

# Protection Of Cultural Property Under International Humanitarian Law: Some Emerging Trends

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## 1. INTRODUCTION

Cultures use properties as the media of expression<sup>[1]</sup> and blossom them into proud cultural property of the community. The creative human genius, in the process, flowers into arts, architecture, sculpture, monument, painting, literature and other innumerable forms of aesthetic manifestations. Transcending the geopolitical boundaries, they constitute cultural heritage of the mankind irrespective of the point whether they are products of individual talent or of group effort.<sup>[2]</sup> From the perspective of specific culture, the cultural property that it produces is an overt mark of its identity,<sup>[3]</sup> a repository of cultural and traditional informations,<sup>[4]</sup> and an essential thing for cultural group's self understanding.<sup>[5]</sup> Being visible symbols of culture and creativity,<sup>[6]</sup> great pieces of art are irreplaceable things,<sup>[7]</sup> as they attempt to grasp eternity by their beauty and grace.

It is the mankind's sad experience that armed conflicts result in intentional or unintentional devastation of cultural property. While earlier wars witnessed deliberate destruction of enemy's cultural property as a measure of annihilation of enemy's power,<sup>[8]</sup> modern armed conflicts with their more destructive mechanisms inflict extensive loss to cultural property. Such destructions and their cultural function, offend inter-generation equity, and impoverish the world's intellectual and artistic attainment. The anger that suppression of culture breeds in the context of armed conflicts, in fact, feeds the subsequent generation's motives for retaliation. As Etienne Clement observes. "[loss] of, or damage to, treasured structures cause despair and feelings of overwhelming suffering to the inhabitants of the affected area; it also makes the rehabilitation of their community much more difficult when the conflict is over".<sup>[9]</sup> Extensive damage to Iraq's antiquities during gulf war (1991), massive 'cultural genocide' in the former Yugoslavia involving destruction of Sarajevo's numerous churches, mosques and libraries - many of which were built in the 14th and 15th century - and destruction of sixty three percent of Croatia's Dubrovnik, the most outstanding historic town of Europe with 460 monuments (1992-93) are some of the recent examples of cultural destruction.<sup>[10]</sup> The latest addition to the unfortunate list of destructions is the destruction of the colossal images of Buddha at Bamiyan of Afghanistan during February and March 2001. This occurred in a non-international conflict as a measure of fanatic subjugation and as a means of drawing the attention of the international community for recognition and economic assistance.

International community has responded from time to time for enhancing the extent of protection of cultural property. From the Leiber Code to the Second Protocol (1999), to the provisions of the Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict, (hereinafter referred to as the Hague Convention) the norms and measures of protection to cultural property got crystallised, stabilised and developed. The objective of the present paper is to comprehend the broad direction of the development and to evaluate the efficacy of the cultural heritage law in times of crisis. It views that the approach of multiculturalism, the enhancement of protective measures and standards, down-playing the factor of military necessity, criminalisation of the wrongs against cultural property and more clear extension of legal norms to protect cultural property during internal conflicts are the major trends in cultural property law under

International Humanitarian Law (hereinafter referred to as IHL) in recent times. It argues that while these are welcome trends, more serious and intensive application of these legal norms and adequate preparation towards these objectives during the time of peace are required; and that, this ought to be done by international cooperation and administrative actions, by effective incorporation of these values into the municipal legal system and by building a broad based public opinion in support of cultural property.

## 2. A HISTORICAL OVERVIEW

According to *Agnipurana* the concept of just war ordained the parties to leave the temples and other places of worship as well as the fruit and flower garden unmolested.<sup>[11]</sup> Manu holds that the victorious king should worship in the temples, honour the priests and proclaim peoples' safety in the conquered country.<sup>[12]</sup> Koran prohibits fighting in sacred places like mosques.<sup>[13]</sup> St. Augustine preached in 'Truce of God' (989 AD) against looting and desecration of places of worship.<sup>[14]</sup> The edict of Frederick I (1158 AD) prohibited plundering during war.<sup>[15]</sup>

In spite of abundant principles of humanism in religion and morality, wars were fought in the past with ruthless savagery. The fall of Carthage, Alexandria, Constantinople, Samarquand and Vijayanagar hugely imperilled culture. In ancient Greece and Rome wars were aimed at complete annihilation of the enemy and enrichment of the victorious.<sup>[16]</sup> Historian Polybius contrasts Alexander's policy of respect for sacred places during war to Philip's wicked acts of plundering, and views that although destruction of fort and resources of enemy may weaken the enemy and enhance one's position, no advantage could be derived from wanton destruction of temples and statues.<sup>[17]</sup> False belief about deities' involvement in war motivated destructions during Roman wars.<sup>[18]</sup> Looting was the standard procedure during those days.<sup>[19]</sup> However, condemning the plundering of artistic treasure, Cicero pleaded that war should spare private and public buildings, sacred and secular, and all works created for adornment or dedicated to religion.<sup>[20]</sup>

In the early Middle Ages when the Goth ruler Totila laid siege on Rome and was about to set fire, Belisarius, one of the Generals of Justinian wrote to Totila, '[b]uilding works of art in a city can only be the undertaking of wise men who know how to live with civility; whereas destroying existing ones can only be the work of lunatics who are not ashamed of going down in history as such ... If you win this war, by destroying Rome, you will not have destroyed some one's property, but your own, whereas if you preserve it, you will logically acquire the most precious of all artistic heritage'.<sup>[21]</sup> The advice was respected and Rome was saved from destruction (546 A.D.) Contrasted with this are the destruction of old Greek libraries in Alexandria (642 A.D.) which treasured the literature of centuries<sup>[22]</sup> and the outrageous sack and plundering of Constantinople during the Fourth Crusade. W.N. Weech describes the battle thus :

"the palaces were burnt. The accumulated treasures of antiquity were recklessly looted and destroyed. The richest monuments went into the melting pot for the value of their metal .. The libraries containing the assembled literature of the classical and early Christina ages, went up in flames".<sup>[23]</sup>

Similarly, Chengiz Khan's destruction of Samarquand made to disappear the arts and crafts that had flourished in Central Asia for hundreds of years.<sup>[24]</sup> The splendid city of Vijayanagar was rendered to ruins after its defeat (1565 A.D.). In this context, Jawaharlal Nehru observed:

"All the beautiful buildings and temples and palaces were destroyed. The exquisite carvings and sculptures were smashed, and huge bonfires were lit to burn up everything that could be burnt".<sup>[25]</sup>

Medieval India witnessed large scale destruction and plundering of places of worship during war.<sup>[26]</sup>

Deviating from the above savage practices, humanity began to evolve a finer principle that works of art and places of worship shall not be destroyed. Vattel (1714-1767), a pioneer international law jurist, stated that whatever the reasons for ravaging a country, buildings and works outstanding for their beauty must be spared, since they were a credit to making and in no way contributed to strengthening the enemy; that nothing could be gained by destroying them, and blithely to deprive oneself of these works of art was tantamount to declaring oneself an enemy of mankind.<sup>27</sup> This ideal did not remain merely as a theoretical one.<sup>[28]</sup> The Leiber Code of 1863 instructed that the property belonging to churches, establishments of education, and museums of the fine arts shall be considered as public property and hence immune from appropriation by the victorious army<sup>[29]</sup> (Art. 34). Classical works of art, libraries, scientific collections and precious instruments shall be protected against avoidable injuries (Art. 35). Bluntschli, commenting on the code, views that it is the duty of the enemy chief to prevent the pointless destruction of noblest products of the human spirit.<sup>[30]</sup> Henry Dunant, the initiator and one of the founders of the Red Cross, warned the future generations against outdoing each other in destroying the most beautiful masterpieces of which civilisation is proud: palaces, castles, ports, docks, bridges, buildings and monuments of all kind.<sup>[31]</sup>

Following the Leiber Code, the English, Italian, Spanish, German and Japanese codes stipulated that moveable and immovable properties dedicated to science or art, churches, museums, libraries, collections of art and archives shall be treated as private property and be spared from bombardment.<sup>[32]</sup> The Brussels Declaration of 1874 not only reiterated these principles but also imposed a duty on the besieged to indicate the presence of such buildings by distinctive and visible signs to be communicated to the enemy before hand.<sup>[33]</sup>

The Oxford Manual of 1880 went a step ahead in penalising offender of cultural property. The Hague Convention of 1907 imposed liability upon the belligerent party which violated the Convention to pay compensation.<sup>[34]</sup> In the background of extensive destruction of cultural property because of sophisticated methods of warfare during the two world wars, the Hague Rules of Air Warfare 1922, Roerich Pact 1935 and the Inter-Allied Declaration 1943 recognised the cultural property as neutral, and imposed international duty of respect and protection for them.<sup>[35]</sup> The lacuna in the earlier law relating to precautionary measures were highlighted by the Archaeological Society of Netherlands. The Nuremberg Trial unfolded facts about atrocities and misappropriation of cultural property.<sup>[36]</sup>

In this background, the UNESCO, which shoulders the responsibility for the preservation of the cultural heritage of humanity, initiated the move for cultural property convention in 1949. The outcome is the landmark Hague Convention of 1954. The Convention is based on the idea that preservation of the cultural heritage is not only a matter for the state on whose territory it is located, but is of great importance for all peoples of the world, and deserved international protection. Realising the need for enhanced protection of cultural property and to tone down the rigours of military necessity, especially in the light of Gulf war and Yugoslavian conflicts, the Protocol of 1999 was adopted.

### **3. TRENDS TOWARDS MULTICULTURALISM IN THE PROTECTION OF CULTURAL PROPERTY UNDER IHL**

Co-existence of multitude cultures with a sense of toleration and co-operation with undisturbed continuance of cultural markers and physical objects irrespective of race, religion and language is a factor undergirded by International Humanitarian Law on protection of cultural property.<sup>[37]</sup> It can be seen below how the very meaning of cultural property got developed on lines of multiculturalism and how the basic objectives of cultural property law tend to promote multiculturalism. Gradual decline of the theory of territoriality in this sphere also supports the cause of cultural pluralism.

### 3.1 Meaning of Cultural Property and its Conduciveness for Multiculturalism

Art. 1 of the Hague Convention, 1954 states that the “term ‘cultural property’ shall cover, irrespective of origin or ownership movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interests; as well as scientific collections and important books or archives or of reproductions of the property defined above”. It also covers buildings whose main and effective purpose is to preserve or exhibit the movable cultural property, such as museums, large libraries, archives and refuges and also centres containing a large amount of cultural property as defined above. The definition is broad enough to cover all the properties which every respective people consider it as of great importance to their cultural heritage. Hence, too narrow an interpretation that confines ‘great importance’ to only world renown items such as the Coliseum, the Sphinx, the Taj Mahal or Mona Lisa will not be appropriate.<sup>[38]</sup> Judge Weeramantry in the *Legality of Nuclear Weapons* case favoured a view that all property listed or scheduled by high contracting parties form considerable segment of cultural heritage.<sup>[39]</sup> Judge Nagendra Singh made an extra judicial observation that “the cultural objects and properties which make up (one state’s) national heritage (are), consequently, the world’s heritage”.<sup>[40]</sup> The idea that cultural heritage of mankind is an aggregate of diverse particularisms is according to Niec, the “practical realisation of the principle that in international relations the cultures of individual nations are equal”.<sup>[41]</sup>

The concept of cultural equality percolates into the empirical reality of cultural diversity within the nation. UNESCO does not subscribe to the essential notions of cultural homogeneity. As R.O’Keefe observes, “Just as the cultural heritage of mankind is the sum of the heritages of the respective nations, so too each national heritage is the sum and usually subtle blend of the various cultures found within that nation, be they ethnic, religious, linguistic, class-based, caste-based, urban, rural, youth, sub or counter cultures”.<sup>[42]</sup> Hence, national governments cannot ride roughshod over the views of non-governmental cultural groupings and associations while compiling register of national heritage. Popular participation in the listing process by all the communities including minorities and indigenous bodies is contemplated. In the context of internal conflicts as in Bosnia-Herzegovina, the minority’s participation in identification of cultural property becomes a measure of significant safeguard.<sup>[43]</sup> On the whole the integration of the idea of cultural equality into the very meaning of cultural property is conducive for multiculturalism.<sup>[44]</sup>

### 3.2 The Objective of Cultural Property Law under International Humanitarian Law

Humanitarian tradition has two dimensions: first, protection of the physical welfare of the person by providing him/ her medical aid, food, shelter and freedom from torture; and second, protection of spiritual and emotional welfare by enabling mobility, family life and access to cultural life.<sup>[45]</sup> Since cultural property constitutes one of the basic elements of civilisation and national culture, its protection avoids emotional embitterment, and contributes towards fortification of the defence of peace in the very minds of people.<sup>[46]</sup>

The preamble to the Hague Convention 1954 recites: “Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world; considering that the preservation of the cultural heritage is of great importance for all peoples of the world and that this heritage shall receive international protection”. A significant point of multiculturalism is made out in this proposition. The very recognition of the fact that each culture’s physical objects, art, sculpture, monuments and literature add to the heritage of mankind reflects competence of each cultural group to participate in world culture with an equality of opportunity along with preserving its own originality.<sup>[47]</sup> Being nourished by the streams of several cultures, the world culture has an

obligation towards safe continuation of each culture's physical context which is inextricably linked to its identity . "This critical preambular recital posits the cultural heritage of mankind as the material sum of the respective national cultures, rather than the manifestation of the sort of *cultura franca* suggested by the narrow reading of Article 1",<sup>[48]</sup> observes R.O'Keefe.

The Preamble takes cognisance of the fact that cultural property has suffered grave damage during recent armed conflicts and that, by reason of the developments in the techniques of warfare, there is increasing danger of destruction. It believes that protection of cultural property cannot be effective unless both national and international measures have been taken to organise it in time of peace. The thrust of the above objective is spread over the operative provisions of the Convention.

#### **4. THE SHIFT FROM 'NATIONAL PATRIMONY' 'COMMON CULTURAL PROPERTY': IMPLICATIONS**

The concept of national cultural patrimony views cultural objects produced, or first discovered, within a state as belonging to that state based on special relationship between that state's people and their cultural artefacts.<sup>[49]</sup> It argues against decontextualisation of cultural property of a colonial state by the excessive possessive instinct of imperial rulers, soldiers and entrepreneurs. With the assertion of independence, former colonies began to enact laws asserting state ownership and control over all the vestiges of the past within their frontiers.<sup>[50]</sup> Although it is an argument against colonial exploitation of cultural property, it was paradoxically employed by Hitler for territorial expansion of Germany on the pretext that cultural property of German origin was 'traced' in non-German territory of Europe, and that logically the territory became part of Germany.<sup>[51]</sup> In the post-war period the National Patrimony theory posed two dangers : first, negative isolationist effect arising from delinking of other countries from access to cultural property of the 'patrimony' state; and second, the destruction of, or disrespect to cultural property of the minority by the majority of the 'patrimony' state.<sup>[52]</sup> The notion of territorial sovereignty underlying the doctrine of national patrimony would shut out protective intervention by other nations.

After the categorical declaration in the Hague Convention of 1954 that cultural property belonging to any people constituted cultural heritage of all mankind,<sup>[53]</sup> the territorial sovereignty theory in this sphere is diluted. But it is only down but not out, especially in view of the principle in the UN Charter protecting the territorial integrity of the nations (Art. 2.4.).<sup>[54]</sup> The concept of common cultural property imposes obligation upon all the High Contracting Parties and their people to safeguard and respect cultural property, whether in their own territory or in the territory of others. It is a controversial issue whether and in which circumstances the Security Council of UN may take collective security measure under Art. 39<sup>[55]</sup> to restore peace and thus protect cultural property. In the background of destruction of 400 mosques and 200 churches at Serbia, fall of cultural city like Dubrovnik at Croatia or destruction of Mostar bridge in 1990s it has been viewed by some scholars like Catherine Vernon that prompt protective intervention by the international community under the leadership of the UN would have prevented the destruction.<sup>[56]</sup> It is submitted, although such serious measure may be well within the framework of international law, it is only the circumstance of grave apprehension of threat to peace that would justify such a measure. The contemplation in the preamble to the Hague Convention that cultural property should receive international protection can be understood to include international community's duty to abstain from damaging, and its duty to avoid damage by positive interference in such circumstances of grave necessity.

The shift from 'national patrimony' to 'common cultural property' is also a shift from right perspective to duty perspective. The new concept calls for increased international co-operation in the field of preservation of cultural property. As J. Crabb views, the solidarity of the international community can be further intensified in

both the political and humanitarian spheres by an increased concern for the protection of cultural property.<sup>[57]</sup> Another factor to be noticed is that the new concept has not dismantled the customary international law principles and treaties that recognise the right and duty of the country of origin within whose boundary the cultural property is situated.

## **5. THE SCHEMES AND MEASURES FOR PROTECTION OF CULTURAL PROPERTY**

The schemes and measures for protection of cultural property are spread over several Conventions, Protocols and other accepted norms. The underlying policies include prohibition of destruction, obligation to safeguard and respect, transportation to safe places, special protection, enhanced protection and creation of public opinion through dissemination of the message underlying the law.

### **5.1 Prohibition of Destruction**

Under the laws and customs regulating land warfare, aerial warfare and war at sea the belligerents are ordained to take all necessary steps to spare, as far as possible, buildings dedicated to public worship, art, science or charitable purposes, historic monuments and hospitals.<sup>[58]</sup> Article 16 of the 1977 Protocol II to Geneva Convention 1949, states, "it is prohibited to commit any acts of hostility against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and use them in support of the military effort". The prohibition of destruction is implicit in the idea of safeguard and respect contemplated in the Hague Convention 1954 (Articles 2, 3

and 4).

### **5.2 Safeguard of, and Respect for Cultural Property**

Safeguarding of cultural property situated within the territory of each High Contracting Parties to the Hague Convention against the foreseeable effects of war is a duty cast upon them, which is to be discharged by making necessary preparation during peace (Art. 3, Hague Convention, 1954). Under the Hague Regulations, making inventory and registration of cultural property by following the prescribed procedure, display of Blue Shield flag and providing special shelters to them or evacuation and transportation of them are contemplated (Arts. 12-15, 18). Fairness demands that the listing process should involve popular participation, and community based nominations coordinated by religious and ethnic minorities.<sup>[59]</sup>

The obligation to respect cultural property by refraining from any act of hostility directed against such property and by refraining from using it or its surroundings in such a way as to expose it to destruction or damage in the event of armed conflict is imposed under Art. 4. Although this is subject to waiver on account of military necessity, the factor of military necessity is structured by laying emphasis on objective considerations. The duty of nations to prohibit theft, misappropriation and vandalism also adds to the duty of protection of cultural property (Art. 4.3). The occupying powers have also similar duties. (Art. 5).

### **5.3. Special Protection and Enhanced Protection**

Apart from the general protection discussed above (5.2), two more levels of protection are available. Special protection under the Hague Convention of 1954 and enhanced protection under the 1999 Protocol are available under International Humanitarian Law. A limited number of refuges intended to shelter movable cultural property and centres containing monuments and other immovable cultural property of very great importance need to be placed under special protection. But they should have been situated at an adequate distance from vulnerable point of military objectives like defence establishment, aerodrome, etc. and should

not have been used for military purpose (Art. 8.1). 'International Register of Cultural Property under Special Protection' contains the entries of such properties. The cultural properties getting special protection shall be marked with the distinctive emblem of Blue Shield (Art.10) and shall be immune from any act of hostility against it or its surrounding places (Art.9). But the immunity is withdrawable when the opposing party violates the obligation under Art. 9 so long as the violation persists (Art. 11.1). It is also withdrawable 'in exceptional cases of unavoidable military necessity, and only for such time as that necessity continues' (Art. 11.2).

The weakness of the 'Special Protection' measure consists in unilateral withdrawal of the immunity by violation of the obligation and flexibility in the factor of military necessity. The weakness came to the limelight in the developments of 1990s. The 1999 Protocol tries to overcome these weaknesses by constituting International Committee for Protection of Cultural Property (ICPCP) and by entrusting upon it the exclusive power to suspend or cancel enhanced protection (Art.14). The ICPCP is contemplated to be an impartial and neutral international body committed to the cause of protection of cultural property.<sup>[60]</sup> Compared to the scope under the Hague Convention 1954 to go for unilateral withdrawal of immunity by a State Party, the 1999 Protocol is definitely a positive development, since it is the representative body of the international community that decides the question of non-availability of enhanced protection. Further, the ICPCP is required to afford an opportunity of hearing to the parties before cancelling or suspending the enhanced protection (Art, 14.4). However, these are only checks against arbitrary withdrawal of protection to cultural property. But when the criteria for enhanced protection ceases to continue or when serious and continuous violation of enhanced system of protection persists, the enhanced protection can be stopped subject to compliance with these procedural safeguards. Such situations are to be considered as exceptional and those arising only in circumstances of impossibility.<sup>[61]</sup>

To have enhanced protection, the cultural property should satisfy three conditions : (i) it should be cultural heritage of the greatest importance for humanity; (ii) it is so recognised and protected by adequate legal and administrative measure; and (iii) it is not used for military purpose and the party undertakes not to use it for the same. (Art. 10 ). It is to be noted that unlike the Hague Convention, the 1999 Protocol does not adopt adequate distance from military objective as the criterion for identification of enhanced status. The ICPCP grants the enhanced status on the basis of request by the parties and specific recommendations by the International Committee of the Blue Shield and other NGOs (Art. 11). It is submitted, that this enables wider communitarian participation in the identification of cultural property that requires enhanced protection.

#### **5.4. Transportation of Cultural Property**

As a measure of protection, transportation of cultural property exclusively, whether within a territory or to another territory, under the international supervision and with the display of emblem may take place at the request of the concerned High Contracting Party (Art. 12 of the Hague Convention 1954 and Arts. 17-19 of Hague Rules 1954). Provisions about transport in urgent cases, immunity of cultural property from seizure, capture and prize and protection of the persons engaged in cultural property are also made (Arts. 13, 14 and 15). As experienced during the Gulf War, timely transportation of cultural property is a significant and rewarding method of protection.<sup>[62]</sup> The High Contracting Parties to the 1977 Protocol I to the Hague Convention are under an obligation to prevent exportation of cultural property from occupied territory, to take into custody the cultural property imported to their territories, to safeguard the cultural property entrusted to them for safe custody, and return them after the cessation of hostilities (I and II of the 1977 Protocol).

#### **5.5. Fostering the Spirit of Respect for Cultural Property**

In order to ensure the observance of the Hague Convention, the High contracting parties are obligated to inculcate among the members of armed forces, a spirit of respect for the culture and cultural property of all peoples by adequate training in peace time (Art. 7). Further, they shall undertake dissemination of the text of the convention so that its principles are made known to the whole population (Art. 25). It is significant that popular support is sought by means of educating the public opinion. In fact, efficacy of law consists in basing it in the popular conscience of the community.

## 6. DOWNPLAYING THE FACTOR OF MILITARY NECESSITY

Military necessity is a problematic factor in the cultural property law. In fact, International Humanitarian Law itself represents necessary balance between military necessity and humanity. Under the Hague Convention 1954 general protection to cultural property can be waived where 'military necessity imperatively requires such waiver' (Art. 4.2.) whereas special protection may be withdrawn 'only in exceptional cases of unavoidable military necessity' (Art. 11.2). What constitutes military necessity and who is to decide that are vexed questions. It is traditionally understood that it is the belligerent who determines, but strictly within the parameters permissible under the laws of war. According to Y. Dinstein and other scholars military necessity cannot override the laws of war and it is itself subject to these same laws.<sup>[63]</sup> M. Sersic views, "Military necessity means the necessity for measures which are essential to attain the goals of war and which are lawful in accordance with the laws and customs of war. Wanton destruction can never be lawful. The customary legal principle of proportionality between the damage and the anticipated military advantage must be respected".<sup>[64]</sup>

Instead of nice balancing of these factors, states, in practice, resorted to translate military convenience into military necessity. Entrusting the field commanders to decide the matter almost amounted to putting the cultural heritage of all mankind "at the mercy of the relatively parochial interest of certain belligerents".<sup>[65]</sup> According to Nahlik it is absurd that the most valuable works of art can be destroyed in the *application* of a convention devoted to the *protection* of cultural property and *according to its terms*.<sup>[66]</sup>

The serious deficiency in the Hague Convention of 1954 was tried to be repaired by the 1999 Protocol. According to Art. 6(a) of the Protocol, "a waiver on the basis of imperative military necessity pursuant to Article 4 Paragraph 2 of the (Hague) Convention may only be invoked to direct an act of hostility against cultural property when and for as long as : (i) that cultural property has, by its function, been made into a military objective; and (ii) there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective". Concerning waiver arising from use of cultural property, military necessity can be invoked only when and for as long as no choice is possible between such use of cultural property and another feasible method for obtaining a similar military advantage (Art. 6(b)). The Protocol also provides that the decision can be taken only by an officer commanding a force of battalion and that effective advance warning shall be given. With regard to cultural property obtaining enhanced protection, there is no express exception for military necessity. But, when cultural property is used as military objective, its claim for enhanced protection gets lost. Even in that circumstance, the choice of means and methods of attack shall be guided by the purpose of terminating such use and avoiding or in any event minimising, damage to the cultural property (Art. 13.2(b)). Further, the decision to attack shall be taken only by top officer, with effective advance warning and by giving reasonable time to the opposing force to mend (Art. 13.2(c)).

It can be gathered from the above that the 1999 Protocol has put forward rigid parameters about military necessity and structured the belligerent's powers in this sphere. Low key treatment of military necessity is a welcome effort. However, power of the ICPCP to suspend or cancel enhanced protection in the case of serious violation of immunity of cultural property (Art. 14 ) is a weak point of the Protocol and revives the problem of

military necessity with the only change that ICPCP would decide the matter, instead of individual state.

## **7. INTERNATIONAL CRIMINALISATION OF WRONGS AGAINST CULTURAL PROPERTY**

Imposition of personal criminal liability upon the perpetrators of war crimes has been expected to yield desirable results of deterrence and universal condemnation. While the 1954 Convention does not contain any provision for criminalising the acts of hostility against cultural property, the municipal law of each country dealt with crimes like theft, mischief, misappropriation, etc. In fact, taking effective measures for the enforcement of the Convention is a duty cast upon the nations (Art.34.1). It is a conspicuous development in the 1990s that wrongs against cultural property are regarded as serious crimes in international law, and dealt with accordingly.

The Statute of International Criminal Tribunal for the former Yugoslavia 1993 confers jurisdiction upon the Tribunal to deal with violations of the laws and customs of war which expressly include, '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' (Art. 3(d)).

The Statute of the International Criminal Court, 1998 includes in the list of serious violations of the laws and customs applicable in international armed conflict, the following acts: "Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purpose, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives" (Art. 8.2.(b) ix.). The Statute confers jurisdiction to ICC in this matter.

Under the 1999 Protocol, detailed provisions about identification of crimes against cultural property, jurisdiction, prosecution and extradition have been made (Art. 15-18). But it leaves the responsibility with the States by providing, "[e]ach party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make offences punishable by appropriate penalties". It can be seen that National Patrimony theory wields influence in this regard.

## **8. INSTITUTIONAL AND NORMATIVE SUPPORT FOR PROTECTION OF CULTURAL PROPERTY**

The role of institutions like International Committee of the Red Cross in the growth and application of International Humanitarian Law has been significant. In the regime of cultural property law, similar role is played by the UNESCO. It not only took initiative in formation of the Hague Convention of 1954 but also assumed to itself the role of supervisor and monitor. Systematic registration of the cultural objects by the UNESCO are some of the key functions that contribute to the success of the Convention (Arts. 23, 26, 27 of the Hague Convention and Art. 15 of the Hague Regulations, 1954).

Under the 1999 Protocol an international committee called the Committee for the Protection of Cultural Property in the event of armed conflict is established. Composed of 12 Parties elected for a tenure of one year by the Meeting of Parties under UNESCO, the Committee is entrusted with important functions to monitor and supervise implementation of the Protocol, and grant, suspend or cancel enhanced protection to cultural property (Arts. 25 and 27.1). In addition to formal relation with UNESCO, International Committee of the Blue Shield and the ICRC, "the committee shall cooperate with international and national governmental and non-governmental organisations having objectives similar to those of the Convention".

Normative support to the protection of cultural property can be gathered from various international human rights conventions, UNESCO conventions, constitutional provisions of the nations and their specific statutes. Integration of the principle that protects cultural property with human rights values mutually support each other.

In fact, conservation of cultural identity contemplated under the International Covenant on Economic, Social, and Cultural Rights (Arts. 3 and 15) is possible only with protection of cultural property. Violation of cultural property constitutes human right violation itself. The UNESCO convention concerning the protection of the World Cultural and Natural Heritage of 1972 and the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 also lend normative support to the protection of cultural property.

At the national level, constitutional and legislative norms support the cause of cultural property. Article 49 of the Indian Constitution states, 'It should be the obligation of the state to protect every monument or place or object of artistic or historic interest declared by or under law made by Parliament to be of national importance, from spoliation, disfigurement, destruction, removal, disposal or export as the case may be". Under the Ancient Monuments Act 1904 and various state legislations on the subject, the Government may declare an ancient monument to be a protected monument; may purchase or take a lease or get compulsory acquisition of the protected monument; or may enter into agreement with the owner for better protection of the monument.<sup>[67]</sup> In order to protect or preserve any ancient monument from hazardous operations like mining, blasting or excavation or misuse, pollution or desecration necessary steps can be taken by the government.<sup>[68]</sup> Persons destroying, altering, imperilling, injuring or removing monuments, or trafficking in antiquities are punishable.<sup>[69]</sup> The Antiquities and Art Treasures Act 1972 prohibits exports of antiquities by persons other than licensees or in violation of law.<sup>[70]</sup> Since these legislations are applicable during both peace and war or in non-international armed conflicts, strict implementation of them support the International Humanitarian Law's mission of protection of cultural property.

## **9. APPLICATION IN NON-INTERNATIONAL ARMED CONFLICTS**

In the event of non-international armed conflicts also the provisions of the Hague Convention are applicable (Art. 19). The increasing number of non-international conflicts have necessitated the application of this provision. The 1999 Protocol makes it clear that the Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.

The wanton destruction of the Buddha statues by the Taliban forces is the worst example of loss of cultural property due to fundamentalism and also due to the policy of holding cultural property as a means of bargain in international relations while prosecuting an internal conflict. The population of Afghanistan is almost entirely Muslim with a small minority of Hindus and Sikhs, and the conflict is political rather than inter-religious one. The protracted civil war (1978-1998) ended in upper hand of Taliban force; whose leaders like Mullah Mohammad Omar and Mullah Nooruddin Turabi and their followers believed in Islamic fundamentalism and iconoclasm<sup>[71]</sup>. Although substantive portion of Afghan territory has been under the control of the Taliban, except Pakistan, UAE and Saudi Arabia no nation has given recognition to Taliban rule. In view of UN's condemnation of the avowed policy of iconoclasm, in 1999 the Shura Council of Taliban passed a decree preventing the destruction of Afghanistan's numerous archaeological sites: But drought, loss of revenue because of stoppage of poppy cultivation due to international pressure, non-recognition and frustration in drawing international community's attention changed the Taliban policy<sup>[72]</sup>. On 26th February 2001 the Taliban commander issued an edict for destruction of Buddha statues. UNESCO regarded the edict running counter to all the basic principles of respect, tolerance and wisdom on which Islam is based, and motivated the member countries to appeal as follows: "We plead with Taliban authorities to stop this irreversible assault on two millennia of Afghanistan's artistic and cultural achievements, treasured not only as spiritual birthright of Buddhists everywhere but also as a universal cultural heritage for people of all faiths and nationalities."<sup>[73]</sup> In

spite of persuasions by many countries and efforts of UNESCO envoy Pierre Lafrane at Afghanistan, the Buddha statues were destroyed and mutilated<sup>[74]</sup>.

Three important legal issues that have arisen in the Afghan context can be discussed as follows: First, are the Buddha statues and stupas cultural properties of international importance? The Buddha statues were carved out of Hindu Kush mountain cliffs during the 3rd and 4th century A.D. under the Kushana rulers. The two figures towering at a height of 175 ft and 110 ft were good examples of Gandhara art and were the most remarkable representation of the Buddha anywhere in the world. With countless rich frescoes painted in dazzling colours, they synthesised Greco-Persian art<sup>[75]</sup>. The archaeological excavations carried during the 20th century had unearthed a large number of stupas. The archaeological remains are the key to understand the history of the bygone era<sup>[76]</sup>. Frequent visits by tourists and Buddhist monks and the UNESCO records, in addition to the ancient and artistic character of the statues, undoubtedly render them cultural property of international importance.

Second, is the Afghanistan Government or the Taliban authority under any legal obligation to protect them? As on today, Afghanistan is not a contracting party to the Hague Convention on Cultural Property. But as discussed earlier, the evolution of cultural property law in international law during the last two centuries through Leiber Code, European Codes, Brussel Declaration, Roerich Pact and other international commitments, which culminated in the Hague Convention of 1954 suggests that the law is deeply rooted in the customary practice of nations and the common conscience of the international community. Hence, irrespective of the question whether Afghanistan is a party to the Hague Convention, the fundamental principle that well established customary practices of international law is binding upon the nations can be invoked against Afghanistan. Since the Taliban authority is the *de facto* ruler of Afghanistan and at least recognised by few countries, in spite of non-recognition by other countries, it is bound by the international legal obligation to protect the cultural property.

Third, whether the legal measures of preventive action, if any, to protect cultural property are adequate under international law to deal with Afghan type of situation? Unlike the situations in Yugoslavia or those during crusades or Spanish- Arab conflicts, in Afghanistan the conflict was not between two rival religious groups. The religious minority in Afghanistan is 1 per cent and the Buddhists were not in the opposing front. The extent of threat to human rights did not amount to such a grave threat to international peace calling for collective security measure of preventive intervention by the United Nations. In this peculiar situation, especially when the Taliban was holding the Buddha statues as hostages for claiming a ransom of international recognition and assistance, the UNESCO has a crucial role of mobilising global opinion and international pressure for prompt action of protection of cultural property. On the whole, weakness of the law in this sphere shall be made good by global opinion and active steps by the international community.

## 10. CONCLUSION

Unlike other properties, cultural property has the dimension of emotional attachment of the community. Its destruction or spoilage inflames the social body in a far more serious way than it apparently appears to be. By and large, International Humanitarian Law has satisfactorily responded to the problem. The reasons for non-compliance and violations are traceable to the inherent non-legal factors and not to the infirmities of International Humanitarian law as such. International community has shown its increased concern for protection of cultural property in the light of Gulf War and Yugoslavian conflicts by enacting statutes and protocols. As in other spheres, here also, efficacy of law depends much upon general acceptance by the global community. The direction of development in International Humanitarian Law about protection of cultural

property is appropriate as it conforms to basic values of humanitarianism and multiculturalism. The shift from territoriality to common cultural property, stringent measures for enhancing the levels of safeguards and the policy of dealing sternly with hostilities against cultural property are sound developments which ought to be supported by international solidarity, education and awareness of its importance for the preservation of civilisation and culture and human dignity, and implementation through national legislations.

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[1] See Rabindranath Tagore, 'Wealth and Welfare' in *Modern Review* February 1905 Cited by Kedarnath Mukerji, *Political Philosophy of Rabindranath Tagore* (1982), pp. 96-97.

[2] Para.3 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 says, "... damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world. The preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection"; also see Art. 1 which defines cultural property by requiring the factor of 'great importance for all peoples of world' an essential ingredient in cultural property; also see Preamble to the UNESCO Convention on the Means of Prohibiting and Preventing the illicit Import, Export and Transfer of Ownership of Cultural Property 1970; also see Rochelle Strahl, "The Retention and Retrieval of Art and Antiquities through International and National Means: The Tug of War over Cultural Property", *Brooklyn Journal of International Law*, vol. 5 (1979) p.103; also see *Proceedings of American Society of International Law*, vol.71(1977), pp. 196-205 on "The International Protection of Cultural Property".

[3] Rebecca Clements, "Misconceptions of Culture: Native Peoples and Cultural Property Under Canadian Law", *University of Toronto Faculty of Law Review*, vol.10 (1991), p.49. cited by Theresa Simpson, "Claims of Indigenous Peoples to Cultural Property in Canada, Australia, and New Zealand" *Hastings International and Comparative Law Review*, vol.18 (1994), pp.195-197 .

[4] Robin A. Morris, "Legal and Ethical Issues in the Trade in Cultural Property", *New Zealand Law Journal*, vol. 40(1990),p. 42, Cited by Theresa Simpson, note 3.

[5] Preamble to the UNESCO Convention 1970 views that knowledge of cultural property increased the knowledge of civilisation of man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional understanding; also see Rebecca Clements, note 3; "Each (cultural property) is a road to the storehouse of universal thought, and continued cultural interchange is essential for a cosmopolitan understanding" observes Manju Chellani, "A Survey of International Law and Current Issues Relating to Protection of Cultural Property", *Delhi Law Review*, vol.XX (1998),p. 157.

[6] Etienna Clement, 'Cultural Heritage Law: Recent Developments and Current Challenges' in *UNESCO Regional Seminar on Implementation of International Law and Cultural Heritage Law, Kathmandu 1997 A Report*, p. 31 at 32 citing Rielmayer's article.

[7] According to Prof. Stanislaw Nahlik cultural properties are immortal traces of the genius of past generations, and with their perennial qualities, continue to relate with the fleeting human generations *Vita brevis - Ars Longa*. Cited by Jiri Toman, *The Protection of Cultural Property in the Event of Armed Conflict*, (Dartmouth,) p.3; ‘The irreplaceable is more important than the replaceable, and the loss of even the most valued human life is ultimately less disastrous than the loss of something which in no circumstances can ever be created again’, observed Sir Harold Nicolson in “Marginal Comments” *Spectator*, 25 February 1944, quoted in Z. John, H. Merryman and Albert E. Elsen, *Law, Ethics and the Visual Art*, 37 (1987); also see M. Catherine Vernon, “Common Cultural Property: The Search for Rights of Protective Intervention”, *Case Western Reserve Journal of International Law*, vol.26 (1994), p.435.

[8] Right to booty of war was recognised ever since Greek times. Xenophon said, “It is a universal and eternal law that, in a city captured by enemies in a state of war, everything, both persons and goods, shall belong to the conquerors”. Xenophon, ‘*Cyropaedia (The Education of Cyrus)*’, VII, 5, 73 Cited by Jiri Toman, note 7, p. 3.

[9] Etienne Clement, note 6, p. 31.

[10] See Christopher Greenwood, ‘Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflicts’ in Peter Rowe (ed.), *The Gulf War 1990-91 in International and English Law*. (Sweet and Maxwell, 1993), p. 80, also see M. Catherine Vernon. note 7, pp.442-444.

[11] *Agniputra* 236, 61-65; also see L.R. Penna, “Written and Customary Provisions Relating to the Conduct of Hostilities and Treatment of Victims of Armed Conflicts in Ancient India”, *International Review of the Red Cross*, n. 271 (1989), pp. 333-47.

[12] *Manu*, VII, 201; also see *Katyayana* 21; see M. Rama Jois, *Legal and Constitutional History of India*, vol. 1, ( N.M. Tripathi, 1984), pp. 664-665.

[13] *Koran*, Chapter II verse 191; also see M.K. Ereksoussi, “The Koran and the Humanitarian Conventions”, *International Review of the Red Cross*, (1962), p. 5.

[14] He preached, “To wage war for loot is a sin (*Propter praedam militare peccatum*)”, see Pietro Verri, “The Condition of Cultural Property in Armed Conflicts: From Antiquity to World War II” *International Review of the Red Cross*, n. 245 (1985), pp. 67-78.

[15] See *Pietro Verri*, note 14.

[16] *Ibid*, 7—74; Xenophon (*Cyropaedia*), Plato (*the Republics and the Laws*), Aristotle (*Politics*) and Gaius, (*Institutes and Deutoronomy*) preached the doctrine of spoils.

[17] Pietro Verri, note 14, pp. 71-72

[18] *Ibid*, p. 71.

[19] Roman Senate had issued a decree authorising everyone to join in the looting of the enemy town of Veii after defeat. See Pietro Verri, note 14, p. 73.

[20] The context was to sack Corinth in 143 B.C. However, Cicero’s preaching went unheeded in subsequent sacks of Syracuse (413 BC), Agrigentium (262 BC) and by Carthagians (214 BC); Plutarch narrates the event of saving of Protogene’s paintings by Demetrius I in response to an exhortation made by an emissary that

burying the painting under a heap of smouldering ruin was an act of disgrace. See Pietro Verri, note 14, pp. 72-73.

[21] Pietro Verri, note 14, p. 75.

[22] W.N. Weech, *History of the World*, (ed.) 2nd ( Asia Publishing House, 1960), p. 253; the estimated number of volumes was 400,000.

[23] *Ibid.* pp. 440-1.

[24] Jawaharlal Nehru, *Glimpses of World History*, (New Delhi, 1935, 14th Reprint. 1999), pp. 218-19.

[25] *Ibid.* p. 259.

[26] See K.A. Neelakanta Shastri *et al.*, *Advanced History of India*, (ed.2) ( Allied Publishers, 1990), pp. 335-6 and p. 508 refer to destruction and plundering of temples at Kangra, Mathura, Somanath, Banaras and Udaipur by Mahmud of Ghazni and Auranagzeb.

[27] Vattel, *Le Droit des gens (The Law of Nations)*, vol. II, Book iii, Chapter 9, Cited by Pietro Verri, note 14, p. 82.

[28] Stanislaw Edward Nahlik, 'Protection of Cultural Property' in *International Dimension of Humanitarian Law*, ( Martinus Nijhoff, 1988), p. 203 refers to its practical application in Peace of Westphalia, and in British Court judgments nullifying captures of collection during Napoleonic wars.

[29] See Pietro Verri, "The condition of cultural property in armed conflicts: From Antiquity to World War II", *International Review of the Red Cross* n.246 (1985), pp.127-128; also see Michael Harris Hoffman, "The Customary Law of Non-International Armed Conflict - Evidence from the United States Civil War" *International Review of the Red Cross*, n.277 (1990), pp. 322-324. Also see Jiri Toman, note 7, p.7.

[30] Jean-Gasper Bluntschli, Article 649 in *Le droit International Codifie* (1868), p. 365 cited by Jiri Toman, note 7, p. 8.

[31] Henry Dunant, "Trahison de la science" in *Unsouvenir de Solferino suivi de l' Avenir sanglant*, ( Henry Dunant Institute, 1969), p. 188, cited by Jiri Toman, note 7, p. 8.

[32] See Pietro Verri, note 29, pp. 128-129.

[33] *Ibid.* p. 129; Jiri Toman, note 7, p. 9.

[34] Jiri Toman, note 7, pp. 10-11.

[35] *Ibid.* pp. 14-20.

[36] *Ibid.* pp. 20-21.

[37] See P. Ishwara Bhat, 'Multiculturalism as a major concern and value of International Humanitarian Law' unpublished monogram / research report submitted to the International Committee of the Red Cross, Regional Delegation, New Delhi in April 2000 under Henry Dunant Fellowship.

[38] L.C. Green, *The Contemporary Law of Armed Conflict*, ( Manchester University Press, 1993) p. 145; also see APV Rogers, *Law on the Battlefield*, ( Manchester University Press 1996) p. 90; referred in R.O'Keefe, "The Meaning of 'Cultural Property' under the 1954 Hague Convention" *Netherlands International Law Review*, vol. XLVI(1999), pp. 26- 29 .

[39] "Legality of the Threat or Use of Nuclear Weapons: Advisory Opinion," *ICJ Reports* (1997) p. 226 at p. 467.

[40] 'Address by Nagendra Singh at the celebration of the Thirtieth Anniversary of the Hague Convention' at Indonesia, 1984 Reports, UNESCO, Doc. CLT/MD/3 p. 14 at 15.

[41] Niec, "Sovereign Rights to Cultural Property" *Polish Yearbook of International Law*, vol.4 (1971), pp. 239 - 250, cited by R. O'keefe, note 38, p. 52.

[42] R.O'Keefe, note 38, p. 52.

[43] *Ibid.* p. 56.

[44] Multiculturalism means coexistence of plurality of cultures with equal rights and mutual cooperation and understanding. See Robert C. Post, "Cultural Heterogeneity and Law" *California Law Review*, vol.76 (1998), pp. 297- 301.

[45] Major thrusts of four Geneva Conventions 1949 relating to humanitarian law, their Protocols, Hague Convention, 1954 and UN Guidelines on Protection of Internally Displaced Persons 1998 have been towards these objectives. See Haris Peter Gasser, 'International Humanitarian Law' in M.K. Balachandran and Rose Verghese, *Introduction to International Humanitarian Law* ( ICRC, 1997), p. 1 at 13; also see Jean Pictet, *The Principles of International Humanitarian Law*, ( ICRC, 1966), pp. 27-29.

[46] Dwight D. Eisenhower, *Peace with Justice*, ( Columbia University Press, 1961), p. 8.

[47] UNESCO and UN Sponsored World Commission on Culture and Development, *Our Creative Diversity: Report of the World Commission on Culture and Development*, (eds.) 2nd. ( UNESCO, 1996) p. 29, Comment by Claude Levi-Strauss.

[48] R.O'Keefe, note 38, p. 38.

[49] Douglas N. Thomson, 'Rolling Back History: The United Nations General Assembly and the Right to Cultural Property' *Case Western Reserve Journal of International Law*, vol.22(1990), p.47; see M. Catherine Vernon, note 7, p. 449 for the view that national patrimony means property right of a nation as one international unit, including claims of control and ownership of cultural artifacts and sites with which the nation can trace an historical relationship through lineage or territory.

[50] Lyndel V. Prot and P.J. O'Keefe, *Law and the Cultural Heritage: Discovery and Excavation*, (1984), pp. 188-89, Cited in M. Catherine Vernon, note 7, p. 449; see Art. 49 of the Indian Constitution and Archaeological Monuments Act of year.

[51] M. Catherine Vernon, note 7, p. 450.

[52] *Ibid.* pp. 452-3.

[53] Preamble to the Hague Convention states “Considering that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection”.

[54] Art. 2 (4) of the U.N. Charter states, “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations”.

[55] Art. 39: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security”.

[56] M. Catherine Vernon, note 7, p. 443.

[57] J. Crabb, ‘International Humanitarian Law and the Protection of Cultural Property’ *Year Book of International Institute of Humanitarian Law*, (1986), pp.267-269 cited in M. Catherine Vernon, note 7, p. 445.

[58] Art. 27 of the Hague Regulations Respecting the Laws and Customs of War on Land 1907; Rule 47 (d) and (f) of San Remo Manual 1994 regarding protection of ships transporting cultural property; and Art. 25 of Hague Rules of Air Warfare, 1923.

[59] See R.O’Keefe, note 38, p. 55.

[60] As per Article 20 the Committee shall be composed of twelve parties which shall be elected by the Meeting of the Parties and in determining membership of the committee, parties shall seek to ensure an equitable representation of the different regions and cultures of the world; the term of office shall be four years (Art. 25); the committee shall monitor and supervise the implementation of the Protocol which provides for enhanced system of protection to cultural property (Art. 27).

[61] Use of places adjacent to ancient temple of Ur by Iraq to position fighter aircrafts in order to misuse the protection of cultural property during the 1991 Gulf war can be cited as an example of such situation. See UN Doc. S/22115, 21 January 1991; UN Doc. S/22218, 13 February 1991.

[62] See Hilaire McCoubrey, ‘Civilians in Occupied Territory’ in Peter Rowe, note 10, pp.205- 220: “Fortunately part of the very significant collection of Islamic antiquities and art held in the Daral-Athar at Islamiyyah Museum had been dispatched... a week before the invasion”.

[63] Y. Dinstein, ‘Military Necessity’, *EPIL*, Instalment 3 (1982) p. 275; N.H.C. Dunbar. ‘Military Necessity in War Crimes Trials’, *British Year Book of International Law*, vol.29 (1952) pp. 442-452; R.J. Zedalis, “Military Necessity and Iraqi Destruction of Kuwaiti Oil” *Rev. Belge*, vol.23 (1990) pp. 333-349; also see M. Serisic, note 64.

[64] Maja Serisic, “Protection of Cultural Property in Time of Armed Conflict”, *Netherlands Yearbook of International Law*, vol.26 (1996), pp 3-14.

[65] J.H Merryman, “Two Ways of Thinking about Cultural Property”, *American Journal of International Law*, vol.80 (1986) pp. 838 - 841.

[66] S.E. Nahlik, “On Some Deficiencies of the Hague Convention of 1954 on the Protection of Cultural

Property in the Event of Armed Conflict”, YBAAA , vol.44 (1974), pp.103-105 cited by M. Serisic, note 64, p. 105.

[67] Sections 3,4,5, 10 and 20C of the Act; State Legislations on the subject, passed under Entry 12 of List II and Entry 40 of List III of Seventh Schedule to [the Constitution](#) include Andhra Pradesh Ancient and Historical Monuments and Archaeological Sites and Remains Acts 1960, Mysore Ancient and Historical Monuments and Archaeological Sites and Remains Act 1962, Madhya Pradesh AHMASR Act 1964, Punjab AHMASR Act 1964, Gujarat AHMASR Act 1967.

[68] Sections 10A and 13 of the Act.

[69] Sections 16 and 17.

[70] Section 3 of the Act of 1972.

[71] Barry Bearak and Holland Cotters, 'Taliban's', *Frontline* March 30 , 2001; Chengappa,' Vandals of History *India Today* March 19, 2001; Barbara Crossette, 'No Tears for Buddha' *Frontline* April 13, 2001; *Outlook*, March 19, 2001.

[72] *Ibid.*, V. Sudarshan, 'Vandals from the Dark age' *Outlook* March, 19, 2001

[73] [http://www.unesco.org/opi2/afghan\\_crisis](http://www.unesco.org/opi2/afghan_crisis).

[74] [http://news.bbc.co.uk/hi/English/world/southasia/newsid\\_1211000](http://news.bbc.co.uk/hi/English/world/southasia/newsid_1211000).

[75] See *supra* n. 71 and 73.

[76] Lolita Nehru, 'Weep for Afghanistan - she is dying!,' *The Hindu* March 16, 2001.

[77] See *Supra* n. 71, 73 and 76.