measures, in accordance with international law, to establish jurisdiction over, and provide effective criminal sanctions against, those persons who commit, or order to be committed³⁷⁸, acts of intentional destruction against cultural heritage of great importance for humanity, whether or not it is inscribed on a list maintained by UNESCO or another organization''³⁷⁹. The Declaration rejects the possibility of punishing the perpetrator on the basis of universal jurisdiction. What it establishes is only a prompt duty to cooperate with the other States involved, namely those that have a territorial or nationality link with the destruction³⁸⁰. Moreover, these Articles do not specify the consequences arising from intentional destruction, such as restoration or compensation for the damages occurred, but only make a general reclaim to IL provisions.

2.3.4 THE LIMITS OF THE DECLARATION

According to a part of the doctrine, the Declaration in its final version does not realize the aim of clarifying the uncertainties and gaps in IL on this matter³⁸¹. Moreover, the fact that an instrument of not-binding nature as a Declaration was chosen demonstrates the preference of States for a political instrument rather than a juridical one³⁸².

However, the Declaration is not considered neither harmful nor useful because of the defection of its content. For someone it is a step backward³⁸³ because it does not

³⁷⁷ Article 8, 2003 UNESCO Declaration.

³⁷⁸ Here emerges the issue of responsibility for command that is no more accepted as a justification for the crimes committed according to orders received by superiors. Maugeri, *La Tutela dei Beni Culturali nel Diritto Internazionale penale*, 189.

³⁷⁹ Article 7, 2003 UNESCO Declaration.

³⁸⁰ Tullio Scovazzi, *La Dichiarazione sulla distruzione intenzionale del patrimonio culturale*, in Paolo Benvenuti and Rosario Sapienza, *La tutela internazionale dei beni culturali nei conflitti armati* (Giuffrè, Milano, 2007), 173.

³⁸¹ Scovazzi, *ibidem*.

³⁸² Scovazzi, *ibidem*.

³⁸³ Lenzerini, 'The UNESCO Declaration', 143.

recognize the most relevant results related to the evolution of IL on the protection of cultural heritage. For these reasons, some academics consider this document as a lost opportunity, endorsing a static and outdated notion of cultural heritage that does not take in account the importance of cultural heritage for the identity and belonging of a community³⁸⁴.

On the contrary, another part of the doctrine deems the Declaration as a strong reaffirmation of the deep concern of the international community in preventing the destruction of cultural heritage and in the punishment of the perpetrators. The latter opinion has to be preferred since the Declaration reflects a growing political consensus at international level on the opportunity³⁸⁵ of holding responsible the States for the intentional destruction of cultural heritage occurred in their territory³⁸⁶. The Declaration alone is not sufficient to prevent the future acts of destruction, but it certainly represents a new statement on the necessity to punish these crimes that affect the entire international community³⁸⁷.

2.4 PROVISIONS ON THE PROTECTION OF CULTURAL HERITAGE AS CUSTOMARY RULES

According to this vision now it is necessary to figure out if some provisions regarding the protection of cultural property reached the nature of customary law or not. Many IHL rules which are covered by treaties not universally ratified exist as CIL. "State practice has gone beyond existing treaties and expanded the rules applicable to NIAC", so CIL extends the legal rules applicable to NIAC. To begin with, Article 27 of the Hague Regulations, a key provision on the protection of

³⁸⁴ Generality and caution of the final text, the lack of a claim to the notion of 'crimes against the cultural heritage of humankind, the insertion of the art. VI and VII with their expression 'extent provided for by international law' and 'in accordance with international law' confirm all this disappointment; Zagato, *La Protezione*, 246.

³⁸⁵ And the necessity.

³⁸⁶ Zagato, *La Protezione*, 246

³⁸⁷ Jan Hladik, 'The UNESCO Declaration concerning the International Destruction of Cultural Heritage' (2004) Vol. 9 No. 3 Art Antiquity and Law, 215, 236.

cultural property during armed conflicts, is argued to have customary nature.³⁸⁸ Even Article 16 of AP II that prohibits any act of hostility against cultural and historical sites and monuments is deemed as a rule of customary nature by the ICRC customary IHL Database³⁸⁹. The customary international humanitarian study of the ICRC claimed the customary nature of the rule that imposes to belligerents to avoid “damage to buildings dedicated to religion, art, science...”³⁹⁰ during armed conflicts. Even if this study affirmed the customary nature of the prohibition of theft, pillage, vandalism and misappropriation³⁹¹, States’ practice is less broad in this case than in the one characterizing the prohibition of attacks against cultural properties. In *Tadic*, the ICTY declared that the rule set forth in Article 19 of the 1954 Hague Convention³⁹² on the protection of cultural heritage in NIAC is a rule with customary character. Also Article 4, paragraph 1 to 3 of this convention, stated that the duty of protecting cultural properties during the ongoing of the hostilities is recognized as a rule of CIL³⁹³. Moreover, we cannot forget the customary nature of the principle of distinction which requires all actors to make a difference between military objectives and civilian objects and consequently forbids any attack against civilian properties, a category which covers cultural sites and works³⁹⁴. To confirm these conclusions, some international tribunals stated that NSAG are bound by IHL, and so have rights

³⁸⁸ Regulation concerning the Law and Custom of War on Land annexed IV Hague Convention on the Law and Custom of War on Land, 18 October 1907; see for example, *Prosecutor v. Kordic & Cerkez*, (Judgement) IT-95-14/2-T, (26 February 2001), para 362 where it referred to “the custom codified in Article 27 of the Hague Regulations” and *Prosecutor vs Tadic* (Decision on Defense Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72(2 October 1995, para 87.

³⁸⁹ ICRC Study on customary International humanitarian law rule 38-39 and Jean Marie Henckaerts & Louise Dowsald –Beck, *Customary International Humanitarian Law* (Vol 1, Cambridge University Press, 2005), 34.

³⁹⁰ ICRC Study on customary International humanitarian law rule 38; Henckaerts & Dowsald – Beck, *ibidem*;

³⁹¹ ICRC Study on customary International humanitarian law rule 40; Henckaerts & Dowsald – Beck, *ibid*, 723-813.

³⁹² Article 19 of the 1954 Hague Convention, which uses the term “parties” rather than ‘States’, to recall the duty of all actors of the conflict to avoid attacks on cultural sites.

³⁹³ *Prosecutor v. Tadic*; (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995) para 127 and 98, and *Prosecutor v. Strugar*, (Trial Chamber Judgement) IT-01-42-T, ICTY (31 January 2005), para 229.

³⁹⁴ Also the principle of proportionality and the requirement to take all feasible precautions in attack are deemed as customary rule as settle in the CIHL Study carried out by the ICRC; Arimatsu and Choudhury, ‘*Protecting Cultural Property in Non-international Armed Conflicts: Syria and Iraq*’ (2015) Vol 91 No. 1 International Law studies 641, 683.

and obligations because of their participation to an armed conflict³⁹⁵. The existence of an armed conflict is a necessary requirement for the application of IHL as stated by the Supreme Court for Sierra Leone, ICTY and ICJ in Nicaragua case³⁹⁶. It is reasonable and necessary, in my opinion, that cultural and civilian properties benefit from the same protection regardless of the nature of the conflict and of the entities involved in it³⁹⁷. According to this perspective, some rules are considered fundamental such as the ones that punish the crime of genocide, crimes against humanity and war crimes because of their heinous character. The provisions that condemn these crimes, considered as “international crimes”, address every entity and their punishment is not a choice of states, but it is a duty³⁹⁸. The recent conflict that has interested Sierra Leone is an important example of the prosecution of acts committed by NSA as “international crimes”: notwithstanding the amnesty granted to the responsible, the UN declared that the amnesty could not include international serious crimes that should be prosecuted by other States³⁹⁹. As mentioned before in this work, the destruction of cultural heritage falls within the category of war crimes or crimes against humanity⁴⁰⁰, thus another basis to hold NSA responsible for their attacks against cultural property is the necessary prosecution of these international crimes.⁴⁰¹

³⁹⁵ It has to be added that many States for this reason refuse to recognize themselves involved in NIAC, because in this case the combatants of NSAG would enjoy major grants in respect to consider them as ordinary criminals subject only to domestic law; Schabas *Punishment of Non-State Actors in Non- International armed conflict*, 920.

³⁹⁶ *Nicaragua v. United States* (Merits) (27 June 1986), para. 201

³⁹⁷ Orla Marie Buckley, *‘Unregulated Armed Conflicts’*, 844-845.

³⁹⁸ Schabas, *‘Punishment of Non-State Actors’*, 910.

³⁹⁹ States are able to prosecute international crimes that did not occur within their territory and without the involvement of their citizens under the principle of universal jurisdiction; thus was clearly established that war crimes and crimes against humanity have to be prosecuted as “international crimes”, therefore also when committed by non-state actors in NIAC and NSA can be hold responsible on this basis, Schabas, *ibid*, 922-923.

⁴⁰⁰ If before was established that there were no international crimes in NIAC, subsequently was stated that certain types of crimes against humanity constitute “international crimes” also when perpetrated during peacetime *and a fortiori*, during NIAC; As stated in Tadic, “it is a settled rule of customary international law that crimes against humanity do not require a connection to international conflicts” thus the type of conflict in which they are committed is indifferent. This develop was also endorsed in the Rome Statute; Schabas, *ibid*, 919-921.

⁴⁰¹ Schabas, *ibid*, 911-912.

Finally, the protection of cultural heritage cannot be separated from the international human rights law (IHL) perspective, because cultural rights fall within the category of human rights, at first sight it may seem that they have to be respected also by NSAG involved in armed conflicts. For instance the Commission of Inquiry in Syria found out that “a minimum human rights obligations”, that can be considered as peremptory norms, bind not only States but also non-state collective groups⁴⁰². Even if human rights treaties do not explicitly impose duties to NSAG, the Commission claimed that these groups are subject to customary human rights law when they exercise *de facto* control over a portion of territory. This is due to the fact that human rights seek to protect individuals from “any sort of oppressive power, regardless its source”⁴⁰³. Many international instruments demonstrate that States are not currently the only addressees of IHRL, for instance the Convention against Torture and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts also bind NSAG⁴⁰⁴. These references reflect a trend that considers NSAG bound also to IHRL if certain circumstances are fulfilled. This perspective is valid for those NSAG that possess international “limited personality”⁴⁰⁵ and it broadens the protection of HR also during armed conflicts. Although actually, in my opinion cultural rights cannot be considered as peremptory norms according to the current structure of IL. Nevertheless, considering cultural rights as *jus cogens* will consent the expansion of the safeguarding duty of every individual’s right to enjoy its culture. Cultural human rights in this perspective may be applied in case of armed conflicts, in peacetime and also in situations of clashes which do not reach the threshold of an armed conflict for which IHL is not at stake⁴⁰⁶. These conclusions are supported by the February Report of the Commission of

⁴⁰² Tilman Rodenhauer, ‘Human Rights Obligations of Non-State Armed Groups in Other Situations of violence: The Syria Example’, (2015) Vol. 3 International Review of Law, 1.

⁴⁰³ Rachel McCorqudale, ‘Overlegalizing Silences: Human Rights and Non State Actors’ (2002) Vol. 96 American Society of International Law, 388.

⁴⁰⁴ Another recent Convention that addresses also NSAG is the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, in particular its Article 7; Rodenhauer, ‘Human Rights Obligations of Non-State Armed Groups’ ,6.

⁴⁰⁵ Rodenhauer, *ibid*, 4.

⁴⁰⁶ Rodenhauer, *ibid*, 6.

Inquiry that expressly stated how human rights of peremptory nature bound the SFA⁴⁰⁷, the same concept was confirmed in the August Report⁴⁰⁸.

Although, at present, cultural rights cannot be regarded as human rights of peremptory nature, but in the future things maybe could change, considering how the intentional destruction of cultural heritage affect the existence of the targeted community.

⁴⁰⁷ Human Rights Council, Report of the International Commission of Inquiry on the Syrian Arab Republic A/HCR/21/50 (February) Annex II, para. 10.

⁴⁰⁸ The August Report of the Commission of Inquiry stated that the FSA was bound to human rights of customary nature, thus differing from the peremptory nature of human rights used in the February Report, although this difference the substance remains the same. HRC, *ibid*, Annex II, para. 10.

CHAPTER 3

THE DESTRUCTION OF PALMYRA AND THE POSSIBLE WAYS TO PROSECUTE ISIS

Summary: 3.1 THE DESTRUCTION OF PALMYRA; - 3.1.1 Palmyra: the Bride of the Desert, the emblem of unconventionality and multiculturalism, a loss for all mankind; - 3.1.2 ISIS's strategy: the use of cultural heritage as a war tool; - 3.1.3 The international provisions breached by ISIS for the destruction of cultural heritage; - 3.2 DESTRUCTION OF CULTURAL HERITAGE AS AN INTERNATIONAL CRIME; - 3.2.1 Why we protect cultural heritage; - 3.2.2 Other studies case: a brief comparison; - 3.2.2.1 The destruction of Timbuktu; - 3.2.2.2 The destruction of the Buddhas of Bamiyan; - 3.2.3 Nazi cultural crimes and some proceedings before the International Military Tribunal; - 3.2.4 Convictions handed down after the Balkan war about the intentional destruction of cultural heritage by ICTY; - 3.2.5 Al-Madhi Judgement; - 3.2.6 Rethinking 'cultural genocide'; - 3.3 PROSECUTING ISIS; - 3.3.1 Isis as a non-state armed group; - 3.3.1.1 The State-centric nature of IL and the reluctance of States in recognizing NSAG; - 3.3.1.2 The definition of NSAG; - 3.3.2 The difficulties on holding responsible non-state organized groups responsible under international criminal law; - 3.3.3 Holding non-state armed groups responsible under customary international law; - 3.3.3.1 Does International Humanitarian Law apply to NIAC?; - 3.3.3.2 The "Functional Personality" of Non- State Armed Groups and customary international law; - 3.3.4 Options for to prosecuting of ISIS members; - 3.3.4.1 Domestic Courts; - 3.3.4.2 The International Criminal Court; - 3.3.4.3 Ad hoc international courts; - 3.3.4.4 The principle of Universal Jurisdiction; - 3.3.4.5 Prosecuting foreign fighters.

3.1 THE DESTRUCTION OF PALMYRA

3.1.1 PALMYRA: THE BRIDE OF THE DESERT, THE EMBLEM OF UNCONVENTIONALITY AND MULTICULTURALISM, A LOSS FOR ALL MANKIND

The armed conflict which is actually affecting Syria¹ is causing an extensive damage

¹ The civil war officially started on 15 march 2011; Paul Matthiae, *Distruzioni, saccheggi e rinascite*,

to Syrian² cultural heritage³, including all six World Heritage Sites, which on June 2013 were inserted in the List of World Heritage in Danger⁴ with the intent to mobilize all possible assistance for the safeguarding of the listed properties. Of all these sites of extraordinary archeological significance, I will analyze only the destruction of Palmyra for its particular role played in the history of the Middle-East as a symbol of tolerance and coexistence.

The ruins of Palmyra are in the Syrian Desert: it is an archeological Greek-Roman city also known as the Bride of the Desert, admired by millions of visitors from every country⁵. It is famous for being a caravan oasis on the Silk Road, a place out of time and different from the other Syrian cities.⁶ The Palmyrenes were renewed merchants and they were a combination of Arabs, Arameans and Amorites. They converted to Christianity during the fourth century and to Islam during the Islamist conquests⁷. They spoke Palmyrene, a dialect of Aramaic, but also Greek was well known and used mostly in commercial and diplomatic exchanges, but after the Islamist conquests these two languages were replaced by Arab. It became a Roman colony during the third century, but it was not comparable to the other towns of the Roman Empire since it was the cradle of unconventionality and multiculturalism, representing a combination of elements from Aramaic, Arab, Persian, Syrian Hellenism, West and East⁸. This city has always remained itself, it neither became a Roman expression nor a Hellenist one⁹. It stood out for the pacific coexistence between the different cultures that have always distinguished this site. It contains

gli attacchi al patrimonio artistico dall' antichità all' Isis (Mondadori Electa 2015), 236.

² These six sites are: the Ancient City of Damascus, Ancient City of Basra, Site of Palmyra, Ancient city of Aleppo, Crac des Chevaliers and Qal' at Salah el-Din and Ancient villages of Northern Syria; Observatory of Syrian Cultural Heritage , UNESCO, <http://en.unesco.org/syrian-observatory/built-heritage>.

³ These six sites are: the Ancient City of Damascus, Ancient City of Basra, Site of Palmyra, Ancient city of Aleppo, Crac des Chevaliers and Qal' at Salah el-Din and Ancient villages of Northern Syria; Observatory of Syrian Cultural Heritage , UNESCO, <http://en.unesco.org/syrian-observatory/built-heritage>.

⁴ UNESCO, World Heritage Committee Report, WCH-13/37.COM/7B (5 July 2013, Paris), 114-118.

⁵ Paul Veyne, *Palmira, Storia di un tesoro in pericolo* (Garzanti Libri, 2016), 11-14.

⁶ Veyne, *ibidem*.

⁷ Veyne, *ibid*, 50.

⁸ Veyne, *ibid*, 51.

⁹ Veyne, *ibid*, 103.

monumental ruins dating back to the first century: the Temple of Bel, the Lion-shaped statue dedicated to Al-Lat, the Temple of Baalshaim and the Great Colonnade of the II century¹⁰.

Since early 2012, the fight between the Syrian armies and opposition forces involved the ruins of Palmyra¹¹ as Assad's military units were lined up in the core of the city to arrange a military base¹². Isis began to destroy many ancient sites of the Syrian territory and this city was not spared: it became a witness of the destructive madness that is a shame for the entire international community¹³. Due to the ongoing of the conflict many ruins were targeted, but the widespread illegal excavations aggravated the situation.¹⁴ In mid-May 2015, Palmyra became the setting of a major crash between the government's forces and Isis troops, and on 20th May the city was conquered by Isis militants. Fortunately, before the defeating of the government troops, Syrian authorities succeeded in transferring many artworks to Damascus, saving them from sure destruction or confiscation¹⁵. In early July, the Islamic State (IS) troops destroyed the 2000-year-old lion-shaped Al-Lat statue positioned at the entrance of the city: it was built to worship the god Al-Lat, thus it was in open contrast with Isis's iconoclastic view of Islam¹⁶.

On 23rd August 2016, Official sources of Damascus and of the Committee for the safeguarding of cultural heritage notified that Isis razed to the ground the Baal Shamin Temple, built in the I century and completed in the II century a. C. claiming

¹⁰ Veyne, *ibidem*.

¹¹ The city of Palmyra was also entitled as national monument by the Syrian government, in accordance with the Syrian Antiquities Law, Site of Palmyra, UNESCO, <http://wch.unesco.org/en/list/23>.

¹² Palmyra is surrounded by gas and oil field, which is another reason that explains its targeting by Isis. Luise Arimatsu and Mohudha Choundhury, *'Protecting Cultural Property in Non-International Armed Conflict: Syria and Iraq'* (2015) Vol 91, International Law Studies, 641, 659.

¹³ Matthiae, *Distruzioni saccheggiate e rinascite*, 230.

¹⁴ Accordingly to the Directorate General of Antiquates and Museums, between 2012 and 2015, '125 cultural objects were confiscated by authorities in Syria, Italy and Lebanon'. Although the total number of antiquities looted from Palmyra is still unknown. Ali Cheikhmous, *'Palmyra: Heritage Adrift'*, Special Report from the Association for the Protection of Syrian Archeology (ASAP) on all the Damages done to Archeological Sites between February 2012 to June 2015 (29 June 2015), 50.

¹⁵ Cheikhmous, *ibid*, 54.

¹⁶ They were three meters tall and weighs 15 tons. Directorate-General of Antiquities & Museums, *'Palmyra: ISIS Members Destroyed Famous Lion-Shaped Al-Lat Statue'*, (30 June 2015).

it was idolatrous¹⁷. Two days later, IS army blew up the Kithot, Jamblique, and Elahbel Funeral Towers in three separate attacks¹⁸. On 30th August 2015, IS terrorists destroyed the Temple of Bel, a masterpiece of the most ancient Roman architecture of the East, claiming to have used 30 metric tons of explosives. The next week, the Arch of Triumph was also destroyed by an explosive device¹⁹. On 27th April 2016, UNESCO reported that even Palmyra's Museum had been considerably devastated. The Islamic State did not limit its destruction to Palmyra: it targeted the Roman ruins in Bosra and the frescoes of Nimrud that constitute the gravest mockery of alabaster sculptures. The attacks were carried out with the careful placement of explosives around the walls of the Northern-West Palace of Nimrud, also known as the 'Juniper Palace'. The appalling images of these destructions posted on a ranting video to celebrate these horrible deeds were confirmed by the satellite images, demonstrating that Isis threats had become reality²⁰.

This destructive logic seems to be based on access and opportunity: the *de facto* dominance allowed them to carefully plan the attacks against these sites as evidenced by the precision used in the destruction of the Temple of Bel. This campaign against idolatry led to the public beheading of the museum's curator, Khaled Al-As'ad, and to the exposure of his body with the severed head between his legs alongside a placard with the word "heretic"²¹. According to numerous press accounts, al-As'ad was murdered for protecting Palmyra antiquities. Other sources claim he was tried on seven charges by an Isis court in June 2015, especially for his collaboration with Assad and Iran. The main argument against him is that IS considered Palmyra idolatrous, polytheistic, and blasphemous²². The awful murder of a fair man, who only faithfully served his country, was committed to disseminate terror on the Palmyra population²³. After these devastations, the Islamic State released a few videos entitled 'Smashing Idols', attributing their devastations to a

¹⁷ Matthiae, *Distruzioni, saccheggi e rinascite*, 328.

¹⁸ Kristin Campion, 'Blast through the Past: Terrorist Attacks on Art and Antiquities as a Reconquest of the Modern Jihadi Identity' (2017) Vol 11 No. 1 Perspective on Terrorism, 1, 6.

¹⁹ Campion, *Blast Trough the Past*, 329.

²⁰ Matthiae, *Distruzioni, saccheggi e rinascite*, 243.

²¹ Campion, *Blast Trough the Past*, 6.

²² Campion, *Ibidem*.

²³ Matthiae, *Distruzioni, saccheggi e rinascite*, 244.

'divine order' imposed by the Prophet Mohammed that encouraged the destruction of icons and idols. As a matter of fact, the site of Palmyra and other towns targeted by this iconoclastic fury were chosen mainly for the cultural significance as they embodied the values of tolerance, respect and coexistence. All the videos or the tweets posted to celebrate the supremacy of the Islamic State on ruins that had survived the flow of time were shared worldwide to get the maximum audience and to increase Isis's *aura* of invincibility against the impotence of the Western countries. Moreover, the increasing importance of Isis's ability in exploiting social media explains the fact that these sites were chosen for their colonnades or agora as these supported the performance. The symbolic importance of Palmyra for the Islamic State became evident in late 2016 when this terrorist organization reconquered the city after it having been expelled by the Russian and Syrian troops²⁴. The reason for this appears mainly symbolic. The Russian Government, which intervened alongside the Assad's army forces, arranged a musical concert among the ruins to celebrate its victory, which was transmitted worldwide by satellite televisions. During the retaking of Palmyra in March, the medieval citadel was further damaged due to the Russian bombardments and it was reported that a temporary Russian military base had been located inside the archeological citadel, turning it into a potential military objective²⁵. It was probably too weak the Russian image that IS decided to reconquer Palmyra as a symbolic slap in the face of Russia²⁶.

Palmyra was inscribed in the World Heritage List for its incomparable cultural significance in 1980 and in 2013 it was inserted in the List of World Heritage in Danger. UNESCO reported that the main factors that put the city in danger were and remain the destruction and damage due to the clashes and the lack of a management plan, but also the extensive illegal excavations in the Valley of Tombs and in the Camp of Diocletian²⁷. On 2nd March 2017 fortunately the Syrian Army retook control

²⁴ Campion, *Blast Trough the Past*, 7.

²⁵ UNESCO reported that the Citadel was being used for military purposes and the complete archeological site was being used for the movements of military vehicles, UNESCO, World Heritage Committee Report (16 may 2014, Paris) WHC-14/38.COM/7A.Add.

²⁶ Campion, *Blast Trough the Past*, 7.

²⁷ UNESCO <http://whc.unesco.org/en/list/23>.

of the city²⁸, but the damages are by now very serious and the cultural identity of this desert treasure is lost forever.

3.1.2 ISIS'S STRATEGY: THE USE OF CULTURAL HERITAGE AS A WAR TOOL

The Islamic State of Iraq and Syria (Isis) does not only target people, but also cultural heritage in its fight to establish a new Caliphate under its extremist religious vision. This terrorist organization is responsible for extensive destructions and damages to cultural sites famous all over the world in order to provoke international concern and resentment²⁹. These devastations always occurred without any chance to be justified by military necessity³⁰. This evil plan against the cultural estate of whole humankind is carried out to demonstrate the impotence of the rest of the world, in particular the Western countries' incapacity of ending their destructive acts. This devastation displays a similar *modus operandi* through the placement of explosive around the cultural site, sometimes combined with the warning to people to stay away from its vicinity³¹. The attacks against artworks and archeological sites are committed within a new form of terrorism, characterized by the "convergence of network social media and the ongoing of the hostilities"³². We are assisting to the birth of a "socially mediated terrorism"³³, realized through the use of the social network to obtain the maximum audience within a sophisticated propaganda and media strategy.

In large areas in Northern Syria, many Christians, Sunnis and Shiites holy places and sanctuaries of great artistic and architectural value were destroyed³⁴. Isis's fury

²⁸ Palmyra: Syrian forces 'completely retake' IS-held town, BBC News (2 March 2017), <http://www.bbc.com/news/world-middle-east-39147612> (last visited on 22 August 2017).

²⁹ Claire Smith, Heather Burke, Cherrie de Leulien and Gary Jackson, 'The Islamic State's symbolic war: Da'esh socially mediated terrorism as a threat to cultural heritage' (2015) Vol. 16 No. 2, Journal of Social Archeology, 164, 171.

³⁰ Article 4, 1954 Hague Convention on the Protection of Cultural Heritage In The Event Of Armed Conflict (hereafter 1954 Hague Convention).

³¹ Smith *et alia*, 'The Islamic State's Symbolic War', 164.

³² Smith *et alia*, *ibidem*.

³³ Smith *et alia*, *ibidem*.

³⁴ Matthiae, *Distruzioni, saccheggi e rinascite*, 238.

displays the extreme religious fanaticism deriving from Salafism³⁵ which considers every worship site, even in memory of Islamic masters and heroes, an unforgivable sign of heresy contrary to pure original Islam religion³⁶. Isis's fight against cultural heritage is carried out following an iconoclastic vision that entails destruction or mutilation³⁷ of religious icons and other representations not in line with its creed. The philosopher Bruno Lautor believes that "iconoclasts are those who destroy with the belief that a utopian order lies behind or beyond the structures they shatter"³⁸. Through this iconoclast destruction the Islamic State attempts to purify its controlled territories. The fight against idolatry becomes a tool to claim its control over the local population, ruling every new conquered territory imposing this extremist religious belief³⁹. As a Caliphate, Isis claims religious, political and military authority over all Muslims. Iconoclasm represents an element of theological and political unity, and the attacks against cultural heritage have been and continue to be the most advertised campaign through videos posted on internet and on social networks⁴⁰. This systematic attack against cultural sites and artworks constitutes an "overall attack"⁴¹ on culture involving also Islamic works of art representing an unacceptable form of idolatry. Irina Bokova, the General Director of UNESCO, has often defined this destructive operation as a "cultural cleansing"⁴² that involves not only Syria, but also Iraq and other areas of the Middle East. According to the statement of John

³⁵ Salafism is a deep and sincere religious movement that fights for the recovery of the Islam purified from the traditionalism of the Official Islam, it brought added value to the Batin, the inner meaning of Koran, instead of the Zahir, the exterior one. Accordingly this vision Official Islam and its religious practices are associated to the Western invaders, Paolo Gonzaga, '*Chi sono i salafiti?*', Arab media Report, Dialogues on civilization, <http://arabmediareport.it/chi-sono-i-salafiti/> last access May, 2017.

³⁶ Matthiau, *Distruzioni, saccheggi e rinascite*, 239.

³⁷ Frequently Isis Iconoclasm involves the mutilation of icons striking heads, eyes and face, Matthieu, *ibidem*.

³⁸ Bruno Lautor, '*An attempt at a Compositionist Manifesto*' (2010) Vol. 41, New Literary History, 471, 479.

³⁹ Smith et alia, '*The Islamic State's Symbolic War*', 168.

⁴⁰ This terrorist organization demonstrates everyday their great sophistication in their military and political strategy Smith, *ibid*, 168.

⁴¹ Federica Mucci, '*Intentional destruction of cultural heritage by Isis: the reaction of the International Community against the specific aspect of the aggression to peace and human rights*' (2016) Vol 2 N. 1 Peace Processes Online, 1,5.

⁴² Gabriela Gestoso Singer, '*Isis's War on Cultural Heritage*' (2015) Centro de Estudio de Historia de el Antiguo Oriente, Pontifical Chatolic University of Argentina, 4.

Kerry⁴³, it is a “purposeful ideological destruction” that injured “irreplaceable evidence of ancient life and society and even involves a catastrophic assault on the Western countries’ engagement in the protection of cultural heritage”.

Within this “evil” plan, there are three main schemes of action: the first one is the use of smoke, mirrors and mock destructions, the second is constituted by shock, awe and censure and finally there is widespread practice of archeological sites’ looting⁴⁴. The first technique aims at exaggerating “the perception of power” of this organization, as in so doing “Isis creates an illusion of power to gain real power”⁴⁵. False destructions are used to test the possible reaction of the international community. An example of this practice can be found in the report of international news⁴⁶ about the destruction of the ancient walls of Ninevah in Iraq that proved to be false according to real satellite images. This demonstrates the increasing importance of networks in disseminating fake news conforming to a modern strategy of “psychological warfare”⁴⁷. Isis, instead uses the tactic of “shock, awe and censure” to obtain the maximum visual impact through social media, to hit the opponents and to push their overreaction⁴⁸. Many videos were posted on YouTube showing the destruction of both replicas and original works of art occurred at the Mosul Museum which was also acclaimed in the Islamic State Magazine, *Dabiq*⁴⁹. These performances are created through the spectacularization⁵⁰ of the devastations that can be considered as the re-enactment of the seventh century destruction of idols carried out in the Ka’aba, by Muhammad⁵¹. Isis’s strategy exploits the “ultra-modern imagery-machine”⁵² as these performative acts aim to charm benefactors, to recruit other fighters, to humiliate the local communities and to eradicate their sense of

⁴³ In September 2014 Singer, ‘*Isis’s War on Cultural Heritage*’, 21.

⁴⁴ Smith et alia, ‘*The Islamic State’s Symbolic War*’, 164.

⁴⁵ Smith et alia, *ibidem*.

⁴⁶ Occurred on 8 January 2015, Smith et alia, *ibid*, 173.

⁴⁷ Smith et alia, *ibid*, 164.

⁴⁸ Robert Green, *The 33 Strategies of War* (New York Viking, 2006), 77.

⁴⁹ Claire Smith et alia, ‘*The Islamic State’s Symbolic War*’, 168.

⁵⁰ New wars are more often fought on the ground of the image, in this “society of the spectacle” everything became image, Guy Debord, *La société du spectacle* (1992, Paris, 3edn, Les editions Gallimard), 21.

⁵¹ Omur Harmasah, ‘*ISIS, Heritage, and the Spectacles of Destruction in the Global Media*’ (2015) Vol. 78 No. 3 *Near Eastern Archaeology*, 170, 174.

⁵² Harmasah, *ibidem*.

belonging and their art expressions⁵³. On the other hand, censure highlights the weakness of the Western countries and their main institutions such as UNESCO and ONU and at the same time fosters the Isis conquests with great emphasis, as if these victories were originated directly from Muhammad's will. In this way, the local population is made more vulnerable because no other alternative to Isis's control seems to be possible. Through the spreading of the videos featuring the attacks against cultural heritage also the neighboring countries are affected by this aura of divine invincibility that surrounds Isis's deeds inviting people from all over the world to join the fight and at the same time inviting others sympathizers to act in the European countries⁵⁴. Ultimately, Isis leads the war against cultural heritage to finance the Caliphate. They destroy immovable large antiquities to carry out their propaganda while movable artworks are spared to be sold on the art illegal market of the Western and American countries. Since the expansion of the art market in the aftermath of WWII, new occasions for "new abuses on cultural heritage" have been provided⁵⁵. The looting of antiquities currently represents the second form of financing of this terrorist organization after oil sales⁵⁶. The Islamic State was able to transform the looting of archeological sites and artworks into a tested "business model", helping financing the establishment of the Caliphate. To this aim, they also employed local people in digging archeological sites in exchange for a rate on the monetary value of the treasures discovered⁵⁷, or sometimes imposed an Islamic "khum tax" on every item found by the civilians⁵⁸. To fight this criminal practice the UN Security Council issued on February 2015 pursuant Chapter VII of the UN

⁵³ Harmansah, *ibidem*.

⁵⁴ Here the "multi- directional approach" of Isis campaign; Harmansah, *ibidem*.

⁵⁵ Erik Nemhet, *'Cultural Security: The evolving role of art in international security'* (2007) Vol. 19 Terrorism and Political Violence, 19, 21.

⁵⁶ Moreover the sale on the art markets its facilitated by the removal of barriers from Northern Syria to Southern Turkey for the export of the antiquities thus Isis realized the institutionalization of the illicit export of archeological finds; House of Commons, 2015, Daily HaNSArd.12 Feb 2015:col 1002. Destruction of Historic Sites (Syria and Iraq), publication of the Uk Parliament; Claire Smith *et alia*, *'The Islamic States's Symbolic war'*, 170.

⁵⁷ Smith *et alia*, *ibid*, 180.

⁵⁸ This tax is not the same for all the localities, in Aleppo is 20%, in Raqqa 50% and even the material of the found increases the percentage, Al-Azm *'ISIS's antiquities Sideline'* New York Times (2 September 2014) <https://www.nytimes.com/2014/09/03/opinion/isis-antiquities-sideline.html?mcubz=0> (last visited on 22 August 2017) .

Charter the Resolution num. 2199 to deter the looting of cultural institutions and archeological sites and to prevent the trading of cultural objects illegally exported from Syria after the beginning of the uprising in March 2011.⁵⁹ This Resolution reaffirms the prohibition of trading cultural objects, which was already stated for Iraq⁶⁰. This Resolution does not only bind the UN member states to take all adequate measures to prevent the illegal trade of antiquities in Syria and Iraq, but also obliges states to hinder the illicit traffic of artworks within their boundaries⁶¹.

Turning to the attacks against cultural heritage, as said before in the Chapter 2, this practice has always characterized the ongoing of the conflict in order to subjugate the enemies. Nowadays, this conduct is very different because of its potential broader impact. Isis wants to hit the entire international community as it destroys the historical monuments placed within their controlled territories that can be considered symbols of Western *modus vivendi* and whose artistic and cultural enjoyment constitutes an inviolable human right.

Furthermore, there is a strong contrast between Isis's hatred for the Western way of life and their broad exploitation of Western technologies to achieve their goals and to strengthen their image in order to attract more volunteers⁶². The stubborn, ruthless and inexorable destruction of what makes peoples' identities characterizes this well-orchestrated savagery which derives from misinterpretations of the Islam holy book⁶³. These actions are meant to eradicate millennia of coexistence between peoples of different ethnicity, cultures and religions with the aim to deny every dialogue, comprehension and coexistence, creating a dehumanized, totalitarian and

⁵⁹ UNSC Res 2199 (12 February 2015) UN Doc S/RES/1999; Luise Arimatsu and Mohububa Choudhury, *Protecting Cultural Property in Non-international Armed Conflicts: Syria and Iraq* (2015) Vol. 91 No. 1 International Law studies 641, 658.

⁶⁰ It has to be considered an important guideline to strengthen the UNESCO action to protect cultural heritage; UNSC Res 1843 (28 July 2003) S/RES/1843, par 7.

⁶¹ Many instruments already used were reminded by The General Director to fight this illegal trade, such as the Interpol's Stolen Works of Art Database, the UNESCO Database of National Cultural Heritage Laws and finally, the Emergency Red List of Cultural Objects at Risk; UNESCO Doc. CI/4100, of 6/3/2015, Federica Mucci, *Intentional Destruction of Cultural Heritage by Isis*, 13-14.

⁶² They cannot be considered as barbarians, as asserted by many, they know very well new technologies and use them in their favor. Every move is carefully planned within a well-orchestrated design to achieve their goals, nothing is left to chance.

⁶³ Matthiae, *Distruzioni, saccheggi e rinascite*, 245.

exclusivist culture out of history⁶⁴. The words of the Director General of UNESCO are emblematic of this barbarity: she declared that, within “cultural cleansing”, cultural heritage becomes the primary objective, as Isis strikes historical sites that belong to mankind to cause suffering. In the last years, culture has become a source of discrimination, separation, oppression and ethnic conflict instead of ensuring coexistence and peace. The Islamic State targets cultural heritage for its meaning and values, for its being bearer of tolerance and mutual respect, and thus seeks to cancel the common roots of the local communities⁶⁵. Bokova concluded by saying that at the beginning of the fight against Isis the protection of cultural heritage was not taken into account, because saving lives constituted the primary aim. While the latter aspect is absolutely fundamental, it is now clear that the fight against Isis does not involve a choice between people and ruins, it is a unique battle that we must win.⁶⁶

3.1.3 THE INTERNATIONAL PROVISIONS BREACHED BY ISIS FOR THE DESTRUCTION OF CULTURAL HERITAGE

Isis’s fury against cultural heritage has involved and continues to involve many area of Syrian territory. Palmyra was not the only site involved in this destructive campaign, many other sites were destroyed or plundered, such as the ancient citadel of Aleppo, whose Museum of Popular Traditions and National Museum were looted⁶⁷, the fortress of Crac des Chevaliers⁶⁸, the ancient city of Bosra⁶⁹, the Homs

⁶⁴ Matthiae, *ibid*, 244.

⁶⁵ Matthiae, *Distruzioni, saccheggi e Rinascite*, 245-246.

⁶⁶ Irina Bokova, General Director released this statement after the demolition of the Mar Elian monastery in the Homs region of the Central Syria, Matthiae, *ibid*, 246.

⁶⁷ Aleppo is one of the six sites inscribed in the World Heritage List, placed subsequently on the World Heritage in Danger list, UNESCO, World Heritage Committee, Report, 37th session; and Directorate General of Antiquities and Museums Syrian Arab Republic Ministry of Culture, State Party Report: State of Conservation of the Syrian Cultural Heritage sites (2014), DGMA UNESCO Report.

⁶⁸ Inscribed in the World Heritage List and then in the World Heritage in Danger list, UNESCO, World Heritage Committee, Report, 37th session and ‘*Syria Crusader Castle Damaged by Air Raid*’, Al Jazeera, (13 July 2013) <http://www.aljazeera.com/news/middleeast/2013/07/201371310630457364.html> (last visited on 22 August 2017).

⁶⁹ The city of Bosra is another World Heritage site, that contains ruins of the Roman, Islamic and Byzantine age; Directorate General of Antiquities and Museums Syrian Arab Republic Ministry

Citadel, the medieval al-Madiq Citadel in Hama province have been damaged by shell fire. Nor were Syria's Armenian Genocide Memorial Church in Deir ez-Zor nor the statue of the king of Hatra were spared⁷⁰. These attacks were deliberately carried out against cultural sites, the most serious destructions were committed wantonly and willfully within an attempt to purify the region from heretics and infidels by violating some domestic and international treaty provisions drafted to protect cultural heritage during armed conflicts.

Firstly, the Islamic State broke some provisions set forth in the Syrian Antiquities Law⁷¹ that was adopted to fight the widespread practice of looting and destruction of antiquities and which continues to apply also in case of armed conflict⁷². In particular Article 7 prohibits the destruction, transformation and damage of both movable and immovable properties by writing on them, or changing their features, and these are sanctioned with five to ten years⁷³. Moreover, the looting carried out by the Islamic State violates art. 57 which bans the trade of antiquities and which is punished with ten to fifteen years of imprisonment plus a fine of 100,000 to 500,000 Syrian Pounds⁷⁴. Also Article 26 has to be considered, because it prohibits the building of military facilities within 500 meters of registered immovable archeological and historical properties and it is sanctioned with one to three years of imprisonment plus fines⁷⁵. There is no preamble explaining the *raison d'être* of this law, but it can be argued that this Law was drafted to hit the practice of looting and smuggling that have always been frequent and made possible by the indifference of the Syrian authorities or, worse, their complicity.⁷⁶

of Culture, State Party Report: State of Conservation of the Syrian Cultural Heritage sites (2014), DGMA UNESCO Report.

⁷⁰ Neither the Iraqi territory was spared by this Iconoclastic fury; Singer, *'Isis's War on Cultural Heritage'*, 7.

⁷¹ Since these devastations were carried out in the Syrian territory since these devastations were carried out in the Syrian territory; Syrian Arab Republic, Ministry of Culture, DGAM, Antiquities Law, Legislative Decree n.222, 26 October 1963, last amended in 1999, English translation.

⁷² Marina Lostal, *'Syria's World Cultural Heritage and Individual Criminal Responsibility'*, (2015), International Review of Law 1, 5.

⁷³ Article 7, Syrian Antiquities Law, Legislative Decree (26 October 1963) (hereafter: Syrian Antiquities law) English translation http://www.unesco.org/culture/natlaws/media/pdf/syrianarabrepublic/sy_antiquitieslaw1963_engtof.pdf (last visited on 27 August 2017).

⁷⁴ Article 58, *ibidem*.

⁷⁵ Article 59(a); *ibidem*, Marina Lostal, *'Syria's World Cultural Heritage'*, 13.

⁷⁶ Lostal, *ibid*, 6.

At international level, the Islamic State violated many provisions regarding the protection of cultural heritage during armed conflicts and some of these reached the threshold of customary international law. To begin with, the wanton destruction of archeological sites, as it occurred to the ruins of Palmyra, was carried out in evident violation of the principle distinction which requires that all the parties of the conflict must distinguish between military objectives and civilian properties, and the latter have to be spared during the ongoing of the conflict. In fact during the hostilities, cultural property might be attacked only if it can be qualified as a military objective, according to the definition of 'military objective' provided in Article 52(2) of AP I⁷⁷. This indisputable rule is part of customary international law and so applies to every form of conflict, its internal or international nature not being a discriminating factor. Consequently, the parties have to do everything possible to identify the nature of the object to target, otherwise they will be held responsible under International Law. It must be said that many cultural sites in Syria maintained their strategic role for military operations thus becoming military objectives, but this is not the case of Palmyra and many other ancient sites of cultural significance that were destroyed intentionally with a discriminatory intent against what does not conform to Isis's religious creed. Moreover, the devastation of Palmyra's antiquities and monuments was committed for the most part when the city was already under the control of the Isis's militia, and no military advantage would have been obtained by its destruction and bombardment, thus in no way Palmyra could be considered a military objective⁷⁸. Even Article 53 of the AP I, which protects historic and religious buildings, applies only to IAC; art. 16 of AP II that delineates the same rule instead applies to NIAC and can be applied in this case. Isis's campaign against cultural heritage also breaks the provision set forth in Article 27 of the Hague Regulations⁷⁹

⁷⁷ Article 52(2), AP II to the Geneva Convention on the Protection of Victims in Non-international conflicts, (8 June 1977) (hereafter AP II).

⁷⁸ After the conquer of Palmyra Isis had no reasons to destroy the ancient artworks for military reasons, the destruction was committed only to hit the local population and the international community to establish a regime of terror based on a Salafist view of Islam.

⁷⁹ Article 27, Regulations Annexed to the Hague Conventions concerning the Customs and Law of War on Land, (18 October 1907) (hereafter Hague Regulations).

which is part of customary international law⁸⁰: it imposes the duty on the parties to spare, as far as possible, religious, artistic, scientific or charitable buildings,. After the conquest of Palmyra, the Islamic State got the entire control of the city exercising *de facto* its power over the territory and its population, entailing a situation of military occupation, thus even Article 56⁸¹ of the IV Hague Regulation that regards the protection of cultural heritage in case of military occupation⁸² was not complied with.

As for the 1954 Hague Convention, Article 19(1) has to be considered as it claims that during NIAC each party is bound as minimum to the obligations set forth in Article 4 on the respect of cultural property during the hostilities. As mentioned in the previous chapter, the parties must refrain from using cultural property and its surroundings in a way that would likely expose them to damage or destruction and forbids any act of hostility against them.⁸³ In no way the destruction of Palmyra and other archeological sites, carried out with the only purpose of destroying the religious and cultural memory of the local communities, can be justified by imperative military necessity which constitutes the only exemption provided by Article 4. These destructions were made according to cultural cleansing that does not involve any military consideration which could justify it. Furthermore, Isis's widespread activity of looting violates paragraph three of this Article⁸⁴ that bans every form of theft, misappropriation, vandalism and pillage of cultural property. This provision involves all kinds of actors, whether they are members of armed forces, organized armed group, criminal groups or local population as confirmed by

⁸⁰ Syria did not ratified this the IV Hague Convection, Annex , but this rule was considered as customary law in the case of *Prosecutor vs Tadic* (Decision on Defense Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) para. 27 and 98 and *Prosecutor v. Pavle Strugar* (Trial Chamber II) IT-01-42/1 (31 January 2005), para. 230; Lostal, '*Syria's World Cultural Heritage*', 7.

⁸¹ IV Hague Regulations, 1907, Article 56, that prohibits the attack of certain private properties during military occupation and provides for legal proceedings in case of its violation; Chapter II, para.3, 6

⁸² A territory can be considered as occupied if it goes *de facto* under the control of an enemy authority, Natalino Ronzitti, *Diritto internazionale dei conflitti armati*, (5 edn, Giappichelli,2014) , 270.

⁸³ Article 4, 1954 Hague Convention on the Protection of cultural Heritage in the Event of Armed Conflict adopted 14 May 1954, entered into force on 7 August 1956) 249 UNTS 240 (hereafter 54' Hague Convention).

⁸⁴ Article 4(3), 1954 Hague Convention.

the Military Manual on the protection of Cultural Property.⁸⁵ Both Article 4 and 19 are now integral part of customary international law⁸⁶, thus these provisions apply without any doubt to Syrian armed conflicts. As for the responsibility deriving from the destruction of cultural property, Isis's action violates the provision contained in Article 28⁸⁷ which provides for the States' prosecution of this type of criminal conduct. Nevertheless, Article. 85(d) of AP I sets the punishment of 'extensive destruction' of cultural property to which special protection has been accorded within the framework of a competent international organization⁸⁸. Even the Rome Statute listed attacks against cultural heritage among war crimes in Article. 8 (2)(b)(iv) ⁸⁹that applies to NIAC. Other important provisions violated are traceable in art. 5⁹⁰ of the UNESCO Convention on The Intentional Destruction of Cultural Heritage that imposes on the Parties the duty to take all possible appropriate measures to preserve and protect cultural heritage. Even the International Convention for the Suppression of Terrorist Bombing⁹¹ prohibits the 'extensive destruction of public places, facilities or system'. Furthermore, Article 20 of the ILC Draft Code cannot be forgotten as it prohibits the seizure, damage or willful damage to religious, charitable, education institutions and buildings dedicated to art and science, historic monuments or works of art, thus reaffirming how protection of cultural property⁹²is always an unavoidable matter involving humanitarian law. Moreover, in the Western world one of the cornerstone of modern societies is the

⁸⁵ Roger O'Keefe, *The Protection of Cultural heritage in Armed Conflict*, (1st edn, Cambridge University Press, 2006), 433.

⁸⁶ Isis's looting also violates Article 4(2)(g) that prohibits pillage during NIAC ; Lostal, 'Syria's World Heritage' , 10

⁸⁷ Article 28, 1954 Hague Convention.

⁸⁸ Francesco Francioni, 'Beyond State Sovereignty: The Protection of cultural Heritage as a Shared Interest of Humanity' (2003) Vol 25 Michigan Journal of International Law, 1219, 1226.

⁸⁹ Article 8 (2)(b)(iv) Rome Statute.

⁹⁰ Article 5, UNESCO Declaration on the Intentional destruction of Cultural Heritage (17 October 2003), http://portal.unesco.org/en/ev.php-URL_ID=17718&URL_DO=DO_TOPIC&URL_SECTION=201.html(Hereafter: 2003 UNESCO Declaration).

⁹¹ International Convention for the Suppression of Terrorist Bombing, adopted by the General Assembly of United Nations (adopted on 15 December 1997, entered into force on 23 May 2003) 2149 UNTS 256.

⁹² Article 20(e)(iv) , ILC Draft Code of Crimes Against the Peace and Security of Mankind, Article 20(e)(iv), (adopted by the International Law Commission at its forty-eighth session, in 1996, and submitted to the General Assembly) [A/CN.4/368](http://www.un.org/doc/6405/1/1/0/6405110.pdf) .

protection of human rights and in recent years cultural rights are gaining growing importance in the field of human rights. For instance, the concept of human dignity contained in the Universal Declaration of Human Rights (UDHR) involves the respect of cultural heritage that is part of peoples' identity, memory and civilization⁹³. This approach was also confirmed in the International Covenant on Economic, Social and Cultural Rights in Article 15⁹⁴ and in the International Covenant on Civil and Political Rights, in particular in the protection of cultural rights of minorities and indigenous people⁹⁵.

Holding ISIS for cultural heritage destruction results in the finding out whether a non-state armed group can be considered bound by some treaties' provisions that were not formally accepted. Recent conflicts increasingly involve non-state actors, while on the contrary inter-state hostilities are less frequent, but I will address this matter later in this work.

3.2 DESTRUCTION OF CULTURAL HERITAGE AS AN INTERNATIONAL CRIME

3.2.1 WHY WE PROTECT CULTURAL HERITAGE

Since the earliest history the devastation of cultural sites and works of art has always been believed a necessary step to annihilate the enemy. Even today this destructive conduct targets the tangible memory and the pride of a group that reflects its identity in numerous cultural expressions⁹⁶. Cultural property performs something more than solely 'property', it is a changing concept, an "ever-shifting dynamic"⁹⁷ notion

⁹³ Article 22, 18 and 27, Universal Declaration of Human Rights (10 December 1948) UNGA Res 217A, Francioni, *'Beyond State Sovereignty'*, 1212.

⁹⁴ Article 15, International Covenant on Economic, Social and Cultural Rights that recognize the right of everyone to take part in the cultural life, (adopted on 16 December 1966, entered into force on 10 January 1967) UNGA RES 2200 A

⁹⁵ Article 27, International Covenant on Civil and Political Rights UNGA Res 2200A (adopted on 16 December 1966); Francioni, *'Beyond State Sovereignty'*, 1213.

⁹⁶ Arimatsu and Choudhury, *'Protecting Cultural Property in NIAC'*, 652.

⁹⁷ Arimatsu and Choudhury, *ibidem*.

that is influenced by time and location and which deserves a higher level of protection for its additional value. This consideration is traceable in the words of S. E. Nahlik who compares the mortal nature of human beings with the immortal trace of its creativity embodied in artworks, and that is expressed in his famous phrase, *Vita Brevis - Ars Longa*⁹⁸. Cultural heritage bears 'symbolic value'⁹⁹ that originates from social and cultural processes that nowadays involve not only the nations' realities, but rather the international community. Safeguarding cultural patrimony "does not regard only monuments and stones, but involves identities and belongings and allows the transmission of values from the past to the future generations"¹⁰⁰. In the words of Irina Bokova "heritage made us unite as a sole community and it is what unifies us within a shared destiny"¹⁰¹. Cultural property creates identities and in this sense can both unify and separate. Cultural heritage "constitutes identities"¹⁰², in fact its protection safeguards 'human plurality and human diversity'¹⁰³. Thus culture constitutes an important vessel of peace, overtaking the contrast between different cultures through the pacific value of coexistence and respect of different cultural groups. It is a manifestation of diversity within the international community, but also within the territory of a single state, in fact the presence in a country of different cultural groups grants the 'Nations' pluralism'¹⁰⁴. Cultural diversity is strictly linked to the "evolutionary character"¹⁰⁵ of culture that allows a productive exchange and intercommunication between different ways of life and traditions¹⁰⁶.

⁹⁸ E. S. Nahlik, *La Protecion Internatinal des Bienes Culturles en Cas de Conflit Arme*, 120 *Recueil des cours de l'academie de droit international* 159(1967), translated in Jiri Toman, *The Road to the 1999 Second Protocol in Protecting Cultural Property in Armed Conflict*, (vol. 29, 2010), 19.

⁹⁹ Arimatsu and Choudhury, 'Protecting Cultural Property in NIAC', 652.

¹⁰⁰ Irina Bokova, Address at International Council on Monuments and Sites (ICOMOS) Gala to commemorate the 40th anniversary of the World Heritage Convention (2 December 2012).

¹⁰¹ Irina Bokova, *ibidem*.

¹⁰² Patrik J. Boylan, *Implementing the 1954 Hague Convention and its Protocols: legal and practical implications* (Boylan Report), (2006) Chapter 13.13.

¹⁰³ Arimatsu and Choudhury, 'Protecting Cultural Property in NIAC', 653.

¹⁰⁴ Francioni, 'Beyond State Sovereignty', 1209-1210.

¹⁰⁵ Francesco Francioni, *ibid*, 1221.

¹⁰⁶ As stated in Article 1 of the Universal Declaration on Cultural Diversity, (2 November 2001).

Culture can be considered as the common estate of mankind thus strictly linked to every human being¹⁰⁷. It embodies the cultural continuity of a community in contrast to limited human existence. Thus the “human dimension”¹⁰⁸ of cultural heritage emerges. It entails the protection of human rights and in particular the right to participate in the cultural life of the community¹⁰⁹. Of course this implies the necessity to punish the most serious violations, and only international law can achieve this aim rather single states’ law. Only international law can pass the antagonism and the lack of confidence which have always characterized different cultures¹¹⁰. Cultural heritage can become an important instrument to limit a state’s sovereignty, as the protection of cultural heritage also needs an action against the aspirations of the territorial state. This new form of safeguarding implies either the states’ acceptance of the directives or the intervention of the competent international organization when they wantonly destroy or damage, or fail to prevent the destruction of cultural heritage¹¹¹. Thus international law plays an irreplaceable role in the protection of cultural patrimony that has to be protected for its universal value¹¹² and not only its significance to one group or state. This new approach towards the protection of cultural heritage is completely in accordance with the jurisprudence of the ICTY¹¹³ where a new ‘holistic perspective’¹¹⁴ on cultural property made his way. Cultural heritage involves the benefit of humanity as a whole, overtaking the concerns of the sovereign states, thus making a collective interest of all population in the preservation of a legacy that belongs to mankind emerge, regardless of political, economic and ideological differences that distinguish

¹⁰⁷ Francioni, *‘Beyond State Sovereignty’*, 1221.

¹⁰⁸ Francioni, *ibidem*.

¹⁰⁹ Article 27 and 22 of the UDHR.

¹¹⁰ Francioni, *‘Beyond State Sovereignty’*, 1221.

¹¹¹ Francioni, *ibid*, 1220.

¹¹² ‘We can perceive cultural heritage of humanity t form its own universe, which is qualified by individual cultures and their products. As part of this human universe, a heritage resource will obtain ‘universal value’ so far as it is true and authentic expression of a particular culture’; Francioni, *ibid*, 1223.

¹¹³ In the next Paragraph I will analyze this jurisprudence studying many sentences issued on this theme.

¹¹⁴ Francioni and Gordley, *‘Enforcing International Law’*, 55.

the various countries¹¹⁵. Every attack against cultural sites or artworks affects the entire international community and this last cannot fail its duty to protect these properties that signify so much in term of knowledge and progress.

3.2.2 OTHER STUDIES CASE: A BRIEF COMPARISON

The destruction of cultural heritage is frequently undertaken by organized armed groups to achieve their goals. These can be the most disparate, such as the annihilation of local communities' memory, the imposition of a particular strict and intolerant religious creed, the conquer of a territory or more often a combination of them. The most famous examples are certainly the destruction of the Buddhas of Bayiman carried out by the Taliban, Al-Qaeda's devastation of the irreplaceable mosques in Timbuktu, the bombing of Dubrovnik and the Monstar Bridge during the Balkan war, but many other examples could be cited. I will analyze only the first two cases since they present many similarities with the devastations carried out by the Islamic State in Syrian and Iraqi territories.

3.2.2.1 THE DESTRUCTION OF TIMBUKTU

The crisis that affected Northern Mali was the result of many long-term factors, recent developments of regional terroristic activities and the aftermaths of the Libyan civil war in 2011. After the independence in 1960¹¹⁶, a strong resentment began to arise among the population of the northern Saharan territories towards the central government¹¹⁷. This was due to the state of abandonment and under-development that had characterized this zone for many years because of the

¹¹⁵ Maria Clelia Ciriello, *Il conflitto armato quale eccezionale fattore di rischio in un sistema internazionale di protezione dei beni culturali ispirato alla completezza*, in Paolo Benvenuti e Rosario Sapienza, *La Tutela Internazionale dei Beni Culturali* (Vol. 17, Giuffrè, 2007), 239.

¹¹⁶ Mali became independent from France on 20th June 1960 after being for almost 100 years a France colony, which belonged to the French Sudan.

¹¹⁷ The central government was located in Bamako.

indifference of Mali's government. Thus many Tuareg movements began to claim their independence from the central government and in 1994 the first rebellion against the Malian army forces took place in Gao, though it was crushed two years later¹¹⁸. In 2012 there was an open-uprising headed by a new insurgent movement, the Islamist Movement for the Liberation of Azawad¹¹⁹ (MNLA), that fought for the independence of the Azawad region. This movement was feed by those who had returned by the Libian civil war with new experience and new armaments. After the battle of Gao on 26-27th June 2012, MNLA and its main ally, Ansar-Dine, conquered the cities of Goa, Kindal and Timbuktu, and proclaimed Azawad's independence and established a new independent government. During these ongoing clashes a few Islamic extremist groups began to make their way in this zone and join the battle besides MNLA. After many disputes and MNLA's rejection of imposing Sharia to the local population, these groups revolted against MNLA's combatants. By that moment MNLA was easily eliminated and Ansar Dine¹²⁰, which was an affiliate of Al- Qaeda, got the control of the principal urban centers in Northern Mali¹²¹ with the aim of replacing the secular character of the country with a strict observance of Sharia. The most famous conquered city was surely Timbuktu, because this city was the center of Islam in Africa during the 15th and 16th century, a culturally fertile place for studies of religion, art and science and an important trade center, being a crossroad for caravans. Three mosques, envied by all the world for their spiritual and cultural significance, are located in this ancient city: Djingareyber, Sankore and Sidi Yahia. For these architectural jewels Timbuktu was inscribed in the World Heritage List in 1988¹²². The event that triggered Ansar-Dine's violent reaction against cultural heritage was the request of Malian government to insert Timbuktu

¹¹⁸ Kyla Branson and Henry Wilkinson, "*Analysis of the crisis in the Northern Mali*", in *Conflict over resources and Terrorism* (OECD Publishing, 2013), 9-90.

¹¹⁹ Azawad is a region of Northern Mali where at the time of the destruction was occurring a conflict for the secessionism from the central government; Branson and Wilkinson, *ibidem*.

¹²⁰ The term means: auxiliaries of Islamic religion; it is a terrorist group with a principal component Tuareg that was affiliated to Al-Qaeda, that began to operate in cooperation with AQIM and MUJAO, two other Islamic terrorist groups.

¹²¹ Gao, Kindal and Timbuktu, Armed Islamist group claims control in Northern Mali; Francesco Francioni and James Gordley, *Enforcing International Cultural Heritage Law*, (Oxford University Press, 2013) 59.

¹²² UNESCO Report, <http://whc.unesco.org/en/list/208>.

in the List of Cultural Heritage in Danger for the serious concern that the ongoing of the hostilities would have threaten the preservation of these religious sites¹²³. After this request, Ansar-Dine¹²⁴ began to destroy the cultural heritage of Timbuktu arguing that any icon, tomb or mausoleum diverted the worshippers' attention and devotion from their unity with God¹²⁵. The mausoleums were dedicated to saints and thus entailed the veneration of human beings in contrast with the belief that God is only one and the one that deserves respect and veneration¹²⁶. Ansar-Dine argued that this criminal action derived from a 'divine order'¹²⁷ to educate the future generations not to worship saints. Many seven-hundred-year old monuments were systematically and carefully damaged, such as the famous door of Sidi Yahia mosque that should not have been opened until the end of time according the legend¹²⁸. Other ancient mausoleums and buildings shared the same faith, as the tombs of Sidi Mahmoud, Sidi Montar and many others¹²⁹. Moreover, after these destructions, the offenders carried the clay of the destroyed mausoleums and statues outside the city to hinder any possibility of reconstruction. The entire international community strongly condemned this action: Irina Bokova¹³⁰, the Director-General of UNESCO, invoked the end of these terrible acts; the World Heritage Committee qualified this crime as "repugnant acts of destruction"; the UN Security Council threatened sanctions against Ansar-Dine. Also the Organization of Islamic Conference declared that the destroyed monuments and statues were 'part of the rich Islamic heritage of Mali' and that they had to be protected from religious extremists. Maybe the international community was not able to prevent this great loss for all humankind,

¹²³ Request accepted by the World Heritage Committee, inscription available at <http://whc.unesco.org/en/news/893>

¹²⁴ The terrorist group had announced every cemetery or toms in the city, G. Martinez, *Destruction of cultural heritage: a crime against humanity?*, *Destruction of cultural heritage in Northern Mali* (2015) *Journal of International Criminal Justice*, Vol. 13, No. 5 1073, 1080.

¹²⁵ According to an iconoclastic view of Sharia.

¹²⁶ Francioni and Gordley, *Enforcing International Cultural Heritage Law*, 60.

¹²⁷ Francioni and Gordley, *ibidem*.

¹²⁸ Francioni and Gordley, *ibidem*.

¹²⁹ Alpha Moya, Cheick el-Kebir, A.lwalidij and the Djingareyber cemetery, moreover of course many statues of saints were destroyed; Francioni and Gordley, *ibid*, 61.

¹³⁰ Director-General of UNESCO since 15 November 2009 <http://www.unesco.org/new/en/unesco/about-us/who-we-are/director-general/biography/> (last visited on 22 August 2017).

but it intervened to punish the perpetrators. The ICC Chief Prosecutor Fatuo Bensouda declared that the attacks against Timbuktu's cultural heritage constituted a war crimes under art. 8 of the ICC Statute and that she had the authority to investigate over these crimes¹³¹. In fact on 18th July the Chief Prosecutor received a request from Mali government to find out if anyone should be charged for these crimes. There was no hesitation in maintaining that Ansar-Dine's actions constituted violations of international law¹³². Mali is part of the ICC Statute, so the Court has jurisdiction over these conducts pursuant to Article 12.2¹³³. Essential for the configuration of a war crime is that the crimes must present a nexus with an armed conflict. The Azawad region was experiencing a situation of armed conflict that had begun in March 2012, since the beginning of the Tuareg rebellion. The fact that, after the battle of Gao, Ansar-Dine conquered the three main cities of the region does not entail the end of the hostilities, in fact the government's troops had never surrendered. Thus there was no reason to deny the ICC jurisdiction over Ansar-Dine's destructions. Consequently, in January 2013 the ICC Prosecutor formally initiated the investigations on the crimes committed in the Northern Mali which have occurred since July 2012. The investigation ended with the conviction of Al-Madhi¹³⁴ who was condemned for the destruction of Timbuktu cultural heritage. This conviction reflects how important the protection of cultural heritage has become in these years. Cultural heritage is strictly linked to the enjoyment of human rights and is a cornerstone of the modern society representing the values of dialogue, tolerance and coexistence that new extremist positions seek to annihilate. Behind these destructions there is the never-ending fight against idolatry, the same behind ISIS's strategy that destroys every idol or icon that offends the real God and pure Islam. The destructions carried out by Ansar-Dine seem to be more religiously motivated than ISIS's ones, in fact the Islamic State's principal aim is to consolidate its power and destroy every archeological piece that cannot be sold on art markets

¹³¹ Francioni and Gordley, *Enforcing International Cultural Heritage Law*, 62.

¹³² Francioni and Gordley, *ibidem*.

¹³³ Article 12(2), Rome Statute on the preconditions to the exercise of jurisdiction that sets forth the jurisdiction of this Court.

¹³⁴ Ahmad Al Faqi Al Mahdi, sentenced to 9 years old imprisonment by the ICC on 27 September 2016, I will analyze the sentence later in this Chapter.

revealing its profane value. Both Islamic groups share the same religious ideology characterized by intolerance of others' religious view¹³⁵, and they also target Islamic symbols not in line with their strict iconoclasm. In both cases, the Islam world condemned these acts, as the international community did. These crimes were carried out in evident disregard of the warnings and petitions of the most influential international organizations within a play of powers. Even though the destructions against cultural heritage carried out by those groups are founded on the same rejection of any form of Muslim veneration of burial sites of ancestors or holy icons, there are some differences between these two groups that have to be addressed. ISIS exploits social media to recruit new militants and to celebrate their attacks, especially those done to the Western countries, a dimension that seems to be more reduced in Al-Qaeda's tactic¹³⁶. Moreover, the Islamic State founded a proto-state within its own army, civil and judiciary administration, instead Al-Qaeda leaders are fugitives and control no territory¹³⁷. Finally, ISIS can be considered as the wealthiest terrorist groups that has ever existed, it controls a consistent stream of money, thanks to oil and gas trade, an extensive extortion racket, a perfect system of maintenance that is also fed by the antiquities' trade, and provides a well-organized administration with no rivals¹³⁸. Apart from these differences, the same reason is at heart of the attacks against cultural heritage, a campaign against idolatry permeated by a strong intolerance towards any different spiritual creed that derive from a misinterpretation of the Islamic sacred book¹³⁹.

¹³⁵ Mari Lekkapari and Kevin A. Griffin, *Pilgrimage and Tourism to Holy Cities: Ideological and Management Perspectives* (CABI Publishing 2016), 145-147.

¹³⁶ Hale Dale, Peter Brooks, Charlotte Florance and Steven Bucci, 'Why Isis might be more dangerous than Al-Qaeda' The daily Signal (28 August 2017) <http://dailysignal.com/2014/08/28/11-reasons-isis-might-dangerous-al-qaeda/> (last visited on 22 September 2017).

¹³⁷ Dale *et alia*, *ibidem*.

¹³⁸ Dale, *et alia*, *ibidem*.

¹³⁹ Isis committed a terrorist attack in Mali on 20th November 2015 during which 27 people died, in some sources is affirmed the penetration of the Islamic State also in Mali, where began to form 'aspiring Isis branches'; Ashley Collman 'A fast-spreading disease New heat map shows ISIS has become a truly global terror group, with outposts as far as Mali and the Philippines' daily Mail (3 August 2016) <http://www.dailymail.co.uk/news/article-3721696/A-fast-spreading-disease-New-map-shows-ISIS-truly-global-terror-group-outposts-far-Mali-Philippines.html> (last visited on 22 September 2017).

3.2.2.2 THE DESTRUCTION OF THE BUDDHAS OF BAMMIAN

Another blatant case of destruction of cultural heritage of inestimable value is the one occurred in the Afghan territory, in March 2001, when the two massive statues of Buddha were razed to the ground by the Taliban in an attempt to purify the region from idolatry.

At that time, Afghanistan was plagued by an internal war between Sunni Muslim, the majority of the population, and Shia, a minority for many years¹⁴⁰. In this fight the Taliban movement, also known as 'the Seeker', showed up. This group was formed in 1994 by some graduates of Pakistani Islamic colleges. At the head of this group was Mullah Mohammed Omar, a man who lost one eye during a fight against the Soviet occupation of Afghanistan¹⁴¹. The purpose of this group was the imposition of the Islamic Sharia all over the country. They called for an 'Islamic Revolution' of which they professed to be the forbearers¹⁴². After its birth, this group obtained a great consent among the population which was exasperated by the never-ending civil conflict that was affecting the country since the end of 1970s. In particular, the Taliban promised stability, better economic conditions for everyone and most of all the restoration of peace. The Islamic Emirate of Afghanistan was quickly created and this group got control over about 90-95% of the entire territory, including Kabul¹⁴³. Instead the rest of the country was under the control of the Islamic State of Afghanistan headed by President B. Rabbani¹⁴⁴. The latter was the only Afghan government recognized by the international community, in fact the UN had always refused to recognize the Taliban one as the nation's acting government

¹⁴⁰ Sunni constitute about 84% of the Afghani population. Un Reports, David Treyster, 'The Taliban, May No Longer Control Afghanistan, But Their Persecution of Religious Minorities Will Forever Remain a Stain on Global Memory' (2002) Vol. 18 New York Law School Journal of Human Rights 527, 527.

¹⁴¹ Francesco Francioni and Federico Lenzerini, 'The destruction of the Buddhas of Bamiyan and International Law' (2014), Vol. 14 No. 4 European Journal of International Law 619, 621.

¹⁴² Francioni and Lenzerini, *ibid* 622.

¹⁴³ Francioni and Lenzerini, *ibidem*.

¹⁴⁴ Francioni and Lenzerini, *ibidem*.

for its implications in terrorist activities¹⁴⁵. Only a few states recognized the Taliban authority as the legitimate government, in fact the Afghan UN seats was still occupied by Rabbani considered the legitimate leader of the country¹⁴⁶. Since June 2000 the fight between the two factions has intensified because of the military support of Iran and Russia to Rabbani's troops and the support of Pakistan to the Taliban¹⁴⁷. During these clashes the country lost a third of the population and Afghanistan still remained one of the hungriest country of world with Somalia¹⁴⁸. When the Taliban came to power, religious intolerance made its way into the country entailing a total lack of freedom of expression and thought and official forbiddance of sacred pictures¹⁴⁹. In this context of religious extremism, on 8th June Mullah Omar issued a decree by which he condemned to death every Afghan who converted to Christianity or Judaism¹⁵⁰. The main reason that led to the repeated rejections of recognition of the Taliban government was due to the assistance given by this group to one of the most dangerous and wanted terrorist of that time, Osama Bin Laden. Several times the international community had asked the Taliban to extradite this terrorist who was believed to be the mind of the 11th September attacks, a request always denied by this group, which on the contrary declared that he was a guest in their country. This behavior led the UN Security Council to adopt many economic sanctions against the Taliban in Resolution 1333 that were strongly dismissed by the Islamic Emirate of Afghanistan government¹⁵¹. As a consequence of this very tense atmosphere, the World Heritage Committee in Naples adopted a resolution regarding the serious worries about the reported threats to the statues of the Buddhas located in the valley of Bamiyan which the Taliban's hard vision of Islam considered symbols of idolatry that have to be destroyed. . The Resolution affirmed

¹⁴⁵ UN refused 5 times to recognize the Taliban government, Kanchana Wangkeo, *Monumental Challenges: The Lawfulness of Destroying Cultural Heritage During Peacetime* (2003) Vol. 28 Yale Journal of International Law 183, 256

¹⁴⁶ Francioni and Lenzerini, *'The destruction of the Buddhas of Bamiyan and International Law'*, 622.

¹⁴⁷ Francioni and Lenzerini, *ibid.*

¹⁴⁸ Human Rights Watch, *'Fueling Afghanistan War'*. HRW World Report 2001: Asia Overview, at www.hrw.org/background/asia/afghanistan/afghbk.htm.

¹⁴⁹ Francioni and Lenzerini, *'The destruction of the Buddhas of Bamiyan and International Law'*, 627.

¹⁵⁰ Francioni and Federico Lenzerini, *ibidem*.

¹⁵¹ UNSC Res 1333 (19 December 2000) UN Doc S/RES/ 1333 and UN Press Release SC/6979.

their inestimable value for all humankind and invited the Afghan authorities to take all the appropriate measures to safeguard its cultural heritage and to cooperate with UNESCO to this aim¹⁵². The concerns turned out to be more than hypothetical worries, in fact in March 2001 the Taliban announced the beginning of a destructive campaign against every piece of Afghan cultural heritage that was not in line with their strict iconoclasm. Thus the two ancient statues representing Buddha: huge sculptures carved into the cliff in the Bamiyan Valley that was a central passage of the Silk Road and was the site of many Buddhist monasteries¹⁵³ belonging to the third and fifth century, were razed to the ground. The Edict of Mullah Omar¹⁵⁴ anticipated the destructions: it declared that according to Fatwa of prominent Afghan scholars the devastation of all statues and icons located in the country belonging to infidels was necessary. Thus on 6th March the destruction of the two Buddhas was announced to the world. This attack was carefully planned, publicly announced and reported in every phase to get the maximum audience and justified by the 'implementation of Islamic order'¹⁵⁵. This act presents some particular characteristic that are unusual in the majority of attacks against cultural heritage. First of all, the destruction was carried out by the government established in the territory where the statues were located¹⁵⁶. Whereas, generally the threat to cultural heritage comes from a foreign enemy. Moreover, there was no military advantage in the destruction of these huge sculptures¹⁵⁷ as the Taliban had already obtained the entire control of the area. It was just an attempt to annihilate any cultural expression in contrast with Sharia iconoclasm. Ultimately, this attack can be considered as an act in defiance of the international community that many times invited the Taliban to reevaluate their intention to destroy Afghan cultural heritage. Many Taliban

¹⁵² UNESCO Report of the XXI Session of the World Heritage Committee, doc.WHC-97/CONF.208/17 (February 1998, Naples), par. VII.58.

¹⁵³ William L. Rathje, 'Why the Taliban are destroying Buddhas', Usa Today (22 March 2001) <https://usatoday30.usatoday.com/news/science/archaeology/2001-03-22-afghan-buddhas.htm> (last visited on 22 August 2017).

¹⁵⁴ Edict of 26th February 2001.

¹⁵⁵ Kabul defends plan to break the statue, France Press agency, 27 February, 2001, at www.Afghan-politics.org.

¹⁵⁶ Francioni and Lenzerini, *The destruction of the Buddhas of Bamiyan and International Law*, 620.

¹⁵⁷ In no way the two statues can be considered as a military objective according art. 52(2) AP I, Francioni and Lenzerini, *ibidem*.

officials declared that the destruction was a response to the repeated rejections of recognizing the Taliban government¹⁵⁸.

In my opinion, this kind of assault against religious symbols is very similar to ISIS's strategy because the destructions constituted 'the peak of a systematic plan'¹⁵⁹ for the eradication of Afghan cultural heritage as occurring in Iraq and Syria due to ISIS's iconoclast fury. Moreover, it was carefully prepared and meticulously reported to affect not only the local population but also the entire world and, in particular, the international community that had not recognized them as the legitimate government and sought to hit them through economic sanctions. It was a deliberate and willful attack against cultural diversity and religious tolerance, two important ideals of the Western world. Furthermore, even the Taliban movement controls a broad territory and has a civil and judiciary administration¹⁶⁰, thus they created a pseudo-government as well as ISIS did. The two groups shared a wide disregard for Western values that are blamed for being permeated by the devil. The enemy is represented by Western politics that is corrupted and invasive. An important difference which emerges between the attacks against cultural properties undertaken by ISIS and the destruction of the Buddhas is that in this latter case idols of another religion, which in reality was not so spread in the country at that time, were destroyed. ISIS on the contrary is conducting an ideological war also against the world to which it belongs, the Arab Islamic world. As for Timbuktu, ISIS reveals a more brutal component towards the population in every field of action and is more economically well-organized with a continuous turnover of funds thanks to oil and gas sale and thanks to a widespread looting activity. The two groups share the same discriminatory intent by invoking the iconoclasm of the Prophet: they deny the freedom of religion, its practice and respect which constitutes an essential human right¹⁶¹ in modern society. So far the situation in Afghanistan has not improved, and

¹⁵⁸ Bren Whitney, 'Lessons from the Destruction of the Baiyman Buddhas, Current Isis Aggression, and a Proposed Framework For Cultural Property' (2016) Vol. 34, *Cardoso Arts and International Law Journal* 215, 232.

¹⁵⁹ Francioni and Lenzerini, 'The destruction of the Buddhas of Bamiyan and International Law', 627.

¹⁶⁰ The attack was declared as necessary and lawful by the Supreme Court; Francesco Francioni and Federico Lenzerini, *ibidem*.

¹⁶¹ In particular, the destruction of cultural heritage violates the right to the preservation of one's own culture.

the territory is still affected by the internal war which ISIS joined in fighting the Shia minority. While the Afghan armies are trying to stop the advancement of the Taliban with the assistance of US, they have to fight Isis that entered some provinces, as for example Nangarhar, Farah, Helmand and Zabul. In 2015 ISIS proclaimed the birth of a new province, 'Khorasan', under its control, creating a separate section of the Islamic State known as Isis-K¹⁶². The population continues to suffer many terrorist attacks perpetrated both by the Taliban and ISIS as testified by the last attack against a hospital in Kabul, occurred on 10th March 2017 claimed by the Islamic State¹⁶³. So far the international community and its main organizations have not taken any action to hold ISIS responsible for the destruction of the Buddhas, but the WHC¹⁶⁴ inscribed the ruins of the Buddhas of Baiyman and the entire valley in the World Heritage List in July 2003¹⁶⁵.

3.2.3 NAZI CULTURAL CRIMES AND SOME PROCEEDINGS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL

Cultural property has always been used as a tool to get psychological control over an enemy through the annihilation of his past and memory, because the real domination is achieved with the complete control and elimination of every aspect of a population, including its cultural traditions¹⁶⁶. The Third Reich did not depart from this trend, in fact Hitler aspired to turn Germany into the cultural capital of the Western world. For this reason, the Nazi forces systematically destroyed a huge

¹⁶² Isis proclaimed the group's formation in January 2015, active in Pakistan and Afghanistan, Wikipedia, The Islamic State of Iraq and Levant and Khorasan Province, https://en.wikipedia.org/wiki/Islamic_State_of_Iraq_and_the_Levant_-_Khorasan_Province.

¹⁶³ 'Il gruppo islamico cambia strategia in Afghanistan', Internazionale, Le Monde, translated by F. Sibani, (10 March 2017) <https://www.internazionale.it/notizie/2017/03/10/stato-islamico-strategia-afghanistan> (last visited 15 August 2017).

¹⁶⁴ World Heritage Committee, 27th session held in July 2003.

¹⁶⁵ Meaning the inestimable value of the Buddhas for all the humankind and their safeguarding as a general interest; Francioni and Lenzerini, *The destruction of the Buddhas of Bamiyan and International Law*, 651.

¹⁶⁶ Singer, *'Isis's War on Cultural Heritage'*, 31.

number of churches, monasteries, libraries and synagogues¹⁶⁷, usually after having plundered them. The Führer carried out a cultural eliminating plan against the deterioration of art caused by Jews' and Bolsheviks' "degenerate art" which was labeled as "trash" and intellectual theft¹⁶⁸. According to the Nazi cultural vision, Jewish art expressions were but mere reproductions of others' creativity that had led German art to its decline¹⁶⁹. The terrible persecution against Jews was justified by the superiority of the Aryan race, that according to Hitler's thought was the only one able to create worthy forms of art¹⁷⁰. This intent to purify German art from Jews' artworks led to the suspension of freedom of expression and assembly, and to the State's entire control of private communication and limitations on the use of property¹⁷¹. Every piece of art had to celebrate the strength, superiority and grace of the Arian race and everything in contrast to this vision was condemned by the Reich¹⁷². Hitler and the Minister of Enlightenment and Propaganda¹⁷³ rapidly obtained the total control over every artistic production, justifying this system with the educational role played by culture¹⁷⁴. Thus strict censorship was established, many museum curators and directors were fired and thousands of books were destroyed to eliminate every sign of the "degenerate art" that "insult German feeling, or destroy or confuse natural form or simply reveal an absence of an adequate manual and artistic skills"¹⁷⁵. When the National Socialist regime realized how remunerative the looting of artworks could be, they began a huge campaign of plundering to sell them. To this purpose a commission for the Exploitation of Degenerate Art was established with the task to sell the works to continental

¹⁶⁷ This destructive plan in particular targeted Ukraine, Byelorussia, Russia and Poland, Roger O' Keefe, *supra* note 58, 82.

¹⁶⁸ Adolf. Hitler, *Mein Kampf* (Ralph Mnheim, translation, 1971), 1924.

¹⁶⁹ Matthew Lippmann, 'Art and Ideology in the Third Reich: The Protection of Cultural Property and The Humanitarian Law of War' (1998) Dickinson Journal of International Law, Vol. 17, No. 1, 4.

¹⁷⁰ Lippmann, 'Art and Ideology in the Third Reich', 4.

¹⁷¹ Decree against Communist subversion, Lippmann, *ibid*, 7.

¹⁷² Lippmann, *ibidem*.

¹⁷³ Paul Goebbels who was "responsible for all influences on the intellectual life of the nation", Jeremy Noakes, 'Nazism 1919-1945 a History in Documents and Eyewitness Accounts: The Nazi Party' (1983) Sate and Society 1919-1939 (Schoken Books, 1983), 14.

¹⁷⁴ Reich Chamber of Culture: to regulate all aspects of art; Matthew Lippmann, *supra* note 259, 10.

¹⁷⁵ William Shirer, *The Rise and Fall of the Third Reich: A History of Nazi Germany* (1960) , 333 .

collectors¹⁷⁶. The Führer was determined to “elevate Germany to cultural preeminence”¹⁷⁷ in all Europe, thus a huge number of private collections of the occupied territories were seized to enrich Nazi’s cultural patrimony¹⁷⁸.

This plan against Jewish identity could not remain unpunished and therefore some judgments before the International Military Tribunal of Nuremberg¹⁷⁹ (IMT) involving the destruction and looting of cultural properties were issued. The IMT jurisdiction extended to breaches of laws and customs of war, among which were the “plunder of public and private property, wanton destruction of cities, town and villages or devastations not justified by military necessity”¹⁸⁰. The charges against the major German criminals involved the destruction of some “industrial cities, cultural monuments, scientific institutions and other properties” in the occupied countries¹⁸¹. In particular, the charge involved a detailed plan of destruction, perpetrated mostly in Russia, where about six million buildings were damaged, 427 museums were widely looted, and in Ukraine, where thousands of books were confiscated¹⁸². The proceeding against A. Rosenberg was emblematic of the Nazi criminal action against cultural property. Rosenberg headed the “Einsatzstab Reichsleiter Rosenberg”, a Nazi unit with the task of seizing artworks under the assumption of creating a Jewish collection¹⁸³. Across Europe, thanks to Rosenberg’s activities, a huge number of pieces from private collections were stolen, many homes

¹⁷⁶ 4829 among paintings and drawings, Jonathan Petropoulos, *Art as Politics in the Third Reich* (UNC Press Book, 1999), 82.

¹⁷⁷ Lippmann, ‘*Art and Ideology in the Third Reich*’, 14.

¹⁷⁸ This ambitious project carefully carried out through detailed catalogues, photographs and confiscations across European countries to increase the richness of Nazi museums, but also the private collections of Hitler, Goering and Von Ribbentrop; Lippmann, ‘*Art and Ideology in the Third Reich*’, 17.

¹⁷⁹ The Nuremberg Charter was issued on 8th August 1945.

¹⁸⁰ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, art. 6(b) 59 Stat. 1544, 82 UNTS 279 (hereafter Nuremberg Charter).

¹⁸¹ These indictments involved for instance the plunder of Nantes, Nancy and Old Marseilles; International Military Tribunal, the United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland and *the Union of Soviet Socialist Republics v. Hermann Wilhelm Goring et alia* (1947) 27 American Journal of International Law, 55.

¹⁸² Lippmann, ‘*Art and Ideology in the Third Reich*’, 11.

¹⁸³ The Reich’s criminal conduct, in the view of the Court, was emblematic of “total war,” which implied that the laws on armed conflict could not constrain the Reich’s sovereign prerogatives; Lippmann, *ibid*, 45.

pillaged and cultural institutions were razed to the grounds¹⁸⁴. He argued that the removal of any property was realized for its safeguard, but he also admitted that this constituted a serious infringement of private property¹⁸⁵. Moreover, he did not decline that many antiquities were transferred to Hitler's and Goering's personal collections. Finally, he was convicted for war crimes and crimes against humanity, among them the wide action of plundering that occurred with a persecutory intent against Jews, and was sentenced to death¹⁸⁶. Also W. Flick¹⁸⁷, who was the former Minister of the Interior, was found guilty for war crimes and crimes against humanity, in particular for the deportation of Jews and the seize of their properties. Another important figure of the Third Reich was J. Streicher¹⁸⁸ that was convicted of crimes against humanity for having commanded the destruction of Nuremberg Synagogue¹⁸⁹ in addition to the deportation of Jews. Goering instead was condemned for having planned the looting of artworks, and his contribution to the action of Rosenberg was proved¹⁹⁰. Many other proceedings against the major Nazi criminals were carried out before national courts, such as the one against A. Greiser¹⁹¹ who was found guilty for having organized the burning and destruction of many synagogues and cemeteries¹⁹². In this trial the Court stated that the Nazi policy perpetrated in Poland constituted "a general totalitarian attack on the right of the small and medium nation to exist, and to have identity on their own"¹⁹³. Another

¹⁸⁴ Rosenberg was accused for the extensive plunder of 69619 Jews homes in France; *Rosenberg* (1946), 287-288.

¹⁸⁵ David Keane, *'The Failure on the Protection of cultural property'* (2004) Vol 14 De Paul-LCA Journal of Art and Entertainment, 1, 6.

¹⁸⁶ He was finally executed at Nuremberg on 16th October 1946.

¹⁸⁷ Wilhelm Flick was the author of a decrees on the confiscations of Jews properties, and he was appointed Reich Protector of Moravia and Bohemia; IMT (1948) 411 American Journal of International Law, 551; Lippmann, *'Art and Ideology in the Third Reich'*, 48.

¹⁸⁸ Streicher was a famous political man he headed the National Socialist for some years and was the author of the *Der Strumer* that was a journal with the aim to spread the hatred against Jews, it was particularly cruel and had a central role in the Nazi propaganda; IMT, (14 November 1945-1 October 1946) 41 American Journal of International Law, 294-295.

¹⁸⁹ The destruction occurred in 1938; Lippmann, *'Art and Ideology in the Third Reich'*, 28.

¹⁹⁰ In Goering, the looting of artworks was not only considered as a crime against humanity, in particular the looting of Jews businesses "was considered as part of the persecution".

¹⁹¹ Greiser was the former governor and National Socialist Leader in Polish territories under the Third Reich's control

¹⁹² Matthew Lippmann, *'Art and Ideology in the Third Reich'*, 4.

¹⁹³ *Trial of Gauleiter Artur Greiser*, (Sup. Nat'l Trib. Poland, June 21-July 7 1946), XIII L. REPT. TRIALS WAR CRIM. 70 (1949).573, at 83-84.

judgment that became famous all over the world was the one concerning A. Eichmann¹⁹⁴ who was prosecuted for war crimes and crimes against humanity, and among these, for the devastation of synagogues and other religious buildings before the Supreme Israeli Court¹⁹⁵. This Court claimed that these conducts were expressions of the crime of persecution against Jews¹⁹⁶, and he was finally sentenced to death. In conclusion, from the IMT jurisprudence it emerged that the seizure and destruction of cultural and religious property constituted persecutory conduct and therefore a crime against humanity¹⁹⁷. The Nuremberg jurisprudence had a great influence in the drafting of the 54' Hague Convention and in the future jurisprudence on the crimes committed against cultural property.

3.2.4 CONVICTIONS HANDED DOWN AFTER THE BALKAN WARS ON THE INTENTIONAL DESTRUCTION OF CULTURAL HERITAGE BY ICTY

In 1990, a period of great instability came after the death of Tito who had created the Socialist Federal Republic of Yugoslavia¹⁹⁸ (SFRY) in 1945 began to characterize the Balkan Peninsula. In a few years, it would have been divided in many different states. The figure of Tito had granted the pacific cohesion between mixed religious, politic and cultural groups¹⁹⁹. Thus after his death many areas of the SFRY²⁰⁰ started to claim their independence from the Republic, such as Croatia and Slovenia, that obtained it respectively in 1991 and 1992. The presence of various ethnics in the Peninsula created many tensions that gradually led to the outbreak of bloody clashes in an attempt of each community to eliminate other ethnic groups. The Balkan war

¹⁹⁴ *Attorney General v. Eichmann*, Case No. 40/61 ,District Court of Jerusalem and its confirmation by the Supreme Court of Israel, Case No 336/61.

¹⁹⁵ In particular the Court found out that the destruction of religious institutions perpetrated by Eichmann amounted to the crime of persecution; *Attorney General v. Eichmann*, Case No. 40/61 District Court of Jerusalem.

¹⁹⁶ Maugeri, *La Protezione dei Beni Culturali nel Diritto Internazionale penale*, 231.

¹⁹⁷ Vrdoljak, *'Cultural Heritage in Human Rights and Humanitarian Law'* (2009), 287.

¹⁹⁸ The SFRY was founded in 1945 and lasted till 1992, the years of its dissolution after the Balkan Wars, https://it.wikipedia.org/wiki/Repubblica_Socialista_Federale_di_Jugoslavia#Storia.

¹⁹⁹ https://it.wikipedia.org/wiki/Repubblica_Federale_di_Jugoslavia.

²⁰⁰ Socialist Federal Republic of Yugoslavia.

lasted from 1991 to 1995 and the opposing factions were accountable of the most horrendous crimes, as, for example, summary executions, rapes, mass killing, but also systematic destructions of cultural heritage that produced 'genocidal effects'²⁰¹. In particular, the most serious attacks against cultural sites occurred during the Bosnian conflict that took place from 1992²⁰² to the end of 1995 in Bosnia-Herzegovina²⁰³. The Croats inside the territory of Bosnia-Herzegovina founded the so called 'Herzeg-Bosnia' to create an independent Croat state from Bosnia and they began to fight the Yugoslavian National Army (JNA)²⁰⁴ that at the times was already turned into a Serbian nationalist army determined to establish the 'greater Serbia' for the unity of all Serbs. At the same time, similar claims came from Albanians, Montenegrins and Kosovars. This precarious situation quickly turned into a war of all against all that brought also to horrifying genocide²⁰⁵. During the ongoing of the hostilities many attacks against Balkan cultural heritage were carried out, but the worst was the bombardment of the 'Old Town' of Dubrovnik and the shelling of the famous Monstar Bridge²⁰⁶. The siege of Dubrovnik occurred during the Croatian War of independence in 1991²⁰⁷ and was perpetrated by the JNA composed by Serbs and Montenegrins that were fighting against the Croatian forces that sought to defend the city. This city of particular cultural value was inscribed in the World Heritage

²⁰¹ Federico Lenzerini, *The Role of International and Mixed Criminal Courts in the Enforcement of International Norms Concerning the Protection of Cultural Heritage*, in *Enforcing International Cultural Heritage Law*, (Oxford University Press, 213) 44 .

²⁰² The Bosnian conflict lasted from March 1992 to November 1995, and was fought between the Croats of Bosnia that claimed their independence and the Republic of Bosnia-Herzegovina (JNA) that instead sought to create 'greater Serbia'.

²⁰³ In Bosnia Herzegovina there were Croats, that were Catholics, Serbs, that were orthodoxies and Bosnians that were Muslims, it could be defined as a 'Yugoslav microcosm'; Lenzerini, *'The Role of International and Mixed Criminal Courts'*, 46.

²⁰⁴ Yugoslavian National army that formerly was the official army of the SFRY that initially tried to preserve the unity of Yugoslavia, but subsequently turned into a Serbian and Montenegrin army that endorsed the Serbian nationalism of a Greater Serbia.

²⁰⁵ Such as the one occurred in Srebrenica.

²⁰⁶ But many other destructions occurred, such as the Stara Gradiska on the Sava River, the historic centre of Sarajevo, the Roman villas at Split and the ancient archaeological sites of Vuhovar; many of these sites were also marked by the white flag of the 54' Hague Convention, in fact there were some evidences of the fact that the emblem incentivized the attack; William Birow, *'Prizes or Plunder? The pillage of Works of Art and the International Law of War'* (1997) Vol. 30, New York University Journal of International Law, 254, 256.

²⁰⁷ 6th December 1991.

List in 1979²⁰⁸ and is also called the 'Pearl of the Adriatic' for its architecture which ranges from Gothic, Renaissance and Baroque style and at the moment is under a restoration program coordinated by UNESCO²⁰⁹. Another important cultural loss involves the siege of the Stari Monstar in 1993²¹⁰, also known as the Monstar Bridge, or 'Old Bridge' that has always been the symbol of the pacific coexistence between Croats and Muslims that had characterized this city for centuries²¹¹. This structure signified so much for the local population that they called themselves "Monstari", or the "Guardian of the bridge"²¹² and was the last evidence of a unite city. The bridge was shelled by the Croat Defence Council (HV) which were trying to eliminate the Muslims from the city to create a new country²¹³ for all the Croats of Bosnia-Herzegovina. To pursue this aim, the territory had firstly to be purified by all non-Croats, and since the bridge represented the last trace of a multiethnic city it had to be destroyed. The attacks against cultural heritage occurred during these wars were carried out to annihilate the memory and the sense of belonging of the local population. These premeditated destructions were aimed to remove the others' cultural traces. These two devastations, which were not the only ones, were made worse because of the fact that they did not occur as collateral effects of the ongoing of the hostilities, but on the contrary they were carefully devised to hit the historical memory and the morality of a people that was spiritually and religiously linked to the heritage involved²¹⁴.

²⁰⁸ Dubrovnik has to be considered as a living city that was destroyed within a process of 'cultural cleansing' as affirmed by the Council of Europe ;*Report on Fact-finding Mission on the situation of the Cultural Heritage in Bosnia-Herzegovina and Croatia* (June 1994) Eur. Parl. Ass. Rp. Doc. AS/CULT/AA n. 38.

²⁰⁹ <http://whc.unesco.org/en/list/95> <http://whc.unesco.org/en/list/95> (last visited on 22 August 2017).

²¹⁰ Stari Monstar was bombed on 9 November 1993, *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780/ 1992* http://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf (last visited on 22 September 2017).

²¹¹ Monstar is a city located in the south of Bosnia- Herzegovina that was the principle theatre of the clashes between the JNA and the Croat Defense Council (HV).

²¹² Michael Sells, *The Bridge betrayed. Religion and genocide in Bosnia* (Vol 11, University of California Press, 1996) 94.

²¹³ Hercez-Bosnia, and Mostar should have been the capital of this new country.

²¹⁴ Federico Lenzerini, *The Role of International and Mixed Criminal Courts*, 41.

The responsible of the terrible crimes committed during the Balkan Wars, and among them the attacks against cultural property, could not remain unpunished, thus in 1993, the UN Security Council established the International Criminal Tribunal for the Former Yugoslavia (ICTY)²¹⁵ with the aim to condemn the responsible of many serious violations of international and humanitarian law and to prevent their reoccurrence. In particular these acts against properties of cultural and religious significance could be prosecuted as war crime pursuant Article 3(d) of the ICTY Statute that punishes “the seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and science, historic monuments and works of art and science”²¹⁶. This Tribunal convicted many individuals for the attacks against cultural heritage pursuant the wording of this article that applies both to internal and international conflicts²¹⁷. The application of this article requires some conditions that have to be fulfilled: the existence of an armed conflict, a close nexus²¹⁸ between the alleged crimes and the hostilities, a direct attack against cultural heritage, the lack of military necessity²¹⁹ and finally the author must have acted with the intent of destroying the institution or with disregard of its likely damage or destruction²²⁰. In *Hadzihasanovic*²²¹ and *Martic*²²², the reasoning of the Appeal Chamber describes how this article reproduces Article 27 and 56 of the Hague Regulations and constitutes a good compromise between the general protection afforded to civilian objects²²³ and the special protection concerning the

²¹⁵ Resolution 827 established the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN SC Res 827 (25TH May of 1993) UN Doc S/RES/ 827.

²¹⁶ Article 3, ICTY Statute (25th May 1993).

²¹⁷ Anna M. Maugeri, *La protezione dei beni culturali nel diritto internazionale penale* (Giuffrè, 2008) 134.

²¹⁸ *Prosecutor v. Tadic*, (Appeal Chamber) IT- 94-1 (27 February 2001), para 67-70; *Prosecutor v. Jokic* (Trial Chamber) IT-01-42/1(18 March 2004) para. 184-185;

²¹⁹ *Prosecutor v. Naletilic*, (Trial Chamber) IT-98-34, para 604-605(31th March 2003); Maugeri, *La tutela dei beni culturali*, 125;

²²⁰ Maugeri, *La protezione dei beni culturali*, 136.

²²¹ *Prosecutor v. Hadzihasanovic*, (Judgment) IT-01-47(15 March 2006) para 32.

²²² *Prosecutor v. Martic*, (Trial Chamber) IT- 95-11 (12 June 2007), para 97.

²²³ Civilian objects are those that do not fall within the category of military objectives defined in art. 52(2) AP I; Maugeri, *La Protezione dei beni culturali*, 143.

cultural estate of every community²²⁴. In particular I am going to analyze the judgments against Miograd Jokic²²⁵ and Pavle Strugar²²⁶, both convicted for the siege of Dubrovnik. Jokic was a commander of the YNA and was held responsible for the bombardment of the city. The prosecution found out that he was aware of the international status of the Old Town, included in the WHL²²⁷. Moreover, many sites of the city were marked with the emblem of the 1954 Hague Convention that was clearly distinguishable. He was therefore condemned to 7 years imprisonment. Strugar was Jokic's superior. He had to maintain 'legal and effective control' over the armies in the zone and he ordered siege of the Old Town, thus in turn he was sentenced to 8 years imprisonment. Art 3(d)²²⁸ requires, as said before, that the attack must be perpetrated with 'intent' and 'knowledge, that means "deliberately or with recklessness" towards the protected sites²²⁹. So the defendants must have acted with the knowledge that the object had a cultural value and in both cases this requirement emerged from the distinct visibility of cultural sites' emblems and their inscription into the WHC. The Chamber underlined the inherent higher degree of gravity of the destruction of cultural properties compared to the destructions of civilian property. In fact it was claimed that "since it is a serious violation of International humanitarian law to attack civilian buildings, it is a crime of even greater seriousness to direct an attack on an especially protected site, such as the Old Town"²³⁰. This prudent jurisprudential approach that criminalized the destruction of cultural heritage as war crimes was not reiterated in the case²³¹, in fact here the Court followed an evolutionary line that led to the criminalization of these conducts as

²²⁴ The Appeal Chamber in this sense reproduced the wording of art. 53 of AP I; A. M. Maugeri, *La tutela*, 144

²²⁵ Jokic, *supra* note 158.

²²⁶ *Prosecutor v. Strugar* (Trial Chamber II) IT-01-42 (24 August 2004).

²²⁷ World Heritage List, according to Convention on the Protection of Cultural and Natural Heritage, (Paris, 1972) (hereafter 72' UNESCO Convention).

²²⁸ Article 3(d), ICTY Statute.

²²⁹ *Prosecutor v. Strugar*, (Appeal Chamber) IT-01-42(17 JULY 2008); Restated in *Blaskic* (Trial Chamber) IT-95-14 (3 March 2000) para. 62 where is required that the objective targeted must have been clearly identified as cultural property; Roger O'keefe '*Protection of cultural Property under International Criminal Law*' (2010) Vol. 11 Melbourne Journal of International Law, 339, 353.

²³⁰ Jokic, para. 51.

²³¹ *Blaskic*, para. 62.

crime against humanity. Blaskic²³² organized a series of attacks against Muslim properties dedicated either to religion or education, and in particular the shelling of Donji Ahmici village²³³, which was razed to the ground and whose two important mosques were completely destroyed²³⁴. He based his defense on the assumption that the destroyed mosques had become the center of local clashes, but this was proved false by the fact that the explosive was carefully placed around the mosque, thus involving premeditation and intentionality²³⁵. The Court not only qualified this conduct as war crime²³⁶, but considered the destruction of buildings dedicated to religion and education as a manner in which the crime of persecution could be performed pursuant art. 5(h)²³⁷ which falls within the category of crimes against humanity. In fact, the Court found out a strong connection between the local Muslim population, that was the first objective of the attack, and the mosques that had just been built thanks to a fundraising campaign among the Muslim population²³⁸. In the same way this approach was restated in *Krodic & Cerkez*²³⁹ where the Tribunal highlighted the discriminatory intent that led the attack of the mosques with the purpose to annihilate the Muslims' religious identity that fell within the crimes

²³² Blaskic was a Croat general sentenced to 45 years' of imprisonment for crimes committed against the Muslims of the Bosnia. <https://www.balkanicaucaso.org/aree/Croazia/Aja-libero-Blaskic-sacrificato-per-coprire-Tudman-26440>.

²³³ The Ahmici village had no strategic importance, but was destroyed for its particular significance for the Muslim community in Bosnia-Herzegovina as a holy place, Anna M. Maugeri supra note 157, 89.

²³⁴ Blaskic was condemned both under art. 3(d) and art. 5(h) according the practice of cumulative charges and convictions, Micaela Frulli, *'Advancing the protection of cultural property through the implementation of the individual criminal responsibility: the case-law of the international criminal tribunal for the Former Yugoslavia'* Workshop 11 The Legal Tools for Conservation and Management of Cultural Heritage in the Mediterranean Countries, directed by Francesco Francioni and Florent Lafrage, 12.

²³⁵ It clearly was "an expert job" So not justified in any way for military necessity; Micaela Frulli, *ibidem*.

²³⁶ As done in the judgments analysed above.

²³⁷ Article 5(h) of the ICTY Statute: "The International tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population(...) (h)persecutions on political, racial and religious grounds".

²³⁸ Lenzerini, *'The Role of International and Mixed Criminal Courts'*, 50.

²³⁹ "This act, when perpetrated with the requisite discriminatory intent, amounts to an attack on the very religious identity of the people. As such it manifests a nearly pure expression of the notion of "crimes against humanity", for all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects" *Prosecutor v Krodic & Cerkez*, (Trial Chamber) IT-95-14/2 (26 February 2001), para. 207.

against humanity²⁴⁰, in specific the crime of persecution. This reasoning was repeated also in *Martic*²⁴¹ who was charged with the destruction of the church of the Assumption of the Virgin that was not being used for military efforts at the time. In *Dordevic*²⁴² the Court defined the necessary elements to qualify the destruction religious buildings as “an underlying act of persecution”. It meant that an extensive destruction or damage, a direct attack against a religious site, the lack of military necessity and finally the author’s intent to destroy or damage the property regardless the probability of its destruction or damage²⁴³ were involved. Even in *Kupreskic*²⁴⁴, the ICTY argued how the principle aim of the destructions was to eliminate the very identity of a particular group, the Muslim group, thus they were perpetrated with a discriminatory intent and so amounted to the crime of persecution²⁴⁵. Persecution according the ICTY jurisprudence²⁴⁶ requires an act or an omission that discriminates de facto and entails a gross deprivation of a fundamental human right recognized by international law and realized with the intent to discriminate for political, religious or racial motives. The Court argued that the conducts that can integrate the crime of persecution are either those that fall within the other crimes against humanity when perpetrated with discriminatory intent or those acts that do not amount to these crimes, but due to their context or their effects can be considered discriminatory in nature²⁴⁷. In fact, even those acts that did not hit a group physically or materially injured a determined group indirectly on political, religious or racial

²⁴⁰ Crimes against humanity constitute the most grave offences to humankind upsetting everyone’s civil consciousness, they are set forth to protect the existence of the whole humanity, granting peace, security and pacific coexistence , they also protect human life, health, freedom and dignity of each person; Hans-H. Jescheck, *Festschrift für Reinhart Maurach*, (1972), 579-590.

²⁴¹ *Martic*, (Appeal Judgment) IT-95-11-A (8 October 2008), para 310-314.

²⁴² *Dordevic*, (Trial Chamber II) IT-O5-87/1-T (23th February 2011), para 1771.

²⁴³ The same conclusion was confirmed also by the Appeal Chamber that underlines that the destruction of cultural heritage can turn into the crime of persecution when perpetrated with discriminatory intent and when the other requirements were met.

²⁴⁴ *Prosecutor V. Kupreskic* (Trial Chamber) IT-95-16 (14 January 2000), para. 621.

²⁴⁵ The crime of persecution involves the victimisation of a person not in her individuality, but for his membership of a target civilian population, *Prosecutor v. Tadic*, (Opinion Trial Judgment) IT-94-1 (7 May 1997), para 644; and Micaela Frulli, ‘*Advancing Protection*’, 10.

²⁴⁶ *Tadic*, para. 697; G. Werle, *Völkerstrafrecht und geltendes deutsches Strafrecht* (2000), 354.

²⁴⁷ In particular are the crimes provided in Article 2 and 3 of the ICTY Statute; *Prosecutor v. Kupreskic*, supra note 184, para.622 and *Prosecutor v. Natelic- Martinovic*, (Trial Chamber) IT-98-34 (31 March 2003), para 632.

grounds²⁴⁸. All these judgments share a broad notion of persecution and demonstrate how attacks against cultural, religious and historical institutions are not only attacks against buildings but on the contrary are attacks against people who are injured by these demolitions²⁴⁹. The ICTY came to this conclusion recalling the Nuremberg jurisprudence, in particular *Stricher* case²⁵⁰ who was condemned for crimes against humanity and for the demolition of the Nuremberg Synagogue; in the same way A. Rosenberg²⁵¹ was convicted for the looting of cultural objects under the category of persecution²⁵². Furthermore, this setting was also confirmed by the 1991 ILC²⁵³ Report on the preparatory works on the Draft Code of Crimes against Peace and Security of Mankind²⁵⁴ stating how persecution can take many forms such as the systematic destruction of monuments or buildings with a special significance for the targeted group²⁵⁵. Thus many individuals were sentenced by the ICTY under art. 5(h) for the damage or destruction of cultural and religious properties, since these crimes bear an intrinsic gravity that turns them into crimes against persons that are deprived of some of their human rights²⁵⁶, as for freedom of religion and the possibility of practicing their religious creeds. This approach emerged also in the UNSC Resolution of 1992 where these conducts were defined as "ethnic purifications" carried out to force the enemy population to exile or to obtain the

²⁴⁸ Frulli, '*Advancing Protection*', 10.

²⁴⁹ In particular crimes against property entail the destruction of the livelihood of the targeted group; Micaela Frulli, *ibid*, 10-11.

²⁵⁰ Julius Stricher was one of the main propagandist of the racial hatred, he was sentenced to death by the International Military Tribunal at Nuremberg.

²⁵¹ Alfred Rosenberg was sentenced among other crimes for the systematic looting of private and public property, by the Nuremberg Tribunal in 1946, The Trial of Major War Criminals sitting at Nuremberg, Germany (9 January, 1946), 124, Exhibit USA 385.

²⁵² Also Eichmann who was the head of Gestapo was sentenced by the Supreme Court of Israeli for the destruction of synagogues that fell into the category of crime against humanity and in particular amounting to a act of persecution, in 1962; Frulli, '*Advancing Protection*', 10; and '*Cosa fu il Processo Eichmann*' , Il Post (25 January 2016) <http://www.ilpost.it/2016/01/25/cosa-fu-il-processo-eichmann/> (last visited on 25 August 2017).

²⁵³ International Law Commission, which is a permanent organ of the UN, whose main task is the progressive development and codification of international law.

²⁵⁴ Report of the International Law Commission on the Work of its Forty-Third Session, (1991) UN Doc.A/46/10/suppl.10 268.

²⁵⁵ Frulli, '*Advancing Protection*', 10.

²⁵⁶ Frulli, *ibid*, 13.

control of a territory²⁵⁷. The punishment of the attacks against cultural and religious properties under the category of crimes against humanity emphasizes the importance of these properties primarily for the identity and the life of each group and secondarily for the whole humankind. The approach endorsed by the ICTY constitutes a great contribution to a better enforcement of the international framework on the protection of cultural heritage²⁵⁸. In fact since its first case, *Tadic*, the Court affirmed the customary nature of some rules on the protection of cultural heritage that consequently do not apply only to IAC²⁵⁹.

3.2.5 AL-MADHI JUDGEMENT

On 27th September 2016, the Trial Chamber of the International Criminal Court, convicted a member of Ansar-Dine for his involvement in the attacks against the cultural and religious sites of Timbuktu pursuant Article 8(2)(e)(iv)²⁶⁰.

Ahmad Al Faqi Al Mahdi²⁶¹, a native of Timbuktu, joined Ansar-Dine²⁶², an armed group that had conquered the Northern Mali against the central government, in

²⁵⁷ UN SC Res 780 of (6 October 1992) UN Doc/ S/RES/780; Francioni, 'Beyond State Sovereignty', 1213; Case n. CH/96/29, *Islamic Community v. Czech Republic*, Human Right Chamber for Bosnia-Herzegovina CH/96/29, on the facts occurred in 1993 in the city of Banja Luka and in particular the destruction of 15 mosques of the city; Maugeri, *La Protezione de beni cultural*, 93.

²⁵⁸ Micaela Frulli, 'Advancing Protection', 13.

²⁵⁹ *Prosecutor v Tadic*, (Appeal Chamber) IT-94-1 (2 October 1995), para 98; *Prosecutor v. Brdanim*, (Trial Chamber II), (1 September 2004), para. 595; *Prosecutor v. Strugar* (Trial Chamber II) IT-01-42 (31 January 2005) and *Prosecutor v. Kordic & Cerkez*, (Trial Chamber) IT-95-14/2 (26 February 2001), para. 207.

²⁶⁰ Art 8(2)(e)(iv) of the Rome Statute: "other serious violations of the law and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely any of the following acts(..) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives". This crime is identically set forth in art 8(2)(b)(ix) which applies to international armed conflict.

²⁶¹ Ahmad al Faqi al Mahdi, also known as Abu Turab.

²⁶² Ansar-Dine and its affiliate Al-Qaeda in the Islamic Maghreb (AQIM) That aspired to impose its extreme interpretation of Sharia law throughout Mali, it maintained the control of the city till January 2013; Tullio Scovazzi, 'La prima sentenza della Corte penale internazionale in tema di distruzione di beni culturali' (2017) in *Diritti umani e diritto internazionale*, 76, <http://www.rivisteweb.it>

April 2012. This jihadist group established a local government with an “Islamic tribunal, an Islamic police force, a media commission and a morality brigade called ‘Hesbah’”²⁶³. Al Madhi assumed the command of the Hesbah²⁶⁴ thanks to his deep knowledge of Islamic teachings and directed and organized an action to purify the moderate Islam that was practiced almost by the 90% of the Malian inhabitants. In June 2012 the leader of Ansar-Dine²⁶⁵ ordered Al Madhi to destroy nine mausoleums, two mosques and historical monuments²⁶⁶ on the assumption that they violated the Islamic ban to build any kind of buildings or shrines over graves²⁶⁷. Thus between 30th June and July 11th ten of the most famous Malian religious sites²⁶⁸ were razed to the ground by Al Madhi and his subordinates. He also wrote a sermon for the occasion invoking the destruction of these sites as a divine order²⁶⁹. He personally directed the course of the operations, carefully determined the sequence of the attacks, provided tools as picks and axes, organized squads to protect the destroyers, was present to all the destructive acts and even personally participated to five demolitions²⁷⁰. It was evident how none of these religious sites could be considered as a military objective²⁷¹, and moreover nine of the ten destroyed mausoleums had been included in the World Heritage List since 1988²⁷². On July 13th, 2012, the Malian Ministry of Justice asked the intervention of the ICC Prosecutor²⁷³ Fatuo Bensouda to investigate on the alleged criminal conducts as crimes against humanity and war crimes, pursuant Article 7 and 8 of the Rome Statute, allegedly occurred since the

²⁶³ *Prosecutor v. Al Madhi* ICC-01/12-01/15(17 August 2017), para 3.

²⁶⁴ He kept this office till September 2012.

²⁶⁵ Iyad gg Ghaly, who is still the leader of this group, that seeks to impose strict Sharia Law across the Malian country, https://en.wikipedia.org/wiki/ANSAr_Dine#Command_Structure.

²⁶⁶ Office of the Prosecutor (OTP), Situation in Mali, 16 January 2016.

²⁶⁷ Paolo Rossi, *The Al Madhi Trial before the International Criminal Court: Attacks on Cultural Heritage between War Crimes and Crimes Against Humanity* (2017) vol. 11 *Diritti Umani e Diritto Internazionale*, 87, 88.

²⁶⁸ Also the famous door of mosque that is famous around the world was destroyed.

²⁶⁹ that he read during the Friday pray; Tullio Scovazzi, *‘La Prima Sentenza della Corte Penale Internazionale’*, 79.

²⁷⁰ Tullio Scovazzi, *ibidem*.

²⁷¹ Ansar-Dine had already got the control of Timbuktu, no military advantage could have justified the destructions.

²⁷² According the provisions of the World Heritage Convention of 1972(Paris).

²⁷³ Mali ratified the Statute of the International Court on 16th August 2000, so the Court has jurisdiction over the country.

beginning of the internal conflict. In September 2005 an arrest warrant was issued by the ICC and the Nigerian authorities gave Al Madhi up to the Court. In December the Prosecutor accused Al Madhi of war crime for having attacked protected sites according to Article. 8(2)(e)(iv)²⁷⁴ which applies to non-international armed conflict²⁷⁵. The proceeding was characterized by the defendant's admission of guilt according to Article. 64(8)(a) of the Rome Statute. The defendant also expressed regret for his actions and for the "suffer caused to his family, his community and to his home country, Mali"²⁷⁶. Even though he pleaded guilty, the Court proved that his admissions were supported by adequate factual evidences²⁷⁷, but certainly the plea accelerated and facilitated the proceeding. The ICC Prosecutor underlined that the destroyed mosques, shrines and graves were important for religious, historical and identity motives. The Court stated that the demolished monuments and statues were not only religiously important, but bear also symbolic and "emotional value" for the Timbuktu population. They played a psychological role and this assumption was confirmed by their inclusion in the World Heritage List²⁷⁸. Moreover, the Pre-Trial Chamber emphasized the global significance of the mausoleums, but especially their significance for the local community, as they were part of the religious life of Timbuktu's people²⁷⁹. Of the two preliminary allegations, the Court only mentioned war crimes in the arrest warrant because gathered information was considered insufficient to establish the commission of crimes against humanity, but at the same time declared that this assumption may be revised and required further analysis²⁸⁰. Thus on 27th of September he was condemned to nine-year-imprisonment for the destruction of Malian cultural heritage. This is the first case decided by an international tribunal in which an individual was judged exclusively for the

²⁷⁴ Article 8(2)(e)(iv), Rome Statute.

²⁷⁵ This article applies to internal conflicts between the government's armed forces and an organized armed group; Tullio Scovazzi, *'La Prima Sentenza della Corte Penale Internazionale'*, 80.

²⁷⁶ Plea of forgiveness.

²⁷⁷ Article 65(1) of the Rome Statute.

²⁷⁸ World Heritage Committee, 20 session, Decision SC-88/CONF.001/8 (24 October 1988).

²⁷⁹ Thus combining the relativist approach with the universalist one on the protection of cultural heritage in international criminal law.

²⁸⁰ OTP Report, para 134-141.

devastation of cultural property²⁸¹. Furthermore, it was first time that the ICC claimed with adequate efficacy and clarity that the deliberate and willful destruction of cultural sites and artworks constitute a war crime of considerable gravity²⁸², and this is not a minor statement in an age where Iconoclasm continues to claim victims. Although for many scholars and also in my opinion this sentence somehow fails in its purpose, the Court should have taken a broader approach of art. 8(2)(e)(iv) in criminalizing the destruction of cultural heritage. In fact in this case the elements for the configuration of a crime against humanity all existed: the destructions were perpetrated within a plan against the Malian population to get absolute obedience to their extremist interpretation of Sharia law²⁸³. In addition, the destructive campaign was undertaken against the Malian population with a discriminatory intent because it was carried out to hit the moderate Islam practiced in Northern Mali²⁸⁴. Thus it can be argued that the devastation of shrines, mosques and graves was persecutory in nature for its purpose to hit a specific religious group²⁸⁵. Even the Trial Chamber recognized that the “discriminatory religious motive invoked for the destruction of the sites” was to be considered for the arrangement of the gravity of the crimes²⁸⁶. Furthermore, the attacks against the population were both widespread and systematic because the area under Ansar-Dine’s control was very broad and committed to enforce the strict Sharia law²⁸⁷. Moreover, the wantonly destruction of cultural sites in particular affected the local community. In this perspective, the attacks were also attacks against people²⁸⁸ as cultural heritage contributes to their cultural and religious identity. Indeed, the demolitions were part of a systematic

²⁸¹ Scovazzi, ‘*La Prima Sentenza della Corte Penale Internazionale*’ 78.

²⁸² The Chambers declared that the crime committed by Al Madhi was of ‘significant gravity’; Scovazzi, *ibid*, 80.

²⁸³ Sebastián A. Green Martinez, ‘*Destruction of Cultural Heritage in Northern Mali, a Crime against Humanity?*’ (2015) Vol. 13, *Journal of International Criminal Justice*, 1073, 1075.

²⁸⁴ Paolo Rossi, ‘*The Al Madhi Trial before the International Criminal Court: Attacks on cultural Heritage between War Crimes and Crimes against Humanity*’ (2007) Vol. 1 *Diritti Umani e Diritto Internazionale*, 91-92.

²⁸⁵ Paolo Rossi, *ibid* 93.

²⁸⁶ *Prosecutor v. Al Madhi* ICC-01/12-01/15 (17 August 2017) para. 81.

²⁸⁷ *Katanga and Ngudjolo Chui Confirmation Decision* (Pre-Trial Chamber I) (30TH September 2008), para 112.

²⁸⁸ Micaela Frulli, ‘*Advancing Protection of Cultural Heritage through the implementation of Individual Criminal Responsibility: The Case-Law of the International Criminal Tribunal for the Former Yugoslavia*’ (2005) *Italian Yearbook of International law*, 195-199.

plan against Timbuktu's inhabitants, an identifiable group targeted for their religious practices, thus entailing a negation of their human dignity and freedom of religion, which is a necessary requirement for the configuration of crimes against humanity²⁸⁹. The inclusion of the destruction of cultural property in the category of crimes against humanity would allow their punishment also in peacetime, but unfortunately Article 8 of the Rome Statute only applies to situation of armed conflict. Thus this judgment represents a missed occasion in this sense. Nevertheless, it cannot be denied that the sentence underlines the importance of protecting cultural heritage in international law and the charge of war crimes was chosen for reasons of rapidity and opportunity given the limited power and investigatory resources of the ICC²⁹⁰.

3.2.6 RETHINKING 'CULTURAL GENOCIDE'

Since its birth the crime of genocide has always been strictly associated with the protection of cultural heritage, because most of the time the genocidal intent is performed not only through the physical elimination of a group, but also through the destruction of its culture and religion. First of all, we have to focus on the notion of genocide, which was formulated for the first time in 1933 by Raphael Lemkin²⁹¹ to rearticulate the crime of 'denationalization of inhabitants of occupied territories'²⁹². To accomplish the total denationalization of a group, it was necessary to completely

²⁸⁹ In particular the destruction of cultural heritage would be configured under the crime of persecution that belongs to the category of crimes against humanity, in fact the International Law Commission found out that persecution can take many forms such as the systematic destruction of monuments or buildings linked to a particular religious, social or cultural group.

²⁹⁰ ICC is almost a 'court of opportunity' Patty Gerstenblith, *'Protection Cultural Heritage in Armed Conflict: Looking Back, Looking Forward'* (1985) Vol.7 Cardozo Public law, Policy and Ethics Journal, 677, 690.

²⁹¹ Raphael Lemkin was a Polish lawyer to who is due the introduction of the crime of genocide, *Genocide a modern crime*, April 1945; Gerstenblith, *'The Destruction of Cultural Heritage: A Crime against Humanity or a crime against People?'* (2016) Vol. 15 No. 336 The John Marshall Review of Intellectual Property Law, 337, 342.

²⁹² The 'denationalisation' was defined as a crime by the UNWCC Committee III even if not provided by the various Hague Conventions; Notes of Committee III Meeting , 9 October 1945, box 5, reel 34, PAG-3/1.0.2, UNWCC.

remove its spiritual values and expressions of its intellectual life that are tied to religious sites, books, objects and cultural heritage. Thus the crime, first labeled as 'denationalization', was replaced by 'genocide' which amounts to a criminal act perpetrated with the aim to eliminate "the physical and cultural elements" of the targeted group²⁹³. In this sense it does not only entail mass-killing, but also the annihilation of targeted group's past and traditions, entailing a loss of their 'cultural contributions'²⁹⁴ to mankind worldwide. Lemkin's wider notion of genocide that included cultural components of populations²⁹⁵ was supported in *Greufelt and Others case*²⁹⁶, before the US Military Tribunal of Nuremberg. The Supreme National Court of Poland also endorsed this notion mentioning 'physical and spiritual genocide'²⁹⁷ and that the Nazis' annihilation campaign against Jews and Poles amounted to the crime of genocide and involved not only attacks against their physical integrity, but also destructions of their cultural and religious identity²⁹⁸.

Right after these events, the General Assembly issued the Genocide Resolution²⁹⁹ which explicitly recognized the criminal nature of genocide under international law: it was separated from crimes against humanity and could be committed both during peacetime and wartime³⁰⁰. The Resolution text defined this crime as "a denial of the right of existence of entire human groups such as homicide is the denial of the right to live"³⁰¹. Subsequently the Secretary General³⁰² prepared a Draft Convention on the

²⁹³ Vrdoljak, 'Cultural Heritage in Human Rights', 293.

²⁹⁴ Raphael Lemkin, *Axis Rule in Occupied Europe. Laws of Occupation, Analysis of Government, Proposals for Redress*, chapter 9, 1944.

²⁹⁵ In particular Lemkin argued the existence of eight different dimensions of genocide: cultural, physical, biological, religious, social, moral and political; David Nersessian, *Rethinking Cultural Genocide Under International Law*, Human Rights Dialogue, (2005, Spring), 7-8.

²⁹⁶ *US v. Greifelt and Others*, IMT 13 LRTWC, (1949) at 9, and Annual Digest 1948, at 654.

²⁹⁷ *Poland v. Grieser*, Supreme National Tribunal of Poland, 7 LRTWC, para 114 and 105; Annual Digest 1946, 389; and *Poland v. Goeth*, Supreme National Tribunal of Poland, 7 LRTWC, 1946, para 9 and 13, and Annual Digest, 1946, 268.

²⁹⁸ Vrdoljak, 'Cultural Heritage in Human Rights', 293.

²⁹⁹ UNGA Res 96(I) (11 December 1946), YBUN(1946-47) at 255; In its Preamble the Resolution highlighted the inherent gravity of genocide that hits all humankind and provokes an enormous loss for humanity that is deprived of the targeted group's cultural traditions, that reflects into a loss of knowledge and progress.

³⁰⁰ Vrdoljak, 'Cultural Heritage in Human Rights', 293.

³⁰¹ UNGA Res 96(I) (11 December 1946) UNYB 1946-47, 255.

³⁰² The Secretariat according the directives of the Economic and Social Council, asked the Division of Human Rights to arrange a Draft Convention on the Prevention and Punishment of Genocide, the final text of the Convention was adopted on 9 December 1948, Paris.

Prevention and Punishment of Genocide where the crime of genocide involved three different dimensions: biological, physical and cultural, because the attack to each of these spheres hit a different aspect of a group's existence³⁰³. The removal of children from their ethnical group, the complete prohibition of the use of religious books, the systematic destruction of religious and historical monuments and the destruction of historic, artistic and religious documents and objects³⁰⁴ fell within the 'cultural genocide' category. Unfortunately, of all the judicial experts interrogated by the Secretariat, only Lemkin claimed the inclusion of 'cultural genocide' in the Convention's text, as he argued that "an attack targeting a collectivity can also take the form of a systematic and organized destruction of art and cultural heritage in which the unique genius and achievement of a collectivity are revealed in fields of science, arts and literature" and can provoke a loss in the culture and progress of all humanity³⁰⁵. Moreover, the Convention restated the impendence of the crime of genocide from the crimes against humanity and its prosecution both during peace and wartime.

Although the concept of 'cultural genocide' was strongly refused by the international community, it was mentioned in some criminal proceedings, in particular in *Kristic* case before the ICTY³⁰⁶ and the case between Bosnia-Herzegovina and Yugoslavia before the ICJ³⁰⁷. The former regards the horrors committed by Serbs in Srebrenica in 1995³⁰⁸. In it the Tribunal reexamined whether the attacks against cultural sites

³⁰³ Gerstenblith, 'A crime Against Humanity or against People?', 343.

³⁰⁴ Gerstenblith, *ibidem*.

³⁰⁵ Thus the Genocide Convention does not provide for this crime and the only reference to cultural elements is contained in the removal of children from their belonging group; Lemkin, *Acts Constituting a General Danger Considered as Offences Against the Law of Nations* (1993); Article 2(e) of the Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 1948; Article II: In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (e) Forcibly transferring children of the group to another group.

³⁰⁶ International Criminal Court for the Former Yugoslavia, *Prosecutor v. Kristic* (Trial Chamber) IT-98-33-T (2 August 2001), para. 580;

³⁰⁷ *Bosnia-Herzegovina v. Serbia* ICJ, case on the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (17 March 2006) CR 2006/22.

³⁰⁸ This episode was the most grave massacre since the II World War, it was perpetrated against the Muslim population of Srebrenica by the Serb- Bosnian armies headed by Ratko Madlic according to a policy of 'ethnic cleansing' to create a State where reunite all Serbs, eliminating other populations. This is the worst crime perpetrated by the army of the Republic of Serbs of Bosnia- Herzegovina that occurred when the Un troops were already located in the territory; 'Il

and works could amount to the crime of genocide. The Court rejected this possibility invoking the preparatory works of the Genocide Convention³⁰⁹ and also the fact that the wording of Article 2 of the Genocide Convention which excluded any cultural reference was identically reflected into the ICTY Statute³¹⁰. The same approach was also evoked by the Statute of the Extraordinary Chamber for Rwanda³¹¹, by the ILC Commentary of the Code of Crimes against Peace and Security of Humankind³¹² and finally by the Rome Statute where only material destruction of a group was contemplated³¹³. So, according the customary principle of *nullum crimen sine lege*, the ICTY rejected the existence of 'cultural genocide'.³¹⁴ However, the Trial Chamber claimed that the destruction of cultural properties and items should prove the genocidal intent, arguing that attacks against the physical or biological integrity of a group are often accompanied by attacks against their cultural and religious symbols³¹⁵. Thus it was declared that the devastation of cultural and religious heritage should be used to prove the *mens rea* of genocide³¹⁶. The same configuration

Massacro di Srebrenica, Il Post (11 July 2017) <http://www.ilpost.it/2015/07/11/massacro-srebrenica/> (last visited on 22 August 2017)

³⁰⁹ When the insertion of 'cultural genocide' was strongly rejected as said before; Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (entered into force on 12 January 1951).

³¹⁰ Article 4(2), of ICTY Statute; Vrdoljak, 'Cultural Heritage in Human Rights', 296 ;Federico Lenzerini, *The role of International and Mixed Criminal Courts in Enforcement of International Norms Concerning the Protection of Cultural Heritage*, Francesco Francioni and James Gordley, *Enforcing International Cultural Heritage Law* (Oxford University Press, 2013), 53.

³¹¹ Article 4 (2) of the International criminal tribunal for Rwanda, where took place a genocide against the Tutsi and moderate Hutu populations, it was one of the most dramatic episode of all history the victim amounted to about 800.000- 1.000.000 according the Human Right Report, https://it.wikipedia.org/wiki/Genocidio_del_Ruanda (last visited on 22 September 2017).

³¹² Article 17, ICL concluded: "As clearly shown by the preparatory work of the Convention, the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, cultural, or other identity of a particular group". ICL, Report on the Works of its Forty-Eight Session, GAOR, 48 Session (1996) Supp No 10, UN Doc A/51/10, 90-91.

³¹³ Article 6, Rome Statute, 1998.

³¹⁴ Vrdoljak, 'Cultural Heritage in Human Rights', 296.

³¹⁵ *Prosecutor v. Krstic* (Trial Chamber) IT-98-33 (11 November 2004), para. 344.

³¹⁶ This reasoning was further developed in Judge M. Shahabuddin partial dissenting opinion where he stated how the preparatory works of the Genocide Convention did not exclude the non-biological or physical destruction of a population, and also added that when a group's characteristics are destroyed this crime amounts to genocide even if it did not involve the physical elimination of the group, all these arguments with regard to the massacre of Srebrenica; *Prosecutor v. Krstic* (Appeal Judgement) IT-98-33 (19 April 2004), dissenting opinion of Judge M. Shahabuddin, at 50 ; Micaela Frulli, 'Advancing the protection', 2005.

was also endorsed by the ICJ in the case between Bosnia-Herzegovina and Yugoslavia³¹⁷ for Yugoslavia's violations of the Genocide Convention's provisions. During the ongoing of the trial an expert on the destruction of Bosnian cultural heritage, A. J. Riedlmayer³¹⁸, was called to testify on the destruction of cultural and religious sites perpetrated by the Yugoslav army, and his intervention served to prove the *mens rea* of genocide. He declared that the attacks against cultural and religious expressions of a group are strictly linked to biological extermination³¹⁹. Even though 'cultural genocide' is not accepted as an independent crime, many voices within the international community invoke its introduction³²⁰ because this would legalize the punishment of attacks against cultural and religious buildings both in peacetime and wartime, and would allow to go further in the exemption of military necessity that prevent the sanction of many cultural and religious sites devastations³²¹. Though at the moment it is unlikely that the notion of 'cultural genocide' will be accepted within the international law framework, some judgments of the US Courts³²² endorsed an evolutionary interpretation of 'physical genocide', including also acts that would fall within the notion of cultural genocide³²³. In particular, following the conclusions of these sentences, the 'expropriation of Jews'

³¹⁷ In particular the breaches of the Genocide Convention were committed by Serbs and Montenegrins that represented Yugoslavia after the beginning of the Balkan wars.

³¹⁸ A. J. Riedlmayer gave oral witness on behalf of Bosnian army even in the case against Milosevic; In the case about the applicability of the Genocide Convention, *Prosecutor v. Milosevic*, (Judgement) IT-02-54, (17 March 2006), <http://www.icj-cij.org/docket/files/91/10628.pdf>.

³¹⁹ He added that often they are carried out before the final biological elimination, *Prosecutor v. Milosevic*, (Judgement) IT-02-54, (17 March 2006), dissenting opinion of A. J. Riedlmayer.

³²⁰ "Cultural genocide is alive and spreading in our world, and stand a as a primary warning that if we do not break through the boundaries of our thought collective we are doomed to re-enact the wretched past, over and again." Lawrence Davidson, *Cultural Genocide*, (2012 Rutgers University Press), 131.

³²¹ Gerstenblith, 'A crime Against Humanity or against People?', 388.

³²² Proceedings Against Nazi criminals of two federal Courts of Appeal; *Simon v. Republic of Hungary*, United States Court of Appeal, District of Columbia Circuit 14-7082 (9 January 2016); *Abelesz v. Magyar Nemzeti Bank*, United State Court of Appeal, Seventh Circuit 11-2387 (22 August 2012).

³²³ Lemkin stated that the atrocities committed during the II World War constituted 'biological and cultural genocide' against Jews; Gerstenblith, 'A crime Against Humanity or against People?', 388.

properties³²⁴ and their ghettoizing constituted ways to perpetuate the genocidal intent³²⁵. In the same perspective the US Secretary of State, John Kerry, while talking about Isis campaign against Iraqi and Syrian heritage claimed that the Islamic State conducts try to “erase thousands of years of cultural heritage by destroying churches, monasteries and monuments”³²⁶, meaning their genocidal intent against different religious creeds.

Thus different ways to prosecute attacks against cultural heritage, as crime against humanity or war crimes have just been analyzed, and a brief overview of cultural genocide has been given; we must conclude that even this criminalization led to different frameworks and penalties which have the merit to focus the attention of the international community on the importance of cultural heritage for the identity of each population and the safeguarding of cultural diversity³²⁷. In my opinion, the best way to prosecute these crimes, given the rejection of ‘cultural genocide’, is under the category of crimes against humanity, that are sanctioned both during an armed conflict and in peacetime, and in this way the significance of cultural and religious properties for the identity and the existence of each cultural group would be emphasized. The destruction of cultural heritage entails the annihilation of groups’ memory, self-pride and sense of belonging, *de facto* involving a deprivation of groups’ cultural contribution for all civilized communities. This does not only constitute a crime against objects and buildings, but it hits the population culturally and anthropologically linked to the targeted heritage. My thought is aligned with that part of the doctrine that draws a hierarchy between crimes against humanity and war crimes, supporting the major gravity of the former ones as confirmed by some provisions of the ICC Statute³²⁸, the ICRT jurisprudence, that in several cases

³²⁴ “Expropriations were considered themselves as genocide” *Simon v. Republic of Hungary*, United States Court of Appeal, District of Columbia Circuit (9 January 2016) 14-7082, para. 142.

³²⁵ Gerstenblith, ‘*A crime Against Humanity or against People?*’, 388.

³²⁶ John Kerry, Remarks on Daesh and Genocide, US Department of State (17 March 2016). <http://www.state.gov/secretary/remarks/2016/03/2544782.htm>.

³²⁷ Vrdoljack, ‘*Cultural Heritage in Human Rights*’, 299-231.

³²⁸ In particular they are: Article 31(1)(c) where is established the exclusion of criminal responsibility in case self- defence for war crimes which works even if the crime was committed against a protect a property, a possibility strongly excluded in relation to crimes against humanity for their inherent major gravity, Article 33 on the defence for plea of superior orders, where is stated that orders to perpetrate genocide or crimes against humanity are manifestly illegal; and

supported this vision, and finally by some trials before domestic courts, such as Albercht's³²⁹ and Eichmann's³³⁰.

3.3 PROSECUTING ISIS

3.3.1 ISIS AS A NON-STATE ARMED GROUP

After WWII, a new form of warfare began to spread with the engagement of non-state entities in armed conflicts accompanied by a greater level of non-compliance with international law (IL) and in particular with international humanitarian law (IHL)³³¹. IL firstly faced the emergence of these new entities during the decolonization period, when these groups fought for national freedom. These new actors are called Non-state actors (NSA) or Non-state armed groups (NSAG)³³² in opposition to States that, instead, are the traditional subjects of international context³³³. NSAG are the “dominant face of modern warfare”, they fight according their opportunistic rules and refuse in the most cases any compliance with international law³³⁴. This new kind of warfare can be identified as the 4th generation

finally Article 124 that consents to the High Contracting Parties to not accept the ICC jurisdiction only for war crimes (at least 7 years), turning out their less seriousness compared to crimes against humanity. Michela Frulli, *Are Crimes Against Humanity More Serious than War Crimes?*, European Journal of International Law, Vol.12 No. 2, 329-340.

³²⁹ *Albercht V. Herald Co*, 390 US 145 (4 mARCH1968), para 425 Nederlandse Jurisprudentie, 748-751, 1949, Micaela Frulli, 346.

³³⁰ *Attorney General v Eichmann* (Judgement) District Court of Jerusalem Case No. 40/61 (11 December 1961); Micaela Frulli, *ibid*, 348.

³³¹ This was largely due to the lack of adequate conflict resolution measures, the fact that the law of armed conflict regards outdated methods and means of warfare and the involvement of armed groups that are not states' regular armies that this branch of law had not included when it was drafted; Mister Cherif Bassiouni, *Criminal Law, 'New Wars and The Crisis of Compliance With The Law of Armed Conflict by Non-State Actors?'* (2008) vol. 98, No. 3 Journal of Criminal Law & Criminology, 764, 770.

³³² In this work the term NSA and NSAG will be used indifferently to identify the same subjects, even though the first one has a broader scope.

³³³ NSAG, Isis, Al Qaeda and Taliban fall within this category, Marco Pedrazzi, *The status of organized armed groups in contemporary armed conflicts*, 74.

³³⁴ Bassiouni, *'New Wars'*, 768.

of warfare³³⁵ and it is characterized by the use of social networks and the annihilation of the enemy's minds in order to destroy their morality, self-pride and political will. Of course government forces are superior in technology, weapons and velocity, but NSAG have agility, surprise effect and can often count on the local population's support³³⁶. The principle aim of NSAG is to delegitimize the opposing State and its behavior through gaining the population's support"³³⁷. NSA seek to achieve "political-power outcome"³³⁸ and to reach this objective their principle resort is indiscriminate violence. In fact, indiscriminate attacks against civilians and protected sites are common in the most recent conflicts, especially after the rise of the "terroristic phenomenon"³³⁹. These criminal actions are mostly based on ideological or religious aims, an aspect that was almost inexistent in IAC. International conflicts are those in which States' forces fought to conquer the enemy's territory and correspond to "conventional wars"³⁴⁰. On the contrary, this new kind of conflict is characterized by NSAG's aspirations to control not only the enemy's territory, but also its population³⁴¹. This strategy is carried out through the dissemination of terror and the displacement or extermination of the enemies³⁴². This tactic implies the use of intimidation: no other alternative exists for the population except supporting these armed groups, which gain in this way both the control of territory and of its inhabitants. This terror strategy seems to be a constant to NSAG actions that often leads to real "ethnic cleansings", such as the ones perpetrated in Croatia, Bosnia, Kosovo, whereas other means to terrorize the people were used in

³³⁵ Moreover Santos identifies three different periods that characterize the evolution of NSAG, the first between the 1940-1970 finds out the presence of "classic revolutionary guerrilla groups" with aimed to get political power; the second included between the 1980-1990 is considered the period of the "new wars" that were mostly civil wars fought by "social bandits", and finally the period after the attacks of 9/11 that sees the more widespread activity of Islamist movements that is qualified as "global war on terror" carried out against the US and the Western World, Solimen Santos, *Agreement on Respect for Human Rights and Humanitarian law Forged Between Governments and Non-State Actors Promote Human Security?*, (2006) Vol. 21 No. 1 Philippine J. Third World Stud, 176, 176 and Bassiuni, 'New Wars', 760.

³³⁶ Bassiuni, 'New Wars', 760.

³³⁷ Bassiuni, *ibid*, 761.

³³⁸ Bassiuni, *ibid*, 760.

³³⁹ Bassiuni, *ibidem*.

³⁴⁰ Bassiuni, *ibid*, 762.

³⁴¹ Bassiuni, *ibid* 766.

³⁴² Bassiuni, *ibidem*.

the conflicts occurred in Angola, Mozambique and East Timor³⁴³. The strategy of terror is carried out with the policy of hate that is exploited to divide the civilian population³⁴⁴. Hate has characterized many of the cruelest campaign against a particular group such as the Holocaust, the conflict in Rwanda, Bosnia and many others³⁴⁵. Moreover, hate plays a central role in the “process of de-humanization” of the conflicts that serves to render more justifiable the violent attacks against civilians³⁴⁶. The several NSAG violations of IL, IHL and human rights law are not deemed as unlawful by their perpetrators that justify them with their “distort perception” caused by the dissemination of hatred³⁴⁷. This well-organized propaganda of hate in particular affects the young and uneducated members of society, inhibiting their sense of humanity and intensifying the most aberrant attacks against people³⁴⁸. All these tactics are used to show the inadequacy of the legitimate governments in resisting them, and in particular their inability to protect the civilian population and its properties. Moreover, the governments often engage in violations of both international and domestic law and this entails a great loss of credibility and ‘legitimacy’ among their population and places the government’s actions on the same level as those of the NSAG³⁴⁹. This fact facilitates the claims of legitimacy of these groups and contemporarily promotes their only legitimate existence. These new forms of conflicts involve reciprocal claims of ‘being the good guys against the bad ones’ and every counterpart justifies its conduct with the goodness of its aims and at the same time justifies its violation of IHL³⁵⁰.

³⁴³ Bassiuni, *ibid*, 767.

³⁴⁴ Bassiuni, *ibidem*.

³⁴⁵ Often hatred is linked to religious or racial motives and has always favored the escalation of violence against the targeted group of people; Bassiuni, *ibidem*.

³⁴⁶ This strategy is exploited to provoke spontaneous reactions of the general public.

³⁴⁷ Bassiuni, *ibid*, 768.

³⁴⁸ Bassiuni, *‘New Wars’*, 761.

³⁴⁹ Bassiuni, *ibid*, 770.

³⁵⁰ Bassiuni, *ibid*, 781.

3.3.1.1 THE STATE-CENTRIC NATURE OF IL AND THE RECLUTANCE OF STATES IN RECOGNIZING NSAG

IL has always been based on States' interests and its framework is therefore the result of the work and will of States³⁵¹. State actors have always maintained their exclusivity within international framework and there has always been inequality between States and armed groups in the development of international rules³⁵². States, in fact, have always safeguarded their sphere of sovereignty and IL can be deemed as an inter-state law. This configuration of IL is confirmed by the absence of NSAG in the drafting of international treaties, because of states' fear that their engagement would confer them a status that they strongly refuse to grant. Consequently, there is no treaty that provides mechanisms for NSA ratification or successive accession. This is due to the perspective according to which NSAG are the enemies of States, they do not avail the same status of legitimate government and also of government armies during warfare. States strongly refuse to grant NSAG legal personality under IL because in their opinion this would make their own sovereignty increasingly irrelevant³⁵³. However, more recent developments has given a certain degree of personality to these entities to consider it at least bound by some IL rules, but I will analyze this topic later in this work.

NSAG are the main actors in the majority of current conflicts and IL cannot avoid dealing with them. There are some provisions that regard armed groups such as AP I that apply to war of national liberation and consider the members of National Liberation Movements as lawful combatants and that's the reason why many States refused its ratification. Instead AP II regards other types of NSA involved in NIAC and although this Protocol³⁵⁴ does not affect the sovereignty of each state party, many countries did not ratify it because of the fear that it would confer legal and

³⁵¹ William Thomas Worster, 'Relative International Legal Personality of Non State Actors' (2006) Vol. 42 N. 1 Brooklyn Journal of International Law, 207, 239.

³⁵² Worster, *ibid*, 245.

³⁵³ Andrew Clapham, *Human Rights Obligations of Non-State Actors* (2006), 151.

³⁵⁴ Article 3, III Geneva Convention on the Treatment of the Prisoners of War, 12 August 1948, (hereafter Article 3).

political recognition to these groups³⁵⁵. Legitimate governments refuse to consider members of NSAG as lawful combatants³⁵⁶, thus they are deprived from the protection afforded by the Geneva Conventions to lawful fighters, such as the status prisoner of war (POW). States have always refused to recognize NSAG legitimacy and their rare recognition only grants “derived legal personality”³⁵⁷. The adjective ‘derived’ is used because it comes from the States’ concession. Thus IL is denoted by a strong asymmetry among States and NSA, and this is another motive invoked by NSA to justify their non-compliance with IHL³⁵⁸. This asymmetry is reflected, for instance, in the fact that when a state launches a bomb which kills the same number of protected people of a “suicide-bomber attack” it is not judged within the international community with the same degree of gravity. In fact, government military operations enjoy a “presumption of legality” whereas the conducts of NSAG are always publicly labeled as criminal actions³⁵⁹. The consequences of this non-recognition policy and the asymmetries above examined entail more frequent violations of IHL, because each party to the conflict justifies its military actions on the legitimacy of its cause³⁶⁰.

3.3.1.2 THE DEFINITION OF NSAG

It is also important to clarify what entities are included by the term “Non-state actors”, which on its turn covers NSAG and so ISIS. By a dictionary definition NSA would be “any entity that is not actually a State”³⁶¹; from a more technical vision UN experts claimed that “NSA can be any actor on the international stage other than a sovereign State”³⁶². The problem is that no general definition neither of NSA nor

³⁵⁵ Bassiuni, ‘*New Wars*’, 782.

³⁵⁶ They do not benefit from the grants of Prisoners of War Status that belong only to States militaries. Bassiuni, *ibidem*.

³⁵⁷ Bassiuni, *ibid*, 785.

³⁵⁸ Bassiuni, *ibidem*.

³⁵⁹ Bassiuni, *New Wars*’, 787.

³⁶⁰ Bassiuni, *ibidem*.

³⁶¹ Andrew Clapham, *Non-state Actors*, (2012), 1.

³⁶² UN experts Briò and Motoc, Andrew Clapham, *ibidem*.

NSAG exists because this term can encompass different realities depending on the context and on the speaker. These entities can vary in size, organization, motives, aims and resources, making the term “non-state actor” difficult to define³⁶³. Nevertheless, it is generally accepted that this term consists of rebel groups, terrorist organizations³⁶⁴, religious groups, and of course organized armed groups³⁶⁵ with a political agenda³⁶⁶. In a narrower way the International Council on Human Rights Policy describes NSAG “as groups that are armed and use force to achieve their objectives and are not under state control”³⁶⁷. In particular this definition includes two features: lack of state control and the use of force, but according the Geneva Call, which is an organization whose principle task is increasing the NSAG compliance with IL, also political aspirations characterize NSAG³⁶⁸.

ISIS can be considered a terrorist group, such as Al Qaeda or the Taliban and it falls within the category of NSA despite the organization’s claims to be a real state. The Islamic State does not fulfill all the requirements to constitute a state and thus it cannot be considered a state entity. There are no clearly defined boundaries, and it is reported that ISIS is losing the control of many conquered cities. The population under its control is subjugated by terror, and cannot be considered as a permanent population who can identify themselves as citizens of the Islamic State. They have

³⁶³ Moreover they are characterized by a “fluid membership and goals that frequently change”; Claudia Hoffmann, *Engaging Non-State Armed Groups in Humanitarian Action* (2006) Vol. 13 International Peacekeeping, 396, 371.

³⁶⁴ It’s important to be noticed that NSA were associated with terrorist Groups in the UN SC Resolution 1267, that regards the sanctions imposed on “individuals and entities belonging or related to Taliban, Osama Bin Laden and Al Qaeda” UNSC Res 1267 (15 October 1999) UN/RES/1267.

³⁶⁵ According to Article 1 of the Hague Regulations, organized armed groups are groups that have “militia and volunteer corps...commanded by a person responsible for his subordinates”, that is a definition recalled also in Article 4 of the III Geneva Convention, 1949.

³⁶⁶ Orla Marie Buckeley, *Unregulated Armed Conflict. Non-State Armed Groups, International Humanitarian Law, and Violence in Western Sahara* (2012) Vol. XXXVII North Carolina Journal of International law & Commercial regulation, 792, 796.

³⁶⁷ This international body is a non-governmental organisation that provides recommendations and researches to increase the compliance of NSAG with human rights law. International Council on Human Rights Policy, *Ends and Means: Human Rights Approaches to Armed Groups*, <http://www.ichrp.org/files/reports/6/105-report-en.pdf>.

³⁶⁸ Geneva Call is a non-governmental organisation that seek to increase IL respect by NSAG, see for more information <http://www.genevacall.org/about/about.htm> (last accessed 17 January 2017).

no choice but to accept their strict rules because if they rebel they would lose their lives³⁶⁹.

3.3.2 THE DIFFICULTIES IN HOLDING NON-STATE ORGANIZED GROUPS RESPONSIBLE UNDER INTERNATIONAL CRIMINAL LAW

With the increasing role played by NSAG in the most recent conflicts, a question has risen spontaneously, whether armed groups can be held responsible for their wrongful acts as groups *per se*. Even though it seems that the international community is taking a few steps in this direction³⁷⁰, the criminal responsibility of these groups has not already been universally established and accepted, because of the embryonic status of IL over NSAG. Their accountability as such is not entirely accepted due to three main issues, the first one regarding the ambiguities that characterize the definition of non-state armed groups, the second about the current absence of a clear rule of attribution for groups' conducts and finally the problem of what forum would have jurisdiction over these acts³⁷¹. Firstly, no fixed definition of non-state armed groups exists, in fact this term is used to encompass many entities with different characteristics, such as insurgents, rebels, terrorists, movements of national liberation and so on. Additionally, it is reasonable to ask if a group has to fulfill some requirements to be qualified as an international subject, such as a certain

³⁶⁹ It seems that Isis fulfils the others conditions for statehood: the capacity to engage international relations with other states (if it would decide to do that), and the government of the Islamic State can be considered as an effective government; Yuani Shany, '*ISIS is the Islamic State really a State?*', Israel democracy institute (14 September 2014). <https://en.idi.org.il/articles/5219> (last visited on 22 August 2017).

³⁷⁰ For instance the ILC in the Draft Articles on State responsibility (in Article 10) has recognized that the conducts performed by an organ of a National Liberation Movement "may be attributed to this movement"; moreover other entities than States might have to pay reparation for their violations, and ultimately according to the statement of the International Commission of Inquiry on Darfur also rebels may be prosecuted for their crimes, and also may pay reparation for their criminal conducts. Another important development in this direction is traceable in the Reports drafted by the Un Secretary -General that list many violations that can be committed by Non State Actors, such the "grave violations of children's rights committed by NSAs acting in Congo, Sudan, Uganda, Somalia and other countries"; Liesbeth Zegveld, *Accountability of armed opposition groups in international law* (Vol 24 Cambridge University Press, 2002), 111.

³⁷¹ Zegveld, *ibidem*.

size, or the control of a territory, an organized structure and so on³⁷². There are no defined answers to this question, but international law requires a low threshold to qualify a group as a legal subject according to international rules for humanitarian reasons³⁷³. However, States are still reluctant to grant legal subjectivity to NSAG and on the contrary they prefer to treat them as ordinary criminals or terrorists to avoid the application of IHL³⁷⁴. In this way, their conducts remain subject only to the domestic law of the state where they are acting, *de facto* denying the grants offered to lawful combatants by humanitarian law. The second problem concerns the lack of principles of attribution on the conducts of armed groups. Attribution is an objective and unavoidable condition to hold any individual or entity accountable for its acts and omissions, and NSAG are abstract entities that can only act through the action of real persons, equally as states³⁷⁵. The only principle established in international practice regards the membership of armed groups that could entail the responsibility of these groups, but currently international law does not provide fixed criteria to determine who can be considered as a member of the group³⁷⁶. This problem could in reality be solved by assimilating NSAG to States, because of their many similarities with state entities, as they are “collective entities with a certain degree of organization and often they have political powers and organs too”³⁷⁷. In this way it would be possible to ensure the application by analogy of Article 4 of the Draft Articles on State Responsibility³⁷⁸. This will not create problems for armed groups with “State-Like” attributes, but on the contrary it would be difficult to support this theory for groups of small dimensions without a defined organizational structure³⁷⁹.

³⁷² Zegveld, *ibidem*.

³⁷³ Zegveld, *ibidem*.

³⁷⁴ Zegveld, *Accountability of armed opposition group*, 111.

³⁷⁵ Zegveld, *ibidem*.

³⁷⁶ Zegveld, *ibidem*.

³⁷⁷ Zegveld, *ibidem*.

³⁷⁸ The Draft Articles on State Responsibility prove, now prove to be inadequate because they do not sufficiently consider the breakdown of the traditional state system of the 19th century and the birth of a new system with news actors. These entities have to be considered responsible for their violations thus the interests of the international community must be rebalanced against the State's sphere of sovereignty; Shabtai Rosenne, 'State Responsibility and International Crimes: Further Reflections on Art. 19 on the Draft Articles on State Responsibility' (1997) Vol. 30 New York University Journal of International Law and Politics, 145, 154.

³⁷⁹ Zegveld, *Accountability of armed opposition group*, 112.

In this case the accountability of the group could be sustained only when it has “the effective control over people”³⁸⁰. The last problem concerns the possible forum that could claim its jurisdiction over NSAG, because till now no international court has expressly consented to extend their jurisdiction over NSAG IL violations³⁸¹. By now, only few international bodies have extended their jurisdiction to include the actions of armed groups such as the Inter- American Commission, The UN Security Council and the UN Council of Human Rights, but they are still a small minority³⁸². This gap is due to the primitive state of international law over these entities and the persistent reluctance of States to recognize NSAG as legitimate entities. There is an increasing necessity of creating a jurisdictional body to which individuals can refer for breaches of their rights committed by NSAG. For these reasons, at the moment the accountability of NSAG *per se* cannot be supported, and the best way to prosecute their criminal actions remains the punishment of individuals.

Nonetheless, holding NSAG responsible as such would be the best solution in terms of both punishment and deterrence, but unfortunately armed groups’ responsibility still represents a grey area of international law³⁸³. The direct accountability of NSAG before International bodies is still underdeveloped and nowadays there are no universally established and accepted measures at international level to hold these groups *per se* responsible for their violations and crimes³⁸⁴, while at the same time there is a strong necessity of considering them bound by IL and in particular by IHL.

3.3.3 HOLDING NON-STATE ARMED GROUPS RESPONSIBLE UNDER CUSTOMARY INTERNATIONAL LAW

³⁸⁰ And not the control over a territory; Zegveld, *ibidem*.

³⁸¹ Zegveld, *ibidem*.

³⁸² Zegveld, *ibid*, 113.

³⁸³ The membership of a group could be a great evidence of the crime; Zegveld, *Accountability of armed opposition group*, 115.

³⁸⁴ Marco Sassoli, ‘*Transnational armed groups and international humanitarian law*’ (2006, Haward) Occasional Papers Series 6 Program on Humanitarian Policy and Conflict Research, 3.

3.3.3.1 DOES INTERNATIONAL HUMANITARIAN LAW APPLY ALSO TO NIAC?

As I previously stated, NSAG are now the main actors of the current armed conflicts that qualify as non-international armed conflicts (NIAC). As said in the first chapter the Syrian conflict, can now be considered as a proxy war, for the involvement of many foreign states. Although, an internal war is still occurring between ISIS and Assad's troops and between the opposition front and the government forces. In order to find out the international legal base on which ISIS responsibility rests on, the discipline of NIAC have to be analyzed³⁸⁵.

Has to be briefly addressed whether IHL applies or not to this kind of conflict and in what way and extent it does. Being the law applicable when an armed conflict rises, IHL is composed by two principle sources, the conventional one, represented by the law contained in the Geneva Convention, and the rules of the Hague Regulations³⁸⁶. IHL purpose is "to prevent and limit human suffering" to civilian population and properties during the ongoing of the hostilities³⁸⁷. IHL mirrors the unresolved tension between States' interests and humanitarian exigencies that has led to the creation of different regimes that regulate IAC and NIAC respectively. Yet, the presence of two different disciplines highlights an unfair unbalance that entails a different degree of protection depending on the type of the conflict³⁸⁸. For instance during NIAC, members of NSAG are not considered as lawful combatants, and they do not fall within the category of Pow³⁸⁹ and its related grants, thus they can be treated as ordinary criminals that are acting against their domestic law³⁹⁰. This inequality allow States to conserve the "monopoly of legitimate use of force and allows them to refuse the protection granted by the Pow status" to NSA members

³⁸⁵ As'ad Abukhalil, *The 8 Proxy Wars Going On in Syria Right Now*, Huffington Post http://www.huffingtonpost.com/asad-abukhalil/syria-proxy-wars_b_5874488.html (last visited on 25 September 2017).

³⁸⁶ Bassiouni, 'New Wars', 723.

³⁸⁷ Bassiouni, *ibid*, 726.

³⁸⁸ Bassiouni, *ibid*, 727.

³⁸⁹ Prisoners of War (POW).

³⁹⁰ Regardless their respect for IHL, Bassiouni, 'New Wars', 729.

and the advantages of combatant legitimacy³⁹¹. In this sense, the actual practice held by States shows the asymmetry that derives from the fact that they consider non-state actors bound to certain international obligations, but at the same time they do not benefit from the Pow status³⁹². From a humanitarian perspective, IHL should grant the same protection to civilian population regardless of the nature of the conflict. The basic principles of IHL are “distinction, proportionality, necessity and the prohibition on inflicting unnecessary attacks or suffering on those who are *hors de combat*”³⁹³ and must apply also in NIAC. For instance, the crime of genocide, crimes against humanity and war crimes that are considered as *jus cogens*³⁹⁴ under International Law no doubt arise on their application to NIAC, and thus to NSAG³⁹⁵. The conflict in Syria passed through 3 different stages: the first one, when it constituted an internal conflict to which only domestic Syrian law could apply, then it turned into NIAC, and now with the participation of other States it can be deemed as IAC. Regardless the type of conflict non-state actors have to be considered bound to some rules of IHL of fundamental importance, while on the contrary the task of IHL would be frustrated. During NIAC both state forces and opposition forces must comply with IHL and HRL, according to the wording of common Article 3 and AP II provisions. In particular, in the next chapter, I will assert how some customary rules of IHL that are not covered by Article 3 and AP II apply to NSAG and so to NIAC³⁹⁶.

³⁹¹ Bassiouni, *ibid*, 729.

³⁹² This imbalance and unfairness leads those who participate to the clashes to not respect the obligations on human treatment that should be respected during the hostilities on the basis of reciprocity; NSA have no interest to comply with IHL without the guarantee of reciprocity; Bassiouni, *ibid*, 731.

³⁹³ *Hors the combats* are persons who are not actively participating to the hostilities, this category includes: militaries who have laid down their arms, sick, wounded and prisoners, or other persons who have left the hostilities for any other reason. Antonio Cassese and Paola Gaeta, *Cassese's International law*, (2 edn, 2005 Oxford University press), 414-417 refers to certain fundamental, overriding principles of international law, from which no derogation is ever permitted.

³⁹⁴ *Jus Cogens*: refers to certain fundamental, overriding principles of international law, from which no derogation is ever permitted. Jan Klabbers, *International Law* (Cambridge University Press, 2013), 46.

³⁹⁵ Bassiouni, *Introduction to International Criminal Law*, 239-242; and Bassiouni, 'Accountability for Violations of International Humanitarian Law', (2000) *Post- Conflicts Justice*, Vol. 6, 383, 394.

³⁹⁶ Chaplam, *Non-State Actors*, 46.

3.3.3.2 THE “FUNCTIONAL PERSONALITY” OF NON-STATE ARMED GROUPS AND CUSTOMARY INTERNATIONAL LAW

In the issue whether NSAG are bound by IHL or not lies the inherent paradox that denotes this legal framework: non-state actors did not participate in the drafting of IHL treaties even though they are considered bound to some rules set forth in these legal instruments. Although their conducts can contribute to the formation of customary international law (CIL)³⁹⁷, they have no influence in the drafting of treaties. This is due to the fact that NSA carry out their fight against the legitimate governments, which are the only ones that can currently ratify international treaties. Nonetheless, it would be unreasonable to consider only States bound to IHL, thus permitting to NSAG to commit violations of fundamental international rules³⁹⁸ which will remain unpunished. This fact can be only explained through the recognition of a certain degree of NSA international personality that is a necessary requirement to be subject of IHL and to enjoy the rights and obligations that it entails³⁹⁹. This means that IHL broadens the qualification of legal persons within the current international context to achieve its principle purposes that are the protection of civilians and their properties during armed conflicts⁴⁰⁰. This concept is explained by the theory of the “functional or relativist personality” according to which NSA are occasionally treated as international subjects as a direct consequence of the “equality of belligerents”⁴⁰¹. Thus they are sometimes treated as if they bear international legal personality to reduce the distress of civilians and combatants at minimum. NSAGs in fact “play a significant role in the success of humanitarian operations and the protection of humanitarian personnel”⁴⁰². It is necessary to

³⁹⁷ This trend is not yet universally accepted.

³⁹⁸ Furthermore the whole motive to apply IHL also to NIAC, that is based on the parity of the counterparts would fail, Zegveld, *supra* note 370, 14; Marco Sassòli and Andrea Bouvier, *How does Law protect in War?* (2001, ICRC, Geneva), 266.

³⁹⁹ Pedrazzi, *The status of organized armed groups*, 76.

⁴⁰⁰ Pedrazzi, *ibid*, 76.

⁴⁰¹ “That can be conferred to organized armed group according to the wording of Article 3 of AP II which establishes the *jus contrahendi* of these entities, that can conclude agreements with the other parties of the conflict; Pedrazzi, *ibid*, 77.

⁴⁰² Buckley, *‘Unregulated Armed Conflicts’*, 801.

specify that IHL does not provide a status to these group except in this sense, in fact the functional personality serves to consider these non-state actors bound to IHL, so far as they are bound to ICL⁴⁰³, but it does not affect their status in a different manner⁴⁰⁴. This functional approach however is preferably applicable to NSA with a certain degree of organization, a factor which constitutes a necessary precondition for the compliance with IHL⁴⁰⁵. This perspective is confirmed by the provision set forth in common Article 3 which binds 'each party of the conflict' to the fundamental rules laid out in this provision and by the multiple statements made by the UN that many times "recalled the duty of all parties to non-international conflict to respect IHL". This approach is restated by the wording of Article 1 of AP II which "supplements and develops" common Article 3. Moreover, the expression "all parties to an armed conflict" was used also in the II Protocol to the Conventional Weapons Convention and in the II Protocol of the 1954 Hague Convention on the Protection of cultural heritage which applies to all the parties of an armed conflict⁴⁰⁶. There are three main ways through which non-state armed groups can be considered bound to IHL: the first one regards the fact that armed groups would be bound to international rules implemented by their national law, the second concerns the assumption that under some circumstances treaties can bind third parties and the last is about customary international rules⁴⁰⁷. The first method is widely accepted, in fact these groups would remain subject to the States' origin government and to its domestic legislation. However, this construction entails a practical issue, in fact NSAG would comply with difficulties to the international obligations assumed by the government they are trying to defeat, proving to be not fully satisfactory to the

⁴⁰³ Article 38 of the Rome Statute describes customary law as "evidence of general practice accepted as law". It is based on the general practice and on *opinion juris* that entails a sense of obligation towards a rule because of its acceptance as law; Klabbers, *International Law*, 76.

⁴⁰⁴ The consequence of this functional personality is that NSA become bearers of rights and obligations under IHL.

⁴⁰⁵ The application of IHL is completely independent from the potential legitimacy recognition that could be made by the adversary, this recognition does not affect in any way the "functional personality" of the group; Pedrazzi, *The status of organized armed groups*, 77 and Sassoli, *'Transnational Armed Groups'*, 16.

⁴⁰⁶ Robin Geiss, *Humanitarian law obligations of organized armed groups* (2010), 94.

⁴⁰⁷ Geiss, *ibid*, 95.

scholar⁴⁰⁸. Moreover, this construction entails a hierarchical relationship between states and NSAG, but these entities often “challenge the authority and the laws of the established government”⁴⁰⁹. The second approach is also not completely useful because IL requires an “explicit acceptance” of the interested group to the international obligations. This proves to be unlikely, as in the case of ISIS and among those entities that strongly refuse to be part of the international order and of its legal implications⁴¹⁰. In my opinion, the best and only feasible way to consider this groups bound to IHL is through international customary law (CIL)⁴¹¹. In fact, many rules of IHL that apply to NIAC, or IAC have reached the status of customary rules and thus bind any entity that acts within the international community, even those with limited legal international personality. To support this theory it can be cited the experience of the Supreme Court for Sierra Leone which convicted the Revolutionary Front for its violations of IHL⁴¹², in the same way the International Commission of Inquiry on Darfur considered the Sudan Liberation Movement bound to IHL, as the ICJ did over the contras in Nicaragua⁴¹³ did. This approach is also confirmed by the words of the ILC Commentary to the Draft Articles according to which “an insurrectional movement may itself be held responsible for its own conduct under IL, for instance for a breach of IHL committed by its militants”⁴¹⁴. To conclude, NSAG must comply with “the legitimate expectations of the international community” that are the

⁴⁰⁸ Geiss, *ibid*, 95-96.

⁴⁰⁹ This theory moreover is based on the assumption that individuals are bound by the rules that bind their home state, regardless they are rebels or insurgents or criminals, but does not take in account that NSAG are diverse from individuals, in fact NSAG are addressed by common Article 3 and by AP II, that impose more obligations than the ones impose to individuals; Zegveld, *Accountability of opposition organized groups*, 233.

⁴¹⁰ According to this theory armed groups would be treated as State-like entities and consequently without their explicit acceptance they will not be bound by IHL; Geiss, ‘*Humanitarian law obligations of organized armed groups*’, 95.

⁴¹¹ CIL, according Article 38 of the Rome Statute, Customary Law is one of the sources of IL, a customary rule formed only if are present two essential preconditions: *opinion iuris* and state practice. Klabbers, *International Law*, 45.

⁴¹² *Prosecutor v. Sam Hinga Norman* (Decision on ton Preliminary Motion Based on Lack of Jurisdiction) (2004), Case No. SCSL-2004-14-AR72 (E), para 22.

⁴¹³ *Nicaragua V. US* (judgement), 1986 ICJ Rep. 14, 114, para 218-219; Sandesh Sivakumaran, “*Binding Armed Opposition Groups*” (2005) Vol. 55 *International & Comparative Law Quarterly*, 369, 373.

⁴¹⁴ No responsibility can exist without obligations to comply with; Sassòli, ‘*Transnational Armed Groups*’, 35.

fundamental obligations and responsibilities that every State has to respect for the whole international community's interest. It is essential in my opinion that also NSAG have to respect international customary law, which consists of rules "that have been accepted and recognized by the international community"⁴¹⁵ It would be unreasonable to consider only States bound to IHL and IHRL, leaving the violations committed by NSAG unpunished and unprosecuted. This approach has developed during these years with no few difficulties due to the enduring reluctance of legitimate governments to recognize NSAG for their fear of losing the legitimacy of their power.

Instead the engagement between States and their opposition forces should lead to better international law compliance. The necessity to involve these groups mainly regards the protection of civilians and their properties that are most severely affected by the brutal nature of the clashes⁴¹⁶. This engagement would surely facilitate the respect of IHL by NSAG, in fact allowing them to participate to the creation or development of humanitarian norms they would be more favorable to their performance⁴¹⁷. Moreover, the negotiation with these entities would also facilitate the resolution of conflicts, but all these favorable evolutions will be possible only if States abandon their inimical attitude towards NSA. All this reasoning is surely correct and useful, and even if ISIS is likely never to accept to be part of the international order, by establishing the sure subjection of these non-state entities to some fundamental rules the States would reduce NSA current violations. A direct consequence of these developments is linked to the necessity of punishing crimes in order to achieve the conviction that these violations will entail a sure conviction and also to discourage future breaches. It is not conceivable that ISIS's crimes remain unpunished, as their wide destructive campaign against people and cultural properties has to be prosecuted. This would otherwise open the door to other future

Commission on Human Rights Special Rapporteur.

⁴¹⁵ Rodenhauer, *'Human Rights Obligations of Non-State Armed Groups'*, 8.

⁴¹⁶ Kofi Annan, 2001 Secretary-General Report: *'Civilians in Armed Conflict'*, par. 65 delivered to the Security Council, UN Doc. S/2001/331 <http://www.securitycouncilreport.org/un-documents/document/Disarm%20S2001331.php> (22 September 2017).

⁴¹⁷ David Steinhoff, *'Talking to the Enemy: State Legitimacy concern with Engaging Non- State Armed Groups'* (2009) Vol. 45, Texas International Law Journal, 287, 298.

violations on the conviction of not being punished for them⁴¹⁸. Thus after this reasoning, the qualification of the conflict and of its parties becomes meaningless to the population that lives in territories involved in the fights, in fact all individuals deserve to be protected from the brutal violence of the conflict, regardless of the involvement of either States or NSAG⁴¹⁹.

Concluding, international policy should be characterized by the involvement of all actors in armed conflicts, regardless of their state or non-state nature as they are subject to:

- 1) IHL which regulates the use of force in armed conflicts and its violations constitute war crimes
- 2) Genocide Convention of 1948 that provides non-derogable prohibitions that are considered as *erga-omnes* rules⁴²⁰
- 3) ICL on the crimes against humanity that sets non-derogable prohibitions of *erga-omnes* nature⁴²¹;

However, by now this is only a “promising approach” that unfortunately has not been yet completely established within the international community⁴²². Actually no international body is expressly mandated to monitor compliance by non-state armed groups with the applicable law. The absence of international bodies that are formally competent to review armed groups’ compliance with IL creates the exigence of a forum to which individuals can submit complaints for IHL violations committed by these entities⁴²³. Therefore actually ISIS crimes, and in particular the destruction of Syrian cultural heritage can be sanctioned through the prosecution of ISIS members responsible of this crimes.

⁴¹⁸ It is necessary that IHL adequately regulates the behaviour of NSAG.

⁴¹⁹ Orla Marie Buckley, ‘Unregulated Armed Conflicts’, 744-745.

⁴²⁰ *Erga omnes* rules are obligations that are not just owed towards the whole international community of States; Klubbers, *International Law*, 132.

⁴²¹ In *Tadic* the Court held for the first time that these crimes have to be condemned not only during IAC, but also in NIAC and peacetime. *Prosecutor v. Tadic*; (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT -94-1-T (2 October 1995), para 87. The punishment of crimes against humanity is embodied in the Statute of the ICC, ICTY and of the ICTR; Bassiouni, ‘New Wars’, 737-738.

⁴²² Buckley, ‘Unregulated Armed Conflict’, 807.

⁴²³ Zegveld, *Accountability of opposition organized groups*, 233

3.3.4 OPTIONS FOR PROSECUTING ISIS MEMBERS

3.3.4.1 PROSECUTING FOREIGN FIGHTERS

The recent conflict which is affecting the Syrian and Iraqi territory brings the emerging phenomenon of foreign fighters (FF) to light. The number of foreign fighters has constantly increased over the past years thanks to ISIS social mediated propaganda to recruit more militants. The first presence of large numbers of foreign jihadi fighters in Syria dates back to late 2011⁴²⁴. According to the Near East Policy report of the Washington Institute, in 2012 700 to 1,400 fighters had entered Syria⁴²⁵. A definition of the expression “foreign fighters” is contained in the UN Res. 2178/2014 which states that to be included in this category fighters must fulfill three conditions: being foreign, terrorists and involved in an armed conflict⁴²⁶. In less than two years, Syria has become the principal jihadist destination and the most famous jihadist battlefield in the world, “providing a training ground for radical Islamists from other nations”⁴²⁷. Most of these volunteers come from Western European countries, such as Belgium, the Netherlands, Germany, the UK and France⁴²⁸. In addition, there are up to 300 or 400 Russian citizens fighting in Syria⁴²⁹. In the majority of countries it is not a crime to join an armed conflict as long as the origin country is not involved in the same conflict⁴³⁰. Therefore, states seek to prosecute these fighters under terrorism charges that include the criminalization of the act of

⁴²⁴ FF do not only joined Isis troops, but also the FSA and Hezbollah militia, but to the aim of this work I will only address the first group; Ali Y. Zelin, *Foreign Fighters Trickle into Syrian Rebellion* (2012) The Washington Institute for East Policy Vol. 11 (11 June 2012).

⁴²⁵ Zelin, *ibidem*.

⁴²⁶ The threshold that clashes have to reach to be considered as armed conflict is set forth in common Article 2 of the four Geneva Conventions, regarding IAC and common Article 3 contained in the same Convention, regarding NIAC.

⁴²⁷ Alastair Reed, Jenine De Roy van Zuijdewijn and Edwin Bakker, ‘*Pathways of Foreign Fighters: Policy Options and Their (Un)Intended Consequences*’, International Centre for Counter Terrorism-The Hague(2015), 7, [http://icct.nl/publications/icct-papers/pathways for Foreign Fighters: Policy Options and Their \(Un\)Intended Consequences](http://icct.nl/publications/icct-papers/pathways%20for%20Foreign%20Fighters%20Policy%20Options%20and%20Their%20(Un)Intended%20Consequences).

⁴²⁸ Reed *et alia*, *ibidem*.

⁴²⁹ ‘*Hundreds of Russian Fighting as Mercenaries in Syria*’ (Ria Novosti, 20 September 2013) [http://en.ria.ru/world/20130920/183614084/hundreds-of-Russians-Fighting-as-Mercenaries-in-Syria – FBS.htm](http://en.ria.ru/world/20130920/183614084/hundreds-of-Russians-Fighting-as-Mercenaries-in-Syria-FBS.htm). (last visited on 24 July 2017).

⁴³⁰ Reed *et al*, ‘*Pathways of Foreign Fighters*’, 8.

joining a determined terrorist group or their engagement in terrorist actions while in Syria and Iraq⁴³¹. This phenomenon constitutes a great threat not only to Syrian and Iraqi people, but also to people of FF's belonging country, in fact after the return to their home country they are often involved in terrorist attacks against their nationals. Many European ISIS militants appear in videos threatening their home countries⁴³². The skills, the experience achieved in the battle field and the radicalizing effect of the participation in Syrian and Iraqi clashes intensify the risk of bloody attacks after their return⁴³³. It is necessary to prevent the occurrence of new terrorist attacks, but when this seems not to possible the punishment of these acts proves to be unavoidable, at least to deter future terrorist actions. To prosecute these crimes it is easy to establish home country's jurisdiction over the responsible through the principle of nationality. According to this principle, States have authority over all their nationals regardless of their location within the boundaries of each state⁴³⁴. On the basis of this principle, in Germany, for instance, Maher H⁴³⁵, who had joined ISIS cause, was sentenced to three years of prison for having prepared murder with "terrorist intent" while he was in Syria. Another example is the sentence against Flavien M. who was convicted to seven years of prison by a French court for conspiracy in planning terrorist attacks⁴³⁶. In Belgium the trial against 45 people charged with "membership of a terrorist organization" that were all found guilty led to finding them all guilty⁴³⁷.

⁴³¹ Reed, *ibid*, 10.

⁴³² Europol declared in its 2012 Terrorism Situation and Trend Report that returning fighters "have the potential to utilize their training, combat experience, knowledge and contacts for terrorist activities inside the EU"; Europol, *Te-Sat 2013: EU Terrorism Situation and Trend Report*, 25 April 2013, <https://www.europol.europa.eu/content/te-sat-2013-eu-terrorism-situation-and-trend-report>.

⁴³³ In particular seems that the active participation in the Syrian clashes increases the radicalization of these subjects.

⁴³⁴ Klabbers, *International Law*, 90.

⁴³⁵ Arrondissementsparket Den Haag, *OM eist 4 jaar tegen vrouw die personen ronselde voor Jihad en 3 jaar tegen teruggekeerde Syriëganger*, 4 November 2014, <https://www.om.nl/onderwerpen/jihad-syriegangers/@87116/eist-4-jaar-vrouw/> (last visited on 21 August 2017).

⁴³⁶ Charlotte Oberti, *'Le parcours chaotique du premier Français accusé de jihad en Syrie'*, France 24 (18 October 2014) <http://www.france24.com/fr/20141017-france-parcours-chaotique-premier-francais-accuse-jihad-syrie-flavien-moreau-justice-proces-/> (last visited on 21 August 2017).

⁴³⁷ "Fouad Belkacem veroordeeld tot twaalf jaar, Jejoen Botnik tot 40 maandem met uitsel", Nieuwsblad (11 February 2015) http://www.nieuwsblad.be/cnt/dmf20150211_01523271 (last visited on 21 August 2017).

3.3.4.2 DOMESTIC COURTS

Every state can exercise its jurisdiction over its territory and its citizens, thus Syrian Courts could easily try ISIS members for the crimes committed, including the deliberate destruction of cultural heritage. This kind of jurisdiction is based on the territoriality and nationality principle that involves state jurisdiction respectively “over all acts that take place within its territory and over its national regardless their current location”⁴³⁸. Thus it seems not to be any obstacle to the punishment of ISIS for the destruction of Palmyra and the devastation of many other Syrian religious and historical sites. Nevertheless, many worries rise about the effective capacity of the Syrian Courts to remain impartial and objective in this case⁴³⁹. In the case of Syria it is uncertain whether the Syrian Court may respect the international standards established for the conducting of fair trials in trying ISIS members.⁴⁴⁰ This in particular is due to the fact that also Assad regime is accused of many violations of human rights, war crimes and crimes against humanity, in the same way as ISIS⁴⁴¹. Moreover, ISIS’s action involves both Iraqi and Syrian territories and it is not sure whether each country will be able to exercise territorial jurisdiction over these crimes. Neither the Iraqi nor the Syrian court seem to be capable of facing trials over crimes of this “complexity or scale”⁴⁴². Another aspect to consider is the “religious and ethnic composition” of the Syrian courts, which would likely weak the integrity of domestic jury⁴⁴³. Actually, a proposal to establish a Syrian Extraordinary

⁴³⁸ Klabbers, *International Law*, 92-93.

⁴³⁹ Andrew Solis, ‘Only[] can Judge: Analysing Which Courts have Jurisdiction over Isis’, (2010) Vol. 40 Southern Illinois University Law Journal, 69, 73.

⁴⁴⁰ Solis, *ibid*, 74.

⁴⁴¹ Neal Robyn-Early, ‘How Will Syria’s Assad Be Held Accountable For Crimes Against Humanity?’, Huffington Post(Mar. 28,2015) <http://www.huffingtonpost.com/2015/03/28/syria-war-crimes-n-6950660.html> (last visited on 22 August 2017).

⁴⁴² Solis, ‘Only[] can Judge Isis’ , 74.

⁴⁴³ The same concerns regarded the Iraqi High Tribunal which tried Saddam Hussein and other Ba’athist leaders and which was deeply compromised because of the decades of Ba’hatist rule, in fact the proceedings were “procedurally and substantively insufficient to protect the defendants’ rights to due process”, Kevin. J. Heller, ‘A poisoned chalice: The Substantive and Procedural Defects of the Iraqi High Tribunal’ (2007) Vol 39 Case w. Res. Journal of International Law, 261, 263.

Tribunal⁴⁴⁴ was presented by a group of international experts and the “Chautauqua Blueprint” was signed on 27 August 2013 for the creation of a Syrian Court to punish the people responsible for the most abhorrent crimes. This proposal turned out to be useless because of the problems cited above, as trial may only be conducted against the defeated and “the involvement of the victors in the prosecuting could turn into unfair and partial trials”⁴⁴⁵. In its Article 20(d)(4), the Chautauqua Blueprint punishes the direct attacks against buildings dedicated to religion, education, art and science or for charitable purpose, historic monuments, hospitals, and places where the shocked and wounded are collected, provided they are no military objectives⁴⁴⁶. This list does not require a threshold of importance of the targeted sites and thus includes every historic and religious place regardless of their value for the whole humanity⁴⁴⁷, as required by the 1954 Hague Convention to distinguish what properties fall under its protection from the others. Moreover, looting is not included in the Chautauqua a Blueprint and it would remain unpunished⁴⁴⁸. Even worse is the lack of punishment of all the conducts that transform a cultural site into a military objective rendering the site vulnerable to legitimate attacks, thus many destructions committed respectively by ISIS, the Assad regime and the rebels, would go unpunished⁴⁴⁹. Thus these several reasons lead to the necessity of an international forum to condemn ISIS for its campaign against Syrian cultural heritage. In this way the judgments would belong to all the international community and the gravity of these destructive actions will be emphasized also in terms of deterrence. As Justice Goldstone said, “collective amnesias does not work”⁴⁵⁰.

⁴⁴⁴ Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes, Chautauqua Blueprint to Prosecute Syrian War Crimes Unveiled, Institute for National Security and Counterterrorism, available at <http://insct.syr.edu/chautaiqua-blueprint-posecute-srian-war-crimes-unveiled/>

⁴⁴⁵ Andrew Solis, ‘Only[] can Judge Isis’, 76.

⁴⁴⁶ Article 20(d)(4) that applies to NIAC and Article 20(b)(10) which applies to IAC Chautauqua Blueprint.

⁴⁴⁷ Marina Lostal, ‘*Syria’s world cultural heritage and individual criminal responsibility*’ (2015) Vol. 3 N. 1 International Review of Law, 3, 4.

⁴⁴⁸ Lostal, *ibid*, 15.

⁴⁴⁹ For instance the bombardment of Crac des Chevaliers would be unpunished because it was used as a military base by the rebels and the attack provided a military benefit for the Syrian Army Id, 14-15.

⁴⁵⁰ Solis, ‘Only[] can Judge Isis’, 75.

3.3.4.3 THE INTERNATIONAL CRIMINAL COURT

The ICC gives a great contribution to the enforcement of human rights obligations and the convictions of war criminals⁴⁵¹. In particular, this Court was created to stop “the impunity for the perpetrators of atrocities that deeply shock the conscience of humanity” and to bring “real people to real jail”⁴⁵². However, in this paragraph it will emerge how this court does not constitute the best solution to punish ISIS destruction of cultural heritage. First of all, ICC has complementary jurisdiction, and here lies the first limit, in fact the inability or unwillingness of Syria to prosecute these crimes should have been proven, but these aspects are not easy to prove⁴⁵³. Moreover, ICC can exercise its jurisdiction only over the offences committed within the territory of a member state, or when the actor is a citizen of a member state, and Syria has not ratified the Rome Statute⁴⁵⁴ yet. This latter issue could be resolved through the application of Article 13 of the Rome Statute which allows the SC to present the matter to ICC to start investigations and prosecution. However, this last chance is unlikely because Russia will probably oppose to this referral because it is the first supporter of Assad government that probably would be prosecuted for its crimes in turn.⁴⁵⁵ According to the Rome Statute, Syria could anyway make a unilateral declaration by which it accepts the ICC jurisdiction, but this is not a feasible solution because of the possible negative implications for the Assad regime that would be prosecuted for the several violations of IHL committed⁴⁵⁶. These reasons accompanied by the ineffectiveness of its prosecutions would lead to the

⁴⁵¹ Solis, *ibid*, 77.

⁴⁵² Solis, *ibidem*.

⁴⁵³ Inability or unwillingness are not easy to prove, in fact should be proved that proceedings were taken to protect the victims, that there were unjustified delays or the lack of impartiality.

⁴⁵⁴ Syrian only signed the Rome Statute (29 November 2009), but did not ratify it; Rome Statute (adopted on 17 July 1998, entered into force on 1 July 2002) 2187 UNTS 3 (Rome Statute).

⁴⁵⁵ In fact the Security Council Draft Resolution of 22 May 2004 that sought to defer the Syrian situation to the ICC was prevented by Russia and China veto, UNSC S/2014/348 (22 May 2014) UN. Doc. S./2014/348.

⁴⁵⁶ Instead the ICC jurisdiction may arise when a state party refers a matter to the Prosecutor pursuant Article 14, but it is not the best way to prosecute Isis.

convictions of only few responsible and it is necessary to consider another solution that would be more feasible and effective⁴⁵⁷.

3.3.4.4 AD HOC INTERNATIONAL COURTS

Even if the UN initially had appointed a Commission of Inquiry which reported that the reference of the Syrian situation to the ICC would have been desirable, subsequently this organ began to consider the idea of establishing an *ad hoc* tribunal⁴⁵⁸. The ICTY Former Chief Prosecutor Carla del Ponte, who sits in the Commission of Inquiry, claimed that this kind of international court would be a better solution than the referral of the situation to the Court⁴⁵⁹. An *ad hoc* Court turned out to be more efficient and faster in the case of ICTY and the International Criminal Tribunal for Rwanda (ICTR)⁴⁶⁰. Moreover, this solution would entail a placement of the Court in the Syrian territory and this simplifies the access to witnesses and other relevant documents⁴⁶¹. The creation of an *ad hoc* tribunal would allow the development and preservation of a record for the whole international community, and this would entail a “global remembrance” of the crimes committed by ISIS⁴⁶². The Chief Prosecutor argued that Russia and China would be more favorable to this option that will authorize the condemnation of extremists⁴⁶³. It is likely Assad government might oppose to any proposal of establishing an international court without any guarantee of not being prosecuted, but the positive aspect of this kind of forum is that it is created by the SC and does not need the

⁴⁵⁷ Gerald Whatman III, *Prosecuting Isis* (2014), Vol. 85 Missouri Law Journal, 850, 871.

⁴⁵⁸ The SC has the power to establish an ad Hoc Tribunal in case of crimes that constitute “grave breaches” of the Geneva Conventions, according Chapter VII of the UN Charter; Whatman III, *Prosecuting Isis*.

⁴⁵⁹ Solis, *Only [] can Judge Isis*, 78.

⁴⁶⁰ This Court was established to prosecute of persons responsible for serious violations of international humanitarian law occurred in Rwanda; UNSC Res 995/1994 (8 November 1994) UN/RES/995.

⁴⁶¹ Solis, *ibid*, 84.

⁴⁶² Solis, *ibid*, 85.

⁴⁶³ Solis, *ibidem*.

permission of the interested state⁴⁶⁴. An *ad hoc* forum represents the best option when heads of state do not cooperate or worse if they have committed crimes, too⁴⁶⁵. *Ad hoc* tribunals seek to achieve four main aims: “justice and punishment, deterrence, record-keeping and the progressive development of international law”⁴⁶⁶. The most positive aspect of these tribunals is their flexibility, because of their capacity to adapt to different current situations, involving the prosecution of accused criminals from any member country in which they are found. Moreover, to support this theory we might recall the positive experiences of ICTY and ICTR that were established to punish the atrocities committed during the Balkan Wars and the genocide in Rwanda. *Ad hoc* courts have restricted jurisdiction, extent and time and these features make these bodies more appropriate for the Syrian situation and more attractive for Russia and China⁴⁶⁷. Moreover, given the inadequacy of prosecuting ISIS members before Syrian domestic court, an *ad hoc* tribunal would allow the prosecution of members both from Syria and Iraq⁴⁶⁸. I think that a prosecution at international level would highlight the gravity and abhorrence of the crimes committed by the Islamic State, while a domestic prosecution would not have the same impact in term of deterrence. In this way the destruction of cultural heritage would obtain greater resonance and having an international precedent on these offences would also emphasize the importance of cultural heritage for each community.

3.3.4.5 THE PRINCIPLE OF UNIVERSAL JURISDICTION

State jurisdiction indicates State’s authority to administer conducts of legal and natural persons and to regulate property according to its domestic law⁴⁶⁹.

⁴⁶⁴ Solis, *ibidem*.

⁴⁶⁵ Solis, *supra* note 442, 86.

⁴⁶⁶ Mark W. Janis, ‘*International Law: Cases and Commentary*’ (Western Academic, 2014) 359.

⁴⁶⁷ Whatman III, *Prosecuting Isis*, 17.

⁴⁶⁸ Solis, ‘*Only[] can Judge Isis*’, 86.

⁴⁶⁹ I will only focus my analysis on criminal jurisdiction leaving aside the civil one; Roger O’Keefe, ‘*Universal Jurisdiction, Clarifying the basic principle*’ (2004) Vol. 2 *Journal of International Criminal Justice*, 735.

Jurisdiction constitutes the cornerstone of enforcement, thus jurisdiction and enforcement are strictly interdependent⁴⁷⁰. While on the one hand jurisdiction over international crimes is based principally on the territoriality and nationality principle, on the other hand another principle comes at stake in the punishment of crimes against cultural property, the so called the 'universal jurisdiction'. This principle is often defined in negative terms, "as a ground of jurisdiction which does not require any link or nexus with the elected forum"⁴⁷¹. According to this principle, a state can establish universal jurisdiction not only if the crime occurred within its boundaries or when the responsible is a national, but also when the crime was perpetrated abroad by a non-national⁴⁷². This perspective reflects the principle of compulsory universal jurisdiction for serious breaches of IL, which entails that all states have the duty to try or extradite non-nationals for war crimes or crimes against humanity committed abroad. Universal jurisdiction was born because of the idea that "some crimes are so abhorrent that all nations can legislate and prosecute, regardless the involvement of their territory or nationals"⁴⁷³. In particular, universal jurisdiction seems to be a wonderful device to prevent the impunity for gross human rights breaches⁴⁷⁴. The historical evolution of LOAC entails that damage and confiscation of cultural properties constitute war crimes or crimes against humanity and these crimes were prosecuted on the basis of universal jurisdiction at the Nuremberg trials⁴⁷⁵ for the first time. Moreover, universal jurisdiction was recognized as part of CIL in relation to crimes against the peace and security of mankind⁴⁷⁶. This approach is traceable in specific in Article 8 of the International Law Commission Draft Code that states that "without prejudice to the jurisdiction

⁴⁷⁰ Mister Cherif Bassiouni, *'Reflections on criminal jurisdiction in international protection of cultural property'* (1983) Vol. 10 N. 2 Syracuse Journal of International Law and Commerce, 311.

⁴⁷¹ Horatio Ascencio, *'Are Spanish Court Breaking Down on Universality? The Supreme Tribunal's Decision in Guantanamo Generals'* (2003) Vol. 690 JILJ, 69.

⁴⁷² This principle developed to face the emergence of piracy, in fact pirates often resides on the high seas, zones over which no state has territorial jurisdiction, furthermore often pirates groups include people of many nationalities that renders their prosecution under the nationality principle difficult; Klabbers, *International Law*, 94, 2013.

⁴⁷³ Klabbers, *International Law*, 95.

⁴⁷⁴ Klabbers, *ibidem*.

⁴⁷⁵ Trials of the Major War Criminals Before the International Military Tribunal; Bassiouni, *'New Wars'*, 308

⁴⁷⁶ Francioni and Lenzerini, *'The Destruction of the Buddhas'*, 688.

of an international criminal court, each party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in Article 17, 18, 19 and 20, irrespective of where or by whom those crimes were committed"⁴⁷⁷. In the Commentary to this provision it is also specified that the phrase "irrespective of where or by whom those crimes were committed' is used to "avoid any doubt as to the existence of universal jurisdiction" for the crimes included in the above mentioned articles⁴⁷⁸. The Commentary also added that "the physical presence of the alleged offender provides a sufficient basis for the exercise of jurisdiction by the custodial state"⁴⁷⁹. In short, CIL allows any state to exercise its jurisdiction over crimes set out in Article 17 to 20, among which there is the deliberate destruction of cultural heritage⁴⁸⁰, but always with the essential condition of the physical presence of the suspect in its territory⁴⁸¹. While this principle is surely universally accepted by the international community, its implementation remains rare, and few treaties present this jurisdiction as compulsory⁴⁸². For instance, also Article 28 of the 1954 Hague Convention⁴⁸³ seems not to oblige the High Contracting Parties to exercise universal jurisdiction over breaches of the Convention provisions as it only allows this possibility⁴⁸⁴. There is a general reluctance among national judges to apply this principle without an *ad hoc* jurisdictional title provided by their domestic law, even if it is not necessary⁴⁸⁵.

⁴⁷⁷ Article 8 of the Draft Code of Crimes against the Peace and Security of Mankind, (adopted by the International Law Commission during the 48TH session, in 1996), Report included in the Yearbook of the International Law Commission, 1996, vol. II, Part Two.

⁴⁷⁸ Commentary to Article 8 Draft Code of Crimes against the Peace and Security of Humankind, Commentary, para. (7), at www.un.org/law/ilc/index.htm

⁴⁷⁹ Article 9, para. (7) Draft Code of Crimes against the Peace and Security of Mankind.

⁴⁸⁰ Article 20(e)(iv) Draft Code of Crimes Against the Peace and Security of Mankind, which includes: Seizure of, destruction of or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; and Article 20(e)(v) which prohibits plunder of public or private property.

⁴⁸¹ Francioni and Lenzerini, *'The Destruction of the Buddhas'*, 647.

⁴⁸² "A proposal to make the ICC work on the basis of universal jurisdiction was rejected", the Court now still works on the basis of territoriality and nationality principles; Klubbers, *International Law*, 95.

⁴⁸³ Article 1954 Hague Convention, as previously said in Chapter 2.7.4.2 of this work.

⁴⁸⁴ O' Keefe, *'Protection of cultural Property under International Criminal Law'*, 24-25.

⁴⁸⁵ Francioni and Lenzerini, *'The Destruction of the Buddhas'*, 648.

This remains one of the most questionable topics, even if there are some famous cases where universal jurisdiction came at stake, such as the cases against Pinochet⁴⁸⁶ and Eichmann⁴⁸⁷, but these constitute rare exemptions. Moreover, this principle runs the risk to become a sort of “look back in anger” being used generally against regime or persons already deposed from power⁴⁸⁸. At present this principle cannot be considered universally established, thus I will analyze some different options to convict ISIS members for their destructive actions.

⁴⁸⁶ *Regina v. Bartle et alia* (Opinions of the House of Lords of Appeal for Judgment in the Cause) House of Lords (25 November 1998).

⁴⁸⁷ *Attorney General v Eichmann* (Judgement) District Court of Jerusalem Case No. 40/61 (11 December 1961).

⁴⁸⁸ Even the proposal on the possibility that the ICJ would work on the basis of universal jurisdiction was rejected and still works on the basis of territorial and nationality principle; Klabbbers, *International Law*, 95.

CONCLUSIONS

The Syrian conflict is in its sixth year, the clashes are still incessant and a settlement seems unlikely at the time of writing¹. People are not the only victims of this civil war, as cultural heritage is suffering several intentional and indiscriminate attacks. Because of ISIS's iconoclasm, Syrian cultural and religious sites have turned into one of its primary military objectives². ISIS is carrying out a real "cultural cleansing" against every symbol of idolatry. This terrorist organization is conducting an "overall attack" on Syrian culture, hitting what the Syrian population considers their national identity³. The city of Palmyra⁴ was subject to the most serious and reiterated attacks by ISIS for its cultural significance both for the Syrian population and the whole mankind⁵. This city was severely targeted for being a symbol of coexistence between different cultures and traditions, a value that ISIS is trying to annihilate while imposing its strict interpretation of Sharia⁶. By destroying important archaeological and religious sites, the Islamic State is not only harming the Syrian population, but it is also seeking to undermine some cornerstones of the Western world, in particular freedom of religion, its practice and the enjoyment of cultural

¹ In particular a diplomatic and pacific resolution seems to be impossible at the moment, ISIS will not accept any form of compromise. In January 2012 peaceful meeting took place, the special UN envoy for Syria Kofi Annan resigned for the failure of these meetings, Assad's government refused to support rebels' requests.

² Paolo Gonzaga, 'Chi sono I salafiti?', Arab media Report, Dialogues on civilization, <http://arabmediareport.it/chi-sono-i-salafiti/> (last visited on 20 September 2017).

³ Federica Mucci, 'Intentional destruction of cultural heritage by Isis: the reaction of the International Community against the specific aspect of the aggression to peace and human rights' (2016) Vol 2 N. 1 Peace Processes Online, 1,5 and Bruno Lautor, 'An attempt at a Compositionist Manifesto' (2010) Vol. 41, New Literary History, 471- 475.

⁴ This city was an oasis in the Syrian Desert, it contains the monumental ruins of a great city that was one of the most important cultural centres of the ancient world.

⁵ Palmyra for its symbolic value was inscribed in the World Heritage List in 1980 and in the List of Heritage in Danger in 2013, World Heritage List, UNESCO <http://whc.unesco.org/en/list/23> (last visited on 20 September 2017). Paul Veyne, *Palmira, Storia di un tesoro in pericolo* (Garzanti Libri, 2016), 11-1 *Site of Palmyra*, <http://whc.unesco.org/en/list/23> (last visited on 20 September 2017).

⁶ The art and architecture of Palmyra were influenced by Greek-Roman and Persian art, standing at the crossroads of several civilizations; Paul Matthiae, *Distruzioni, saccheggi e rinascite, gli attacchi al patrimonio artistico dall' antichità all' Isis* (Mondadori Electa, 2015), 244 and *Site of Palmyra* <http://whc.unesco.org/en/list/23> (last visited on 22 September 2017).

rights. According to the statement of the US former Secretary of State, John Kerry⁷, it is a “purposeful ideological destruction” that injures “irreplaceable evidence of ancient life and society and even involves a catastrophic assault on the Western countries’ engagement in the protection of cultural heritage”. Iconoclasm is a typical aspect of the strictest Islam and it is not only embraced by ISIS. It also led to the destructions of Timbuktu’s mausoleums carried out by the al-Qaeda’s affiliate, Ansar-Dine⁸ and the Taleban’s devastation of the Buddhas of Bayiman⁹. A comparison between these devastations and ISIS’s destructive actions is fundamental to bring out the heinousness of the Islamic State conducts. Even though ISIS, the Taleban and Ansar-Dine share the same religious creed, the Islamic State’s destructive plan is more carefully planned, indiscriminate and systematic¹⁰. ISIS does not hesitate to strike also moderate Muslims and their cultural symbols. This indiscriminate violence against the Muslim world is the reason why Al-Qaeda disavowed ISIS, being, displeased by its excessive brutality, and led to the split between these two terrorist groups¹¹. Furthermore, ISIS’ action has a broader impact mostly thanks to the dissemination of the videos displaying its destructions worldwide, sometimes even fake videos of destruction are spread to test the international community’s reaction¹². We have assisted to the rise of a “socially mediated terrorism”¹³ in recent years. The extent of ISIS action against cultural heritage and its purpose, the eradication of coexistence and pluralism, entail its necessary prevention and when it is not possible its international prosecution turns out to be unavoidable. International law (IL) was not able to prevent ISIS’s campaign

⁷ In September 2014 Singer, ‘Isis’s War on Cultural Heritage, 21.

⁸ Francesco Francioni, James Gordley, *Enforcing International Cultural Heritage Law*, (Oxford University Press, 2013) 51-62.

⁹ Francesco Francioni, Federico Lenzerini, ‘The Destruction of the Buddhas the Bayiam and International Law’ (2003) Vol. 14 No. 4 European Journal of International Law, 619-651.

¹⁰ <http://whc.unesco.org/en/list/23> (last visited on 22 September).

¹¹ Donald Holbrook, *Al-Qaeda and the Rise of ISIS*, Survival (2017) Vol. 57 No 2, 93, 96.

¹² Thanks the work of media experts, videos reporting its destructive action are broadcasted worldwide to emphasize ISIS’s supremacy and the impotence of its enemies: Hale Dale, Peter Brooks, Charlotte Florance and Steven Bucci, ‘Why Isis might be more dangerous than Al-Qaeda’, The daily Signal (28 August 2017) <http://dailysignal.com/2014/08/28/11-reasons-isis-might-dangerous-al-qaeda/> (last visited on 20 September 2017).

¹³ Smith et alia, *ibid*, 164.

against Syrian cultural heritage, but it plays a key role in condemning and deterring further cultural crimes.

In no way ISIS attacks against cultural and religious patrimony can be justified under the exception of military necessity, as no military advantage could be obtained through the attacks against Palmyra and other archaeological sites¹⁴. Consequently, the next pace is to find out how the destruction of cultural property has been criminalized within the international jurisprudence and whether ISIS cultural crimes can be punished according to the contemporary context of international law. This crime was sanctioned as a war crime or as a crime against humanity, in particular as a form in which the crime of persecution can display by the International Military Tribunal at Nuremberg¹⁵ and International Tribunal for the Former Yugoslavia (ICTY)¹⁶. The ICTY jurisprudence in particular gave a great contribution to the prosecution of the crimes against cultural and religious heritage as a crime against humanity when perpetrated with a discriminatory intent against a determined group. The court went over this formulation and added that the destruction of cultural heritage perpetrated with a discriminatory intent can also serve to prove the *mens reas* of genocide¹⁷. In fact, mass-killings are often linked to attacks against the cultural and religious heritage of the targeted community. Although the existence of a prohibition of cultural genocide was explicitly rejected during the drafting of the Genocide Convention¹⁸, the qualification of the destruction of cultural property as a

¹⁴ Palmyra was destroyed when ISIS had already gained the control over the city, thus no military benefit can justify this action.

¹⁵ In particular see Goering, Rosemberg, Flick, Stricher and Grieser sentences; Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, art. 6(b) 59 Stat. 1544, 82 UNTS 279.

¹⁶ In particular see the proceedings against Tadic, Strugar, Jokic and Blaskic, in which many provisions on the international protection of cultural rights were declared of having reached a customary status; *Prosecutor v. Tadic*; (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995); *Prosecutor v. Strugar*, (Trial Chamber Judgement) IT-01-42-T, ICTY (31 January 2005); *Prosecutor v. Jokic* (Trial Chamber) IT-01-42/1(18 March 2004) and *Prosecutor v. Blaskic* (Trial Chamber) IT-95-14 (3 March 2000).

¹⁷ *Prosecutor v. Kristic* (Trial Chamber) IT-98-33 (11 November 2004), para. 344., the same approach was restated in *Bosnia-Herzegovina v. Serbia*, ICJ, case on the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (17 March 2006) CR 2006/22.

¹⁸ This argument is addressed in Chapter 3.2.6: the Draft Convention on the Prevention and Punishment of Genocide where the crime of genocide provided also the cultural genocide, although in the final version of the Convention there is no reference to the cultural dimension of genocide. At present the crime of genocide includes only physical and biological extermination

crime against humanity would be a better choice than the qualification as a war crime, according to the author's mind. This qualification, in fact would highlight the seriousness of this crime and would consent its punishment also in peacetime and in case of internal clashes which do not reach the threshold of NIAC¹⁹. The most relevant judgement in this context is surely the International Criminal Court (ICC)'s recent conviction of a member of Ansar-Dine for having planned and participated in the destruction of Timbuktu's religious and cultural sites, some of which had been inscribed in the World Heritage List for their incommensurable value²⁰. It was the first time in which a member of a non-state armed group (NSAG) has been convicted exclusively for the destruction of cultural and religious heritage.

This is most relevant for answering the main questions that this dissertation aims at addressing: namely, whether the Islamic State, that cannot be deemed a state, but a non-state armed group (NSAG), is bound to international law (IL), and in particular to international humanitarian law (IHL), and whether its crimes can be prosecuted on this basis. IL can be regarded as an inter-state law, drafted according to states' will and interests²¹. Therefore, IL structure shows the unresolved asymmetry between states and other entities²². States have always considered NSAG as their main enemies and have always prevented NSAG participation in the drafting of international law²³. This attitude reflects the States' intent of safeguarding their

of a determined group; Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (entered into force on 12 January 1951); Raphael Lemkin, *Acts Constituting a General Danger Considered as Offences Against the Law of Nations* Raphael Lemkin (Madrid, Spain: 5th Conference for the Unification of Penal Law in Madrid, Spain, October 1933 preventgenocide.org. <http://www.preventgenocide.org/lemkin/madrid1933-english.htm> (accessed 10 September 2017) *Acts Constituting a General Danger Considered as Offences Against the Law of Nations* Raphael Lemkin (Madrid, Spain: 5th Conference for the Unification of Penal Law in Madrid, Spain, October 1933 preventgenocide.org. <http://www.preventgenocide.org/lemkin/madrid1933-english.htm> (accessed 10 September 2017).

¹⁹ The jurisprudence of the ICTY, IMT and mostly of ICC help us in finding if ISIS attacks can be punished and under which category of crimes.

²⁰ *Prosecutor v. Al Madhi* ICC-01/12-01/15(17 August 2017).

²¹ William Thomas Worster, 'Relative International Legal Personality of Non State Actors' (2006) Vol. 42 N. 1 Brooklyn Journal of International Law, 207, 239.

²² Mister Cherif Bassiuoni, Criminal Law, 'New Wars and The Crisis of Compliance With The Law of Armed Conflict by Non-State Actors?' (2008) vol. 98, No. 3 Journal of Criminal Law & Criminology, 764, 785.

²³ Worster, 'Relative International Legal Personality', 239.

sphere of sovereignty, involving an unfair balance within the international context²⁴. NSAG constitute a real threat to the states' power: they are their direct rivals because they fight to overthrow established governments and to replace them.

At first sight it seems unlikely to consider ISIS, and other NSAG, subject to IL and IHL, or *jus in bello* that applies to the Syrian conflict²⁵. International treaties and conventions are drafted for states and no possibility of ratification or accession is provided for other entities such as NSAG with the only exception of AP I that attributes International Liberation Movements the *jus contrahendi*²⁶.

Nonetheless, nowadays NSAG are playing a key role within the international context, non-international conflicts. IL and IHL in particular, must evolve in accordance with these new realities to reach their purposes that are the maintenance of international peace and security and the protection of civilians and their properties²⁷ respectively. The proliferation of NSAG involves the abandonment of the traditional perspective according to which IL would exclusively regulate states' behaviours. With the advance of globalization states can no longer be considered the only subjects of IL. If, on one hand NSAG can be held responsible for the crimes committed before the consolidation of their state juridical personality as the new governments and the implementation of the individual responsibility of NSAG members cannot be doubted. On the other hand, holding ISIS and broader NSAG responsible results to be problematic for the current absence of judicial mechanisms²⁸ that permit their prosecution. To prosecute ISIS cultural crimes firstly it is necessary to find out whether NSAG bear or not a sort of international legal personality²⁹. Only

²⁴ This unbalance reflects also in the different discipline that regulates IAC and NIAC, a complete equivalence between these two types of conflict has not been already reach, only few provisions discipline NIAC, instead IAC's regulation is surely more complete. This is a great advantage for states that do not have to comply with the more restricted regulation of IAC when they oppose to NSAG; Bassiouni, 'New Wars?', 785-787.

²⁵ *Jus in bello* applies in case of armed conflicts, instead *jus ad bellum* provides a regulation of the lawful reasons of a state to wage war.

²⁶ Liesbeth Zegveld, *Accountability of armed opposition groups in international law* (Vol 24, Cambridge University Press, 2002), 111.

²⁷ Actually, IHL aims at the protection of human lives, cultural properties, environment, work and installations; Jan Klubbers, *International Law* (Cambridge University Press, 8th edn, 2016), 205.

²⁸ Both at international and national level.

²⁹ Marco Pedrazzi, *The status of organized armed groups in contemporary armed conflicts*, 76.

through the solution of this question these groups' responsibility can be argued. The most recent developments of IL confers a sort of "functional or relativist personality" that allows to consider NSAG as international subjects³⁰. Nevertheless, this approach only allows to deem organized groups bound to some fundamental international rules³¹. This perspective shows how IL is able to evolve in accordance with these new exigencies. This is demonstrated by the fact that some conventions explicitly bind these entities such as AP II³², the Convention against Torture and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts and the 1954 Hague Convention³³ explicitly bind also NSAG³⁴.

At this point another matter has to be solved: according to the traditional approach of IL any international subject, as a matter of principle, has to comply only with the international norms to which it has consented to be bound. ISIS has not agreed to be bound by any international rule yet, on the contrary it strongly rejects the international order and its rules³⁵. Thus, to find out if ISIS cultural crimes can be legally prosecuted we must refer to customary international law (CIL). Some fundamental international rules have now a customary nature and cannot be contravened by any entity, regardless of their state or non-state nature and the acceptance of these rules. CIL identifies the rules accepted and recognized by the entire international community, they embody the "legitimate expectations of the international community"³⁶. Following the aim of this work, that seeks to identify a possible legal basis that would allow ISIS members' prosecution for cultural crimes, CIL constitutes the best authoritative solution. In fact, many provisions which

³⁰ Pedrazzi, *ibid* 77.

³¹ Pedrazzi, *ibidem*.

³² AP II entirely applies to NIAC, see Chapter 1.1.3.1 that addresses this matter.

³³ Article 19, 1954 Hague Convention.

³⁴ Another recent Convention that addresses also NSAG is the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, in particular its Article 7; Rodenhause, 'Human Rights Obligations of Non-State Armed Groups', 6.

³⁵ Barak Medelson, *The jihadi threat to international order*, The Washington Post (15 may 2015) https://www.washingtonpost.com/news/monkey-cage/wp/2015/05/15/the-jihadi-threat-to-international-order/?utm_ (last visited on 11 September 2017)

³⁶ Tilman Rodenhauer, 'Human Rights Obligations of Non-State Armed Groups', (2012) *Journal of International Humanitarian Legal Studies* Vol. 2 No. 3, 263, 271.

provide for the protection of cultural heritage in armed conflicts have reached a customary status, as demonstrated in the final paragraph of chapter three, and therefore bind all subjects of IL. Furthermore, even the provisions that sanction the crime of genocide, crimes against humanity and war crimes for their heinous character are considered customary rules. These crimes can be qualified as “international crimes” and due to their seriousness the persecution of the responsible is absolutely compulsory³⁷. As we have just seen above, cultural crimes fall within the scope of war crimes or crimes against humanity. Thus the customary nature of these crimes represents another legal basis to hold their perpetrators accountable³⁸. This conclusion is confirmed by the ICC conviction of Al-Madhi for the destruction of Timbuktu’s mosques. The member of al- Qaeda in Mali was sentenced pursuant Article 8(2)(e)(iv) of the Rome Statute to 9 years’ imprisonment for the devastation of Malian cultural heritage³⁹. This sentence can be deemed as a turning point in the prosecution of cultural crimes committed by a NSAG member, constituting a precedent for future similar cases. In this proceeding the ICC for the first time had the chance to emphasise the “significant gravity” of this crime. The sentence assigned a primary role to the cultural value of the attacked property: specifically, the “symbolic and emotional value” for the Timbuktu’s population and their outstanding universal value proved by their inclusion in the UNESCO World Heritage List⁴⁰. With this sentence the ICC qualified the intentional destruction of cultural heritage as a war crime⁴¹ and this is not a minor statement in an age where Iconoclasm continues to claim victims. At the same time, cultural rights cannot, at

³⁷ As demonstrated by the Sierra Leone Court jurisprudence; Schabas, ‘Punishment of Non-State actors in non-international conflicts.’ (2002) *Fordham Journal of International Law*, 907, 910.

³⁸ Was clearly established that war crimes and crimes against humanity have to be prosecuted as “international crimes”, therefore also when committed by non-state actors in NIAC and NSA can be hold responsible on this basis, Schabas, *ibid*, 922-923.

³⁹ *Prosecutor v. Al Madhi* ICC-01/12-01/15(27 September 2016).

⁴⁰ “Furthermore, all the sites but one [...] were UNESCO World Heritage sites and, as such, their attack appears to be of particular gravity as their destructions does not only affect the direct victims of the crimes, namely the faithful and inhabitants of Timbuktu, but also people throughout Mali and the international community; *Prosecutor v. Al Madhi* ICC-01/12-01/15(27 September 2016), para 80.

⁴¹ Even if the Tullio Scovazzi, ‘*La prima sentenza della Corte penale internazionale in tema di distruzione di beni culturali*’ (2017) in *Diritti umani e diritto internazionale*, 76, <http://www.rivisteweb.it> (last visited on 23 September 2017).

present be considered as peremptory norms.⁴² Considering these rights as *jus cogens* should increase the respect of cultural rights, although actually no judicial mechanisms to sanction NSAG violations of HR exist.

From a humanitarian perspective, civilians and their properties deserve the same degree of protection in time of warfare regardless of the nature of the entities involved in the conflict. It is not conceivable that ISIS actions remain unpunished as their wide destructive campaign against people and their cultural tangible and intangible expressions, has to be judicially condemned. This impunity would otherwise encourage future violations on the conviction of not being punished for them⁴³. It would be unreasonable to punish the same crimes when committed by states and not when perpetrated by other entities⁴⁴. This solution would frustrate the purpose of IHL and the principle of the “equality of belligerents”⁴⁵. However, today the responsibility of organized groups as such is not universally established within the international community. By now, no international bodies have extended their jurisdiction to include actions of NSAG⁴⁶. Holding NSAG as such responsible for their crimes is surely a promising approach that can improve the protection of civilians and their properties during armed conflicts and improve the NASG compliance with IHL. Even though the group’s accountability would be the best solution to deter further NSAG breaches of IL, organized groups’ responsibility constitutes is still an undeveloped branch of IL. Within the current set-up of IL the only way to punish NSAG crimes is through the prosecution of the allegedly responsible individuals.

⁴² Jean Marie Henckaerts, *Concurrent Application of Humanitarian and Human Rights Law: a Victim Perspective*, in Roberta Arnold and Noelle Quenivet, *International Humanitarian Law and Human Rights Law* (Martonus Nijhoff Publishers, 2008), 256-259.

⁴³ It is necessary that IHL adequately regulates the behaviour of NSAG.

⁴⁴ Zegveld, *Accountability of armed opposition groups*, 114; Marco Sassòli and Andrea Bouvier, *How does Law protect in War?* (2001, ICRC, Geneva), 266.

⁴⁵ To NSAG is also attributed the *jus contrahendi*, according to which these groups can conclude agreements to end Pedrazzi, *The status of organized armed groups*, 76.

⁴⁶ Zegveld, *ibid*, 113.

However, Syrian domestic courts seems to be completely unprepared to hear cases of this complexity and extent⁴⁷. Moreover, also Assad's troops are engaged in several damages to cultural heritage and human rights violations. It is thus unlikely that the Syrian court would respect the international rules of fair trial⁴⁸. An international forum would not present the same difficulties; on the contrary it would emphasize the seriousness of this crime and an international judgement would constitute another authoritative precedent on the matter. The best option to prosecute ISIS's militants would be the establishment of an *ad hoc* court as argued by ICTY Former Chief Prosecutor Carla del Ponte⁴⁹. An *ad hoc* court in fact would allow an easier and quicker access to documents and witnesses and probably will not encounter many oppositions by the other foreign states involved in the conflict⁵⁰.

Crimes against cultural heritage result in crimes against people and their identity as they infringe communities' cultural and religious freedom and tradition. The annihilation of Syrian cultural properties affects not only the Syrian population, but the whole international community. Instead of being a vessel of peace and coexistence, cultural heritage is now used as a weapon to divide and violently oppress those individuals or groups that are labelled as "different"⁵¹. The holistic approach embraced by the most recent international instruments on that matter shows how cultural heritage bears irreplaceable values for the present and future generations. Every devastation deprives the whole mankind of the cultural contributions of each targeted community⁵². Moreover, only through the knowledge of the past mankind can evolve for the better. Even if the protection of human lives is the primary objective of IHL, the battle to protect cultural patrimony must not be

⁴⁷ The same reasoning can be extended to Iraqi domestic court; Andrew Solis, 'Only [] can Judge: Analysing Which Courts have Jurisdiction over Isis', (2010) Vol. 40 Southern Illinois University Law Journal, 69-73.

⁴⁸ Neal Robyn-Early, 'How Will Syria's Assad Be Held Accountable For Crimes Against Humanity?', Huffington Post (Mar. 28, 2015) <http://www.huffingtonpost.com/2015/03/28/syria-war-crimes-n-6950660.html> (last visited on 22 September 2017)

⁴⁹ Solis, 'Only [] can Judge Isis', 78.

⁵⁰ Solis, *ibid*, 85.

⁵¹ Francesco Francioni, 'Beyond State Sovereignty: The Protection of cultural Heritage as a Shared Interest of Humanity' (2003) Vol 25 Michigan Journal of International Law, 1219-1229.

⁵² Raphael Lemkin, *Axis Rule in Occupied Europe. Laws of Occupation, Analysis of Government, Proposals for Redress*, chapter 9, 1944.

overshadowed. Safeguarding cultural property is not only about “buildings and stones”, it is about traditions and the peoples’ memory⁵³. The recovery and safeguard of cultural heritage thus promotes the pacific coexistence among peoples, favouring mutual respect and understanding of the differences⁵⁴.

⁵³ Irina Bokova, General Director released this statement after the demolition of the Mar Elian monastery in the Homs region of the Central Syria; Matthiae, *Distruzioni, saccheggi e rinascite*, 246.

⁵⁴ Francioni, *‘Beyond State Sovereignty’*, 1219-1229.

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