

# **Cultural Cleansing as an Emerging Form of Mass Atrocity: A Comparative Analysis of the Protection Against Intentional Destruction of Cultural Heritage under International Law and Islamic Law**

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Cultural cleansing, understood as the intentional destruction of cultural heritage in the pursuit of homogeneity, has increasingly become a tactic utilized, notably by militant factions purporting to advocate for Islam, in their efforts to impose a uniform, tightly controlled identity. The international community's response has been largely limited by the sources of law at its disposition. This paper argues that the gaps and limits of the international humanitarian and criminal law frameworks should be addressed by adopting a culturally and legally inclusive approach. Islamic law can thus contribute in many ways: firstly, by addressing the inconsistencies of the current intentional law frameworks in its understanding of the implications of cultural heritage and its destruction, and secondly, through its potential of generating further compliance and legitimacy to the current overwhelmingly western-oriented framework of international law.

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## 1. INTRODUCTION

Cultural cleansing, a term which has gained significant momentum since the Taliban's destruction of the Buddhas of Bamiyan, has been repeatedly quoted in relation to the looting and destruction of cultural heritage in Mali, Syria and Iraq.<sup>1</sup> Although this term is not used exclusively in relation to the latter conflicts, its relevance has become prominently illustrated after continuous, intentional attacks against cultural property. These are carried out in the pursuance of "homogeneity", through the elimination of that which historically represents any diversity of thought, religion and ultimately identity.<sup>2</sup>

The intrinsic link between the destruction of cultural heritage and cultural cleansing is substantiated by the inherently anthropocentric nature of cultural heritage. Whether they are monuments, artefacts or intangible manifestation of culture, these elements represent an identity common to a community or identifiable group. Far beyond any material worth they may hold, cultural heritage, at its core, is protected and valued because of its deep connection to collective and individual identity. Thus, any act of

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<sup>1</sup> Irina Bokova, "Culture on the Front Line of New Wars", , *The Brown Journal of World Affairs*, Vol. 22, No. 1, 2015..

<sup>2</sup> Noelle Higgins, *The Protection of Cultural Heritage during Armed Conflict: The Changing Paradigms*, 1<sup>st</sup> ed., Routledge, Abingdon, 2020, p. 37.

deliberate destruction propagates an erasure – or cleansing – of diversity as well as collective history and memory of group identity.

Such destructive strategies have been repeatedly exemplified in contexts of contemporary armed conflicts, particularly by extremist factions purporting to advocate for Islam. The 2001 destruction of the Buddhas of Bamiyan in Northern Afghanistan by the Taliban, in particular, significantly highlighted the pattern of such calculated attacks on culture.<sup>3</sup> Since then, and following the onset of the conflict in Iraq, belligerent acts akin to these have been committed by extremist group ISIL. Notable examples include the looting of invaluable cultural items at the Mosul Museum as well as at the National Iraqi Museum in Baghdad, the bulldozing of the ancient Assyrian city of Nirmud, and the destruction of the World Heritage Site, Hatra. UNESCO has identified these acts as mechanisms of domination and perpetuation of extremist propaganda, making them part of an ongoing strategy of cultural cleansing in the region.<sup>4</sup>

Following the outbreak of the civil war in 2011, Syria has experienced significant destruction to its cultural heritage. As a consequence, each of the six registered World Heritage Sites within its borders have been damaged to varying extents, including the Site of Palmyra and parts of the Ancient City of Aleppo.<sup>5</sup> In 2015, the monastery of Mar Elia, situated in Qartatayn – a small settlement recognised as an oasis at the convergence of Damascus, Homs and Palmyra – was destroyed by Daesh.<sup>6</sup> The

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<sup>3</sup> Kevin Chamberlain, “Casualties of Armed Conflict: Protecting Cultural Property”, in Terry D. Gill, Robin Geiß, Heike Krieger, Tim McCormack, Christopher Paulussen, Jessica Dorsey (eds), *Yearbook of International Humanitarian Law*, Vol. 17, 2014, p. 191.

<sup>4</sup> “Destruction of Hatra marks a turning point in the cultural cleansing underway in Iraq” say heads of UNESCO and ISESCO, 7 March 2015, available at: <https://whc.unesco.org/en/news/1245> (all internet references were accessed on 08 August 2024).

<sup>5</sup> K. Chamberlain, above note 3, p. 191.

<sup>6</sup> Emma Loosley Leeming, “Cultural memory as a mechanism for community cohesion: Dayr Mar Elia esh-Sharqi, Qaryatayn, Syria” in Veysel Apaydin (ed), *Critical Perspectives on Cultural Memory and Heritage*, UCL Press, 2020, p. 211.

demolition of this site has been identified as the cause of significant negative impacts on the mental wellbeing of multiple affected communities. This monument served not only as the religious centre of town for Christians and Muslims alike, but also as “the tangible proof of a foundation myth central to their self-perception”.<sup>7</sup>

The most comprehensive definition of cultural heritage is found in the United Nations Educational, Scientific and Cultural Organisation’s (UNESCO) 1972 convention concerning the Protection of the Tangible and Intangible World Cultural and Natural Heritage.<sup>8</sup> The latter describes cultural heritage as monuments, groups of buildings, sites and expressions which are considered to be of “outstanding universal value”.<sup>9</sup> However, international law frameworks have not necessarily assimilated around this definition and instead what is found is a piecemeal approach to cultural heritage across and within different frameworks. While there is no actual definition for “cultural heritage” in the Qur’an, the concept is very much present in Islamic law and its protection is clear, despite the misinterpretation and misuse of classical approaches, which neglect relevant contexts.<sup>10</sup>

Following the emergence of this tactic of cultural cleansing in the region, the three frameworks that will be considered within this paper are that of International Humanitarian Law (IHL), International Criminal Law (ICL) specifically pertaining to war crimes, and Islamic Law. This analysis will follow each of their respective positions on the intentional destruction of cultural heritage. While the three frameworks in this paper may have different approaches to the prohibition of intentional destruction of cultural heritage in armed conflict, to say these differences would

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<sup>7</sup> Ibid, p. 212.

<sup>8</sup> UN Educational Scientific and Cultural Organization (UNESCO) Convention Concerning the Protection of the World Cultural and Natural Heritage (entered into force 17 December 1975), Art. 1.

<sup>9</sup> Ibid.

<sup>10</sup> Fatimah Alshehaby, “Cultural Heritage Protection in Islamic Tradition”, *International Journal of Cultural Property*, Vol. 27, No. 3, pp. 293.

prevent a mutually reinforcing approach to the prosecution of crime would be short-sighted.

In order to address how these three frameworks could better work together, this paper will review how each, individually, addresses protection of cultural heritage, followed by an analysis of the compatibility of their respective normative frameworks. This will lead to an assessment of the mutually reinforcing potential of combining the strengths of the three frameworks to address cultural cleansing. The aim of this paper will be to guide the discussion towards an appreciation of the multi-faceted meaning and implications behind the term cultural heritage as well as the opportunity for greater international compliance, by harmonizing Islamic Law and international law for the protection of cultural heritage in armed conflict.

## **2. CULTURAL CLEANSING UNDER THE INTERNATIONAL HUMANITARIAN LAW (IHL) FRAMEWORK**

### **2.1 Cultural Heritage Under the 1954 Hague Convention**

Cultural heritage has historically been considered collateral damage in armed conflict. In response to this, UNESCO drafted the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage, which conferred special protective status upon registration on its World Heritage Lists, and thus considered to be of “outstanding universal value”.<sup>11</sup> This convention has had a remarkable influence on informing international law instruments and principles, which are not necessarily based solely on UNESCO recognition, despite it being indicative.<sup>12</sup>

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<sup>11</sup> 1972 UNESCO Convention, above note 8.

<sup>12</sup> Uzma S. Bishop-Burney, “Prosecutor v. Ahmad Al Faqi Al Mahdi”, *The American Journal of International Law*, Vol. 111, No. 1, 2017, pp. 126, 131.

However, as important as the UNESCO convention may be, addressing the protection of cultural heritage in armed conflict inevitably requires an assessment of its position within the rules governing armed conflicts themselves. Thus, attention is drawn to the circumstances and actions triggering such protection under International Humanitarian Law (IHL). The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (“1954 Convention”) was a landmark development for its time in two key ways: firstly, it included the first comprehensive definition of cultural property, which following the aftermath of the Second World War and the extensive destruction caused to landmark cultural sites, was considered a necessity.<sup>13</sup> This definition, found in Article 1 of the Convention, clearly and exclusively relates to tangible manifestation of culture and covers only property considered to be “of the greatest importance to cultural heritage”, which in itself raises a number of questions in relation to criteria, as well as inevitably creating a level of hierarchy, and a risk of marginalization of specific cultures which may not be considered of greatest importance according to Western ideals.<sup>14</sup>

Secondly, the convention established two protective regimes based on the obligation to safeguard or respect.<sup>15</sup> The latter acts as an important and distinctive feature of this convention relating to the scope of its application, which unlike most of the sources governing IHL, applies in a pre-emptive manner, insofar as it imposes certain obligations based on the protection of cultural property in anticipation of armed conflict.<sup>16</sup>

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<sup>13</sup> Victoria Arnal, “Destructive trends in contemporary armed conflicts and the overlooked aspect of intangible cultural heritage: A critical comparison of the protection of cultural heritage under IHL and the Islamic law of armed conflict”, *International Review of the Red Cross*, 2020, pp. 539, 544.

<sup>14</sup> Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 UNTS 240, 14 May 1954 (entered into force 7 August 1956), 249 UNTS 240, Art. 1(a).

<sup>15</sup> *Ibid.*, Arts. 2-4.

<sup>16</sup> Berenika Drazewska, “Military Necessity in International Cultural Heritage Law”, *International Humanitarian Law Series*, Vol. 61, No. 885, 2021, p. 24.

The 1954 Convention was then completed, by the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1999 (“Second Protocol”). The main provisions further extend the scope of protection to conflicts of a non-international character, provide for a clarification for the notion of enhanced protection, and establish the basis for linking the convention with what was at the time an emerging practice of individual responsibility following establishment of the first permanent international criminal court (“ICC”) in 2002 and the adoption of the Rome Statute. In the context of this paper, a crucial advancement introduced by this Second Protocol of 1999 is the refined definition of enhanced protection. This designation grants pertinent cultural property immunity, subject only to limited exceptions, thereby bestowing upon it the highest degree of safeguarding.<sup>17</sup> Additionally, the Second Protocol narrows the scope of the waiver to the obligation to respect cultural property based on the principle of military objective, pursuant to Additional Protocol I to the Geneva Conventions of 12 August 1949, and requires that “there is no feasible alternative available to obtain a similar military advantage”.<sup>18</sup>

There is no doubt that the 1954 Hague Convention and its 1999 Protocol have been instrumental in terms of consolidating mechanisms and general awareness of the international community surrounding the need for specific protection of cultural property during armed conflict. Nevertheless, given the contextual significance of safeguarding cultural heritage in the aftermath of the destructive repercussions of World War II, and the opportunity presented by this convention to elucidate and establish a robust protective framework during armed conflict, it appears to have fallen short of expectations. In analysing the substantive content of the Convention, it is argued that the instrument is weak in terms of enforcement and lacking in significant depth in terms of defining culture and its properties. Moreover, in practice, the Convention provides for

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<sup>17</sup> Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, 2251 UNTS 369, Arts. 10-11.

<sup>18</sup> *Ibid.*, Art. 6(a)(ii).

dysfunctional implementation and compliance mechanisms, which provide little in terms of actual enforcement.<sup>19</sup>

However, as Chechi reveals, this result may not have been wholly unintentional. At the time, the Convention itself was never intended to create a new standard that would supersede or rectify the shortcomings of international law, but rather as a complement to existing treaties or norms of IHL.<sup>20</sup> Therefore, if we draw this assessment of the framework of the Hague Convention and its Additional Protocol back to the specific context of this paper, we see that protection may be conferred on a basic level in so far as it provides legal recognition to the violations committed against cultural heritage in the conflicts such as in Mali, Iraq and Syria. However, this is strictly reserved to the material and tangible dimension of these attacks against cultural heritage. This one-dimensional approach neglects the central material of the attacks carried out and fails to address the core of a phenomenon such as cultural cleansing by protecting alterations of intangible cultural through attacks on the tangible.<sup>21</sup>

## 2.2 Cultural Heritage under the 1949 Geneva Convention

Considering the intended complementary nature of the 1954 Hague Convention, attention is naturally drawn to an alternative source of IHL in establishing enforceable protection of cultural heritage in armed conflict. Customary law, the 1949 Geneva Convention<sup>22</sup> and most specifically its Additional Protocols (API and APII) have provided key

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<sup>19</sup> Roger O'Keefe, "The Protection of Cultural Property in Armed Conflict", *Amicus Curiae*, No. 71, 2007, p. 4.

<sup>20</sup> Alessandro Chechi, *The Settlement of International Cultural Heritage Disputes*, Oxford University Press, Oxford, 2014, p. 72.

<sup>21</sup> Hiram Abtahi, "Adjudicating attacks targeting culture: revisiting the approach under state responsibility and individual criminal responsibility", Vol. 10, *Leiden Studies on the Frontiers of International Law*, 2023, p. 1.

<sup>22</sup> Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, (entered into force October 1950), 75 UNTS 287.



rules pertaining to the protection of cultural heritage.<sup>23</sup> In general, IHL customary law provides that:

“Parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives.”<sup>24</sup>

This provides a first basis upon which cultural heritage may find protection during armed conflict, as it ensures that attacks are not to be carried out against those objects which do not fall under the ambit of military objectives. However, in itself, this does not guarantee specific protection for cultural heritage. Thus, alongside this, customary law has evolved specifically in relation to wartime’s treatment of cultural heritage and explicitly prohibits attacks on cultural property unless imperatively required by military necessity and its destruction.<sup>25</sup> In relation to ensuring that cultural property does not become a military object, customary law holds that:

“The use of property of great importance to the cultural heritage of every people for purposes which are likely to expose it to destruction or damage is prohibited, unless imperatively required by military necessity.”<sup>26</sup>

A reflection of these principles is found in Article 53 of the API, which explicitly establishes the special status of cultural property in times of conflict of an international character, by prohibiting:

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<sup>23</sup> Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978); Additional Protocol II to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (entered into force 8 June 1977), 1125 UNTS 609.

<sup>24</sup> Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 7.

<sup>25</sup> *Ibid*, Rule 38.

<sup>26</sup> *Ibid*, Rule 39.

“(a) to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;

(b) to use them in support of the military effort.”<sup>27</sup>

Article 16 of the APII supplements the latter provision by expanding the scope of this protection to conflicts on a non-international character, with nearly identical wording.<sup>28</sup> The broader meaning of cultural heritage adopted in these provisions and the specific reference to “spiritual” in addition to cultural heritage, can arguably be seen as planting the seeds of protection of intangible culture.<sup>29</sup> The likeliness that this was the intention of the drafters is uncertain, but even so, this stipulation, intentional or not, demonstrates the indivisibility of tangible cultural property and the intangible cultural heritage it represents. This relationship lies at the heart of comprehending cultural cleansing and the escalating crimes against culture in the affected regions. These issues have largely remained overlooked in the substantive content of IHL and arguably within international law more broadly.

### 2.3 The Applicability of Geneva Conventions in Contemporary Manifestations of Cultural Cleansing IHL

A key consideration when assessing the efficacy of the IHL framework within the context of cultural cleansing is its applicability to the specificities of contexts such as in Mali, Syria and Iraq in relation to parties involved. While it is true that the APII addresses non-state armed groups (NSAG), many of the Geneva conventions and protocols are considered customary international law and are thus considered to be applicable to

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<sup>27</sup> Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 (entered into force 7 December 1978), 1125 UNTS 609, Art. 53.

<sup>28</sup> *Ibid.*, Art. 16.

<sup>29</sup> V. Arnal, above note 13, p. 545.

armed groups such as the Islamic State of Iraq and Levant (ISIL), Al-Nusrah Front (ANF) and another Al-Qaida associated NSAGs.<sup>30</sup> In relation to the 1954 Hague Convention, its scope of applicability to NSAGs is only addressed within one provision, where it addresses the obligation of “all warring parties” including NSAGs to apply to a minimum the obligation to respect cultural heritage in times of armed conflict.<sup>31</sup>

Despite this, enforcement and accountability mechanisms for NSAGs are difficult to implement. This is most likely due to the state-centric nature of these conventions, which often lead to a lack of knowledge and accessibility of these rules to NSAGs. This was illustrated in the 2017 preliminary findings of a scoping study conducted by Geneva Call, which delves into the intricate dynamics between armed non-state actors and cultural heritage.<sup>32</sup> Another notable finding was the apparent reluctance of NSAGs in Muslim-majority states to acknowledge the legitimacy of international regulations safeguarding cultural heritage, despite the fact that “none of the ANSAs interviewed as part of the study expressed disagreement with these rules”.<sup>33</sup>

## 2.4 Compartmentalisation of tangible vs. intangible heritage in IHL

In assessing the wider IHL framework and drawing this back to the specific nature of the crime being addressed in the paper, namely the wiping of community or group identity through cultural cleansing, a gap in the IHL framework becomes obvious – there is an absence of protection for intangible cultural heritage.

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<sup>30</sup> Above note 37, Art. 1.

<sup>31</sup> Above note 14, Art. 19(1).

<sup>32</sup> Geneva Call, “Culture Under Fire”, 2018, available at: [https://www.biicl.org/documents/39\\_cultural\\_heritage\\_study\\_final\\_highres\\_no\\_cover\\_page.pdf](https://www.biicl.org/documents/39_cultural_heritage_study_final_highres_no_cover_page.pdf).

<sup>33</sup> Ibid, p. 49.

As previously mentioned, the 1954 Hague Convention and its 1999 Additional Protocol are still purely grounded in the arguably outdated, yet not unimportant, considerations of cultural “property”. This provides only one dimension of the larger picture of cultural heritage protection and thus in an attempt to complete this picture within the IHL framework, it is natural that attention is turned to the Geneva Convention and its Additional Protocols. However as seen above, the latter does not provide further means of expanding the understanding of protected cultural heritage. Both direct protection of cultural heritage, under the Additional Protocols, and indirect protection, under the general protection of civilian objects, are tangible-centred.<sup>34</sup> Even with the inclusion of references to “spiritual” and cultural heritage in the API and APII, allowing for inferences to be drawn and connections to be made with intangible cultural heritage, their impact may be limited if not recognized in practice. Therefore, the extent to which cultural cleansing can be said to be addressed under IHL is limited, though arguably not without potential.

#### *2.4.1 Shifting Towards An Integrated Approach To Cultural Protection Under IHL*

What is required to address the gap in protection is a shift from a tangible-centric outlook to one which is heritage-centred – meaning assessing damage beyond its typology, while also focusing on the relationship between damage to the tangible and the consequences of those damages on the identity of victims and natural persons.<sup>35</sup> The importance of tangible cultural heritage is undeniable within the values that it holds in its own right, be that in relation to its historical or political aspects. However, a key and central dimension to the value of cultural property or tangible cultural heritage is through the contribution it provides to collective memory and identity. Most of the time, if not at all times, tangible cultural property will act as the physical manifestations of intangible heritage and

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<sup>34</sup> H. Abtahi, above note 21, p.131.

<sup>35</sup> *Ibid*, p.155.

identity, thus the growing trend of using the former in the aim of destroy the latter.<sup>36</sup> This is precisely the reason for ensuring that IHL, and International Law more broadly, moves away from a compartmentalized approach to tangible or intangible heritage and instead views and addresses these through an integrated approach. As Abtathi argues, “while these attacks manifest the destruction of the tangible, there always looms, in the background, the feeling of the intangible’s alteration.”<sup>37</sup>

Without such shift, the IHL framework can only provide protection so far as the cultural property in question firstly fits within the traditional hierarchy of value conferred onto material objects and monuments by Western ideals and does so within its own rights as a tangible entity, rather than through its link to human identity. In its current form, the IHL framework runs the risk of “marginalizing a certain type of heritage and therefore certain communities”, thus providing little support as a tool against the commission of the crime of cultural cleansing.<sup>38</sup>

### **3. INTENTIONAL DESTRUCTION OF CULTURAL HERITAGE AS A WAR CRIME**

#### **3.1 Development of Cultural Heritage in International Criminal Law**

The International Criminal Tribunal for the former Yugoslavia has led to key advancements on the development of International Criminal Law in relation to cultural heritage and enforcing the principles of protection for which UNESCO stands. The Tribunal has been described as providing the “first concerted effort to establish that attacks against cultural property constituted crimes under customary international law and to hold those

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<sup>36</sup> *Ibid*, p. 1.

<sup>37</sup> *Ibid*.

<sup>38</sup> V. Arnal, above note 13, p. 546.

most responsible for these crimes [...]individually accountable.<sup>39</sup> The influence of the Tribunal on International Criminal Law may be traced back to a shift described by Janine Clark as one which defines cultural heritage primarily as “object-centric”, to one which recognizes a conceptual link between cultural heritage and peoples’ identity.<sup>40</sup> This hypothesis would suggest that International Criminal Law may go a step further than IHL and provide a promising tool in promoting a shift towards an integrated model by formally blurring of the current legal divisions between tangible and intangible components of cultural heritage.

The implication of the latter for this paper and the analysis of the destruction of cultural heritage in Islamic law contexts is that it recognizes the nuances of the recent attacks on cultural sites carried out in Iraq, Syria and Mali. Essentially, at first instance, ICL seems to be better apt to effectively prosecute these acts of cultural cleansing taking place in these contexts; the indivisibility of the destruction of cultural monuments and persecution of people in the aim of destroying diversity is more readily established.<sup>41</sup> Thus, the above progress has had significant effects on the prosecution of crimes committed against cultural heritage in the International Criminal Law framework. In fact, these developments heavily influenced what resulted in the first conviction in the International Criminal Court (ICC) for the war crime of intentionally directing attacks against buildings dedicated to cultural heritage, under article 8(2)(e)(iv) in the Al Mahdi case.<sup>42</sup>

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<sup>39</sup> Serge Brammertz, *et al*, “Attacks against Cultural Heritage as a Weapon of War: Prosecutions at the ICTY”, *Journal of International Criminal Justice*, Vol. 15, No. 5, 2016, pp. 1143, 1151.

<sup>40</sup> Janine Clark, “The destruction of cultural heritage in armed conflict: the ‘human element’ and the jurisprudence of the ICTY”, *International Criminal Law Review*, Vol. 18, No. 1, 2016, pp. 5-6.

<sup>41</sup> I. Bokova, above note 1, p.290.

<sup>42</sup> Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002), Art. 8(2)(e)(iv); International Criminal Court, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Case No. ICC-01/12-01/15, Trial Judgment, 27 September 2016.

### 3.2 Prosecuting Cultural Cleansing under the Jurisdiction of the ICC

The prohibition of deliberate targeting of cultural heritage can be found as a well-established principle in International Criminal Law.<sup>43</sup> Its explicit mention in the Rome Statue as well as the acknowledgement of “intention” has been key in pushing forward recognition of cultural cleansing. Although cultural cleansing has clear significance under more than one of the core Crimes of the ICC, namely Genocide and Crimes Against Humanity, this paper will focus on its prosecution under Article 8, pertaining to War Crimes. This is in part due to the fact that in order to establish genocidal intent, the cultural cleansing would need to aim to bring about the physically destruction of the targeted groups, which is not in itself the intent behind cultural cleansing.<sup>44</sup> While further discussion and much convincing academic literature does unpack the arguments surrounding this limiting factor, this is not the subject of this paper. In relation to Crimes Against Humanity, no case has yet been decided in relation to the destruction of cultural heritage in the ICC; however the potential is clear in relation to, firstly, the lower threshold of applicability, as the commission of crimes need not be done in the context of an armed conflict.<sup>45</sup> Furthermore, the provision prohibits the commission of acts based on the;

“Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act

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<sup>43</sup> Brian I. Daniels, “Is the Destruction of Cultural Property a War Crime”, *Apollo International Art Magazine*, 28 November 2016, available at: <https://www.apollo-magazine.com/is-the-destruction-of-cultural-property-a-war-crime/>.

<sup>44</sup> Above note 42, Art. 6.

<sup>45</sup> International Criminal Court, *Elements of Crimes*, International Criminal Court, Art. 7, para. 1, Art. 7, para. 1, p. 3. available at: <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>.

referred to in this paragraph or any crime within the jurisdiction of the Court.”<sup>46</sup>

The explicit reference to persecution based on “cultural” grounds allows for clear inferences to be made, suggesting a compelling case could be established for the deliberate destruction of cultural heritage as constituting a crime against humanity. However, whether the latter can truly address the crime of cultural cleansing and recognize the use of physical cultural destruction as a premise for the destruction on intangible cultural identity has yet to be seen.

The ICC judgement in the Al Hassan case offers an illustrative example of how the Court inferred cultural persecution, albeit indirectly, through the established grounds of religious and gender persecution. On 26 June 2024, Trial Chamber X delivered its judgement, holding Al Hassan accountable for crimes against humanity in Northern Mali. His accountability was upheld based on the leadership and organization role he held as a senior member of the Islamic Police, where he took on a pivotal role in enforcing the oppressive collation government formed by extremist groups Ansar Dine and Al-Qaeda in the Islamic Maghreb (AQIM) in Timbuktu.<sup>47</sup>

The Court’s decision particularly focused on Al Hassan’s role in prohibiting local populations from engaging in cultural and social practices, as well as compelling them to conform their behaviours and religious practices to the rigid and enforced interpretations of the Ansar Dine/AQIM coalition.<sup>48</sup> Furthermore, women and girls were coerced into forced marriages with members of the armed groups, a practice that strongly contravened local cultural traditions where marriages typically occurred within local tribes.<sup>49</sup>

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<sup>46</sup> Above note 42, Art. 7(1)(h).

<sup>47</sup> The International Criminal Court, *The Prosecutor V. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Case No ICC-01/12-01/18, Trial Judgement, 26 June 2024.

<sup>48</sup> *Ibid*, p. 718.

<sup>49</sup> *Ibid*, p. 793.



Despite these significant findings, the Court stopped short of explicitly recognizing a direct link between the persecution and the intention to destroy intangible manifestation of culture. Consequently, cultural cleansing as a constituent act of a crime against humanity remains to be unaddressed and unacknowledged by the Court. While the Al Hassan case may have laid the groundwork for potential future consideration of cultural cleansing under crimes against humanity, substantial efforts are still required to elucidate the ICC's approach to this issue. Such efforts could pave the way for more comprehensive judicial recognition and address the full scope of cultural cleansing.

### *3.2.1– Prosecuting Cultural Cleansing as a War Crime:*

The Rome Statute initially addresses war crimes, categorized as 'Grave breaches of the Geneva Conventions of 12 August 1949'.<sup>50</sup> The ways in which protection from cultural cleansing may fit into the latter has been previously discussed in detail in section 2.2 of this paper. The Statute then goes further and makes explicit reference to attacks against cultural heritage as a war crime under “intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments”. This is provided for in Article 8(2)(b)(ix), which covers conflict of an international character and under Article 8(2)(e)(iv) for those of an internal character. It is highly doubtful that during the drafting of the Statute, the reference to “intentionally directing attacks” against these monuments of cultural heritage was included in relation to the concept of cultural cleansing. However, such an interpretation may be shown in the Al Mahdi case – it is argued that despite there being no explicit reference to cultural cleansing, the core principles of the concept were readily established throughout.

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<sup>50</sup> Above note 42, Art. 8(2)(a).

The arrest of Al Mahdi occurred within the broader context of the armed violence in Mali in early 2012, following the withdrawal of Malian armed forces and the establishment of a coalition government between extremist groups of Ansar Dine and Al-Qaeda in the Islamic Maghreb (AQIM). This coalition, as described above, imposed a series of religious and political edicts over the territory of Timbuktu, including the imposition of an extremist ideological tribunal, police force, media commission and morality brigade, known as the *Hesbah*. Al Mahdi played a pivotal role in supporting to these armed movements as a recognized expert on religious matters. He was consulted in this capacity by the Islamic tribunal and appointed as leader to the Hesbah.

The mausoleums of saints and mosques of Timbuktu were integral to the religious life of its inhabitants and constituted a shared cultural heritage for the community. Between 30 June 2012 and 11 July 2012, multiple attacks were carried out resulting in the destruction of ten of Timbuktu's most significant and well-known cultural heritage sites. Al Mahdi justified this destruction to journalists at the time stating that, "What you see here is one of the ways of eradicating superstition, heresy and all things or subterfuge which can lead to idolatry."<sup>51</sup>

The United Nations Special Rapporteur in the field of cultural rights, Farida Shaheed, stated that the events in Timbuktu constituted "a loss for us all, but for the local population it also means the denial of their identity, their beliefs, their history and their dignity".<sup>52</sup> Moreover, the approach taken during the trial has been described as a "culture-value approach", meaning the Prosecutor and Trial Chamber frequently referred to the

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<sup>51</sup> Ana Filipa Vrdoljak, "Prosecutor v Ahmad Al Faqi Al Mahdi: Judgment and Sentence & Reparations Order (Int'l Crim Ct):", *International Legal Materials*, Vol. 57, No. 1, 2018, p. 29.

<sup>52</sup> Farida Shaheed, "Report of the Special Rapporteur in the Field of Cultural Rights, Farida Shaheed: the right to freedom of artistic expression and creativity", UN Doc A/HRC/23/34, 24 December 2014.

importance of prosecuting attacks on cultural property as these amounted to attacks on cultural identity.<sup>53</sup>

While this attracted much support and was seen as pushing forward in international justice agenda the protection of cultural heritage, in its entirety, it was also considered unsatisfactory in its limited clarification of the law in this area. As previously mentioned, the Statute does not depend on the classification of the UNESCO World Heritage list – therefore its protection may be broader than this. However, in the Al Mahdi case, nine out of the ten sites attacked were World Heritage sites and thus, the judgement did not provide any further explication or analysis of what renders a particular site historically or religiously significant enough to fall within the ambit of Article 8.<sup>54</sup> This landmark case was a missed opportunity for the Court to provide a precise analytical framework for future application of Article 8 in relation to destruction of cultural property. While there have been developments in the prosecution of attacks against cultural heritage, the development has been arguably stagnant since the Al Mahdi case. What was seen as an opportunity to set precedence and clarify and extend the law instead had limited effect in doing so. Thus, mechanisms and attempts to further clarify and explicitly address the weaponization of cultural heritage in the aim of cleansing relevant identities are still required.

## **4. PROTECTION OF CULTURAL HERITAGE IN ISLAMIC LAW**

### **4.1 Islamic Law and Its Sources**

Prior to the development and implementation of International Humanitarian or Criminal Law frameworks, or any established Western

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<sup>53</sup> Mohamed Badar & Noelle Higgins, “Discussion Interrupted: The Destruction and Protection of Cultural Property under International Law and Islamic Law - the Case of Prosecutor v. Al Mahdi”, *International Criminal Law Review*, Vol. 17, No. 3, 2017, pp. 486, 509-510.

<sup>54</sup> U. Bishop-Burney, above note 12, p. 131.

codification related to *jus in bello*, the Islamic Law of armed conflict already served as a regulatory source for fundamental principles governing the conduct of hostilities. Similar to the origins of Roman Law, Islamic law is largely the product of juristic interpretation, which while laying the foundations of Islamic legal thought, also led to significant debates and resulting divergences across what are known as the various “schools” of law.<sup>55</sup>

Far from being a monolithic construct, Islamic law is contained within and interpreted through its multiple authoritative sources. The primary and most authoritative source is the Qur’an, which is regarded as the most authentic record of the word of God. However, the Qur’an encompasses both legal and non-legal teachings, necessitating the development of a methodology for juridical interpretation, known as *fiqh* or normative Islamic jurisprudence.<sup>56</sup> The second primary source is known as the *sunnah* of the Prophet Muhammad, consisting of the records of actions and sayings of the Prophet, which were passed on to him through the revealed word of God.<sup>57</sup> Written accounts of these, termed *Hadith*, have been recorded by a number of well-known writers. As a result, though these are considered the second most authoritative source of Islamic law teachings, their authenticity and reliability are sometimes subject to scrutiny. The third and final primary source is the unanimous consensus of jurists, known as *Ijma*.<sup>58</sup> Though this may fall third in the hierarchy, it makes up the majority of Islamic jurisprudence.<sup>59</sup> Beyond these primary sources, jurists may engage in independent reasoning, known as *ijtihad*. The latter constitutes the secondary sources of Islamic law and are developed using

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<sup>55</sup> Farooq A. Hassan, “The Sources of Islamic Law”, *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 76, p. 65.

<sup>56</sup> *Ibid*, p. 66.

<sup>57</sup> Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations*, Palgrave Macmillan, New York, 2011, p. 72.

<sup>58</sup> Sherman A. Jackson, “Jihad and the Modern World”, *Journal of Islamic Law and Culture*, Vol. 7, No. 1, 2002, p. 2.

<sup>59</sup> F.A. Hassan, above note 55, p. 67.

different methods or methodologies, the primary one being *qiyas* (analogy).<sup>60</sup>

Islamic law is inherently progressive, with its normative framework allowing for the continued continuation of applicability rules unless new evidence warrants a change due to contemporary circumstances. As such, Islamic law of armed conflict should be understood based on how it approaches notions, justification and consequences of war, rather than through the specific formulation of rules at any particular historical period.<sup>61</sup>

#### 4.2 Defining Cultural Heritage Under Islamic Law of Armed Conflict (ILAC)

Despite the lack of explicit mention of “cultural heritage” in the Qur’an, the concept of respect and protection of enemy property in armed conflict is often established based on a *hadith* of the Prophet Mohammad.<sup>62</sup> Jurists’ deliberations on the latter are guided by two contradicting instances; first is based on the hadith and the relevant Qur’anic reference, where the Prophet ordered his followers to cut down the palm trees of the tribe of Banu al-Nadir.<sup>63</sup> However, in stark contrast to this we find the subsequent 10 commandments of Abu Bakr, which included “do not cut down fruit-bearing trees; do not destroy buildings [...] do not burn or drown palm trees.”<sup>64</sup>

Jurists interpret this disjunction in two ways: either that the command by the Prophet was later abrogated or that Abu Bakr’s commandment

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<sup>60</sup> A. Al-Dawoody, above note 57, pp. 72-73.

<sup>61</sup> Cemil Çakmak and Güneş Güneysu, “Exploring Foundational Convergence between the Islamic Law of Armed Conflict and Modern International Humanitarian Law: Evidence from al-Shaybani’s *Siyar al-Kabir*”, *International Review of the Red Cross*, Vol. 102, No. 915, p. 1157.

<sup>62</sup> F. Alshehaby, above note 5, p. 291.

<sup>63</sup> A. Al-Dawoody, above note 57, p. 129.

<sup>64</sup> *Ibid.*

followed a principle of necessity and avoidance of excess destruction.<sup>65</sup> Addressing the latter, this principle of necessity is supported by the principle that all wealth is supposed to be “a trust from God, [and] is considered a serious trespass to destroy it without cause”.<sup>66</sup> In fact, “belligerent” property and even more specifically their religious monuments and places of worship are protected under Islamic law.

Firstly, the prohibition of attacks on religious sites is an Islamic law principle, as stated by Judge Mohammed Bedjaoui.<sup>67</sup> This is supported by the Hadith of the Prophet Muhammad and his position is arguably exemplified in The Charter of Privileges granted to the Monks of St Catherine: “None of their churches and other places of worship will be desolated or destroyed or demolished...”<sup>68</sup> Therefore, it seems as though there is an overall level of consensus over the fact that the destruction of religious property of belligerent parties is generally prohibited under Islamic law. Considering that cultural heritage is wider than simply property of a religious nature, even when considering the contradiction of the two guiding sources for the conduct of hostilities in relation to belligerent property in general, the principle of proportionality or necessity acts as a protective barrier to wanton destruction.

#### 4.3 Addressing Cultural Cleansing and Protection of Intangible Cultural Heritage Under ILAC

Beyond tangible property, practices and what may be equated to “intangible cultural heritage” are also addressed in Islamic law and protected through the principle of respect of diversity and non-Muslim

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<sup>65</sup> A. Al-Dawoody, above note 63.

<sup>66</sup> Karima Bennoune, “As-Salamu Alaykum - Humanitarian Law in Islamic Jurisprudence”, *Michigan Journal of International Law*, Vol. 15, p. 622.

<sup>67</sup> A. Al-Dawoody, above note 57, p.126.

<sup>68</sup> Bilal Atkinson, “A Christian Convert to Islam Explores How the Holy Prophet Muhammad (sa) Treated Christians”, *The Review of Religions*, 2 November 2020, available at: <https://www.reviewofreligions.org/26069/a-christian-convert-to-islam-explores-how-the-holy-prophet-muhammad-sa-treated-christians/>.

traditions. The relevance of understanding the Islamic law position on this is important when relating back to the idea of cultural cleansing and the erasing of cultural identity.

Even when addressing the root causes of the destruction of the Buddhas of Bamiyan, it is evident that this was in fact part of a systemic plan aimed at eradicating ancient Afghan culture to avoid the risk that “gods of the infidels” be worshipped once again and ensure “implementation of Islamic order”.<sup>69</sup> However, according to Fai Howeidy, “the Taliban edict was contrary to Islam, since “Islam respects other cultures even if they include rituals that are against Islamic law”.<sup>70</sup> An important consideration here is where the Taliban drew such authority to base their actions on. As mentioned before, there is no direct reference to “cultural heritage” in the Qur’an, and neither is there to the prohibition of said icons and sculpture.<sup>71</sup> Therefore, the basis upon which these claims were made by the Taliban, and have been referred to by other extremist groups, are Hadiths of the Prophet which are often accused of being non-authentic or suffering from weak transmission.<sup>72</sup>

A further tool of manipulation used by extremists is the appropriation of Hadiths void of context – ISIL, for example, commonly refers to Hadiths attributed to a specific time, where Muslims were under intense persecution, and following the Prophet’s victory, when they returned to Makkah, were ordered to destroy icons and symbols.<sup>73</sup> However, when context is considered, it is evident that this command was based on destroying symbols and icons that represented an oppressive regime and

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<sup>69</sup> Fancesco Francioni & Federico Lenzerini, “The Destruction of the Buddhas of Bamiyan and International Law”, *European Journal of International Law*, Vol. 14, 2003, pp. 626-629.

<sup>70</sup> *Ibid*, p. 627.

<sup>71</sup> F. Alshehaby, above note 5, p. 297.

<sup>72</sup> Eleni Polymenopoulou, “Caliphs, Jinns, and Sufi Shrines: The Protection of Cultural Heritage and Cultural Rights under Islamic Law”, *Emory International Law Review*, Vol. 36, 2022, pp. 743, 755.

<sup>73</sup> Hadrat Mirza Bashiruddin Mahmud Ahmad, *Life of Muhammad*, 6<sup>th</sup> ed., Islam International Publications Ltd, Surrey, 2013, pp. 163-145.

was done “as part of a strategy to allow for peaceful coexistence”.<sup>74</sup> In fact, before this victory, another hadith of the Prophet says “When you are in Syria, you will meet those who remember God much in their houses of worship. You should have no dispute with them, and give no trouble to them”.<sup>75</sup> This goes beyond the protection of religious sites and onto giving “no trouble” to “those who remember God ‘in their houses of worship’”, thus offering protection to the practices and intangible aspect of other cultures. As mentioned above in particular relation to IHL, the protection of intangible cultural heritage and the practices through which identity is preserved and transmitted addresses a common critique of the misplaced emphasis on material property in international law. As this hadith illustrates, Islamic Law provides a basis for enforcing a wider application of protection of cultural heritage by reframing it as also pertaining to the protection of identity.

Essentially, Islamic Law arguably addresses compartmentalisation concerns, particularly within the IHL framework, and recentres the practice of protecting cultural heritage around recognizing the plurality of its manifestations, be in tangible or intangible. “And if anyone of the idolaters ask protection of thee, grant him protection so that he may hear the word of Allah: then convey him to his place of security...”,<sup>76</sup> as noted by Rizwan Safir, this proclamation found in the Qur’an places upon Muslims an obligation to create a “place of security” and thus confers onto non-Muslims protection of the person and arguably their faith.<sup>77</sup> Therefore, respect for the idea of cultural heritage is clearly established in Islamic Law and additionally considers the link with intangible cultural heritage, through the respect of diversity and practices. This connection that Islamic Law makes between what is closely comparable to Western

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<sup>74</sup> Rizwan Safir, “Islam’s Response to the Destruction of Cultural Heritage”, *The Review of Religions*, 19 October 2015, available at: <https://www.reviewofreligions.org/12238/islams-response-to-the-destruction-of-cultural-heritage/>.

<sup>75</sup> H. Ahmad, above note 73, p. 149.

<sup>76</sup> Holy Qur’an, Surah Al-Hajj, Verse 41.

<sup>77</sup> R. Safir, above note 74.



conceptions of tangible culture, property, and intangible culture, religion and practices, reflects a similar and in some ways wider protection of cultural heritage than under International Law.

## **5. POTENTIAL FOR AN INTEGRATED MODEL FOR PROTECTION AGAINST CULTURAL CLEANSING**

The discussion surrounding an integrated model of legal frameworks is hardly an unexplored topic. In fact, this idea is already present within international legal instruments. International laws were originally drafted to be based on and reflect principles of law recognized by “civilised nations”, as inscribed in the Statute of the International Court of Justice.<sup>78</sup> Two main inferences may be made from this. Firstly, this general principle surrounding the sources of international law would in fact support an integrated approach, which may include relevant principles of Islamic law. In support of this, and specifically related to this paper, the ICC has an explicit provision<sup>79</sup> which prioritizes consideration of all legal traditions, especially those most relevant to a particular case.<sup>80</sup>

Secondly, the intention behind “civilized nations” draws clear inferences to colonial powers as well as a hierarchy of Western influence over the institutions of international law. The effect of this archaic terminology is that it reflects the somewhat unidimensional sources of international law, which overwhelmingly represent Western legal principles, thus undermining the legitimacy of international law beyond these jurisdictions. It is therefore not unreasonable to argue that a criminal justice system based on an international law framework, which is not universally informed, will lack a key aspect of legitimacy and cultural competency. This could not be more relevant considering the current debate surrounding ongoing cultural heritage destruction in the pursuance

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<sup>78</sup> The United Nations Statute of the International Court of Justice, 26 June 1945 (entered into force 24 October 1945), Art. 38(1)(c).

<sup>79</sup> Above note 42, Art. 21(1)(c).

<sup>80</sup> E. Polymenopoulou above note 72, p. 769.

of homogeneity. IHL and ICL's ability to address a phenomenon such a cultural cleansing may be decidedly strengthened by an ability to engage with the cultures and systems that it is trying to protect.

### 5.1 The Case for An Integrated Model and Debunking Misconceptions Around This Approach

Eleni Polymenopoulou describes three overarching reasons for reluctance to refer to Islamic law and its sources by international law bodies.<sup>81</sup> First is the complexity of Islamic law and the plurality of its sources. Second are the possible tensions of the limits of creative freedom under Islamic law, which are stricter than those under international human rights law standards. Finally, she addresses the issue of conflicting interpretations, not limited to those within schools of Islamic law, but also in between a classical Islamic Law approach and the contemporary system of laws of Muslims states, based on civil codes and common law principles. While it is true that to disregard these concerns would not be as much conducive to a robust integrated approach as it would be to an obscure and disjunctive system, allowing these concerns to invalidate any conversation of integration all together would be short-sighted.

The first concern, relative to the pluralistic and complex nature of Islamic law, is particularly relevant in this paper considering the general lack of jurists' consensus or "*ijma*" around many of the rules pertaining to protection of cultural property in armed conflict. However, recognizing that many of these rules are based on jurists' discretion and interpretation of principles of the Qur'an or the Sunnah of the Prophet may also be beneficial, as it reflects the changeable nature of Islamic law.<sup>82</sup> In reality, this complexity allows for a fluid and dynamic legal system based on the principle of *Ijtihad*, mentioned above, which provides for interpretation of law by jurists. This may then create space to interpret laws on the

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<sup>81</sup> *Ibid*, pp. 764-767.

<sup>82</sup> A. Al-Dawoody, above note 57, p. 129.

protection of cultural heritage within a context where international criminal law creates space for a more pluralistic approach.

Polymenopoulou's second reason may be firstly addressed by looking at what an integrated model seeks to achieve, which is not replacing international standards with those of Islamic Law, but rather using the latter in a reinforcing manner. This means that the aim is not to find a compromise, which could in certain circumstances require human rights' standards to be lowered; instead, as this paper has aimed to show, Islamic Law does in fact confer substantial protection on cultural heritage, which can be in line with international law standards. Thus, harmonizing the two frameworks in these instances may emphasize the legitimacy of international standards to Muslim States and most notably non-State actors that follow Islamic Law and often do not recognize the legitimacy of international conventions.<sup>83</sup>

Additionally, the Islamic Law position on protection of cultural heritage is not necessarily more restrictive than that of IHL or ICL. Islamic law does not prescribe protection of property based on the status of "outstanding universal value". Instead, protection is offered to property in general, with certain sources that address religious property more specifically. Moreover, the link drawn between cultural property and its intangible relevance to individuals' identity is more clearly made in Islamic law, thus offering a more protective approach to the concept of cultural cleansing.

Addressing the final apprehension, this paper refers back to the idea that Islamic Law jurists' constant reengagement with the Qur'an and Sunnah of the Prophet allow them to keep Islam's message alive and be responsive to contemporary needs.<sup>84</sup> However, this centrality of religion in the classical expression of Islamic law is a doubled edged sword in respect

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<sup>83</sup> V. Arnal, above note 13, p. 555.

<sup>84</sup> *Ibid*, p. 555.

to its support for international norms – in reality, when contradictions arise, “the higher demands of religion are likely to trump secular fear of punishment or a desire to obey human laws”.<sup>85</sup> Therefore, contemporary legal codes of Muslim States and their authority may help limit the influences of religion and encourage a pragmatic and symbiotic relationship between the religious sources of Islamic Law and International Law.

As mentioned above, the legal justifications used by extremist groups such as ISIL lack stable grounding under teachings of Islamic law. Additionally, upon examination of the situations pertaining to the ongoing looting and destructions of cultural heritage in Syria and Iraq, it is evident that these practices are motivated by political and financial gain, rather than a desire to preach and follow obligations under Islamic law.<sup>86</sup> This induced the UNSC resolution 1299 in 2015, which condemned the actions by ISIS and the Al-Nusrah Front (ANF) in Syria and Iraq.<sup>87</sup>

Despite this, these non-State groups are still able to hide behind manipulated expressions of Islamic Law because, firstly, they are not party to and thus do not consider themselves bound by the standards of international conventions such as the Rome Statute.

Secondly, and more broadly, these groups are often based on rejections of Western conceptions of political and legal philosophies. However, as this paper argues, Islamic Law in many ways is aligned with International Criminal Law’s prohibition of deliberate destruction of cultural heritage and in its own way addresses and condemns the principle of the cultural cleansing taking place in Iraq and Syria. Subsequently, the lack of reference to Islamic Law in the case of Al Mahdi, was indeed a disappointing, missed opportunity, deliberate or not, by the Trial

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<sup>85</sup> Carolyn Evans, “The Double-Edged Sword: Religious Influences on International Humanitarian Law”, *Melbourne Journal of International Law*, Vol. 6, 2005, p. 21.

<sup>86</sup> R. Safir, above note 74.

<sup>87</sup> UNSC Res. 2199, 12 February 2015, UN Doc S/RES/2199, 12 February 2015.

Chamber. This is particularly true considering the rarity of a situation as such, where Al Mahdi's guilty plea, resolute cooperation with the prosecution as well as his previously held influence in Islamic jurisprudence, could have been a key opportunity for the ICC to demonstrate the advantages of legal cooperation and reinforcement. Therefore, the prospect of International Criminal Law utilising the relevant teachings of Islamic Law as a basis for developing a modern formulation of international law could be seen to "add moral legitimacy and cross-cultural relevance to those rules".<sup>88</sup>

## 6. CONCLUSION

The current state of cultural heritage protection under international law appears fragmented and occasionally rests upon a superficial comprehension of cultural heritage nuances. This inadequacy hampers the development of a robust framework capable of effectively addressing the growing threat of cultural cleansing. To effectively combat this crime, it is imperative to acknowledge the intricate interplay between both tangible and intangible aspects of culture, which collectively constitute the broader spectrum of cultural heritage. These concerns are most evident within the framework of International Humanitarian Law, whereas International Criminal Law appears to offer greater potential for tackling cultural cleansing. However, the efficacy of this potential remains subject to future confirmation. So far, the ICC has had limited case law providing for the prosecution of deliberate attacks against cultural heritage; the landmark case of *Prosecutor v. Ahmad Al Faqi Al Mahdi* may have provided International Criminal Law with promising direction, however this may have limited impact on informing future cases of cultural cleansing in International Criminal Law considering the specific nature of this case.

Despite a lack of explicitly coined crime of "intentional destruction of cultural heritage" in Islamic law, a prohibition of the concept of cultural

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<sup>88</sup> C. Evans, above note 85, p. 12.

cleansing is clearly present when considering the protection of diversity and belligerent property, religious or not, during armed conflict within the different sources of Islamic law. In some ways, it is as though these armed groups have a better understanding of the anthropological significance of cultural heritage on contemporary societies, which is why the indivisibility of the tangible and intangible manifestations of cultural heritage is precisely the target of their attacks. As a result, what can only be described as a lag in the international law's approach or understanding of cultural heritage is of serious detriment to the protection it could otherwise offer. However, as indicated within the Geneva Call study, recognizing the intangible cultural heritage embodied in physical sites will not ensure compliance without perceived legitimacy.<sup>89</sup> Protective measures are only effective so far as they are perceived to be comprehensive and legitimate by the relevant audiences. Thus, relevance of a comprehensive approach to prosecuting the intentional destruction of cultural heritage in armed conflict, that uses relevant Islamic jurisprudence to inform policies under IHL and ICL, cannot be understated. The latter is especially true considering the effect that destruction of the Buddhas of Bamiyan had on informing UNESCO policies and the ongoing and growing practice of pillaging and looting of cultural heritage in recent conflict in Iraq and Syria. Therefore, a formulation of the law prohibiting acts of cultural cleansing, which reflects a cooperative and supportive approach to the criminalization of intentional destruction of cultural heritage in Islamic Law and International Criminal Law and International Humanitarian Law would help foster a better understanding and avoid misinterpretation of Islamic law. In turn, this may encourage compliance with International Criminal law by Muslim States and non-State actors if it is seen to incorporate and be guided by influences beyond those of western legal systems and perspectives on international crimes.

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<sup>89</sup> Marina Lostal, Kristin Hausler & Pascal Bongard, "Armed Non-State Actors and Cultural Heritage in Armed Conflict", *International Journal of Cultural Property*, Vol. 24, 2017, p. 425.

