

LUND UNIVERSITY

European Master's Degree in Human Rights and Democratisation
2015/2016

**Using Culture to finance Terrorism : Legal deficiencies and perspectives for
an enhanced Protection of Cultural Heritage**

Léa CHAUVEAU

Under the supervision of the Professor Emeritus Goran MELANDER

Abstract

Pillages have been legitimated for millenniums under the aegis of wars and centuries under colonialism. Pillaging Cultural Heritage of the enemy by removing symbols of its Identity has been on for immemorial times. As Machiavelli stated at the beginning of the 16th century, “whoever becomes master of a City accustomed to living in freedom and does not destroy it, may reckon on being destroy by it”¹.

The other purpose of pillaging, as demonstrated under the Napoleonic era, was to raise funds to support the war effort. Two hundred years later, attacking enemy's identity and raising funds are both a *leitmotiv* for terrorist exactions against Cultural Heritage.

In 1999, Mohammed Atta, a member of Al Qaeda, tried to sell looted antiquities to fund the terrorist attacks perpetrated two years later in New York². If western countries are not the same active actors of past pillages, they witness in their auction houses numerous arrivals of cultural objects from Iraq and Syria. Among the many tragedies occurring in the region, the onslaught of the Islamic State has played an important role in the devastation of the region's Cultural Heritage.

This paper examines from a legal perspective the different initiatives that have been taken to protect Cultural Property in source countries in Conflict such as Iraq. If the International community has for several years developed the legislation in relation to Cultural Property as a financing source for terrorism, the legislations in place at the domestic level seem to brake its enforcement.

The final chapter will thus present alternatives to overcome this lack of enforcement by developing existing systems such as the system of Refuge for Cultural Property or the extension of the Responsibility to Protect principle to Cultural Property.

1 Machiavel, 1532, Chapter V.

2 Noah Charney, P. Danton, J. Kleberg, “Protecting Cultural Heritage from Art theft; International Challenge, Local Opportunity,” FBI Law Enforcement Bulletin, Mar2012, Vol. 81 Issue 3, p1-8.

TABLE OF CONTENTS

Introduction.....	p. 10
I. Contextual Presentation.....	p. 10
1. <i>Historical Perspective.....</i>	<i>p. 10</i>
2. <i>Contemporary Issues related to Cultural Property Protection; The “changing face of war”</i>	<i>p. 15</i>
II. Introduction to the legal Sources.....	p. 21
III. Conceptual frame and terminological questions.....	p. 26
1. <i>Conventional definitions : Cultural Heritage, Property and Objects.....</i>	<i>p.26</i>
1.a. <i>Cultural Heritage.....</i>	<i>p. 26</i>
1.b. <i>Cultural Property.....</i>	<i>p. 27</i>
1.b.a <i>Tangible and Intangible Cultural Property.....</i>	<i>p. 30</i>
1.b.b <i>Movable and Immovable Cultural Property.....</i>	<i>p. 32</i>
2. <i>The Concept of Trafficking or Illicit Trade.....</i>	<i>p. 32</i>
3. <i>International/ Non-International Armed Conflicts : is a distinction relevant ?</i>	<i>p. 34</i>
4. <i>Terrorism, Cultural Property and International Security.....</i>	<i>p. 37</i>
IV. Cultural Property in danger and Human Rights under threat.....	p. 41
1. <i>The Right to Participate in Cultural Life.....</i>	<i>p. 41</i>
2. <i>Property and Ownership in Cultural Heritage.....</i>	<i>p. 44</i>
3. <i>Cultural Rights of Minorities.....</i>	<i>p. 47</i>
5. <i>Rights in conflict from the European perspective ; principle of free movement of goods and illicit trade of cultural property.....</i>	<i>p. 48</i>

A state-centric Rule of Law and its problematic enforcement..... p. 51

I. The Legal efforts to support International Cooperation.....p. 51

I. 1. *International Criminal Law applied to Cultural Property*.....p. 51

I. 2. *Humanitarian Law and the implementation of the 1954 Hague Convention for the Protection of Cultural Property in the event of Armed Conflict*.....p. 54

I. 3. *Implementing the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export or Transfer of Ownership of Cultural Property*.....p. 58

I. 5. *UN Resolutions and Soft Law Instruments*.....p. 59

II. Preserving European Heritage; a priority of the European legal framework.....p. 64

II. 1. *Cultural Heritage in the Treaties of the European Union*.....p. 66

II. 2. *EU Specific regulations on countering the illicit traffic of Cultural Property*.....p. 67

II. 3. *Weaknesses and Obstacles to the Implementation of EU's Policies*.p. 68

II. 4. *The enhanced protection offered by the Council of Europe*.....p. 70

II. 5. *Bona Fide principle in Civil Law systems and the notion of Gross negligence in the Council of Europe legislation: the brake to International Law enforcement*.....p. 72

III. A reflect of the International Effort in French and Iraqi Domestic Legislations.....p. 75

III. 1. *The illustration of French legislation and measures in place to tackle the Illicit traffic of Cultural Property*.....p. 75

III. 2. *The Iraqi legal framework on Cultural Property protection*.....p. 77

Protecting Cultural Property : The call for alternatives.....	p. 80
I. Cultural Property: the new “Refugee” of Wars ?.....	p. 80
I. 1. <i>Museums : diplomatic actors of Wars ? Existing systems of International Law.....</i>	<i>p. 81</i>
I. 1. 1. The concept of Repositories of Last Resort in Museums Codes of Ethics.....	p. 81
I. 2. <i>The concept of Refuges under the 1954 Hague convention.....</i>	<i>p. 83</i>
II. Preserving Cultural Heritage; an approach to preventive alternatives.....	p. 86
II. 1. <i>The Martinez proposal at the intersection of Repositories of Last Resort and Refuges concepts.....</i>	<i>p. 86</i>
II. 1. 1. The application of “Refugee” status to Cultural Property.....	p. 88
II. 2. <i>The extension of the Responsibility to Protect Principle to Cultural Property; ultimate alternative or indispensable measure ?.....</i>	<i>p. 89</i>
Conclusion.....	p. 94
Bibliography.....	p. 97

Methodology and Structure

The interdisciplinary feature of this paper led me to approach the two different groups of research method used in social sciences.

First, I adopted an empirical-analytical approach. To understand the fight against the Illicit Traffic of Cultural Property and its evolution through law in the last sixty years, it required me to collect numerous datas; factual datas to understand the context and legal datas to understand its framework. This research was thus qualitative, mainly based on legal and archival resources.

I first proceeded from a *lex lata* perspective; I took into consideration all the positive legal resources that could be relevant to answer my research questions and selected the most impactful. I presented them and analysed them at three different levels; International, European and Domestic to obtain a complete and broad picture of the Law framing my topic.

The exercise of regulations and conventions selection was particularly difficult as I perceived an interest in many documents for the purpose of my research but considering the time and length requirements, I focused on the most pertinent. For instance, as this research focuses on the Prevention of Traffic rather than the Restitution process of Objects, I decided to exclude the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects adopted in 1995, as it emphasises the Restitution process. To take another example at the european level, I mentioned the Council of Europe Convention on the Prevention against Terrorism but not elaborated further on it considering that, even though it marked an important step by calling upon states to collaborate for the prevention against terrorism, the offences tackled in this Convention were not specific enough to the purpose of my research, not addressing specifically the question of terrorism financing.

Once I collected all the relevant sources for the realisation of my researches, I

analysed them in the light of the context whose my paper deals with; the current Iraqi internal conflict and the exactions of Daech on Cultural Property in this region.

To that extent, I adopted more of an interpretative method to understand the traffic of cultural objects and its legal framework within a broader picture, in a comprehensive and holistic way.

Indeed, the fact that this traffic finances back terrorist groups calls states to take into account various factors that are important to understand. By linking the Traffic of Cultural Property to Terrorism and Human Rights, I highlight the role that Law has to play as a regulator; how it failed to do so and how it could succeed to do so in the future. From then, I proceeded from a *lex ferenda* perspective.

To understand the current Legal framework tackling the Traffic of Cultural Property it is important to take into account the phenomenon of terrorism and how they influenced each other; how recent terrorist exactions boosted the adoption and enforcement of legislation and, *vice versa*, how law impacted or aimed at impacting terrorist exactions on Cultural Property.

This research is consequently really interdisciplinary; touching mainly upon Humanitarian Law with the 1954 Hague Convention on the Protection of Cultural Property at the International Level, Public International Law but as well touching upon Human Rights Law with a focus on Cultural Rights, International Cultural Heritage Law, European Law and specific Domestic French and Iraqi Cultural Laws .

The aim was to offer a picture as broad as possible of the most relevant legislation in this area to subtract more saliently what was lacking and what could be kept in the future from the past legislation to consider a future enlightened legislation as efficient as possible.

For this purpose, I supported my analysis with previous and ongoing reports of states compliance with Conventions and with an observation of states practice. Moreover, I compared the critics of academics regarding the Legal enforcement of conventions and the empirical behaviour of States to subtract results (contradictions or matches) and position myself for more accurate proposals.

Adopting these methods was the most suitable for my researches and followed a simple logic to make it as easy as possible for the reader to understand the different steps of my intellectual approach;

1) presentation of the context (historical, geographical, factual) to understand the complex current circle of issues and implications linking Traffic of Cultural Property, Financing of Terrorism and Access to Cultural Property.

2) *lex lata*; presenting law as the regulator between Traffic of Cultural Property, Financing of Terrorism and Access to Cultural Property. In a holistic approach, it was fundamental to address step by step International Law, European and Domestic Law to analyse their different roles in safeguarding Cultural Property.

3) *lex ferenda* ; after the presentation of the legal framework at different levels, I subtract some critics and outcomes, kept the concepts that could be developed in the future and fit the most to current states practices.

At this step, the method employed demonstrated its fruitfulness by giving to the reader the tools to understand the broader picture of the Traffic in Cultural Property and invited her and him to think upon the proposals that could be made to improve the legal framework in place. Moreover, it reflects the need to act upon the two pillars of the fight against Trafficking; Legal enforcement and International cooperation. As the research showed it, those two notions are really entangled.

Delimitations

The purpose of this paper is neither to analyse the art market of antiquities nor to adopt a network perspective by analysing the role played by each actor in trafficking but rather to identify the legal scheme that aims at discouraging it and how Law plays a different role at each level; international, european and domestic.

Regarding the legal approaches, the purpose of this paper is to tackle the traffic of Cultural Property from source countries in Conflict, with a particular focus on the current Iraqi internal situation involving terrorist groups. However, the difficulty in dealing with trafficking is the volatile feature of this system. If the provenance of Cultural Property is from War zones, it thus enters peaceful areas such as western Europe, sometimes even after the conflict in the state of origin ended. To that extent, humanitarian law is not sufficient to safeguard Cultural Property from those countries and we need to approach other branches such as International Public Law, International Cultural Heritage Law, Regulations and Conventions in relation both with Terrorism and its financing and to a smallest extent Criminal Law.

Research questions

How has Law been a tool to discourage Cultural property trafficking as a financial source for terrorism ? What could be the alternatives to legal deficiencies ?

INTRODUCTORY CHAPTER

I. CONTEXTUAL PRESENTATION

1. Historical Perspective

As early as the 2nd Century before J.C, the Greek historian Polybius was the first to draw a report on the destruction and looting of Cultural Heritage during wars. More than simply witnessing and reporting, Polybius made a distinction between the looting that aims a particular result – such as a financial advantage – and the free, useless looting that results in the mere selfish satisfaction of the perpetrator. He described the latter as “the action of madness”.³

Eighteen centuries later, Hugo Grotius recognizes in *De Jure Belli ac pacis*⁴ (1625) the lawfulness of the pillage and destruction of enemy's Cultural Property during wars, with no consideration for its sacred or profane feature. Attacking an enemy by attacking its culture is not a modern practice and was considered by the pioneer of the Law of Nations as a legitimate rule.

If Culture is the pillar of national, religious or ethnic identity, any attempt to damage it is a direct intrusion in people's identity. In the words of Tom Bazley, “looting a defeated opponent's cultural valuables also serves as another form of denigration and humiliation”⁵ that could lead the enemy to consider sooner its surrender.

During the Napoleonic era, this practice took a common face with his campaigns across Europe and into Egypt, authorizing and organizing the looting of historical sites. If removing symbols of Culture and Identity from the gained territories was one of the aim of those pillages, the main purpose was to raise funds to support the war effort⁶. This purpose is particularly interesting considering that, as detailed below, this mean of

3 Polybius, *The Histories*, Volume I: Books 1-2. Translated by W. R. Paton. Revised by F. W. Walbank, Christian Habicht. Loeb Classical Library 128. Cambridge, MA: Harvard University Press, 2010.

4 Hugo Grotius, *De jure belli ac pacis*. Libri tres. J.B. Scott (ed.) , Oxford : Clarendon Press, 1925, p.658.

5 Tom Bazley, *Crimes of the Art World*, 1st ed., Praeger pub., Santa Barbara, 2010, p.84.

6 Lindsay Ivan, *The History of loot and Stolen Art, from Antiquity until the Present Day*, 1st ed., Unicorn Press Ltd (ed.), United Kingdom, London, 2013, p.424.

raising funds – by looting – in war zones is still one of the main preoccupation regarding the need for protection of Cultural Heritage.

From the Identity and Cultural perspective, the stealing of Art that occurred under the Nazi regime is particularly pertinent to defend the idea that an aggression towards Culture is an aggression towards Individuals⁷ that build their identity and preserve their dignity through it⁸.

Indeed, it is in the aftermath of the atrocities that occurred during the WWII that the Nuremberg trials intervened in the mid-twentieth century to prohibit, *inter alia*, the destruction and pillage “of cultural (and religious) property during armed conflicts”, found to be “customary international law, binding on all states”⁹.

If, after the War, efforts have been made by adopting legal instruments to limit and prohibit the States Use of Force¹⁰, practice has shown that they were not ready to abandon this power. In default of stopping wars, a lot has been done to limit its effects *inter alia* through the development of Humanitarian Law.

After the War, legal priority has been given to the protection of individuals and the determination to not let what happened being reproduced. To that extent, the emergence of International Human Rights Law with the Universal Declaration on Human Rights (1948) appeared as the corner stone of a new era.

With regards to the Normative Protection of Cultural Property, the United Nations Educational, Scientific and Cultural Organisation (UNESCO) was mandated in 1945, right after its creation. Legal measures were taken relatively quickly considering that nine years after its creation, the 1954 Hague Convention for the Protection of

7 Lindsay, 2013, p. 15.

8 The relation between the enjoyment of one's culture and her/his dignity has been established by the United Nations in the 2007 Declaration on the Rights of Indigenous People ; Art 15(1), available at : http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

9 Filipa Vrdoljak , “Cultural Heritage, Human Rights and the Privatization of War”, A. Durbach and L. Lixinski (ed.), Hart Publishing, University of Technology, Sydney, 2016, p. 3.

10 UN Charter, 1945, Article 2(4); “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 ”.

Cultural Property in the event of Armed Conflicts¹¹ was adopted after the convocation of an Intergovernmental Conference and inaugurated the notion of Cultural Property as a legal category. The philosophical background of this Convention resides in the preamble, recognizing that “cultural property has suffered grave damage during recent armed conflicts and that, by reason of the developments in the technique of warfare, it is in increasing danger of destruction”. Moreover, the minds behind the Convention addressed the question of Heritage ownership or non-ownership by stating 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”.

Whereas the 1954 Convention has obviously been influenced by the atrocities of the War, the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership¹² adopted fifteen years later and applicable in time of peace reveals the consequences of the War regarding Cultural Heritage. Indeed, the controversies over the misappropriation, restitution and traffic of art that occurred after the WWII urged for the adoption of a new Convention.

Regarding the past and ongoing traffic of Culture, the 1954 and 1970 Conventions are often complementary. As it happened during WWII and as it is for instance happening today with the looting of historical sites by non-state actors in Iraq and Syria, the illicit acquisition process in war time, scrutinised under the scope of the Hague Convention, is followed by years of movement out of war zones, thus falling under the scrutiny of the 1970 Convention.

These two Conventions are acting as a relay to overcome in the greatest possible extent any gap and lick on the trafficking road of Cultural Objects.

Acting *a priori* as well as on ongoing basis is fundamental to protect and safeguard

11 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, The Hague, 14 May 1954.

12 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership, Paris, 14 November 1970.

Cultural Heritage from any Destruction or theft and consequently to protect the Right of people to participate in Cultural Life.

Used as the legal basis for the following developments, these conventions and potential gaps between their scopes and within their scopes will be examined. After having identified those gaps it will be interesting to analyse how Domestic Laws – mostly concerning Protection of Cultural Heritage – and European Law – mostly concerning its trafficking – have played a role in filling the gaps of International Regulations in these areas.

Considering that the emphasis is put in this paper on the acquisition process of cultural property through pillages and looting in contemporary conflicts rather than on the return process of those properties in the aftermath of conflicts, the 1995 UNIDROIT Convention on Stolen or illegally exported Cultural Objects is just mentioned here to highlight its importance in the legal framework of Cultural Property safeguarding. If the name of the Convention presupposes a broad scope of application, the preamble of the Convention emphasizes that “this Convention is intended to facilitate the restitution and return of cultural objects”¹³ and is thus of less relevance for the purposes of this paper.

With regards to the acquisition process of Cultural Property in time of war, there has been a historical shift in two ways. At the first level and as it is explained in more details below, the actors removing cultural objects from their territories of origin have changed. From States authorization and organization of pillages in conquest territories, non-state actors are nowadays playing a major role in the looting of their own Cultural Property.

At the Second level and as a consequence of the first observation, western states in the looting process are nowadays mainly passive actors, receiving on their territories an incredible amount of cultural objects entering the art market and making of Europe a central arena of looted property's mainly final dealings. If western countries have been

13 UNIDROIT Convention on Stolen or Illegally exported Cultural Objects, Rome, 24 June 1995.

targeted as the “Spoils of War” for centuries¹⁴ regarding Cultural Property and were accomplice of those transfers, the control that they exert on this flux has changed. From public actors, the “Spoils of War” are now mostly private collectors.

To situate the different actors of cultural property traffic, the states of origin of these objects will be called “source countries”¹⁵ or “artifacts rich states”¹⁶ and states of arrivals called “market countries”¹⁷ to borrow the usual terms employed to qualify them.

This distinction is particularly important from the network perspective such as taken by Peter Campbell¹⁸. Indeed, this paradigm analyses each level of cultural property “from the ground to the buyer”¹⁹ passing by various intermediaries. However, the purpose of this paper is neither to analyse the art market of antiquities nor the role played by each actor in its trafficking but rather to identify the legal scheme that aims at discouraging it and how law differs at each level; international, european and domestic.

The distinction between “source” and “market” countries will thus be relevant at the domestic stage, distinguishing the law from a market country – France – and a source country – Iraq.

The shift above mentioned regarding the more passive role of western states in acquiring cultural property on the ground is the result of the rapid “changing face of war”²⁰ and the economic globalization. From International conflicts opposing States, the current picture of International Relations integrates Non-state actors and Non-International conflicts. Moreover, the constant demand of collectors on the art market

14 Elizabeth Simpson, *Spoils of war : World War II and its aftermath : the loss, reappearance, and recovery of cultural property*, 1st ed., H.N Abrams Inc., New York, 1997, p.336.

15 Janet Blake, *International Cultural Heritage Law*, 1st ed., Oxford university press, Oxford, 2015, p.84.

16 Blake, 2015, p.84.

17 Blake, 2015, p.84.

18 Peter Campbell, “The Illicit Antiquities Trade as a Transnational Criminal Network: Characterizing and Anticipating Trafficking of Cultural Heritage,” *International Journal of Cultural Property*, Vol. 20, Issue 02, May 2013, pp.113-153.

19 Morag M. Kersel, “From the Ground to the Buyer: A Market Analysis of the Illegal Trade in Antiquities”, in N. Brodie, M.M Kersel and K.W. Tubb (eds), *Archeology, Cultural Heritage, and the Antiquities Trade*, University Press of Florida, Gainesville, 2006, p.190.

20 Vrdoljak, p.2.

and the amelioration of means of transportation have accelerated the perpetration of transnational crimes. This change revealed the limits of the existing International Law regulating Conflicts and Cultural Property Protection and urged the International community to adapt its legal framework to that matter.

2. Contemporary issues related to Cultural Property Protection

The “changing face of war”²¹

The classical scheme of wars and the laws that frame it did not anticipate the issues raised by the current context at two levels.

As mentioned above, states are not anymore the only actors taking part in combats under International Law but Non-state actors are increasingly present, especially with the raise of International Terrorism.

The current conflicts running in Syria and Iraq challenge the Law at different levels; regarding the application of International Law and in the area of Cultural heritage. Indeed, Non-state actors engaged in conflicts are developing an independent administrative system and delivering licenses allowing excavations on historical sites by non professionals, prerogatives normally owned by the State²².

Taking the example of the middle-eastern region from a contemporary perspective is particularly relevant with regards to the deliberate and intentional Destruction of Cultural Heritage that occurred in Iraq and Syria and the trafficking that resulted from it for several years²³. If Culture in general and Cultural Heritage in particular are often associated with collateral victims of wars, they are in reality their direct victims, as a mean to reach the people behind it.

21 Vrdoljak, p.2.

22 Jamie Hansen-Lewis, Jacob N. Shapiro, “Understanding the Daesh Economy”, *Perspective on Terrorism*, vol. 9, no. 4, 2015, p.61.

23 “Stop Trafficking Cultural Heritage in Iraq and Syria” (UNESCO Theme). Retrieved from <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/awareness-raising-initiatives/help-stop-the-destruction-of-cultural-heritage-in-syria-and-iraq/>

The development of Non International Armed Conflicts is considered by International Humanitarian Law²⁴ but this form of conflict renders difficult the possibilities of concrete actions from the International Community. Indeed, the lack of knowledge of the non-state opponent that mostly act in ignorance of the Law of War and the fact that the International Community would have to intervene on the territory of a State without necessarily being opposed to this state render difficult direct concrete actions. In this situation, International Community actions must occur with the consent and in support of the State on which territory the Non International Armed Conflict happens²⁵.

Dealing with the illicit trade and movement of cultural objects from the Iraqi region in the contemporary period implies to understand in a nutshell the conflictual issues that are currently going on and the claims of certain Non-state actors in those regions that directly or indirectly result in the traffic of cultural objects.

Victim of the first and second Persian Gulf Wars, Iraqi Cultural Heritage has been the target of important destruction and looting such as the looting of the Iraq museum in April 2003²⁶ and destruction of its National Library.

Before the last U.S troops left Iraq in December 2011, the situation also degraded in Syria. Simultaneously to the altercations that occurred between the Bashar el-Assad's regime and its opponents since March 2011, new actors entered the conflict.

The Islamic State of Iraq and the Levant (ISIS or Daesh), created in 2006 by Abu Musab Al-Zarqawi and linked to the terrorist organization Al-Qaïda in Iraq, emancipated itself from the latter to become independent in 2014. Authors of numerous

24 Art. 3 Geneva Convention, 1949 : “(...) In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties (...)”. See Additional Protocol II, 1977.

25 Sivakumaran Sandesh, *The Law of Non-International Armed Conflict*, Oxford University Press, London, 2014, p. 336.

26 Peter Stone, Johanne Farchakh Bajjalý, *The Destruction of Cultural Heritage in Iraq*, 1st ed., Boydell Press pub., Woodbridge, 2008, p.4.

exactions in their quest of founding a new sunni Caliphate, the United Nations condemned Daesh as a terrorist group responsible for war crimes, ethnic cleansing and crime against Humanity²⁷.

The investigations led by Romain Bolzinger and Geraldine Schwarz²⁸ give us more details about the systems put in place in conquest territories. As agents of a proto-state, members of Daesh run an administrative and penal system within the different cities under their control, thus excluding any control from the legitimate Iraqi government. In order to become financially self-sufficient, inter alia to finance this system and their armament, Daesh resorted to diverse methods such as the establishment of new taxes, the selling of foreign fighters passports, kidnapping of civilians for ransom payments, etc²⁹.

As the investigations above mentioned illustrate it, the destruction of historical sites and the traffic of rooted out cultural property within the Caliphate is among their most lucrative financial resources. Nonetheless, it would be prudent here not to advance any figure, as their amount has been really controversial the last past years. If some scholars have asserted their leading financial role in funding terrorism³⁰, some scholars and organizations such as INTERPOL called for prudence regarding those assumptions in absence of any precise data³¹.

In the introductory part, it was observed that the destruction and looting of

27 Christoph Reuter and Hanin Ghaddar; Interview, “Voyage au bout de la Terreur”, *Courrier International*, Octobre/Novembre/Décembre 2015, Hors série, p. 6.

28 Geraldine Schwarz; “Du Moyen-Orient à l'Europe, un vaste trafic d'oeuvres d'art” info.arte.tv, 2014, available at <http://bit.ly/1wXYhPx/> / Bolzinger Romain, « Speciale Investigation; Traffic d'art, Le Trésor de Guerre du terrorisme », 20 juin 2011, canal +, Tac presse, available at : <https://www.youtube.com/watch?v=AVCdW8VlsfU>

29 Matthew Levitt, “Terrorist financing and the Islamic State”, Testimony submitted to the House Committee on Financial Services, November 13, 2014.

30 Vanessa Hanson, “Looted antiquities : Economic Opportunity for Terrorists”, *Senior Theses and Capstone Projects*. Paper 35, May 13, 2015, <http://scholar.dominican.edu/senior-theses/35/> / Justine Drennan, “The Black Market Battleground” *Foreign Policy*, October 17, 2014, available at : <http://foreignpolicy.com/2014/10/17/the-black-market-battleground/>

31 Unknown, “Danti’s Inference: The Known Unknowns of ISIS and Antiquities Looting,” posted on CHASING APHRODITE, November 18, 2014, available at : <https://chasingaphrodite.com/2014/11/18/dantis-inference-the-known-unknowns-of-isis- and-antiquities-looting/>

cultural property in History had aimed two objectives; to annihilate the identity of the enemy and fund the war efforts.

Reproducing this scheme, the Islamic State is tracking and destroying antic temples and pagan statues for two purposes; to eradicate a culture guilty of witnessing the polytheist past of those territories and secondly to develop a potential lucrative financial resource on the black antiquities market³².

Since Iraq has been invaded by the US in 2003, the claim that antiquities are funding either insurgency or terrorism is quite spread. Peter Campbell reminded in his paper the words of the Iraqi ambassador Hussain Mahmood Fadhlalla al-Khateeb and Iraqi museum director Donny George who claimed that illicit trade of antiquities are funding both terrorism and insurgent groups. He adds the words of the United States Colonel Matthew Bogdanos affirming that « there is no doubt that international trade in illegal Iraqi art and antiquities is funding the insurgency” and funding arms purchases³³.

Daesh seems to administer more this looting and trafficking rather than properly organizing it. Indeed, an Antiquities Department – Diwan al Rikaz – has been created to provide random excavation licenses against taxes to “little hands”, unqualified farmers or individuals in financial needs that receive in most cases less than one percent of the eventual retail value of the goods³⁴. Those licenses are validated by the stamp of Daesh³⁵ which offer protection to dealers for the storage and cross-borders transit of these excavations against money³⁶. Daesh is emptying its territories from the witnesses of the Past.

In this quest of eradicating idols, the Islamic State has caught the international attention in its propaganda video diffusing the images in Syria of the Palmyra site

32 Robin Verner, “L’islam et le crépuscule des idoles (ou pourquoi Daesh détruit aveuglément ses racines)”, *Slate magazine*, October 1st, 2015, available at : <http://www.slate.fr/story/107193/islam-le-crepuscule-des-idoles>

33 Campbell, 2013, p. 140.

34 Kersel, 2006, p.200.

35 Jean-Luc Martinez, *Cinquante Propositions Françaises pour protéger le patrimoine de l’Humanité*, Rapport au Président de la République sur la protection du patrimoine en situation de conflit armé, November 2015, p.34., available at : <http://www.elysee.fr/assets/Uploads/Cinquante-propositions-francaises-pour-protéger-le-patrimoine-de-lhumanite.pdf>.

36 Kersel, 2006, p. 203.

destruction in August 2015. Qualified as a war crime by the director general of UNESCO Irina Bokova³⁷, she urged the International community to support the effort of safeguarding their heritage and identity.

In a document released in 2015³⁸, Irina Bokova took stock of the situation reminding the loss of Syria where “eight sites on the World Heritage Tentative List have been damaged, destroyed, or severely impacted by looting and illegal excavations”³⁹ and of Iraq where 2 000 archeological sites, out of 10 000, are under the control of Daesh and heavily looted. She adds that “two of the four UNESCO World Heritage sites in the country – Hatra and Ashur – have been destroyed, while fighting has damaged at least nine other sites. » Taking a look at the satellites whose purpose is to reveal the damages on historical sites through images, they showed in January 2014 for instance at the site of Doura Europos, 300 people digging with heavy machinery and bulldozers. On the same line, Apamée is nowadays nothing but craters made by pillagers.

In several Resolutions examined further,⁴⁰ the United Nations called the State Parties to block the financing of terrorist groups by, *inter alia*, regulating the trade of art antiquities of looted objects from Syria and Iraq. UNESCO also calls for the collaboration with other organizations such as INTERPOL to block what it identifies as “cultural cleansing”⁴¹.

The protection of Cultural Property and the prevention of its traffic indeed require actions in market countries, to tackle the demand and reduce the offer.

Domestic regulations are needed to control the lack of scrutiny of auction houses in London, New York and Paris regarding the origins of sold objects. For instance, the principle of good faith is applicable in France regarding the possession of objects and

37 Irina Bokova, « Director-General Irina Bokova firmly condemns the destruction of Palmyra's ancient temple of Baalshamin, Syria », speech 24.08.2015, UNESCO website available at : <http://en.unesco.org/news/director-general-irina-bokova-firmly-condemns-destruction-palmyra-s-ancient-temple-baalshamin>.

38 Irina Bokova, “Culture on the frontline of New Wars”, *Brown Journal of World Affairs*. Fall/Winter2015, Vol. 22 Issue 1, p289-296.

39 Bokova, 2015, p. 291.

40 SC/RES/1483, SC/RES/2170, SC/RES/2199, SC/RES/2233.

41 Cfr. supra footnote 36.

has posed several problems to the enforcement of International Law. When it comes to movable goods, possession means ownership⁴².

Considering the practical difficulties to stop the export from “source countries” and the flexibility of auction houses around their import in “market countries”, the question of regulation proposals at the International, European and Domestic – French and Iraqi – levels needs to be raised.

The purpose of this paper is to understand the importance of Cultural Heritage and its trafficking both regarding its access to Individuals and its narrow relation with International Security and Terrorism. More than giving attention to simple objects, attention is given to the consequences of the lack of regulations on individuals and the need for more cooperation on this matter. Tackling Cultural Property trafficking and ensuring its Protection is ensuring to people their right to benefit from cultural heritage and their right to participate in cultural life. Moreover in the contemporary picture, tackling cultural property trafficking is acting against the financing of terrorist groups to prevent them from growing and heightening their exactions. Attacking the financial resources of terrorism is a first step to grow in their scale of actions. It is important to evoke the role of the Law to ensure this process as the witness of the global desire to end a situation of empirical impunity.

42 French Civil Code, *Code civil*, Art. 2276.

II. INTRODUCTION TO THE LEGAL SOURCES

Already in 1863, the Francis Lieber Instructions⁴³, or Lieber Code, set out the protection of Cultural Property in the event of armed conflicts applied to the Government of the U.S Armies in the Field. Forty years later, the Conventions with Respect to the Laws and Customs of War on Land and its annex better known as the Hague Conventions of 1899 and 1907 prohibited the destruction and seizure of cultural property⁴⁴.

However, these efforts were revealed insufficient while witnessing numerous damages to cultural property during the first world war, such as the bombing of the Cathedral of Reims, and during the second world war, such as the demolition in Kiev of the Dormition Cathedral.

However, it is interesting to note that the first attempts to codify rules on the Protection of Cultural Property after the WWI have been made during a Non international Armed Conflict and more specifically during the Spanish civil war. However, these efforts have been vain during the WWII⁴⁵.

To overcome these insufficiencies, an initiative was launched by UNESCO and the Dutch government which organized a conference that led to the adoption of the Convention on the Protection of Cultural Property during Armed Conflicts, better known as the Hague Convention of 1954⁴⁶. This text provides for a general prohibition of cultural property seizure and destruction out of military purposes.

Since, the illegal movement and trade of cultural property has been a growing

43 Instructions for the Government of Armies of the United States in the Field (Lieber Code), adopted April 24, 1863, available at : <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument>

44 Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, adopted October 18, 1907, available at : <http://www.icrc.org/ihl.nsf/FULL/195?OpenDocument>

45 Jiri Toman, *Cultural Property in War : Improvement in Protection ; Commentary on the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, Unesco pub., World Heritage series, Paris, 2009, available at : <http://unesdoc.unesco.org/images/0018/001864/186496e.pdf>

46 Ana Filipa Vrdoljak, "History and Evolution of International Cultural Heritage Law: Through the Question of the Removal and Return of Cultural Objects", November 28, 2008, Proceedings of the Expert Meeting and First Extraordinary Session of the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation, Seoul, 25 to 28 November 2008.

scourge that could only be weakened through appropriate countermeasures. Among these, law has played a fundamental role. Nonetheless, no Convention has been adopted yet to deal directly with the illicit traffic of cultural goods in time of war. Thus, implementing international conventions and enforcing them in domestic legislation, adopting new laws, developing soft law has become a priority to minimize trafficking.

In this sector, the United Nations have led the march, notwithstanding the importance of other organizations such as UNIDROIT or ICOM.

If the 1954 Convention was adopted in reaction to the destruction and stealing of art that occurred during the WWII, the UN have been reacting for several years to the growing damages caused by terrorism on cultural property.

With the Resolution 2199 unanimously adopted in February 2015 to counter, inter alia, the illicit trafficking in cultural property from Iraq and Syria, the International community showed its willingness to commit in the fight against terrorism and its financing.

At the European level, Council and Commission have adopted regulations and directives to enforce these Conventions and Resolutions. However, several problems are recurrent, such as the enforcement and harmonization of International and European law in Domestic legislation⁴⁷.

For instance, neither Syria nor Iraq have ratified the Rome statute and Second Protocol of the 1954 Hague Convention adopted in 1999. In order to observe the implementation of International Law at the domestic level, further observation will be given to the legislation in France and Iraq as an illustration from a source-country victim of terrorist exactions and one of the main art market-country.

It seems opportune to present, at the introductory level, the main sources of law that served as a basis for our developments. To that extent, the Hague Convention of 1954 and the UNESCO Convention of 1970 should be introduced to the reader, before

⁴⁷ Francesco Francioni, James Gordley, *Enforcing International Cultural Heritage Law*, 1st ed., Oxford, Oxford University Press, 2013, pp.280.

analysing in the First Chapter the deficiencies regarding their implementation.

1. The 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict

As mentioned above, this Convention was the first to introduce Cultural Property as an independent legal entity and to bestow to the latter the qualification of “international public good”⁴⁸, as understood in the Preamble of the Convention according to which “damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind”⁴⁹.

This Convention entered into force on 7 August 1956 and has been ratified by 127 states⁵⁰.

This Convention is of great importance because it calls upon states to adopt protection measures in peace time in order to render this protection fully effective in time of war. States Parties commit to protect (art. 2), safeguard (art 3) and respect (art.4) Cultural Property.

The Convention provides for measures such as the preparation of inventories, the placement of specific emblems on Cultural Property of greatest importance (art. 6) or the creation of Refuges (art. 8) that will be object of further analysis.

It is of particular interest to examine this Convention considering the duty of States not only to protect the cultural property situated on their territory but as well on the territory of others. This perspective differs for instance from the European perspective, still in majority state-centric.

Regarding its Protocols, the first one has been adopted in 1954 and entered into force on 7 august 1956. Since the adoption of the 2d Protocol to the Hague Convention

48 Francesco Francioni, James Gordley, *Enforcing International Cultural Heritage Law*, 1st ed., Oxford: Oxford University Press, 2013, p.2.

49 Hague Convention, 1954, Preamble.

50 UNESCO website, list available at : <http://www.unesco.org/eri/la/convention.asp?KO=13637&language=E&order=alpha>

in 1999, its applicability has been less controversial, enlarging it to Non International Armed Conflicts and thus adapting it to the most usual form of combat today⁵¹.

However, according to Desch⁵², the applicability of the Protocol to irregular groups and non-state actors was still problematic until non-state actors were prosecuted before the International Court of the Former Yugoslavia.

Few years later, Sigrid Van der Auwera caught the attention on the topic of non-combatants. She notes that “civilian looters are a major factor in the destruction of cultural property in the event of armed conflict”⁵³ and evokes Gerstenblith argument in favour of an obligation imposed “to protect cultural sites, monuments, and repositories from the actions of local populations”⁵⁴. Thus, the application of the 1954 Hague Convention would be broadened to a large extent but adapted to the empirical situation and danger faced by Cultural Property.

She argues that the context of the Second Protocol was different from the context of the 1954 Convention and thus does not refer only to acts of the state's own military in Article 4 when prohibiting the theft, pillage and misappropriation of Cultural Property but considers more actors in accordance with the new actors of wars involved in Non International Armed Conflicts.

Thus, it could be considered that Protocol II implies that states have an obligation to protect their cultural property even against the actions of civilians.

2. 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property

This Convention marked an important step regarding the international cooperation in cultural property matters. Whereas the focus of the 1954 Hague

51 *Ibid.*

52 T. Desch, “Problems in the Implementation of the Convention from the Perspective of International Law.” in *Protection of Cultural Property in the Event of Armed Conflict: A Challenge in Peace Support Operations*, ed. E.R. Micewski and G. Sladek, Vienna : Military Printing Press, 2002,pp. 13–27.

53 Sigrid Van der Auwera, “International Law and the Protection of Cultural Property in the Event of Armed Conflict: Actual Problems and Challenges”, *Routledge, The journal of arts Management, Law, and Society*, no.43, 2013, p. 177.

54 Patty Gerstenblith, “The Case for Change in International Law in the Aftermath of the 2003 Gulf War.” *Conference on Protecting Cultural Heritage: International Law after the War in Iraq*, Chicago, 2006, available at : <http://culturalpolicy.uchicago.edu/papers/2006-protecting-heritage/Gerstenblith.paper.pdf>

Convention was on the protection and safeguarding of cultural property in time of war, the 1970 Convention appears not as a supplementary but as a complementary of the first. It is the first to elaborate on the measures to take – not on the ground level but after the pillage occurred – to prevent the illicit import, export and transfer of ownership of cultural property in time of war.

It has been adopted at the General Conference of UNESCO on 14 November 1970 and came into force on 24 April 1972. It has been ratified by 120 countries⁵⁵. France ratified the Convention in 1997 but we are still in the expectation for Iraq to ratify.

The illicit traffic of cultural property has always been really lucrative. If the 1970 UNESCO Convention has been a pioneer in the fight against illicit trafficking of cultural property, the dimension it takes when financing terrorist organisations require enhanced actions from states.

Nonetheless, this document is of greatest importance by offering legal and political tools for the States.

It is organised on three pillars; preventive measures to adopt with a focus on the exportation control of states, restitution process and international cooperation. Already a difference can be noted compared to the 1954 Convention. This Convention is more state centric by focusing on the control of exportation and thus the protection of the states own cultural property. Nonetheless, the third pillar strives to set up a framework for International cooperation and allow for mutual assistance if the Cultural Property of a State is deemed in danger.

Regarding European and Domestic Laws, they will be presented and examined in the next Chapter of the development. Indeed, the aim is to present the main treaties dealing with the topic to further observe how they have been implemented or have influenced legal adoption at the european and domestic levels.

⁵⁵ Vrdoljak, 2015, p. 12.

III. CONCEPTUAL FRAME AND TERMINOLOGICAL QUESTIONS

1. Cultural Heritage, Property and Objects

The definition of those notions owe much to International Law. The terms “Cultural Heritage” and “Cultural Property” reveal an elusive notion that Conventional Law has tried to enlighten. If Conventions use alternatively these terms, their terminological interchangeability is still disputed in doctrine⁵⁶. For the purposes of this paper, the terms will alternatively be used depending of the Convention at stake. Cultural Heritage, Cultural Property and Cultural Objects will be defined through the scope of application of legal conventions, leaving aside philosophical and doctrinal perspectives.

1.1. Cultural Heritage

According to Frigo Manlio and Janet Blake, Cultural Heritage implies a transmission factor, it expresses a “form of inheritance to be kept in safekeeping and handed down to future generations”⁵⁷. From this observation can be drawn the main difference between Cultural Heritage and Cultural Property; the first has transcended Time and generations and such a burden of the Past is not imposed on the second.

In the legal instruments relevant to this paper, the terms of “Cultural Heritage” have been detailed in the 1972 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage and used in the 2003 UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage. In the 1972 Convention,

⁵⁶ Frigo Manlio, “Cultural Property v. Cultural Heritage ; a “battle of concepts” in International Law ?”, *International Review of the Red Cross*, Cambridge University Press, Vol. 86, 2004 ; Przyborowska-Klimczak Anna, “Les notions de ‘biens culturels’ et de “patrimoine culturel mondial” dans le droit international”, *Polish Yearbook of International Law*, Vol. XVIII, 1989-1990 ; Prött Lyndel and O Keefe Patrick J., “ “Cultural heritage” or “cultural property” ?”, *International Journal of Cultural Property*, Vol. 14, 2007.

⁵⁷ Manlio, 2007, p. 83.

Article 1 stipulates that :

«For the purpose of this Convention, the following shall be considered as "cultural heritage":

monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, (...) which are of outstanding universal value from the point of view of history, art or science;

groups of buildings: groups of separate or connected buildings (...)

sites: works of man or the combined works of nature and man, and areas including archaeological sites (...).”⁵⁸

1.2. Cultural Property

The notion of Cultural Property will particularly be used in this paper as it is the object of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the attached Regulations for its Execution. It is also used in the 1970 UNESCO Convention. In the first Convention, the term “cultural property” covers;

“irrespective of origin or ownership:

(a) *movable or immovable* property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; (...)

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property (...) such as museums, large libraries and depositories of archives,

⁵⁸ Convention concerning the Protection of the World Cultural and Natural Heritage, 1972, Art 1.

and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a);

(c) centres containing a large amount of cultural property (...) to be known as 'centres containing monuments'.⁵⁹”

This categorisation of different types of goods aims at covering and protecting a broad range of cultural entities and goods.

However, using a different structure, the 1970 UNESCO Convention provides a list of the different entities that tends to be more exhaustive. Only to mention the most relevant entities, the Convention provides in its Article 1 that Cultural Property

“means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science (...)” and which belongs to the following categories:

(...) (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries ;

(d) elements of artistic or historical monuments or archaeological sites which have been dismembered;

(e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals; (...)

(g) property of artistic interest, such as:

(ii) original works of statuary art and sculpture in any material;

(iii) original engravings, prints and lithographs ; (...)”

59 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, the Hague, 1954.

After analysis of Cultural Heritage and Cultural Property Conventional clarification, the main difference seems to reside in their scope. Cultural Property certainly includes Intangible Heritage⁶⁰ in the 1970 UNESCO Convention while there is no such conventional inclusion regarding Cultural Heritage.

Nonetheless, the scope of Cultural Heritage in the 1970 UNESCO Convention being much broader than it is in the 1954 Hague Convention, we can wonder to what extent the broadest definition enlarge the older.

Considering the technological evolution that occurred during the sixteen years between the two Conventions, this enlargement is certainly due to the new forms of art that arose in the sixties. This extension is favourable to the protection of cultural property; broader the definition is broader the protection is meant to be.

The scope of Cultural Property is thus broader than Cultural Heritage understood as Tangible Cultural Heritage.

However in practice, the Resolutions adopted later in application of these conventions did not attach particular attention in separating those terms. For instance, in the Resolution 2008/23 adopted by ECOSOC⁶¹, it well stipulates that “cultural property” is a part of the broader “common heritage of humankind” and adds that even if the terms have been alternatively used in the three Conventions above mentioned, they will be used in the Resolution as interchangeable, “with no attempt to privilege one meaning or interpretation over others”.

Even if the main intention of the 1995 UNIDROIT Convention on stolen or illegally exported cultural objects, as said above, is “to facilitate” its restitution and return rather than tackling directly its acquisition and transit processes, it is nonetheless interesting to observe the change of terminology.

From Cultural Property to Cultural Heritage, the 1995 Convention mentions “cultural objects”.

However, even if the term “object” seems associated with Tangible heritage, the

60 (j) archives, **including sound**, photographic and cinematographic archives

61 Res. ECOSOC 2008/23

terminology differs but the substance is identical⁶² to the list provided in the 1970 Convention. It is thus interchangeable with Cultural property and covers Intangible heritage such as “sounds”⁶³.

However, as Patrick O’Keefe noticed it, it is important to keep in mind that this term of “cultural property” is not applicable to the subsequent standards of UNESCO related to cultural property⁶⁴.

1.3. Tangible and Intangible Cultural Property

Cultural Property covers a broad range of perspectives whose one of the main division is often made between tangible heritage – inter alia monuments, products of archeological excavations, coins – and intangible heritage such as songs, traditions or ancient manufacturing technics. Janet Blake qualifies this intangible property as «the information that we can glean from the material culture (...) – the intellectual, human context in which the material culture was made or evolved»⁶⁵. Thus, tangible and intangible cultural property are entangled and one can hardly be conceived without the other.

It is interesting to observe that legally speaking, Cultural Property certainly encompasses intangible heritage such as traditions while Cultural Heritage does not. Indeed, as it was said above, Cultural Heritage can be distinguished by its purpose of transmission. What can be better qualified by the requirement of transmission than a tradition ?

Also, regarding their protection especially in time of war, it seems that practical assistance and support will be more effective regarding Tangible heritage. Protecting an

62 1995 UNIDROIT Convention ; Article 2 (a)(b)(c)(d)(e)(f)(g)(h)(i)(j)(k)

63 *Ibidem*.

64 Patrick O’Keefe, “Using UNIDROIT to avoid Cultural Heritage Disputes ; Limitation Periods”, *Willamete Journal of International Law and Dispute Resolution*, vol. 14, 2006.

65 Blake, 2015, p.10.

intangible property such as traditions implies the protection of the people to whom this tradition belongs.

As we will see below, external states to a conflict have the possibility, based on the Hague Convention, to offer assistance to protect the Cultural Property of the States in conflict. Wouldn't it be dangerous then from a legal perspective to consider Traditions as an Intangible Cultural Property falling under the scope of the Hague Convention ?

Considering those ambiguities, it goes without saying that integrating Intangible Heritage under Cultural Heritage and not under Cultural Property in the 1954 and 1970 Conventions would be way more consistent.

Indeed, the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage⁶⁶ has corrected this terminological non-sense by associating the term Intangible to “cultural heritage” and defines it in its article 2 as the

« practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. »⁶⁷

Regarding Tangible Heritage, the Information Document Glossary of World

66 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, Paris, 17 October 2003.

67 Article 2 par. 1. Convention for the Safeguarding of the Intangible Cultural Heritage above mentioned; § 2 The “intangible cultural heritage”, as defined in paragraph 1 above, is manifested inter alia in the following domains: (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; (b) performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; (e) traditional craftsmanship. §3 “Safeguarding” means measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non- formal education, as well as the revitalization of the various aspects of such heritage.

Heritage terms⁶⁸ made by UNESCO in 1996 qualifies the latter as including “buildings and historic places, monuments, artifacts, etc., which are considered worthy of preservation for the future. These include objects significant to the archaeology, architecture, science or technology of a specific culture”.

It also provides a definition of movable and immovable Property.

1.4. Movable and Immovable Property

The Document mentioned above briefly defines Movable Property as a “property that can easily be moved from one location to the other” and Immovable Property as a “property that cannot easily be moved. The opposite of immovable property is movable property”⁶⁹.

After consideration of those definitions, it seems opportune to narrow the scope of our developments and exclude some of those concepts for the purposes of this paper. Notwithstanding the importance to keep all these terms in mind, Cultural Property as well as Tangible and Movable Property will be at the core of the developments, for the simple reason that tangible and movable properties are more susceptible to be object of theft and traffic. Cultural Heritage can also be used as a synonym of Cultural Property below.

2. *Concept of Trafficking or Illicit Trade*

It seems that the concept of Trafficking is only associated in international treaties with persons. In the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, the object of study is different but the trafficking process as described can still be relevant. Indeed, trafficking is described as “the recruitment, *transportation, transfer, harboring or receipt* (of persons)...”⁷⁰.

Looking at other legal documents such as the Resolutions and Declarations

68 UNESCO, Information Document Glossary on World Heritage Terms, June 1996, available at : <http://whc.unesco.org/archive/gloss96.htm>

69 *Ibid.*

70 UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons supplementing the United Nations Convention against Transnational Organized Crime, New York City, 12 December 2000.

adopted in application of the 1954 Hague Convention, 1970 UNESCO Convention and 1995 UNIDROIT Convention⁷¹ or at the discussion meeting that happened in 2009 in Vienna⁷², Trafficking could be described as a process starting from the withdrawal of an object from its place of origin – museum, monument, archeological site – in a “source country”⁷³ in order to make it transit towards a “market country”⁷⁴ where it will be sold – generally in European auction houses.

Also, the definition of human trafficking could be adapted to the context of Cultural Property. Trafficking thus consists in a transit process including its “transportation, transfer, harboring or receipt” from a “source country” to a “market country”.

Many actors are involved in this process and render difficult the apprehension of the objects. The purpose of this paper is to present the legal framework aiming at stopping this process, considering that the prevention of such transit in “source countries” in conflict are practically really difficult to put in place.

71 ECOSOC Resolution 2004/34 Protection against trafficking in cultural property, 21 July 2004

ECOSOC Resolution 2008/23 Protection against trafficking in cultural property, 24 July 2008

UNODC, General Ass. Resolution 2010/19, Crime prevention and criminal justice responses to protect cultural property, especially with regard to its trafficking, 20 April 2010

UNODC, General Ass. Resolution 66/180, Strengthening crime prevention and criminal justice responses to protect cultural property, especially with regard to its trafficking, 30 March 2012

UNODC, General Ass. Resolution 68/186, Strengthening crime prevention and criminal justice responses to protect cultural property, especially with regard to its trafficking, 18 December 2013

UNODC, Salvador Declaration on Comprehensive Strategies for Global Challenges: Crime Prevention and Criminal Justice Systems and Their Development in a Changing World, April 2010

UNODC, Draft Doha Declaration on integrating crime prevention and criminal justice into the wider United Nations agenda to address social and economic challenges and to promote the rule of law at the national and international levels, and public participation, 31 March 2015

72 UNODC, Open-ended intergovernmental expert group meeting on protection against trafficking in cultural property, Vienna, Austria, 24-26 November 2009, report available at : <http://www.unodc.org/unodc/en/organized-crime/trafficking-in-cultural-property-expert-group-2009.html>

73 *Ibid.* para. 7.

74 *Ibid.*

3. *International/Non-International armed Conflict : is a distinction relevant ?*

This section aims at illustrating the above mentioned impacts of the negligence of protection on cultural rights, occurring in International or Non-International armed conflict. The legal relevance of this distinction will be tackled afterwards.

International Armed Conflicts

To understand what International and Non-International Armed Conflicts are from the legal perspective, look should be had to International Humanitarian Law. According to the common Article II to the Geneva Conventions of 1949, an International Armed Conflict occurs in “all cases of declared war or of any other armed conflict which may arise *between two or more of the High Contracting Parties (...)*” or in case of “partial or total occupation of the territory of a High Contracting Party(...)”⁷⁵. A general definition has been proposed by the International Criminal Tribunal for the former Yugoslavia in the Tadic case, stating that “an armed conflict exists whenever there is a resort to armed force *between States*”⁷⁶.

The main denominator is the role played by the States in the conflict as the only combatants. On the contrary, the information carried by treaty law about Non International Armed Conflict is broader in terms of conflict actors.

Non-international armed conflict (NIAC)

The Common Article 3 of the Geneva Conventions and the 1977 Additional Protocol II to the Geneva Conventions are both relevant.

According to the common Article 3 of the Geneva Conventions, Non International armed Conflicts are “armed conflicts *not of an international character occurring in the territory of one of the High Contracting Parties*”⁷⁷. The International Committee of the Red Cross came to precise this scope by adding that “one or more non-governmental

⁷⁵ Geneva Conventions, 1949, Common Art. 2.

⁷⁶ ICTY, The Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para. 70.

⁷⁷ Geneva Conventions, 1949, Common Article 3.

armed groups are involved”. Here the qualification is important and reveal what was mentioned before regarding the “changing face of war”. The picture of War has changed and does not include exclusively States. Here and for the purpose of this paper is worth mentioning terrorist groups as non-governmental armed groups.

However, to be qualified as such, a conflict must meet certain conditions such as an intensity threshold and organizational element.

The International Criminal Tribunal for the former Yugoslavia considered that “*the gravity of attacks and their recurrence; the temporal and territorial expansion of violence and the collective character of hostilities; whether various parties were able to operate from a territory under their control; an increase in the number of government forces; the mobilization of volunteers and the distribution and type of weapons among both parties to the conflict; the displacement of a large number of people owing to the conflict; and whether the conflict is subject to any relevant scrutiny or action by the UN Security Council*”⁷⁸ were important factors for the qualification of a conflict as a NIAC. Regarding the second element, the non-state actors involved in the conflict must be in possession of a sufficient armament to launch attacks.

If Syria can be defined as an “Internationalized” NIAC⁷⁹ regarding the involvement of the International Coalition⁸⁰ and Russia in the Conflict to fight the Islamic State, Iraq presents a different character.

From an International Armed Conflict that lasted until 2011, the situation has evolved to a Non International Armed Conflict, opposing the Iraqi State to the Islamic State occupying an important part of the North and in confrontation with the Kurds and several minorities. Nonetheless, an international involvement has been illustrated by Coalition airstrikes in Mosul, in March 2016, in support to the Iraqi government.

However, the qualification of a conflict as internal or international and the

⁷⁸ Cfr supra note 63.

⁷⁹ Cfr supra note 63.

⁸⁰ The Coalition includes States whose the United States, United Kingdom, France, Germany, Italy, Canada, Turkey, Denmark.

presence of non-state actors can have a practical relevance when dealing with trafficking of cultural property but a quasi inexistent legal relevance⁸¹.

At most, this qualification is relevant for the source countries, considering that the main actors involved in the sourcing of cultural property in war zones and especially in Iraq today are non-state actors and that renders state control difficult on the export of such cultural property. Indeed, the presence of ISIS as a non-state actor opposed to the Iraqi government has an empirical and genuine impact on the trafficking of cultural property. As the government lost control over the territory occupied by ISIS, it goes without saying that their exactions both on individuals and cultural property escape states scrutiny. Regarding the restitution process, the importance of actors in the conflict can however play a role for the source country. If the conflict involves two states like it was the case between Iraq and US during the Second Gulf war, it is more likely that the cultural Property stolen or imported during this time will benefit from more clarity in its follow up and road to market countries. Then, it might be easier for Iraq to ask US for the restitution of objects. In the case where non state actors from the source country are the perpetrators and where the state is completely left out from the export process, it is probably harder both for the source country and arrival country to intercept those objects and thus to retribute them. That is why more scrutiny is needed in this case to not lose the cultural property on the market far from the eyes of states and close from the hands of private collectors.

However, at the legal level, we can wonder to what extent the presence of non state actors and the qualification of a conflict as International or Non International has an impact on “market countries”. In a broad and theoretical perspective, the legal relevance of the qualification of a conflict as International or Non International is quasi inexistent nowadays for them, considering that today, legal instruments dealing with cultural property encompass both kinds of conflict and that the 2nd protocol of the Hague Convention encompasses situations of Non International Armed Conflicts as well.

81 Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, 1st ed., Cambridge, Cambridge University Press, 2004, p. 46.

Moreover, the regulations that have been adopted by the UN such as the Regulation 2199 analysed further on and the measures taken by the EU to tackle the financing of ISIS and thus the trafficking of cultural property target the conflict as such and do not differentiate regarding the nature of a conflict as international or non international.

Indeed this qualification is of low legal relevance when we think both about the acquisition process and the restitution process. When we think about the acquisition process, as it was said above, the difference could only be made if the International Conflict involved a market country such as, for instance, France. In this case, France could be an active agent in looting directly cultural property from the source country. Otherwise, whether the conflict is international and involve other states such as the gulf wars, or if the conflict is mostly internal like it is currently the case in Iraq, France is a passive agent receiving cultural property on its territory from a source country in conflict, without consideration for its internal or international character.

To that extent, the Regulations that have been adopted by the UN or measures taken by the EU are targeting countries in conflict without distinction of their nature.

Thus, this qualification is only practically relevant to enlighten the reader on the situation ongoing in Iraq and the regulation that have been adopted to tackle this particular situation but is not legally relevant when it comes to tackle the trafficking of cultural property.

4. International Security, Terrorism and Cultural Property

4.1. Terrorism

Even though we can identify more easily episodes of terrorism rather than a clear legal definition of terrorism, few attempts have been made to frame and define Terrorism. First, the 1937 Convention for the Prevention and Punishment of terrorism

was a failure and ratified by only two states. The same year than the adoption of the Hague Convention, in 1954, attempt was made by the International Law Commission to draft a code of offences against the peace and security of mankind but was never adopted. Forty years later, the United Nations Declaration on measures to eliminate International Terrorism was adopted by the General Assembly, followed ten years later by the Resolution of the Security Council 1566/2004, targeting in its paragraph three terrorism as

“criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act”⁸².

In the Draft comprehensive Convention Against International Terrorism, on the table of negotiations for twenty years, the definition of the crime has been problematic and proposed as followed;

"1. Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes:
(a) Death or serious bodily injury to any person; or
(b) **Serious damage to public or private property**, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or
(c) **Damage to property**, places, facilities, or systems referred to in paragraph 1 (b) of this article, resulting or likely to result in major economic loss,
when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act."⁸³

⁸² S/RES/1566 (2004), para. 3.

⁸³ United Nations General Assembly, Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, Sixth session, (28 January – 1 February 2002), Annex II, art.

The main criticism and legal challenge that the International community faces vis-à-vis terrorism is the lack of consensus upon a definition of the term. However, if a consensus can't be reached, some elements are common to the various definitions of terrorism. Indeed, terrorism as an offence is constituted by an objective and subjective elements under International Law ; *actus reus* and *mens rea*.

The objective element is the act in itself and states agree that it is constituted by the use of violence. The exactions that have been perpetrated against Cultural Property in Syria and Iraq are part of a terrorist plan, considering the presence of an *actus reus* – the use of violence against property – and a *mens rea* – the objective of affecting the population by attacking its past and identity and attracting international attention. The Ideological aspect in considering an act as an act of terrorism is fundamental.

Part of the subjective element being the intention of coercing the state to do or to abstain from doing something through violence or through instauring a state of terror within the general public indeed forced states to take further measures, military but also legal.

4.2. International Security

Even though International Security is a political concept, it is worth mentioning it regarding that it laid in the background of many legal acts adopted for several decades. Moreover, the Security of persons is a human right granted by the Article 3 of the Universal Declaration on Human Rights⁸⁴.

International Security plays a major role in the prevention of conflicts. It is both an end in itself and a mean for peace⁸⁵. This concept has been developed during the

2.1., available at : <http://www.un.org/documents/ga/docs/57/a5737.pdf>

84 Universal Declaration of Human Rights, Paris, 1948, Art. 3; “Everyone has the right to life, liberty and security of person.”

85 Bertel Heurlin, Kristensen, “International Security”, in *International Relations*, vol.II – International Security, Danish Institute of International Affairs, Copenhagen, Denmark.

Cold War to face the nuclear threat. In this war opposing the East to the West, the enemy was clearly defined. To that extent, the rise of global terrorists networks has challenged and posed a huge threat to International Security.

After 9/11, developed countries have been exposed to an invisible threat that made them vulnerable. The reaction to this vulnerability has been a really strong willingness to “securitise” this international threat of terrorism⁸⁶. One of the means employed, alongside military actions, was the adoption of International and Domestic legislation against Terrorism to improve upon global security⁸⁷. Thus, elaborating upon the fight against cultural property traffic amounts to elaborating upon a way to improve International Security.

Indeed, the link between Security, Terrorism that occur in and from the middle-east and Cultural Property is tight.

Terrorism represents both a threat to International Security and to Cultural Property in the countries of origin such as Iraq. Relatively, Cultural property trafficking resulting from terrorist exactions nourishes back terrorism and thus weaken International security. One way to break this circle is to improve the Law to make of it a barrier against Trafficking and Terrorism.

The choice of making a case study on France and Iraq is related to these assumptions. Notwithstanding my particular knowledge of french legislation and Iraq history, the reason is more pragmatic. Iraq has witnessed for more than two decades important exactions both towards its population and its cultural heritage. The particular situation going on at the moment with a particular focus on Daesh makes of this country an interesting case study. On the other end of the road, France has more recently been the victim of the same terrorist group in January and November 2015 and has been paradoxically the beneficiary on its art market of the exactions in Iraq against cultural

86 Roland Dannreuther, *International Security : the Contemporary Agenda*, 2nd ed., Polity Press, Cambridge, 2013, pp.10-15.

87 Marc Steinberg, *International Securities Law, a contemporary and comparative analysis*, ed. Kluwer Law International, London, 1999, pp. 50-70.

property.

Thus, the position of Iraq as an important source country and France as an important market country and their high consideration and struggle against terrorism make of them special objects of scrutiny and investigation.

IV. CULTURAL HERITAGE IN DANGER AND HUMAN RIGHTS UNDER THREAT

The purpose of this sub-chapter is to analyse which human rights are the most relevant when we talk about Cultural Property Destruction, Trafficking and Protection. What is the impact of the intentional destruction and trafficking of cultural property on the enjoyment of human rights and especially on cultural rights ?

This sub-chapter should be kept in mind not only as an independent part of the developments but as a background for all arguments considering that all the laws mentioned, at the international, european and domestic levels, have been adopted on the basis and with the purpose of granting to present and next generations the capacity to enjoy and witness Cultural Heritage.

The main impact of cultural property trafficking on human rights concerns cultural rights. Tackling this trafficking is both a way to tackle the financing of terrorist groups but as well to promote their importance and respect.

1. The Right to participate in cultural life

The link between Cultural Property Protection and Human Rights could seem distended. Indeed, the direct object of this Protection is not the Individual as it is the case with the Universal Declaration for Human Rights. The direct object of Cultural Property protection is materialized by stones, artifacts or all the goods mentioned above in Cultural Property definition. However, neglecting this protection has an impact on

cultural practices and beliefs and on the right of affected persons to participate in cultural life.

If the Article 27 §1 of the UDHR already provided for the right “of everyone to take part in cultural life”, its binding character on states emerged from the adoption of what is called the second generation of Human Rights in 1966 with the International Covenant on Economic, Social and Cultural Rights (CESCR).

The Article 15 of the CESCR recognizes “the right of everyone to take part in cultural life (...)”⁸⁸. However, the 2009 General comment no. 21⁸⁹ of the UN Committee on Economic, Social and Cultural Rights gives more details about its scope and application.

Regarding the concept of “cultural life”;

“The Committee considers that culture, for the purpose of implementing article 15 (1) (a), encompasses, inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and *man-made environments*, food, clothing and *shelter and the arts*, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence (...) »

If this comment gives a large space to intangible property, the terms « man-made environment », « shelter » and « the arts » are broad enough to encompass Tangible Property in the sense of the 1954 Hague Convention and 1970 UNESCO Convention.

The Article is also relevant with regards to the obligation imposed on states parties “to take deliberate and concrete measures aimed at the full implementation of the right of everyone to take part in cultural life”⁹⁰ and to adopt necessary steps “for the

88 United Nations International Covenant on Economic, Social and Cultural Rights, New York, 1966, Art. 15.

89 CESCR, General Comment no. 21 (2009), par 15(a).

90 Cfr. supra note 73, para. 45.

*conservation, development and dissemination of science and culture*⁹¹.

The five elements or conditions of the right to take part in cultural life include availability, accessibility, acceptability, adaptability and appropriateness. Notwithstanding the importance of the four other elements, the condition of Accessibility is particularly relevant to the purpose of this paper. The Committee further elaborates on this condition by stating that it “consists of *effective and concrete opportunities* for individuals and communities to enjoy culture fully, within physical and financial reach for all in both urban and rural areas, without discrimination”. How can people access to Cultural Property in the sense of Article 15(a) if the latter has been destroyed or looted ?

To that extent, a discussion has been launched about the adoption of an independent “right to access to Cultural Heritage”. In 2011, a Consultation has been organized and a report published by the Independent Expert in the field of Cultural Rights, Ms. Farida Shaheed, to decide whether access to Cultural Heritage was an independent Human Right⁹².

If no precise answer has been brought yet from this discussion, UNESCO supports this initiative by promoting in its resources, *inter alia* and as an example, the 2010 Protection of Cultural Property Act⁹³ adopted by the Montenegrin state that provides a Right to Cultural Heritage.

The Article 5 recognizes that “every person has a right to use cultural property, under equal conditions (...) for the purpose of his or her participation in cultural life”⁹⁴ and this “right of access to a cultural property may be limited only for the purpose of protection of public interest and rights and freedoms of others”⁹⁵. Thus, this article of the Protection of Cultural Property Act would be an adequate basis for the adoption and integration of the right to access cultural Property in International Law, independently

91 Cfr. supra note 73, para. 47.

92 Consultation organized by the Independent Expert in the field of cultural rights, Ms. Farida Shaheed, Palais des Nations, Room XXI, 10 February 2011

Report of the independent expert in the field of cultural rights, Farida Shaheed, A/HRC/17/38, The right of access to and enjoyment of cultural heritage, Statement at the 17th session of the Human Rights Council.

93 The 24th convocation of the Assembly of Montenegro, at 10th meeting of the first regular session in 2010, on July 27, 2010 passed the “Protection of Cultural Property Act” of the Montenegrin State.

94 *Idem*, art. 5 para. 1.

95 *Idem*, art. 5 para. 3.

or as part of the Right to participate in cultural life .

Regarding the implementation of cultural rights at the regional level in the jurisprudence of the European Court of Human Rights, it is interesting to note that even if it has never recognized as such a right to the protection of cultural property or heritage, “it has accepted that the protection of that heritage is a legitimate aim that the State may pursue when interfering with individual rights, especially with the right to property enshrined in Article 1 of Protocol No. 1”⁹⁶. It is interesting to see that under the jurisprudence of the Court, there is an acceptance of the judges to appreciate Cultural heritage from the angle of the individual right to property whereas, as examined below, the theoretical debate is axed on the question whether Cultural Heritage should be treated as a state or universal question and how to reconcile both in Law.

2. *The concept of Ownership and Property in Cultural Heritage*

Coming back to Cultural Heritage and Cultural Property, they raise the question of ownership. It is striking to see that this question has arose the interest of many scholars. If it is hard to find a clear answer about the ownership of Cultural Heritage and Property in Conventions, we can first look for some clues in the abundant flow of doctrine and researches⁹⁷.

Why is it important to approach this question ? Depending on who is considered to own Cultural Heritage or Property, it is interesting to see if the possibility for the International Community to take measures for its protection and the basis for those actions will differ under the Law.

During the 19th Century, John Ruskin observed in his book *The seven lamps of*

96 ECHR Research Division, “Cultural Rights in the case-law of the European Court of Human Rights”, January 2011.

Beyeler v. Italy ([GC], no. 33202/96, ECHR 2000-I), *Debelianovi v. Bulgaria* (no. 61951/00, 29 March 2007), *Kozacioğlu v. Turkey* ([GC], no. 2334/03, 19 February 2009)

97 F.K Gibbon, *Who Owns the Past ? Cultural Policy, Cultural Property and The Law*, Rutgers University Press, London, 2005 ; Cuno James, *Who Owns Antiquity ? Museums and the battle Over our Ancient Heritage*, Princeton University Press, 2008.

architecture that the conservation of ancient monuments is not only a matter of convenience or feelings but a matter of belonging. History does not belong to anyone if everyone⁹⁸. For this reason, cultural heritage and ancient monuments are in principle inviolable. However, as seen above, wars and time have had many opportunities to gainsay this assumption.

The definition of Cultural Heritage and the common sense that emanates from this notion would relate it to and infer it from Humanity, free from any possession.

However, the notion of Cultural Property includes in its own terms – “property” – a dimension of possession.

Here a distinction need to be made to avoid any confusion. Cultural Heritage and the philosophical perspective of a Universal Heritage should not be mistaken for the concept of “common heritage of mankind”⁹⁹. This concept of International Law has been developed in the sixties by the Maltese Ambassador Pardo and target common spaces such as ocean floor or the moon. This concept is more related to natural resources and their exploitation.

Looking at the International Conventions, the 1954 Hague Convention's Preamble recognizes Cultural Heritage as an “international common good”¹⁰⁰ by stating 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”¹⁰¹. On the same line, the 1970 UNESCO Convention states in its preamble that “the interchange of cultural property among nations (...) increases the knowledge of the civilization of Man (...)” and “cultural property constitutes one of the basic elements of civilization and national culture”¹⁰².

From these clauses, it seems that both nations and the international community

98 John Ruskin, *Les sept lampes de l'architecture* (trad. George Elwall), éd. Denoël, 1987, p. 206.

99 Baslar, Kemal. *The Concept of the Common Heritage of Mankind in International Law*, Brill Nijhoff pub., Dordrecht, The Netherlands, 1998, p.12.

100 Francioni, 2014, p. 2.

101 1954 Hague Convention, Preamble.

102 1970 UNESCO Convention, Preamble.

have a responsibility regarding Cultural Property, implying a sense of belonging.

Thus, two dimensions are involved. First, Cultural property delivered in nation-centred terms sets the basis for state action. Domestic laws are legitimate and necessary to protect Cultural Property, as a pillar of Culture and Nation.

Secondly, Cultural Property delivered in universal terms sets the basis for international cooperation. International cooperation and the Law are needed to fully protect Cultural Property, as the core of Humanity heritage, especially in the globalization era.

From this assumption, it will be interesting to observe how Domestic and International Law are articulated to fill each other's gaps in this area. This observation will be based on a two countries study that are France and Iraq. It is interesting to note to that extent and as it will be analysed further on that from domestic and european perspectives, accent is put by States on their own national heritage and everything needs to done in term of Universal Heritage Protection. On the contrary from the International perspective, accent has been logically put on the Preservation of Cultural Heritage as universal matter.

Universal and National perspectives are nonetheless not the only ones affecting Cultural Property. Indeed, individuals play an important role in cultural property ownership especially in the jurisprudence of the European Court of Human Rights, which deals only with the protection of Cultural Heritage from the perspective of individual right to property and not as a collective right to property, contrary to the Inter American Court of Human Rights that adopted this approach in its jurisprudence.¹⁰³

Before moving on however, I would like to address the straightforward burden placed on states by the 1972 World Heritage Convention. In its Article 4, it stipulates that “each state Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future

¹⁰³Communal Right to Property recognized by the case *Mayagna Awas Tigni Community v. Nicaragua*, (Inter American Court of Human Rights, 2001).

generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, *belongs primarily to that State*". It explicitly places the International Responsibility at the second level, adding that the state "will do all it can to this end (...) and, where appropriate, with any international assistance and co-operation (...)"¹⁰⁴.

3. *Cultural rights of Minorities*

Keeping in mind that one of the main relevant feature of Cultural Heritage is the role that it plays in the construction of individual or group identity, "at the level of the local community, region, or nation"¹⁰⁵, special attention needs to be given to Minorities.

The Article 27 of the ICCPR provides that "in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language ».

In situation of armed conflicts, violations of minorities rights are more likely to happen. In relation to Cultural Heritage and Minorities in time of conflicts, the destruction of places of worship and the trade of religious goods have severely infringed both Article 27 of the ICCPR and Article 18 of the UDHR¹⁰⁶.

Regarding the Christian minority community, it has suffered numerous exactions from the Islamic state since 2014 and the destruction of their places of worship such as the destruction of St Elijah's Monastery¹⁰⁷, the Virgin Mary Church or more recently the Sa'a Qadima Church. In the city of Mosul, the sanctuaries of Jonas and the prophet David and Sufi sheikh mausoleums have been the target of exactions¹⁰⁸.

104UNESCO World Heritage Convention, 1972, Art. 4.

105Blake, 2015, p.16.

106UDHR, Art.18 : "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

107Andrew Curry, "Here are the Ancient sites ISIS has damaged and destroyed", *National Geographic news*, Sept. 2015, available at : <http://news.nationalgeographic.com/2015/09/150901-isis-destruction-looting-ancient-sites-iraq-syria-archaeology/>

108 UNESCO, "Heritage and Cultural Diversity at Risk in Iraq and Syria," News release, December 3,

In the northern region of Nineveh, several minorities are cohabiting. Christians, Yazidis, Shabaks and Turkmen are taken in a conflict that prevent them to practice their customs and express their beliefs.

5. Trafficking Cultural Property ; Rights In Conflict from the european perspective

Illicit trade of Cultural Property and Free movement of goods

If the political instability is an important factor in the extraction of objects in the “source countries”, the illicit trade of Cultural Property is sustained by the constant demand from the “market countries” and collectors and the opening of borders in Europe.

The European Union has been founded on economic grounds with the European Economic Community. On this basis, custom duties and quantitative restrictions were eliminated in 1968. Nineteen years later, the Single market Act came into force, paving the way for the elimination of any barriers to the circulation of goods and persons. Cultural goods are considered as merchandise and this assimilation has been made explicit by the Court of Justice of the European Union in 1968 in the case *Commission v. Italie*¹⁰⁹ where it considered that artistic and historical goods, like all commercial goods, could be object of financial appreciation and thus fell under the rules of the common european market.

The right to free movement of goods is set up in articles 26 and 28-37 of the Treaty on the Functioning of the European Union (TFEU).

The internal market has brought many challenges regarding illicit trades and trafficking. Thus, it will be interesting to analyse how the European Union has balanced the freedom that it provides with the prohibition of Cultural Property trafficking that it prescribes.

2014, available at : <http://unesdoc.unesco.org/images/0023/002325/232562e.pdf>
109 CJCE, 10 décembre 1968, *Commission c. Italie*, aff. 7-68, Rec.

6. *The resulting need for International Cooperation*

As Mackenzie stated already in 2002, “the illegal excavation of archaeological sites is a global problem, and the attendant loss of cultural heritage is devastating. The assorted countermeasures imposed by various nations against illegal trade do not appear to be working, to some extent because the trade and the pathways that artefacts travel are poorly understood, and consequently the controls are inadequately targeted¹¹⁰.”

Moreover, as asserted above, the effectivity of International Law is relative in time of war regarding Cultural Property. That being said, some strategies need to be taken in order to complete the gaps left by Law. As we will see further on, one of the first reasons of this ineffectiveness or fragility is the lack of legal harmonization between states, especially within Europe.

Notwithstanding their primordality in trafficking cultural property, the historical and market analysis won't be approached in this paper, privileging the legal angle.

However, it is important to keep in mind the tight relation between these three approaches. As Erik Nemeth noticed it, the role of art has evolved regarding international security over the past centuries. In the arrival countries, the growth of the art market during the last fifty years and the constant demand of collectors; in the source countries, the emergence of non state actors led by an ideology extolling the identity of the other and the loss of territory control by the state, have both generated a context for trafficking¹¹¹. In this context, Law has played a role to raise international awareness after WWII regarding the risk of leaving cultural property and art in the hands of extremists that resulted in a loss for humanity when those objects were lost in the market.

For two decades, numerous hard laws and soft laws have been at the intersection of cultural property and security issues, such as the resolution 2199 adopted in 2015 and calling for the prudence of states regarding cultural property trafficking and its role in

110 Simon Mackenzie and Tess Davis, “Temple Looting in Cambodia: Anatomy of a Statue Trafficking Network », *British Journal of Criminology* Advance Access published, June 13, 2014, available at : <http://bjc.oxfordjournals.org/content/early/2014/06/13/bjc.azu038.full.pdf+html>

111 Erik Nemeth, “Cultural Security : the evolving role of art in International Security”, *Terrorism and Political Violence*, Vol. 19, Iss. 1, February 2007.

funding terrorism.

To that extent, the second part will focus on the most relevant Legislation that have been adopted at the International, European and Domestic levels in relation to Cultural Property, Conflicts and Terrorism, with the purpose of ensuring global security.

CHAPTER I. A STATE CENTRIC RULE OF LAW AND ITS PROBLEMATIC ENFORCEMENT

As mentioned above, the perception of Cultural Property and the need for its Protection differs from the perspective taken. From the International Law perspective, Cultural Heritage is an “international common good” that requires actions from States to ensure its Protection, without any consideration for the Heritage of one or another specific country. On the other hand, the European and Domestic perspectives give particular attention to the protection by States of their own Heritage and demonstrate a tendency to leave aside the notion of “Universal Heritage”, in favour of “European Heritage”. Nonetheless, this attitude has allowed the art market to enjoy the arrivals of objects from all over the world, by focusing on exportation and neglecting importation controls.

I. THE LEGAL EFFORTS TO SUPPORT INTERNATIONAL COOPERATION

International Conventions furnish a legal frame for the protection of cultural property as well as for tackling transnational crime. International Criminal Law has recently played an important role in placing Cultural Heritage on the seat of the victim.

*1. The International Criminal Law approach : application of the Article 8 of the Rome statute to Cultural Property*¹¹²

The Rome Statute adopted in 1998 established the International Criminal Court and four core international crimes; genocide, crime against humanity, war crimes and the crime of aggression.

The Article 8 details the substance of war crimes. Here are highlighted the main relevant extracts concerning Cultural Heritage;

¹¹² Rome Statute of the International Criminal Court, Rome, 1998 ; available at https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

“1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, ‘war crimes’ means:

(...)

(iv) **Extensive destruction and appropriation of property**, not justified by military necessity and carried out unlawfully and wantonly;

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(...) (ii) **Intentionally directing attacks against civilian objects**, that is, objects which are not military objectives;

(...)

(v) **Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings** which are undefended and which are not military objectives;

(...) (ix) **Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments (...)**

(...) (xiii) **Destroying or seizing the enemy's property** unless such destruction or seizure be imperatively demanded by the necessities of war;

(...) (xvi) **Pillaging a town or place**, even when taken by assault;

(f) Paragraph 2 (e) **applies to armed conflicts not of an international character (...)**”

“Impunity for war crimes against cultural heritage must stop” was the call of UNESCO in 2015 after the announce of the transfer to the ICC (International Criminal Court) of an allegedly extremist accused of the destruction of religious and historical monuments in Mali¹¹³ under Article 8(2)(e)(iv) (clause reiterated in the (ix) cited above).

Irina Bokova noted in regards to this that “this is the first such case and it breaks new ground for the protection of humanity's shared cultural heritage and values”¹¹⁴.

113 UNESCO, « Impunity for war crimes against cultural heritage must stop », September 26, 2015, available at : <https://en.unesco.org/news/impunity-war-crimes-against-cultural-heritage-must-stop>

114 *Idem*.

Indeed for the first time in 2016, the International Criminal Court is opening a trial under Article 8 against Ahmad al-Faqi al-Mahdi for the destruction of mausoleums in Timbuktu that might boost the profile of the Court¹¹⁵. As Mark Ellis, a member of the International Bar association mentioned it, the “destruction of cultural heritage is not a second-rate crime. It is part of an atrocity to erase a people”¹¹⁶. This first case opens the door for further suits against perpetrators of Cultural Property destruction or pillage, as well encompassed as a war crime in the 2(e)(xvi) clause of Article 8.

However, if intentional attacks directed against historic monuments are considered as a war crime under the ICC Statute and could lead to the opening of a case against members of terrorists groups such as Daesh, Iraq is not a party to the Statute and by consequence, could not surrender any of its nationals. Nonetheless, considering the important number of foreign fighters in this organization and that the Court could only prosecute the alleged responsible of destruction, pillage or attack on the territory of Iraq if they are nationals of states parties to the ICC Statute, any state party whose nationals are allegedly responsible for such acts are strongly encouraged to surrender them to the Court. Naturally, Iraq is as well encouraged to sign and ratify the Rome Statute to benefit from the protection offered by International Criminal Law and end the impunity of the perpetrators of attacks against cultural heritage from Iraqi nationals. Indeed, in an article released by Liz Sly in 2015, the latter insists on the fact that although an important number of fighters are coming from all over the world, the leaders of this organization are Iraqi high profile professionals, former officers of the Iraqi army who worked under Saddam Hussein, hence their savoir-faire in combats and training¹¹⁷.

115 Marina Lostal, “The first of its kind: the ICC opens a case against Ahmad Al Faqi Al Mahdi for the destruction of cultural heritage in Mali”, October 2, 2015, Global Policy Forum, available at : <https://www.globalpolicy.org/component/content/article/163-general/52814-icc-opens-a-case-for-the-destruction-of-cultural-heritage-in-mali.html>

116 Owen Bowcott, « ICC's first cultural destruction trial to open in The Hague », *The Guardian*, Sunday 28, February 2016, available at : <https://www.theguardian.com/law/2016/feb/28/iccs-first-cultural-destruction-trial-to-open-in-the-hague>

117 Liz Sly, « Le fantôme de Saddam », *The Washington Post* in *Le Courrier International*, Special serie « Daech, la menace planétaire ; analyse de la presse étrangère », December 2015.

2. Humanitarian Law : Implementation of the 1954 Hague Convention for the **protection** of Cultural Property

As already mentioned, the first legal instrument of International Law that has been exclusively dedicated to the protection of cultural property in time of war is the Hague Convention of 1954.

For the first time, Cultural Property is not only targeted as a collateral victim of war but as an independent legal category of International Law.

2.1 Preventive measures for Cultural Property Protection

The Convention provides for two levels of protection; the first chapter settles the state duty to protect cultural property, encompassing its safeguarding and respect, and a second chapter provides for special protection. The Second Protocol of 1999 added another strengthened level of protection to overcome the fact that the special protection of the Hague Convention never worked¹¹⁸. However, neither France nor Iraq are parties to the 2d Protocol.

Regarding the particular provisions dealing with “theft, pillage or misappropriation” of cultural property, the Article 4(3) affirms that;

“The High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against cultural property. They shall refrain from *requisitioning* movable cultural property situated in the territory of another High Contracting Party.”

In this paragraph lays the first interesting mention for what will base the development of this paper's third part. If I first argued for the necessity to develop international cooperation and state actions to prohibit, prevent and put a stop to any

118 Patty Gerstenblith, “Beyond the 1954 Hague Convention”, in Robert Albrow and Bill Ivey, *Cultural Awareness in the Military, Developments and Implications for Future Humanitarian Cooperation*, 1st ed., Palgrave MacMillan, 2014, 83-99 p.

form of theft, pillage or misappropriation of cultural property, it seems now opportune to look at the second part of this paragraph, requiring High Contracting Parties to “*refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party*”.

Here, “requisitioning” is understood as the taking or seizure of property. Now, if we look at Article 3 providing that High Contracting Parties should “*undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict*”, we can wonder to what extent the prohibition of requisition is absolute if the latter is undertaken with the purpose of safeguarding it.

Here, the main element is to know which state will proceed to this requisition and the consent of concerned states upon it. The prohibition implies that the states in conflict can't requisition the movable property of one another. Thus, we can presume that only states committed in the conflict are concerned by this provision.

What about third states ? If we take a look at Article 8 regarding the Special protection regime for cultural property, it comes to precise that “*there may be placed under special protection a limited number of refuges intended to shelter movable cultural property in the event of armed conflict, of centres containing monuments and other immovable cultural property of very great importance*”. The rest of the article and further details will be examined in the third part of the paper.

Thus, nothing prevents third states to preventively conclude an agreement with the state whose property is deemed in danger to requisition it in time of peace with the purpose of safeguarding it in time of war.

However, as Patrick Boylan analysed it in his review of the Hague Convention¹¹⁹, States could be reluctant to any such preventive measures unless it is done in secrecy. Indeed, resorting to a third state in order to protect its cultural property is an admission of the potentiality of a war or conflict involvement in the future. Seen as an unfriendly or aggressive stance, it could accelerate the fall of the state in this conflict.

119 Patrick Boylan, UNESCO Archives, *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict*, 1993.

The third and last part of this paper will be dedicated to the legal and practical feasibility of states proposals that have been made based on this article such as the french proposal of “Asylum right” for cultural property in danger.

2.3 Implementation progress of the 1954 Hague Convention and its Two Protocols

Regarding the implementation of the 1954 Convention and its Protocols, some skepticism has been evoked. Some requirements of these documents such as the establishment of specialized personnel and services in armed forces, competent to deal with Cultural Heritage issues have not really been implemented. In France for instance, one department has been mandated by the State to deal with Cultural Property, called the Central Office of the Fight Against the Traffic of Cultural goods. However, this service is not part of any of the three branches of the Army but as part of the Ministry of the Interior. Moreover, it does not deal specifically with the protection of Cultural Property on the field in time of war and is centred on stolen national Cultural Heritage.

In the most optimistic perspective, its mission of prevention towards the public could play a minor role among members of the military.

The main problem that seems to emanate from the Convention is the weakness of both its implementation and evaluation mechanisms¹²⁰.

Although the Hague Convention provides for the State obligation to deliver a report every four years on the implementation progress, the compilation of reports whose UNESCO is in charge reveals a really low compliance by States. For instance in 2010, only 40 states out of 121 submitted a report¹²¹.

Consequently, it is important for UNESCO to implement stricter mechanisms and consider sanctions for the states to comply with the reporting requirement. Protection of Cultural Property in time of conflict is not taken seriously enough by

120 Lyndel Prott, “International Control of Illicit Movement on the Cultural Heritage : The 1970

UNESCO Convention and Some Possible Alternatives”, *Syracuse J. Int'l L. & Com.*, 1983.

121 UNESCO Report on the Implementation of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Two Protocols, 2005–2010, http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/periodic_report_2011_en.pdf

states, they have to be encouraged to implement international humanitarian law instruments.

Regarding more specifically to the trafficking matters, the second problem concerns the lack of policies and legislation harmonization. A movement perceived as illicit by the State of origin in conflict could be deemed completely legal by the state of arrival or importing state.

The will here is not to undermine the fundamental role played by the Convention to enhance international cooperation for the fight against cultural property trafficking but just to highlight the weaknesses of its mechanisms, such as provided by the article 7.

From this perspective, the efficiency of International Law seems uncertain. The prohibition of pillage and the immunity whose cultural goods benefit since the 1899 Hague Convention is nowadays part of International custom but meet difficulties to produce its full effect.

However, Conventions are not anymore the only level of protection offered by International Law, especially concerning both Cultural Property and Terrorism. It is important to notice the progress in the efficiency of the International branch dedicated to the prevention and repression of attacks perpetrated against cultural property.

The role of International Cultural Heritage Law in tackling Cultural property trafficking on the road from war to peaceful zones

The purpose of this paper is to tackle the traffic of Cultural Property from source countries in Conflict. However, the difficulty is that from War zones, it enters peaceful areas such as Europe. Then, humanitarian law need to be relayed by other branches.

3. Challenges posed by the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property

This Convention implies a broad range of responsibilities for the state. First, the state is responsible to implement the necessary protection measures on its own territory (art. 5), encompassing national legislation, inventories and national services for the protection of cultural property.

It has also the responsibility to prevent museums and similar institutions (?) on its territory to make acquisitions of cultural property exported in an illicit manner from the source country after the entry into force of the Convention¹²². This article is particularly important in that it emphasizes the importation rather than exportation phase. Indeed, as this legal study reveals it, the most common pattern in Cultural Property Laws is a focus on exportation, revealing a state centric approach to Heritage.

However, the Convention is silent on the terms “similar institutions” found in the Article 7. Does it encompass Auction houses ? Considering the private character of auction houses, it is only by tackling upstream the trafficking that state could have an impact on auction houses acquisitions. If we take the french case, museums are under state control and considered as delivering a public service¹²³. Thus, it is easier for the state to intervene in the process of acquisition. However, the actors involved in art market and collectors in auction houses are private entities harder to control. To that extent, article 5 encourages art dealers to adopt codes of conduct to regulate their own sector.

The article 6 insists on the necessity to develop certificates for proving the licit character of a cultural property movement. However, its implementation would require an harmonization among states that is still missing. Here, the focus was already put on exporting states rather than importing states. With a focus on Europe, we will see to that extent that, harmonization in terms of cultural property export is lacking but the control

122 1970 UNESCO Convention, Art. 7.a.

123 Jacques Chevallier, *Le Service Public : Que sais-je ?*, ed. PUF, Paris, 2015.

on cultural property importation is completely inadequate.

In the Information Kit provided by UNESCO in 2011¹²⁴, precision is given that in today's context, the Convention implies states duty to adopt emergency import bans “when the cultural heritage of a State Party is seriously endangered by intense looting of archaeological and ethnological artefacts”¹²⁵, encompassing Iraq. One more time, the interest has been shifted from exporting countries to importing ones. Even if the 1970 UNESCO Convention is applicable in time of peace, it is important to understand the role or the lack of role played by countries in conflict in the export control of their cultural property because of the lack of control they exert on their territory. To that extent, the burden has to be placed on importing states, even if the practicability of such measures seems hard to achieve.

Regarding now the efficiency of the Convention and its success in the last 45 years, it is important to note that it did not manage to solve the deepest problems posed by the illicit international movement of cultural property, especially in terms of return and restitution to the state of origin¹²⁶.

4. UN Resolutions and Soft Law Instruments

As mentioned above, the United Nations and its agencies have been a leader in the fight against cultural property trafficking.

Already in 2003, after the invasion of Iraq by the United States, the Security Council adopted the Resolution 1483 to lift the trade sanctions against Iraq and recall for the attention of states on its situation. For the purpose of this paper, the interesting extracts were found in the preamble as well as in paragraph 7 of the Resolution.

Indeed, the Security council stressed the “*need for respect for the archaeological,*

124 UNESCO, Information Kit, “The fight against the illicit trafficking of cultural objects ; the 1970 Convention Past and Future”, 15 March 2011, available at : <http://unesdoc.unesco.org/images/0019/001916/191606E.pdf>

125 *Idem.*, p. 9.

126 Patrick O'Keefe, “Commentary on the UNESCO 1970 Convention on the Means of Prohibiting the illicit import, export and transfer of ownership of Cultural Property”, rev. ed. Leicester, Institute of Art and Law, 2007.

*historical, cultural, and religious heritage of Iraq, and for the continued protection of archaeological, historical, cultural, and religious sites, museums, libraries, and monuments*¹²⁷.

While insisting on the importance of the return to Iraq of cultural property that has been illegally removed from Iraq since 1990, especially from the National museum as well as the National Library pillaged in 2003, this resolution established a “*prohibition on trade in or transfer of such items and items with respect to which reasonable suspicion exists that they have been illegally removed, and calls upon the United Nations Educational, Scientific, and Cultural Organization, Interpol, and other international organizations, as appropriate, to assist in the implementation of this paragraph*”¹²⁸.

The Resolutions adopted under Chapter 7 of the UN Charter benefit from a particular legal authority lacking with other resolutions such as the ones adopted by the Economic and Social Council. However, the efforts of this Council in the fight against cultural property trafficking have been revealed through the adoption of few resolutions. Here, we toppled from the realm of hard law with Security council resolutions to the realm of soft law with ECOSOC resolutions such as the Resolution 2008/23 entitled “*Protection against trafficking in Cultural Property*”¹²⁹.

The United Nations Office on Drugs and Crime have also played an important role in the adoption of relevant Resolutions such as the 2010/19 Resolution¹³⁰ for the “*crime prevention and criminal justice responses to protect cultural property, especially with regard to its trafficking*”. The Resolutions 2233¹³¹ also deals specifically with the situation in Iraq. Space limit does not allow for further developments on these resolutions but make us keep in mind that Cultural Property trafficking in on the

127 S/RES/1483 (2003), Adopted by the Security Council at its 4761st meeting, on 22 May 2003, Preamble.

128 *Idem*, para. 7.

129 ECOSOC Resolution 2008/23, available at : <http://www.un.org/en/ecosoc/docs/2008/resolution%202008-23.pdf>

130 UNODC, General Ass. Resolution 2010/19, available at : https://www.unodc.org/documents/commissions/CCPCJ/Crime_Resolutions/2010-2019/2010/ECOSOC/Resolution_2010-19.pdf

131 S/RES/2233 (2015), Adopted by the Security Council at its 7495th meeting, on 29 July 2015.

International Agenda.

4.1 Resolution 2199 adopted under Chapter 7 of the UN Charter

Although the previous resolutions are worth being mentioned, the most relevant Resolution for the purpose of this paper, at the intersection of Cultural Property, Heritage and International Security is the Resolution 2199 approved on the 12th of February 2015 under a Russian initiative¹³². The Resolution 2170¹³³ was adopted one year before to condemn the widespread abuses of human rights and humanitarian law by terrorists groups in Syria and Iraq and recall for the responsibility of UN member states to protect populations on these territories. To reinforce and complete this resolution, the UNSC adopted the Resolution 2199 whereby the international community decided to commit in the fight against the attacks perpetrated against Cultural Heritage both in itself and as a lucrative tool for terrorist organizations.

The Resolution 2199 targets several sources of terrorism financing; donations, oil, hostages and antiquities. More generally, the SC prohibits the member states to commit in any trade with Daesh, the Al-Nusrah Front or groups associated with Al Qaida.

After the atrocities that occurred in Iraq and Syria, the member states condemned those destructions of Cultural Heritage and decided to go further by taking concrete steps. The UN called for the collaboration of member states with its partners such as INTERPOL, UNESCO, the ICCROM, WRO, UNIDROIT, UNODC, ICOM, to prevent any trade of illegally removed objects during a period of conflicts from Iraq and Syria¹³⁴.

Taking a look at the Resolution, the paragraphs 15 to 17 are especially dedicated to Cultural Heritage. Whereas the paragraphs 15 and 16 reiterate the exactions of

132 S/RES/2199 (2015), Adopted by the Security Council at its 7379th meeting, on 12 February 2015.

133 S/RES/2170 (2014), Adopted by the Security Council at its 7242nd meeting, on 15 August 2014.

134 UNESCO Website, "Unanimously adopting UN Resolution 2199 (2015), Security Council condemns trade with Al Qaida associated groups, Threatens further targeted sanctions", 12 February 2015, available at : <http://www.un.org/press/en/2015/sc11775.doc.htm>

terrorist groups against Cultural Heritage whose Resolution applies to, as well as the financial benefit gained from it, the paragraph 17 tends to be the most effective by urging states to “*take appropriate steps to prevent the trade in Iraqi and Syrian cultural property*”¹³⁵, although silent on the appropriateness expectations. This Resolution is a legal frame that have been further precised regarding its implementation. For instance, on the 5th of May 2015, UNESCO delivered a Guideline aiming at accompanying states in the implementation of the resolution as well as their reporting obligation¹³⁶.

Indeed, this Resolution was strengthened by the states obligation to report on their progress 120 days after the Resolution adoption and the requirement of UN organizations to track on their implementation progress. To that extent, the next sections of this paper will be dedicated to the evolution on progress of states at the european level and then with a focus on domestic steps taken by France and Iraq.

After the adoption of the resolution, the UN french representative François Delattre advanced the particular determination of France with regards to the attacks that occurred against Charlie Hebdo in January 2015. Also, the most recent attacks that occurred in Paris on the 13th of November 2015 have as well encouraged for further actions.

However, the Resolution 2253¹³⁷ adopted by the Security Council in December 2015 denounces in its paragraph 15 the “insufficient level of reporting” from Member states regarding the steps that have been taken to comply with the Resolution 2199. It also “calls upon Member States to report such interdictions of antiquities, as well as the outcome of proceedings brought against individuals and entities as a result of any such activity”¹³⁸.

135 S/RES/2199, para. 17.

136 UNESCO, « Guidelines for National actions and reporting of Paragraph 17 of the United Nations Security Council Resolution 2199 », 5 may 2015

137 S/RES/2253 (2015), Adopted by the Security Council at its 7587th meeting, on 17 December 2015.

138 *Idem*, para. 15.

4.2. Soft Law Instruments; the alternatives to the lack of Specific Convention on traffic against Illicit Property from Countries in conflict

After the UN intervened to invite many organizations to cooperate in the fight against Cultural Property trafficking, some really useful tools have been put at the disposal of the Public.

INTERPOL has put in place on its website a database of stolen works of art that combines a description of the object and a picture. This database has become public in 2009 and encourages all art dealers to check if the goods that they receive have actually been reported as stolen by a state¹³⁹. If that is the case, they are invited to report it.

The International Council of Museums provides for Red lists that classify the archaeological objects or works of art that are in danger and under threat all over the world. This tool has a preventive aim to reduce the risk of exportation and awareness in importing countries. Indeed, those Red Lists are given by INTERPOL and the WCO to the police, customs officials, auction houses and museums throughout the world.

Emergency Red Lists have been created for particularly vulnerable Cultural Heritage. In 2003, the emergency Red List of Iraqi Antiquities at Risk has been delivered and updated in 2015¹⁴⁰.

It is important to precise that these instruments are here to support the effort of International Law but are not binding. Thus, their effectiveness stands on the willingness of the market actors to use them, there is no follow up but hope that their existence has already saved numerous pieces of art illegally exported. These tools can actually assist member states in developing the appropriate measures mentioned in Resolution 2199 and national legislation to limit this type of crime.

Additionally, UNESCO has publicly made available a database on National Cultural Heritage Laws in order to improve on the harmonization of domestic legislations¹⁴¹.

139 INTERPOL Database for stolen works of art, available at : <http://www.interpol.int/notice/search/woa>

140 ICOM, The Emergency Red List of Iraqi Antiquities at Risk, 2015 available at :

http://icom.museum/fileadmin/user_upload/pdf/Press_Releases/Red_List_Iraq_EN_2015.pdf

141 UNESCO database of National Cultural Heritage Laws, available at :

II. PRESERVING EUROPEAN HERITAGE : A PRIORITY OF THE EUROPEAN LEGAL FRAMEWORK

As Barbara Hoffman stated in her analysis of European Cultural Heritage legislation, the challenge that it has to face is to ensure an equal preservation of the principle of free movement of goods sets up in articles 26 and 28 to 37 of the TFEU and the protection of Cultural Heritage¹⁴². The preservation of Cultural Heritage within Europe is one of EU's priority and the European Commission is currently working on the establishment of an integrated approach to Cultural Heritage, insisting on its fundamental role for the economic growth of Europe¹⁴³. Indeed, regulations on the preservation of European Cultural Heritage are numerous. When it comes to their transnational movement, scrutiny is also given. The Council regulation 116/2009¹⁴⁴ adopted in December 2008 aims for instance at ensuring uniform export controls through systematic possession of export licenses. Nonetheless, little attention is given to the broader picture of Cultural Heritage and its protection as a universal matter. Little attention is given to the traffic of Cultural Property in danger from third countries in conflict and their importation in western european states.

It is striking to note the unbalance between export policies and import policies, the first objective being the protection of the Cultural Heritage present on the european territory. Thus, it is not at the Cultural Heritage Law of the European Union that we should have a look for the purpose of this paper but at the “Cultural dimension of EU foreign policies”¹⁴⁵. Indeed, in an opinion of the Committee on Culture and Education

<http://www.unesco.org/culture/natlaws/>

142 Barbara Hoffman, “European Union Legislation pertaining to Cultural Goods” in *Art and Cultural Heritage ; Law, Policy and Practice*, 1st ed., Cambridge, Cambridge University Press, 2006, p.191.

143 European Commission, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS, Towards an Integrated approach to Cultural Heritage of Europe, 2014, available at : http://ec.europa.eu/culture/library/publications/2014-heritage-communication_en.pdf

144 Council Regulation (EC) No. 116/2009, adopted on December 18, 2008.

145 European Parliament, Opinion of the Committee on Culture and Education, on the role of the EU within the UN – how to better achieve EU foreign policy goals (2015/2104(INI)), available at : <http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&reference=PE560.704&format=PDF&language=EN&secondRef=03>

and on the role played by the EU within the United Nations, it calls in paragraph 4 “*for a more integrated approach and fruitful cooperation between the Commission, the EEAS, Parliament and the UN in areas such as the promotion of culture, the preservation of cultural heritage at risk, the combating of illicit trade in cultural property (including inside the EU), conflict prevention, reconciliation processes, peace building (...)*”¹⁴⁶.

The purpose of these assumptions is not to deny the implication of EU in the combat against illicit traffic but simply to report that this is not tackle under its Cultural heritage legislation but as part of its Foreign policies and support to developing countries.

The European Commission is the responsible organ to develop effective measures to tackle illicit traffic of cultural property. To that extent, it identified the three main issues in this sector : “a lack of consistent terminology and legal definitions, especially between EU languages; a lack of consistent legislation between Member States”¹⁴⁷ and “a lack of information and data on trafficking in cultural goods”¹⁴⁸.

For instance, the establishment of the Euromed Programme has been an important step in the european effort to support mediterranean countries in the safeguard of their cultural heritage even out of the european borders such as the support offered to Lebanon and Syria. As part of this effort, the European Commission has created an Action fiche for Syria, “helping the Syrian population cope with the effects of the crisis and prepare for early recovery”¹⁴⁹. However, the efforts made to tackle cultural traffic from Iraq were not found through this institutional effort but as a following of international legislation on that matter.

It seems now opportune to get an overview of the EU legislation and policies

146 *Ibid.*

147 European Commission website, « Trafficking of cultural goods » section in Culture> Policy> Culture Sector Support, available at : http://ec.europa.eu/culture/policy/culture-policies/trafficking_en.htm

148 *Ibid.*

149 European Commission, Annex I of the Commission Implementing Decision on the 2013 Special Measure for the Syrian population and the host communities in Jordan “Helping the Syrian population cope with the effects of the crisis and prepare for early recovery”, October 10, 2013, CRIS number: ENPI/2013/024-892, available at : http://ec.europa.eu/europeaid/documents/aap/2013/af_aap-spe_2013_jor.pdf

that have been adopted and implemented to support the international effort against trafficking.

1. Cultural Heritage in the treaties

Frigo Manlio raised an important point when he noticed that in the Treaty establishing the European Community adopted in Rome in 1957, the only article (art.30) that dealt with the circulation of cultural goods was found under the Part III, Title I “Free movement of goods”, Chapter II “Prohibition of quantitative restrictions between member States”.

The Article 23 covering rules on the custom unions and trade in all goods stipulates that “quantitative restrictions on both imports and exports as well as all measures having equivalent effect shall be prohibited”¹⁵⁰. Thus, there is at first sight little protection offered by the EU to Cultural Heritage in provenance of third countries in conflict if no restriction can be exercised on importation. Indeed, protecting the free market is a priority that gives little space for restrictions.

However, some limitations have accompanied the adoption in 2007 of the Treaty on the Functioning of the European Union¹⁵¹. The Article 36 of the TFEU, equivalent of the former Article 30 above mentioned, corroborated by article 34, bring us some more details about import legislation within the European Union.

Under the same Chapter than the Treaty establishing the European Community “Prohibition of quantitative restrictions between member states”, the article 34 (former article 28) first prohibits in the same manner between Member States any “quantitative restriction on imports and all measures having equivalent effect”.

The Article 36 thus sets up the exceptions and limitations of articles 34 and 35. It stipulates that “the provisions of Articles 34 and 35 shall not preclude prohibitions or

¹⁵⁰ Frigo Manlio, “Cultural Property v. Cultural heritage ; “a battle of concepts””, *International Review of the Red Cross*, vol. 86, no. 854, June 2004, p. 370.

¹⁵¹ Treaty on the Functioning of the European Union, 2007.

restrictions on imports, exports or goods in transit justified on grounds of (...) *public security; (...) the protection of national treasures possessing artistic, historic or archaeological value (...)* ».

The Article 36 of the TFEU is the only article dealing with the protection and circulation of Cultural goods. Moreover in the same article, it is interesting to find a mention of both security and “national treasures”, without any consideration for its internal or external provenance from the European Union.

2. EU Regulations for the fight against Illicit trafficking

As I said above, the majority of the regulations that have been adopted by the EU have been so to protect the Cultural Heritage of the Member states. However, what interests us now is to look a bit deeper at the regulations of the EU that have been adopted regarding the protection and importation of cultural goods from third countries in conflict with a focus on Iraq.

On the 7th of July 2003, the Council adopted a common position¹⁵² on the Iraqi situation, reaffirming the resolution 1483 of the Security Council lifting the embargo on Iraq and stressing the obligation to return Iraqi cultural property that would have been illegally removed from the territory since 1990.

The Article 3 of the Council common position stipulates to that extent that “*All appropriate steps will be taken to facilitate the safe return to Iraqi institutions of Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from the Iraq National Museum, the National Library, and other locations in Iraq since the adoption of Security Council Resolution 661 (1990), including by **establishing a prohibition on trade in or transfer of such items and items with respect to which reasonable suspicion exists that they have been illegally removed***”¹⁵³.

¹⁵² Council common position 2003/495/CFSP, adopted on July 7, 2003, on Iraq and repealing Common Positions 96/741/CFSP and 2002/599/CFSP, available at : <https://publications.europa.eu/en/publication-detail/-/publication/d34b2da5-a727-41fe-8ce2-44016256770f/language-en>

¹⁵³ *Idem*, Art.3.

If the EU has adopted several policies with regards to Cultural Property trafficking and if it is integrated in its treaties, some weaknesses may be highlighted.

3. Weaknesses and Obstacles to the implementation of EU's policies

To address one of the issue evoked by the European Commission regarding the lack of information on trafficking in Cultural goods, a study has been released on the topic and is really informative¹⁵⁴. The Study on Preventing and Fighting illicit trafficking in cultural goods in the European Union informs us, inter alia, on the need for more scrutiny on importation and some obstacles faced concerning the illicit movement of cultural goods.

3.1 Lack of importation controls

Loads of tentatives have been made to regulate the export of cultural goods, legitimately placing the burden of cultural heritage protection on the states of origin. However, considering the extent to which illicit traffic has developed, all states, encompassing the states of arrivals, have a responsibility to take steps to preserve Cultural heritage and the universal feature of the Right to participate in Cultural Life.

Here, the meaning is not to undermine the role of the unified export control of the EU or the role of the Model Export Certificate of Cultural Goods established by UNESCO and the WCO. On the contrary, the latter is really important to standardize the work of customs and police officials, especially considering their likely lack of knowledge in Cultural heritage¹⁵⁵. Indeed, if there is an international standard of export certificates, the officials know where to look for the same information needed in different parts of the world and in different languages. Moreover, it diminishes the risk

154 CECOJI-CNRS, "Study on preventing and fighting illicit trafficking in cultural goods in the European Union", UMR 6224 Contract No. Home/2009/ISEC/PR/019-A2 Final Report – October 2011, available at : http://ec.europa.eu/home-affairs/doc_centre/crime/docs/Report%20Trafficking%20in%20cultural%20goods%20EN.pdf

155 UNESCO, "Why is the UNESCO-WCO Model Export Certificate needed ?", available at : <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/legal-and-practical-instruments/unesco-wco-model-export-certificate/faqs/#c163827>

of fake certificates.

At the other end of the line, the importation of cultural goods is not object of much scrutiny and is pretty rare in European countries. The control is generally limited to custom declarations but there is no particular control for cultural goods. Considered on the same level than every goods since 1968¹⁵⁶, they can be object of a formal control on the origin and value of the good but no importation is formally prohibited.

However and as mentioned above, cultural goods from Iraq benefit from an exception. With the 2003 Council common position, all movements of Iraqi cultural property are forbidden unless it is proven that they have been exported before the 6th of August 1990. Nonetheless in practice, this exception is neither sufficient nor efficient considering the free movement of goods principle in the EU. If the problem is the lack or fragility of importation control, this exception does not establish in itself an obligation of empirical enhanced control but only the legal prohibition of importation from Iraq. Thus, in facts, in absence of particular instruments or measures for those goods, the effectivity of the Common position risks to be perceived only at the symbolical level.

The first state of arrival of the good on European territory has a bigger burden on its shoulders, responsible for ensuring that the cultural goods is not coming from Iraq. There, the Model Export Certificate will be important to quickly detect the licitness of the movement, even though no legal basis exists that provides for the obligation to control exportation certificates from states of origin¹⁵⁷.

To overcome the lack of concrete measures adopted by the EU regarding import controls, domestic legislation is particularly important. Establishing a special penal sanction would allow for more scrutiny. However, none of the 27 members of the

156 *Commission v. Italy* (ECtHR, 1968)

157 CECOJI-CNRS, "Study on preventing and fighting illicit trafficking in cultural goods in the European Union", UMR 6224 Contract No. Home/2009/ISEC/PR/019-A2 Final Report – October 2011, available at : http://ec.europa.eu/home-affairs/doc_centre/crime/docs/Report%20Trafficking%20in%20cultural%20goods%20EN.pdf

European Union penally sanction the specific crime of illicit trafficking in cultural property¹⁵⁸.

After the study and overall presentation of the EU legal framework regarding Cultural Property protection and support to the fight against Cultural Property, it seems that while regulations on Protection of Cultural Heritage are really state centric and focus on European states heritage, the only external perspective was brought through the implementation of International Resolutions preventing the financing of terrorist organisations and thus any trade in objects from Iraq.

4. The enhanced Protection offered by the Council of Europe

As Janet Blake notes it, Cultural Heritage at the european level is targeted under its own Cultural Heritage Law and considered as a “capital” for sustainable development¹⁵⁹. To that extent, the focus on export control from european states rather than import controls from third countries is really emphasized to preserve the cultural wealth of Europe.

The Council of Europe has for one of its main mandate the protection and promotion of Human Rights and thus has insisted on the importance of fighting illicit trafficking for the protection of cultural heritage. As early as 1949, “the founding documents of the Council of Europe referred to the need to protect a “common heritage” of the European nations as a means of protecting human rights, fostering democracy, and ensuring peace”¹⁶⁰.

Thirty six years later, the Council of Europe adopted the European Convention on Offences related to Cultural Property¹⁶¹. However, neither the term traffic nor the

158 *Idem*.

159 Blake, 2015, p. 320.

160 Blake, 2015, p. 322.

161 Council of Europe, European Convention on Offenses Related to Cultural Property, Delphi, June 1985, available at : <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007a085>

term destruction appear in this Convention. The term “protection” related to Cultural Property appears twice but only concerning the Cultural Heritage of Europe. At first sight, it does not seem that the scope of application of this Convention is broad enough to encompass illegally removed cultural goods from third countries.

Thirty years later again, the European Committee on Crime Problems addressed this issue, positioning itself in favour of the 1985 Convention revision. It wants to adapt the role played by the Council to the present context¹⁶². Thus, the Committee encourages the Council in its memo to take position in the fight against illicit trafficking in Cultural property linked with terrorism. It mentions the looting that occurred in Mosul in 2015 and the intention of islamic militants to sell items to fund their operations. It adds that “although many States already have criminal legislation on cultural property, the only way to combat this phenomenon effectively is through joint action at international level”¹⁶³.

Attentive to the suggestions of the European Committee on Crime Problems, the Minister's deputies of all member states of the Council of Europe decided to settle, during its 1249th meeting held on the 2d and 3d of March 2015, the Committee on Offences Relating to Cultural Property (PC-ICB)¹⁶⁴. The mandate of the expert group has started on the 1st of March 2016 and will last until the 31st of December 2017.

Michael Plachta reported in an article that “The PC-IBC shall ensure that the draft Convention deals, inter alia, with the following issues: (i) definition of cultural property; (ii) criminalization of behaviour which has the potential to harm cultural property; (iii) criminalization of illicit destruction of cultural property; (iv) criminalization of trafficking in cultural property; (v) prevention of offences relating to

162 European Committee on Crime Problems, Memorandum on the Revision of the 1985 European Convention on Offences relating to Cultural Property, 7 April 2015, available at : [http://www.coe.int/t/dghl/standardsetting/cdpc/Bureau%20documents/CDPC%20\(2015\)%206%20-%20e%20-%20Memorandum%20on%20the%20revision%20of%20the%201985%20European%20Convention%20on%20Offences%20Relating%20to%20Cultural%20Property.pdf](http://www.coe.int/t/dghl/standardsetting/cdpc/Bureau%20documents/CDPC%20(2015)%206%20-%20e%20-%20Memorandum%20on%20the%20revision%20of%20the%201985%20European%20Convention%20on%20Offences%20Relating%20to%20Cultural%20Property.pdf)

163 *Idem*, p.5.

164 Michel Plachta, “Council of Europe Sets up an Expert Group to Deal with Cultural Property Offences Relating to Cultural Property”, *International Enforcement Law Reporter*, 4/1/2016, vol. 32, Iss. 4, p130-132.

cultural property; and (vi) international co-operation”¹⁶⁵. The scope of application of the revised Convention reveals the willingness of the Council of Europe to take concrete measures in the fight against illicit traffic of cultural property. However, some domestic legal traditions are still problematic within Europe.

Regarding the support offered by the Council of Europe to the fight against illicit traffic in Cultural Property and the promotion of its safeguarding from terrorist exactions, I would like to mention the Convention on the Prevention against Terrorism adopted in 2005. Although this Convention is relevant in the fight against terrorism, its feature is more general and mainly targets terrorism through the offences of “public provocation to commit a terrorist offence” (art.5), “recruitment for terrorism”(art.6) and “training for terrorism”(art.7), thus is not specific enough for the concern of this research. The article 2 is nonetheless worth mentioning because it recalls states to enhance their efforts in preventing terrorism and “its negative effects on the full enjoyment of Human Rights”¹⁶⁶ and thus indirectly to act upon its financing.

5. Bona fide or Good faith Principle in Civil Law systems; the brake to International Law enforcement

In many European states exist a principle that facilitates the acquisition of cultural goods and has posed some problems to block the passage of goods in the hands of private collectors when those goods were illegally exported. In civil law systems, this principle takes the form of the following adage; “as far as goods and chattels are concerned, possession amounts to title”, translated from the French Civil code article 2276; “en fait de meubles, la possession vaut titre”¹⁶⁷.

When we talk about the principle of good faith, we talk about the “acquisitive prescription”¹⁶⁸ of a good in good faith. This acquisitive prescription is present in many

165 *Idem*.

166 Council of Europe, Convention on the Prevention against Terrorism, Warsaw, 2005.

167 French Civil code, *Code civil* ; art 2276.

168 CECOJI-CNRS, Study on preventing and fighting illicit trafficking in cultural goods in the

European states legislation; for instance in Germany – where there is a general presumption of good faith¹⁶⁹ –, Switzerland – where the prescription period is prolonged to 30 years¹⁷⁰ – or France, through the Article 2258 and following of the Code civil provide for the *usucapion* of goods or acquisitive prescription with an immediate effect¹⁷¹. Nonetheless, an exception exists for the cases of theft or loss for which the prescription is prolonged to three years. Moreover, property belonging to the Public Domain and certain listed goods are not covered by the rule of immediate acquisition, being qualified as inalienable and thus non submitted to trade.

Civil law systems are really different from common law systems on that matter where the principle of acquisitive prescription in good faith is not applied according to the *nemo dat quod non habet* principle¹⁷².

Regarding the question of proof, presumption of good faith exists for instance both in France (art. 2258 of the Civil code) and Iraq (art. 1148(1) of the Civil code).

The notion of Gross negligence in the 1985 Council of Europe Convention

The Council of Europe, in its 1985 Convention above mentioned, also dealt with the question of *bona fide* purchasers and the differences between legislations of European states as a facilitator for the illicit traffic of cultural property.

In the Appendix III §2 of the Convention, it is well stipulated that “the acquisition in a grossly negligent manner of cultural property obtained as the result of theft or of an offence against property other than theft” is to be treated as a criminal

European Union, UMR 6224 Contract No. Home/2009/ISEC/PR/019-A2 Final Report – October 2011, available at : http://ec.europa.eu/home-affairs/doc_centre/crime/docs/Report%20Trafficking%20in%20cultural%20goods%20EN.pdf

169 German code, BGB para. 937(2)

170 Swiss Civil code, Art 728(1a)

171 French Code civil ; art 2276(1).

172 Elham Balaval, « The Doctrine of Nemo Dat Quod Non Habet and Its Exceptions », J. Appl. Environ. Biol. Sci., 4(5)7-14, 2014, p. 1 ; “The rule means no one can transfer a better title than he himself has. Thus if goods are purchased from a person who is not the owner and who does not sell them under owner’s authority, the buyer does not acquire a title to any of the same notwithstanding that he has paid value for the same in good faith”.

offense”¹⁷³. The question is to know what a gross negligence under the Convention means ? In the light of what has been said before, a purchaser that acquire a cultural good in bad faith or without any due diligence would be guilty of gross negligence, even though once again, the appreciation of good faith is variable depending in which state the acquisition occurs.

To enlighten this notion, Michael Plachta explicits that the new Convention or revised version of the 1985 Convention should “contain a due diligence standard in order to address all hypothesis where objects stolen, illicitly excavated or illicitly exported are transferred and acquired on the market”¹⁷⁴, using the provision of the 1995 UNIDROIT Convention as a standard model¹⁷⁵.

173 Council of Europe, European Convention on Offenses Related to Cultural Property, Delphi, June 1985, Appendix III §2 available at : <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007a085>

174 Plachta, 2016, p. 3.

175 Articles 4(4), 6(2)) of the 1995 UNIDROIT Convention and Article 10 of the EU Directive 2014/60 : “In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances”.

III. A REFLECT OF THE INTERNATIONAL EFFORT IN FRENCH AND IRAQI DOMESTIC LEGISLATIONS

“Although the idea of cultural internationalism is currently warmly accepted (“cultural property belongs to humanity as a whole”), the protection of cultural property largely remains an exclusive obligation of the state concerned as stipulated by the Article 4 of the 1972 UNESCO Convention on the Protection of Cultural and National Heritage¹⁷⁶. (...) States have the freedom of choice as to what to protect and how to protect it”¹⁷⁷. As Van Der Auwera notices it, the main competencies in terms of cultural property remain between the hands of States. Although the EU has received special competencies regarding exportation and importation of goods at its borders, States are still mainly their own ruler. However, on the assumption that “states have the freedom of choice as to what to protect and how to protect it”, the exception regarding countries in conflict has to be made. The State's loss of its territory's control does not easily allow anymore for freedom of choice. However, it still exists. The State is free to make preventive choices to reduce the risk of any harm against its cultural property and to take, *a priori*, special measures (see chapter III).

1. The french legal framework

France has always maintained a particular tradition of opacity on its art market. Leader in this sector, the adage of “possession vaut titre” of our civil code has always given privileges to the private collectors¹⁷⁸. This principle has also led to abuses such as the scandal of the Parisian auction house Drouot, where were sold for instance in 2005 a Sumerian clay nail for 240 000 euros whose place of origin was under terrorist groups control¹⁷⁹. To that, the new director of the Baghdad Museum , looted in 2003, replied that France never returned the object¹⁸⁰. Is that a sign of french opportunism ? A lack of scrutiny ? Of stringent legislation ?

176 UNESCO Convention on the Protection of Cultural and Natural Heritage, Art. 4.

177 Van Der Auwera, 2015, p.1.

178 Géraldine Meignan, “Trafic d'antiquités: l'ombre de Daech sur le marché de l'art”, *L'Express*, online journal, posted on 28.08.2015.

179 Romain Bolzinger, “Speciale Investigation; Traffic d'art, Le Trésor de Guerre du terrorisme”, 20 juin 2011, canal +, Tac presse, available at : <https://www.youtube.com/watch?v=AVCdW8VlsfU>

180 *Idem*.

As Patrick Boylan noted in its review of the 1954 Hague Convention, France has no excuse in its lax behaviour vis à vis this type of Cultural property as an embargo on importation must systematically be imposed when they are in provenance of countries suffering armed conflict¹⁸¹. Nonetheless are excluded from this embargo the preventive measures of refuges for cultural property.

Keeping in mind that the presumption of the purchaser's good faith is a pillar of french legislation concerning the acquisition of goods – exception made for stolen and lost goods with a prescription of three years –, let us have a look on the legislation in place for cultural property dealings and importation, expecting it to be more stringent.

1.1. Fiscal regime

According to the Article 291 I of the french General Code on Taxation¹⁸², is considered as importation “the entrance of a good, in provenance of a State or a territory that does not belong to the European Union(...) or of a good in provenance (...) of another state of the European Union”.

As Pearl Gourdon noted it, the french taxation system is placing an important burden on the french art market¹⁸³. Antiquities are nonetheless benefiting from a T.V.A taxation reduction of 5.5%. If the author questions the height of this rate regarding its impact on the french art market dynamism, I would argue that higher the taxation rate is, stricter the control on importation would be.

However, when the importation is the fruit of an agreement by official structures such as museums, antiquities are exonerated from taxes¹⁸⁴.

181 Boylan Patrick, 1993, p. 72.

182 Code Général des Impôts, Article 291§1

183 Pearl Gourdon, "Excerpts from the Memoire Le Regime Juridique et Fiscal Français des Importations et Exportations d'Oeuvres d'Art", in *Art and cultural heritage: law, policy and practice*, New York, Cambridge University press, 2006, p. 197.

184 Annexe IV Code Général des Impôts, Art. 50.

Legislation on importation

In March 2012, the state adopted a binding act, called *Circulaire*, to implement the Council Common position on the specific restrictive measures on Iraqi cultural goods importation.

As previously said, antiquities can be object of a control on origins and value of the good but the effectivity of this control is questionable regarding the lack of expertise of customs officials on Iraqi cultural heritage, unless they carefully make use the red list distributed by ICOM.

Without entering into many details, it is worth mentioning yet that in 2015, a draft Law on the Freedom of Creation, Architecture and Heritage¹⁸⁵ has been presented to the Senate to protect the Cultural Heritage in Danger in countries suffering conflicts. However, mention of this law will be made in the Third chapter.

At the institutional level, the Central Office for the Fight Against the Traffic of Cultural Goods (Office Central de Lutte contre le Trafic de Biens Culturels) is part of the National Police and Ministry of the Interior. Its mandate aims at preventing this traffic through the diffusion of information and the promotion of international cooperation.

This office has an authoritative mandate in line with the Directive of the Council 93/7/CEE of the 15th of March 1993.

2. The Iraqi legal framework

International as well as domestic legislation have developed in two directions; one aiming at protecting cultural heritage against military operations and the second aiming at protecting cultural heritage against the demand on the international art market and consequent illicit removal of objects from their context of origin.

In the words of Patty Gerstenblith, this cleavage “has caused an inadequate

¹⁸⁵ Loi sur la liberté de la création, de l'architecture et du patrimoine, Art. L. 111-10, available at : https://www.senat.fr/espace_presse/actualites/201511/projet_de_loi_relatif_a_la_liberte_de_la_creation_a_larchitecture_et_au_patrimoine.html

response in the protection of cultural sites, monuments and objects, and no experience in recent time better illustrates this failure than the ongoing situation in Iraq, which has been devastating to its cultural heritage”¹⁸⁶.

Iraq has ratified the 1954 Hague Convention and its first protocol in 1968 and the 1970 UNESCO Convention in 1973.

Neither France nor Iraq have ratified the Second Protocol of the Hague Convention.

According to the Iraqi Constitution, “Antiquities, archeological sites, cultural buildings, manuscripts, and coins shall be considered national treasures under the jurisdiction of the federal authorities, and shall be managed in cooperation with the regions and governorates, and this shall be regulated by law”¹⁸⁷. However, in the recent context, this clause was not applied anymore considering the loss of control by the state in some parts of the north.

Cultural Heritage Protection is not a new trend in Iraq and was already protected in 1926 by a law “prohibiting the smuggling of Antiquities”¹⁸⁸ as well as by Antiquities Law of 1936 and their amendments¹⁸⁹.

More recently, right after the beginning of the Second Gulf War, a Law on Antiquities and Heritage was adopted. The Article 1 presents the objective of the Law, inter alia “preserving the Antiquity and Heritage in the Republic of Iraq for being substantial aspect of the (National Wealth)”¹⁹⁰.

Regarding movable antiquities, the Chapter 3 explicits the prohibition, for any person, to “possess any movable antiquity”¹⁹¹.

186 Gerstenblith, 2006, p. 90.

187 Constitution of the Republic of Iraq, Article 113, 15 October 2005.

188 Law Prohibiting the Smuggling of Antiquities No.40 of 1926

189 Antiquities Law No. 59 of 1936 and the two Amendments (No. 120 of 1974 and No. 164 of 1975)

190 Antiquities and Heritage Law No. 55 of 2002.

191 *Idem*, Chapter III Art 17 para. 1.

What is interesting to note is that although European law and French law were criticized for focusing on export legislation, it would have been expected that Iraq, being the victim of numerous illegal removal of cultural property, would have a stringent legislation to regulate their exportation. However, when look is taken at the Law no. 55, focus is put on imports rather than exports in the body of the text. Indeed, the article 20 details a strict procedure for artefacts importation¹⁹² while exportation clauses are put under the Penalties chapter at the Article 41. This article sanctions the exportation of antiquities or the intention of importing it from Iraq to a maximum of three years imprisonment or a fine of 100 000 Iraqi dinars¹⁹³

Regarding the excavation, the law provides for the monopoly of the Antiquity Authority.

192 *Idem*, Chapter III, Article 20 – 1. Whoever, in accordance with the LAW, enters [imports] a movable or heritage artifact, shall post a license to the custom authority. 2. In details, the customs authority shall inform the Antiquity Authority, concerning the movable or heritage artifact, within 24 hours from the date of presenting the license. 3. Whoever, enters [imports] a movable or heritage artifact, shall be committed to register the artifacts to the Antiquity Authority, within 30 days, according to the provisions (B, C, D) of item 4 of article 17 of this LAW. 4. The authority, shall confiscate the movable or heritage artifact that entered Iraq, should proved, it has illegally taken over from the origin, it shall also be restored to the original country, taken reciprocity, into consideration.

193 Cfr. *supra* note 184.

CHAPTER II. PROTECTING CULTURAL PROPERTY : THE CALL FOR ALTERNATIVES.

As mentioned above, the process of goods acquisition in western countries has been reversed. From legitimate and lawful looting of western empires, they became passive actors in the acquisition process but active on the market. Because of the activity of the market and, with optimism, a moral consciousness vis-à-vis Cultural Heritage, european former colonial states have stopped looting in what are now developing countries. However, I would like to put under the light a Refuge system that might attract the criticism against western opportunism on Culture. What if european states took over Cultural goods under deposit in order to protect it ? Is this possible without facing the terrible imperialist critics of the past ?

I. CULTURAL PROPERTY: THE NEW “REFUGEE” OF WARS ?

Considering the Refuge system covered by the 1954 Hague Convention, attention needs to be given to the Status of “Refugee” that could result from its application. Nonetheless, such an analogy deserves carefulness with the use of specific words and especially with this particular status.

Taking this into account, it is nonetheless interesting to further develop on this analogy by evoking a system that merits scrutiny.

To that extent will be presented some practical measures that target situations of emergency such as Armed Conflicts , with a focus on the french proposal that wanted to enlarge the application of Asylum law to Cultural Property. Opportunism or real solution, this proposal will be analyzed further.

Before getting back to the early age of Cultural Property Protection in 1954, let us have a look at the Article 4 of the 1972 UNESCO Convention on the Protection of Cultural and Natural Heritage. If this Convention has not been the object of further examination above, one of the term used for its purpose makes it particularly interesting at this level of the developments.

In its Article 4, the Convention poses the primary duty of states to ensure “the identification, protection, conservation, presentation and transmission – of Cultural Heritage – to future generations”¹⁹⁴. The second part of the article is particularly relevant for the purpose of our developments by urging states to “do all it can to this end, to the utmost of its own resources and, where appropriate, *with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.* »

The term « assistance » legitimates foreign actions to help the State whose Cultural Property is in danger. However, this assistance is conditioned for instance by the request of the State whose Cultural Property is in danger.

The Article 6 paragraph 2 reinforces this call; “States Parties undertake, in accordance with the provisions of this Convention, to *give their help* in the identification, protection, conservation and presentation of the cultural and natural heritage referred to in paragraphs 2 and 4 of Article 11 if the States on whose territory it is situated so *request*”.

The condition of the request will be at stake. Is a third state able to offer its assistance and this followed by an agreement with the State whose Cultural Property is in danger ?

1. Museums: diplomatic actors of wars ? Acquisition, Temporary Deposit and Refuges

1.1 The concept of Repositories of last resort in Museums Codes of Ethics

Some argue that museums play an important role in Cultural Diplomacy, by loaning to each other cultural objects, it contributes to the sharing and exchange of Culture.¹⁹⁵ But what if it went further ? What if museums could be a key diplomatic actor before and during wars through their codes of Conduct ?

¹⁹⁴Art.4, 1972 UNESCO Convention on the Protection of Cultural and Natural Heritage

¹⁹⁵Hoogwaerts Leanne, What role do museums and art institutions play in international relations today and specifically in the development of what Joseph Nye called “soft power”? (Joseph Nye, *Soft Power the Means to Success in World Politics*, Public Affairs: NY 2004), August 14, 2012

When a conflict is ongoing or have stroke an artefacts-rich-country in the past years, the presumption that Cultural Property arriving in Europe from this country has been looted or illegally removed is strong. In these circumstances, the conditions of acquisition are stringent and the article 6.4 of the International Council of Museums code of ethics prohibits any acquisition of objects from a country in conflict.

In the article 2.11 of the same code, it is provided for the possible creation of Repositories of Last Resort. It states that « nothing in this Code of Ethics should prevent a museum from acting as an authorized repository for unprovenanced, illicitly collected or recovered specimens or objects from the territory over which it has lawful responsibility »¹⁹⁶. Thus, this article provides for a distinction between acquiring an object and accepting it in deposit while it is still considered in danger.

This concept of Repository of Last resort has been adopted in many Code of Ethics, by other museums or even universities¹⁹⁷. The British Library even evokes the concept of “safe haven”¹⁹⁸. Nonetheless, if we take a look at the code of ethics of the eminent museum of the Louvre, this concept is not found. Hence, the willingness of its director to put in place a particular policy that will be examined further.

Although the development of this concept is a real step in the Protection of Cultural Property from countries in conflict or in post-conflict situation, it should be strictly framed and systematically conditioned by a return policy when the good is not in danger anymore, as in situation where the State has taken back full control of its territory. The implementation of such policies could give museums a real role as guarantors of foreign Cultural Heritage and a real role in diplomacy.

196ICOM Code of Ethics, Art 2.11.

197University College London Cultural Property Policy, Art. 5(2)(g), British Library Ethical Future Acquisition Policy, Art 12, British Museum Policy Acquisitions of Objects for the Collection, Art. 3.2(iii),

198 Peter Stone, *Cultural Heritage, Ethics and the Military*, London: Boydell Press, p73.
And British Library Ethical Future Acquisition Policy, Art 13.

2. *The concept of Refuges under the 1954 Hague Convention*

The Concept of Repositories of Last Resort is far from being a new trend or an invention of the ICOM. In the Part II of this paper, it was said that the Special Protection regime provided by the 1954 Hague Convention was a failure. Was it really a failure or has it been reused and reframed by Organizations and States through different names and procedures. Indeed, the concept of Repository of Last Resort strongly reminds of the Concept of Refuges developed under the Hague Convention.

Keeping the Article 2.11 of the ICOM Code of Ethics in mind, let us have a look to the article I.2. Of the Protocol of the 1954 Hague Convention, providing that “*each High Contracting Party undertakes to take into its custody cultural property imported into its territory either directly or indirectly from any occupied territory, This shall either be effected automatically upon the importation of the property or, failing this, at the request of the authorities of that territory.*”

Although these articles seem similar in substance, some differentiations need to be made. As I noticed above regarding the ICOM Code of Ethics, the Request of assistance from the state whose Cultural Property is in danger was a condition for the museum acquisition. The Article I.2 of the Protocol is broader, not requiring for any type of Institutions responsible for the deposit, such as museums, and admitting the direct importation of objects by foreign states. This last admission is nonetheless really questionable in the light of International Law and the principle of Non-Interference.

This article has to be understood and taken in a particular situation of emergency, or as the ICOM Code of Ethics calls it; as a last resort solution.

The Article 3 of the 1954 Hague Convention calls upon states to take the necessary measures in time of peace to preserve Cultural Property that is in foreseeable danger. However and first, it is difficult to appreciate the foreseeability of a danger. Secondly and as Patrick Boylan stated in its review of the 1954 Hague Convention, the request of one country to another for assistance to preserve its Cultural Property could

be a counter productive move¹⁹⁹ if perceived as an unfriendly move by the State or Non-State actors whose the threat come from. Thus, if such measure is undertaken, it would have to be in secrecy.

The Article 8 of the Hague Convention especially provides for the implementation of Refuges for Cultural Property in the event of armed conflicts.

The second clause of the Article provides for the creation of “centres containing monuments and other immovable cultural property of very great importance”. As the target of this paper is the movable Cultural Property, monuments as such are not considered under the concept of refuges. Moreover, practical considerations allow some thoughts about the effectivity of such measures. Protecting immovable property in time of war imply military intervention or private security companies and thus is a way more complex system to put in place. Protecting Movable Cultural Property does not necessarily involve military or security forces and leave space to more efficient preventive measures of safety.

Regarding the place where these refuges should be settled, the only information provided is the request of “an adequate distance from any large industrial centre or from any important military objective constituting a vulnerable point”²⁰⁰. Here it is important to note that there is no prohibition for the Cultural Property to be moved on the territory of another state as long as this distance from any vulnerable point is respected and as long as it is not used for military purposes. This call for International Cooperation is actually reiterated in Article 12 which confirms the possibility of the refuge to be abroad²⁰¹.

Numerous scholars have denounced the failure of the Special Protection provided by the Hague Convention and considered the adoption of the Second Protocol

199 Patrick Boylan, 1993, p. 61.

200 Art 8(a). Hague Convention

201 Art 12, Hague Convention ; About the transport of cultural property under special protection.

(...)“transport exclusively engaged in the transfer of cultural property, whether within a territory **or to another territory...**”

as the way to overcome this failure²⁰². This assumption is interesting when we note the really low rate of ratification of the 2d Protocol²⁰³ and, on the contrary, the creation of refuges by Switzerland in 1999 that evacuated from museums the most valuable objects to stock them in safety and reconstitute them after the conflicts end. The little town of Bubendorf hosted 1400 afghan objects before being returned to Kabul in 2007 under the aegis of UNESCO²⁰⁴.

Considering the success of this “Museum in exile”²⁰⁵ that did nothing more than taking the concept of Refuges found in the Hague Convention and the Concept of Repository of Last Resort that is obviously inspired from the same concept, is it reasonable to consider that the Special Protection provided by the Hague Convention was a failure ? A need for adaptation and update is certain, but the concept of Refuges developed in the Convention could be the base for a general system and is far from being obsolete. A relative success with regards to the number of times it has been implemented – four times, two times in 1969, one time in 1978 and one in 1999²⁰⁶ – but a huge success with regards to the Cultural objects that have been saved. These measures are put each time in place as a new creation but neither the idea of Repository of Last Resort nor the Idea of museums in Exile are new.

Actually, even the Hague Convention did not create this concept. In 1936, the International Museums Office draft Convention proposed for “additional arrangements for the designation, special identification and international inspection of temporary refuges or shelters for movable cultural property, located at least 20 km. from likely theatres of military operations, from any military, economic or communications

202 Silvia Borelli Silvia, F. Lenzerini, *Cultural Heritage, Cultural Rights, Cultural Diversity : New Developments in International Law*, Boston: Martinus Nijhoff pub., July 2012, p.33.

203 Only 25 states have ratified the 2d Protocol of the Hague Convention ;

<http://www.unesco.org/eri/la/convention.asp?KO=15207&language=F>

204 Constance Wyndham, “The National Museum of Afghanistan”, in *Culture and Conflict online*, available at : <http://www.cultureandconflict.org.uk/projects/the-national-museum-of-afghanistan/>

205 UNESCO, “Museum-in-Exile: Swiss Foundation safeguards over 1,400 Afghan artefacts”, available at :

http://portal.unesco.org/culture/en/ev.phpURL_ID=35362&URL_DO=DO_TOPIC&URL_SECTION=201.html

206 Boylan, 1993, p. 70.

target.”²⁰⁷

Let us take the example of the 50 proposals of the director of the Louvre released in November 2015 and see how this concept of Refuges or Shelters has been, again, reformulated. The idea went even further. Indeed, the concept of an Asylum for Cultural Property has been put on the table.

II. PRESERVING CULTURAL HERITAGE : AN APPROACH TO PREVENTIVE ALTERNATIVES

1. Repository of Last Resort and Refuges at the intersection of The Martinez Proposal : An Asylum Right for Cultural Property ?

In July 2015, Fleur Pellerin, the french minister of Culture and Communication, deposited at the General Assembly a Draft Law on the freedom of creation, architecture and heritage. The procedure of adoption has not been achieved yet but is in process. In this draft Law, the Article L. 111-10 provides that “*in situation where cultural property is in grave danger due to an armed conflict or a disaster on the territory on which it is situated, the State can, at the request of the State owner or if a Security Council Resolution has been adopted, puts temporarily at the disposal of the requesting state refuges to protect cultural property in deposit under the aegis of UNESCO*”. This provision is accompanied by a restitution clause.

Thus, as said above, far from being obsolete, the concept of Refuges has been brought back to light after the shocking excavations that have been ongoing for few years in Syria and Iraq and pointed up by medias.

Moreover, this law provides for the possibility conferred to custom officials to check on cultural goods importation for the countries that have ratified the 1970 UNESCO Convention and also provides for the transposition in domestic law of the

207 Boylan, 1993, p. 72.

Security Council 2199, accompanied by a hardening of sanction.

Even if the law does not provide in itself for the autonomous penalty against traffic in Cultural property, it is a first step forward.

From the willing to develop International cooperation for the protection of Cultural Property in 1954, we assist to the implementation of provisions in domestic laws that both promote International Cooperation and the enforcement of International Laws such as, indirectly, the Council Resolutions 2199, by subtracting objects in museums or historical sites in danger to put them in safe places and thus avoid their traffic on the art market.

In the following months, Jean-Luc Martinez, the Director of the Louvre, was invited by François Hollande to submit a list of proposals to ensure the Protection of Cultural Property in time of armed conflict. In November 2015, the “fifty french proposals to protect the Heritage of Humanity” were released²⁰⁸.

These proposals have a direct link to the exactions perpetrated by Daesh. Indeed, Jean Luc Martinez states that “the best answer to the barbarians that want to destroy the past consists in a collective mobilisation that would start now to build the future”.

What is interesting for the purpose of this paper is found in the Proposal 47, entitled Preventive asylum right concept for Cultural Property²⁰⁹. This proposal retakes the same idea of Refuges and offers to put in place a juridical mechanism that would allow for the deposit in France of cultural property in grave danger. It well stipulated its inspiration from the swiss model above mentioned. The dynamic of this system is cooperative and could lead to the adoption of a new UNESCO Convention that would frame the concept.

To ensure the effectivity of such Convention however, it should provide for the

208 Jean Luc Martinez Jean-Luc, “Cinquante propositions françaises pour protéger le patrimoine de l'Humanité”, Rapport au Président de la République sur la protection du patrimoine en situation de conflit armé, Novembre 2015.

209 *Idem*, p. 48.

obligation of a systematic restitution clause in bilateral agreements and detail its conditions. Moreover, only persons having a special expertise in Cultural Heritage would be in charge of the inventory of cultural goods deemed in danger. Specific and practical questions should be approached such as transport, insurance, responsibility, competencies of tribunals, applicable law, etc.

1.1. The application of “Refugee” Status to Cultural Property

If we talk about Refuges for Cultural Property, it is nonetheless important to highlight the particular implication of such a regime and such a statute. Legally speaking, the assimilation of Cultural Property to Refugees deserves more specification.

Refugee Status under International Law

The 1951 Convention relating to the status of Refugees provides for a definition of who should be considered as a Refugee under the Law. The mandate of the Convention includes any person who is in position of *“well-founded fear of being persecuted for reason of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”*.

Already it appears that talking about Cultural Property as a “Refugee” of war is not legally correct. Indeed, objects don't possess a juridical personality and are thus not entitled to benefit from a status of Refugees, the Convention applying only to “persons”.

Thus, the only way for Cultural Property to be legitimately qualified as a “Refugee” would be to modify the 1951 Refugee Convention by Including a special regime applying to Cultural Property. Also, the United Nations High Commissioner for

Refugees has enhanced competencies to develop the Refugee definition²¹⁰.

Indeed, regarding the situation ongoing in Iraq, Cultural Property has in facts become the new direct victim of War and it would not be a non-sense to consider that Culture is persecuted there for reason of its religious dimension, nationality and as well for going against the political opinion, although better qualified as extremist ideologies, of such terrorist groups.

Although there has been an International expansion of the Refugee Concept, for instance at the european level with the Council of Europe that developed the definition, encompassing “*de facto* refugees”, the problem for the purpose of the paper is still the same regarding the mere nature of Cultural Property excluded in itself from the regimes in place as long as Special Regime are not implemented.

However, if a regime is created, it should first be implemented independently from Refugee Law and be the object of an independent UNESCO Convention, to avoid a wave of confusion.

Nonetheless, the step taken by France in this area through the adoption of the Fleur Pellerin Law exacerbates the willingness of states to develop and adapt the systems already provided in Conventions. Is that a sign of the future development of a special regime for Cultural Property ?

2. The extension of the Responsibility to Protect to Cultural Heritage; ultimate alternative or indispensable measure ?

Since the Destruction of Cultural Heritage has been appreciated by the International Criminal Court as a War crime under particular circumstances, it appeared to me that the concept of Responsibility to Protect (R2P) could be extended to Cultural Property. Indeed, when perpetrated with the intention of persecuting communities by altering their Cultural Heritage and Identity, the R2P should be applied.

210 James Hathaway, « The Law of Refugee Status », Vancouver: Butterworths pub., 2001, p.6.

As Patrick Boylan highlighted, attempts to implement the system of Refuge could be braked by the reluctance of the state whose Cultural Property is in danger to request for assistance if this request is perceived by the perceived enemy as an unfriendly move. One way to get around this in a situation of emergency would be to invoke the Responsibility to Protect of the International Community regarding Cultural Heritage. Supporting this argument, Federico Lenzerini stated the indispensable character of its application to Cultural Property, “with the purpose of protecting humanity against the irreplaceable loss of its heritage.”²¹¹

This concept of International Law and International Relations has emerged in 2005 when world leaders decided to put an end to mass atrocities, genocide or war crimes and frame the “never again” plea heard too many times for a century²¹². As Alex Bellamy argues it and as most of academics would argue, the principle of R2P is far from being perfect. However, this project succeed in what many international projects failed to achieve in preventing the four crimes of the article 5 of the Rome Statute; to reach an International Consensus.

This Principle was unanimously adopted by the General Assembly in 2005, agreeing on the principle that States have the duty to protect their population from genocide, war crime, crime against humanity or aggression, and that they have the duty to intervene in any State that fail to do so. Thus, this principle emerged as an exception of the Principle of Non Intervention provided by the Article 2(7) of the UN Charter.

The Outcome Document of the 2005 United Nations World Summit revealed officially the three pillars of the R2P²¹³ as ,(1), the states responsibility to protect their own population against genocide, war crimes, ethnic cleansing and crimes against humanity by means of prevention, (2), the mutual assistance of states in capacity building and eventually, (3) the international responsibility to take collective action in case one state is not capable to discharge itself from the first responsibility.

In 2009, the General Assembly decided unanimously again to pursue with the implementation of the Principle²¹⁴.

211 Federico Lenzerini, “Terrorism, Conflicts and the Responsibility to Protect Cultural Heritage”, *International Spectator*, June 2016, Vol. 51, Iss. 2, pp. 70-85.

212 Alex Bellamy, *The Responsibility to Protect: A defense*, Oxford: Oxford University Press, 2014.

213 General Assembly, A/Res/60/1, 2005 World Summit Outcome, para. 138-140.

214 General Assembly, A/63/677, Implementing the Responsibility to Protect, 12 2009.

Now, let us apply this principle to Cultural Heritage. As it has been shown during the developments and especially in Part II, States have always tended to protect their own cultural property by putting an incredible unbalance on controlling their exports rather than imports of cultural goods.

While witnessing the atrocities perpetrated and promoted through media for several years by terrorist organisations, the international community has tended to give more attention to the protection of Cultural Heritage. Here, the proposal would be to consider the Refuge system above examined as a preventive mean to fulfill the responsibility of States to Protect Cultural Heritage.

Regarding the applicability of the R2P principle to Cultural Heritage, several points need to be considered. First, according to the first pillar of the R2P principle, states have the responsibility to protect their population against war crimes. As examined under the Chapter II, the International Criminal Court launched a case in 2015, against Ahmad al-Faqi al-Mahdi under the Article 8 of its Rome Statute to appreciate the intentional destruction of Cultural Heritage in Timbuktu as a War Crime.

The Second and Third Pillar provide for the mutual assistance of States to build protection capacities. However, when the Iraqi delegates asked for the international community to assist their country in protecting its Cultural Heritage during the Meeting of the Subcommittee of the 1970 UNESCO Convention²¹⁵ in 2014, states reactions have been quite limited²¹⁶.

Nonetheless, countries such as France has taken steps such as mentioned above by working on the elaboration of means to Protect Cultural Heritage after the International attention was caught by the numerous exactions filmed and released online.

Considering this assistance duty under the R2P principle and the duty of States to protect Cultural Heritage as an “international public good” traced back to the preamble of the Hague Convention of 1954, there is a due positive obligation of States to take measures.

²¹⁵ Meeting of the Subcommittee of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, July 2014.

²¹⁶ Lenzerini, 2016, p.79.

However, the problem that occur is the nature of the measures taken. Indeed, the R2P principle provides in its pillar for a collective action to protect against war crime, genocide, ethnic cleansing or crimes against humanity.

Nonetheless, regarding the preventive system of Refuge, if the latter is put in place under a bilateral agreement, the R2P principle can't be invoked anymore. Indeed, the idea of a Refuge system under the aegis of UNESCO does not imply the same procedures than the R2P principle application under the Security Council aegis.

Two processes should be distinguished. In the situation where Cultural Heritage is in danger, as the R2P principle should not be a systematic resort, the state should seek for assistance from a state having developed a Refuge system first.

In situations where a State has serious reasons to believe its Cultural Heritage to be in danger, this state could call upon other states having a Refuge system in place to take its Cultural Property under deposit.

If none agreement is reached with another state, whether because the State whose Property was in danger did not accept any *a priori* assistance or because the urgent feature of the situation did not allow for preventive actions anymore, the International Community should consider the inability of the State concerned to protect its Cultural Heritage without an external assistance. In this situation, an intervention would be required. Then, from a bilateral agreement involving security forces and UNESCO, the second measure involve a military intervention under the scrutiny of the Security Council. The R2P principle extension of application to Cultural Heritage should be invoked on two grounds; for the protection against war crimes as appreciated by the ICC and against ethnic cleansing as compared to by Irina Bokova when the intention to destroy the identity of a group is leading the action of destruction.

Even if the R2P principle is applied, the use of a Refuge should be the second step of the intervention and an agreement between states should be found regarding the Country of deposit, to avoid to a maximum extent the critics of a unilateral intervention whose legality is at stake²¹⁷.

217 Bellamy, 2014, p.83.

However, such a procedure would be really hard to implement with regards to Diplomacy. Indeed, if the International Community takes actions to take over the Cultural Property of a state in the sake of its Protection, it does not make any doubt that the shadow of colonialism critics would resurface.

CONCLUSION

THE LATE ANSWER TO THE CRITIC OF CULTURAL IMPERIALISM AND OPPORTUNISM

Surely, when it comes to the relation of Western/Southern countries with Culture, the first terms that come to our mind are Imperialist plunder. Indeed, nobody wants to see reproduce the scandal of the Elgin Marbles in the early 19th²¹⁸ and the problems faced today by the Greek government to recover those Parthenon marbles from the British Museum. The question of Western opportunism is really important when it comes to cultural dealings. Are the art market countries really willing to end the traffic in Cultural Objects ? Is this idea of Refuge an other trick to subtract Cultural Heritage at the benefit of the Louvre or the British Museum ?

If skepticism is largely allowed, I believe that Law here can play a major role as a regulator.

Indeed, regarding the idea of a Refuge system, the latter would be entirely framed by bilateral agreements under the aegis of UNESCO. As I said above, bilateral agreements should be conditioned by a systematic clause of restitution when the Cultural Property is not deemed in danger anymore. As to know how to appreciate if Cultural Property is not in danger anymore, the recovery of a full State control of its territory should be the limit.

UNESCO should play a regulator here by accompanying the transport and the restitution process as well as the visit of the Refuge, to ensure the compliance with the terms of the bilateral agreements. It should put at the disposal of the States of departure and of arrival, experts in Cultural Heritage to participate in the inventory of Cultural heritage in danger and to ensure a follow up of its conservation in the Refuge.

All the questions of insurance, responsibility and tribunal competencies should be addressed *a priori* in the bilateral agreement.

218 Merryman John Henry, "Thinking about the Elgin Marbles", *Michigan Law Review* Vol. 83, No. 8 (Aug., 1985), pp. 1880-1923

To the critic regarding western opportunism, the State whose Cultural Property is in danger is free to request the assistance of a neighboring Country or country of its choice, under condition that the necessary infrastructures are available.

The aim here is not to create a concept but to develop the Special Protection regime found in the 1954 Hague Convention and deemed by many scholars as a failure. From *lex lata*, we slowly derive towards *lex ferenda*. The objective is to update the old concept of Refuge and submit it to a stringent legal framework. It has shown its success in Switzerland and can surely prove its efficiency in the future, if it is promoted enough for instance through UNESCO at the international scale.

With regards to the traffic in Cultural Property, it is important here again to distinguish between public and private actors. The actors of the art market, collectors or sellers in auction houses are surely for an important part favorable to a minimum level of scrutiny. However, the resolutions that have been adopted at the International level aim at making aware all actors involved in the art market of their responsibility in financing terrorism. Dealing with Cultural Property nowadays implies that all actors, public and private, should take a broader picture of the context; without scrutiny on the movement of cultural objects, they might access the cultural market and escape the public sphere if sold to private collectors. By escaping the public sphere, they escape from the access to everyone to Cultural Heritage and nourish the financing of terrorist groups at the origin of their excavation. As the risk is really high in time of war in artifacts rich states, one solution could be to subtract as many objects and property as possible in order to protect them from looting, under stringent conditions of restitution.

Improving a general system of prevention and potentially developing a Special status under Refugee Law for Cultural Property would generate more systematic protection and *de facto* enhance the enforcement of the Law with regards to Heritage.

However, these considerations mainly target movable property. Indeed the

protection offered to immovable property implies military or security forces intervention on site and should be the object of independent developments.

The main argument that was opposed to the Special Protection provided by the 1954 Convention was the primordially of securing civilians, taking over the importance of preserving Cultural Heritage. However, with the conflict going on in Iraq and Syria and the combat of Daesh against ancient times, States really measure the importance of Cultural Heritage in war; as a victim and as a mean of financing.

So, to the question of whether protecting cultural heritage in time of war is a luxury or a necessity, Irina Bokova addressed her concern; “Protecting culture must no longer be seen as a luxury to be left for another day. Culture is a catalyst of change, and there is no need to choose between saving human lives and preserving cultural heritage: the two are inseparable.”²¹⁹

To end with some words on the R2P principle extension to Cultural Heritage and the critics it would surely attract, I would first remind the nature of this proposal which would be an alternative of last resort and not a systematic procedure. Moreover, to address the critics against the western modern imperialism or hegemony, I would highlight the argument made by Lenzerini who stated that in 2006 and 2009, “by virtue of their permanent membership of the UN Security Council, China and Russia have repeatedly discussed R2P and have cast more votes at the UN in favour of the principle that have the great majority of Western democracies”²²⁰. Moreover, the reluctance of Barack Obama to intervene in Syria at the beginning of the conflict reveals this fear of imperialist criticism.

219 Bokova Irina, Culture on the Front Line of New Wars *Essays and Interviews*, Brown Journal of World Affairs 22 Brown J. Word Aff., 2015, p. 294.

220 Lenzerini, 2016, p. 85.

BIBLIOGRAPHY

PRIMARY SOURCES

Books

Law :

- BASLAR Kemal, *The Concept of the Common Heritage of Mankind in International Law*, 1st ed., Dordrecht: Brill Nijhoff pub., The Netherlands, 1998, p.464.
- BAZLEY Tom, *Crimes of the Art World*, 1st ed., Santa Barbara: Praeger pub., 2010, p.230.
- BLAKE Janet, *International Cultural Heritage Law*, 1st ed., Oxford: Oxford University Press, 2015, p.384.
- BORELLI Silvia, LENZERINI Federico, *Cultural Heritage, Cultural Rights, Cultural Diversity : New Developments in International Law*, Boston: Martinus Nijhof pub., July 2012, p. 440.
- CHEVALLIER Jacques, *Le Service Public : Que sais-je ?*, Paris: ed. PUF, 2015, p. 128.
- DINSTEIN Yoram, *The Conduct of Hostilities Under the Law of International Armed Conflict*, 1st ed., Cambridge: Cambridge University Press, 2004, p. 277.
- FRANCONI Francesco, GORDLEY James, *Enforcing International Cultural Heritage Law*, 1st ed., Oxford: Oxford University Press, 2013, p.280.
- GIBBON F.K, *Who Owns the Past ? Cultural Policy, Cultural Property and The Law*, London: Rutgers University Press, 2005, p. 384.
- GROTIUS Hugo, *De jure belli ac pacis. Libri tres.* J.B. Scott (ed.) , Oxford: Clarendon Press, 1925, p.658.
- HATHAWAY James, « The Law of Refugee Status », Vancouver: Butterworths pub., 2001, p. 300.

- SIVAKUMARAN Sandesh, *The Law of Non-International Armed Conflict*, London: Oxford University Press, 2014, p. 696.
- STEINBERG Marc, *International Securities Law, a contemporary and comparative analysis*, London: ed. Kluwer Law International, 1999, p. 340.

History :

- CUNO James, *Who Owns Antiquity ? Museums and the battle Over our Ancient Heritage*, Woodstock: Princeton University Press, 2008, p. 288.
- LINDSAY Ivan, *The History of loot and Stolen Art, from Antiquity until the Present Day*, 1st ed., London: Unicorn Press Ltd (ed.), United Kingdom, 2013, p.424.
- POLYBIUS, *The Histories*, Volume I: Books 1-2. Translated by W. R. Paton. Revised by F. W. Walbank, Christian Habicht. Loeb Classical Library 128. Cambridge, MA: Harvard University Press, 2010.
- RUSKIN John, *Les sept lampes de l'architecture* (trad. George Elwall), éd. Denoël, Paris : col. ESPRIT ET LES F, 1987, p. 231.
- SIMPSON Elizabeth, *Spoils of war : World War II and its aftermath : the loss, reappearance, and recovery of cultural property*, New York: H.N Abrams pub., 1997, p. 336.
- STONE Peter, FARCHAKH BAJJALY Johanne, *The Destruction of Cultural Heritage in Iraq*, 1st ed., Woodbridge: Boydell Press pub., 2008, p. 352.
- STONE Peter, *Cultural Heritage, Ethics and the Military*, London: Boydell Press, p. 240.

International Relations :

- DANNREUTHER Roland, *International Security : the Contemporary Agenda*, 2nd ed., Cambridge: Polity Press pub., 2013, p. 340.
- BELLAMY Alex, *The Responsibility to Protect: A defense*, Oxford: Oxford University Press, 2014, 204.

Articles

- BATOR Paul, “An essay on the International Trade in Art”, 34 *Stan. L. Rev.* 275, 1982.
- BOKOVA Irina, “Culture on the frontline of New Wars”, *Brown Journal of World Affairs*. Fall/Winter2015, Vol. 22 Issue 1, pp. 289-296.
- CAMPBELL Peter, “The Illicit Antiquities Trade as a Transnational Criminal Network: Characterizing and Anticipating Trafficking of Cultural Heritage,” *International Journal of Cultural Property*, Vol. 20, Issue 02, May 2013, pp.113-153.
- CHARNEY Noah , DANTON P., KLEBERG J., “Protecting Cultural Heritage from Art theft; International Challenge, Local Opportunity,” *FBI Law Enforcement Bulletin*, Mar2012, Vol. 81 Issue 3, pp. 1-8.
- DANTI Michael, “Ground-Based Observations of Cultural Heritage Incidents in Syria and Iraq”, *Near Eastern Archaeology*, Vol. 78, No. 3, Special Issue: The Cultural Heritage Crisis in the Middle East, September 2015, pp. 132-141.
- DESCH T., “Problems in the Implementation of the Convention from the Perspective of International Law.” in *Protection of Cultural Property in the Event of Armed Conflict: A Challenge in Peace Support Operations*, ed. E.R. Micewski and G. Sladek, Vienna : Military Printing Press, 2002, pp. 13–27.
- FAGAN Brian, “Introduction”, in *The Oxford Companion to Archeology*, Oxford University Press, New York, 1996, p. VIII.
- FORREST Craig, “The Doctrine of Military Necessity and the Protection of Cultural Property during Armed Conflict.” *California Western International Law Journal* 37 (2), J.S., 2007, pp. 177–219.
- FRIGO Manlio, “Cultural Property v. Cultural Heritage ; a “battle of concepts””, *International Review of the Red Cross*, Vol. 86, no. 854, June 2004, pp. 367-377.
- GERSTENBLITH Patty, “Beyond the 1954 Hague Convention”, in Robert Albro and Bill Ivey, *Cultural Awareness in the Military, Developments and*

Implications for Future Humanitarian Cooperation, 1st ed., Palgrave MacMillan pub., 2014, pp. 83-99.

- GOURDON Pearl, "Excerpts from the Memoire Le Regime Juridique et Fiscal Français des Importations et Exportations d'Oeuvres d'Art", in *Art and cultural heritage: law, policy and practice*, Cambridge University press, New York, 2006, pp. 197.
- HANSEN-LEWIS Jamie, N. SHAPIRO Jacob, "Understanding the Daesh Economy", *Perspective on Terrorism*, vol. 9, no. 4, 2015, p. 61.
- HANSON Vanessa, « Looted antiquities : Economic Opportunity for Terrorists », "Looted antiquities : Economic Opportunity for Terrorists", *Senior Theses and Capstone Projects*. Paper 35, May 13, 2015, <http://scholar.dominican.edu/senior-theses/35>.
- HEURLIN, KRISTENSEN, « International Security », in *International Relations*, vol.II – International Security, Danish Institute of International Affairs, Copenhagen, Denmark.
- HOFFMAN Barbara, "European Union Legislation pertaining to Cultural Goods" in *Art and Cultural Heritage ; Law, Policy and Practice*, 1st ed., Cambridge, Cambridge University Press, 2006, pp.191-206.
- LENZERINI Federico, "Terrorism, Conflicts and the Responsibility to Protect Cultural Heritage", *International Spectator*, June 2016, Vol. 51, Iss. 2, pp. 70-85.
- MERRYMAN John Henry, "Thinking about the Elgin Marbles", *Michigan Law Review* Vol. 83, No. 8, August 1985, pp. 1880-1923.
- MORAG M. Kersel, "From the Ground to the Buyer: A Market Analysis of the Illegal Trade in Antiquities", in N. Brodie, M.M Kersel and K.W. Tubb (eds), *Archeology, Cultural Heritage, and the Antiquities Trade*, University Press of Florida, Gainesville, 2006, pp.188-205.
- NEMETH Erik, "Cultural Security : the evolving role of art in International Security", *Terrorism and Political Violence*, Vol. 19, Iss. 1, February 2007.
- O'KEEFE Patrick, "Using UNIDROIT to avoid Cultural Heritage Disputes ; Limitation Periods", *Willamete Journal of International Law and Dispute Resolution*, vol. 14, 2006.

- PLACHTA Michael, “Council of Europe Sets up an Expert Group to Deal with Cultural Property Offences Relating to Cultural Property”, *International Enforcement Law Reporter*, 4/1/2016, Vol. 32, Iss. 4., pp. 130-132.
- PROTT Lyndel and O KEEFE Patrick J., ““Cultural heritage” or “cultural property”?”, *International Journal of Cultural Property*, Vol. 14, 2007.
- PROTT Lyndel, “International Control of Illicit Movement on the Cultural Heritage : The 1970 UNESCO Convention and Some Possible Alternatives”, *Syracuse J. Int'l L. & Com.*, 1983.
- PRZYBOROWSKA-KLIMCZAK Anna, “Les notions de ‘biens culturels’ et de ‘patrimoine culturel mondial’ dans le droit international”, *Polish Yearbook of International Law*, Vol. XVIII, 1989-1990.
- REUTER Christoph and GHADDAR Hanin Interview, “Voyage au bout de la Terreur”, *Courrier International*, Octobre/Novembre/Décembre 2015, Hors série, p. 6.
- SIMON Mackenzie, TESS Davis, “Temple Looting in Cambodia: Anatomy of a Statue Trafficking Network”, *British Journal of Criminology*, first published online June 13, 2014.
- SLY Liz, « Le fantôme de Saddam », *The Washington Post in Le Courrier International*, Hors série « Daech, la menace planétaire ; analyse de la presse étrangère », December 2015.
- VAN DER AUWERA Sigrid, “International Law and the Protection of Cultural Property in the Event of Armed Conflict: Actual Problems and Challenges », *Routledge, The journal of arts Management, Law, and Society*, no. 43, 2013, pp. 175–190.
- VRDOLJAK Ana Filipa, “Cultural Heritage, Human Rights and the Privatization of War”, A. Durbach and L. Lixinski (ed.), Hart Publishing, University of Technology, Sydney, 2016, p. 33.
- VRDOLJAK Ana Filipa, “History and Evolution of International Cultural Heritage Law: Through the Question of the Removal and Return of Cultural Objects”, November 28, 2008, Proceedings of the Expert Meeting and First Extraordinary Session of the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation, Seoul, 25 to 28 November 2008.

LEGAL DOCUMENTS

International law (chronological order)

Treaties and Conventions

- Declaration on the Rights of Indigenous People, 2007.
- UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, Paris, 17 October 2003.
- UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons supplementing the United Nations Convention against Transnational Organized Crime, New York City, 12 December 2000.
- Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, adopted on 26 March 1999, available at : <http://www.icrc.org/ihl.nsf/FULL/590?OpenDocument>
- Rome Statute of the International Criminal Court, Rome, 17 June 1998.
- UNESCO, Information Document Glossary on World Heritage Terms, June 1996.
- UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Rome, 25 June 1995.
- United Nations Declaration on measures to eliminate International Terrorism, 1994.
- UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972.
- UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Paris, 14 November 1970.
- Protocol to the Convention on the Definition of Refugee Status, 1967.
- United Nations International Covenant on Economic, Social and Cultural Rights,

New York, 1966.

- Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954.
- First Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954.
- International Law Commission, Draft Code of Offences against the Peace and Security of Mankind, 1954, never adopted.
- Convention on the Definition of Refugee Status, 1951.
- Geneva Conventions, 1949.
- Universal Declaration of Human Rights, Paris, 1948.
- United Nations Charter, San Francisco, 1945.
- League of Nations, Convention for the Prevention and Punishment of terrorism, 1937.
- Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907.
- Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863.

Resolutions and Declarations

- UNODC, Draft Doha Declaration on integrating crime prevention and criminal justice into the wider United Nations agenda to address social and economic challenges and to promote the rule of law at the national and international levels, and public participation, on 31 March 2015.
- UNODC, General Ass. Resolution 68/186, Strengthening crime prevention and criminal justice responses to protect cultural property, especially with regard to

its trafficking, on 18 December 2013.

- UNODC, General Ass. Resolution 66/180, Strengthening crime prevention and criminal justice responses to protect cultural property, especially with regard to its trafficking, on 30 March 2012.
- UNODC, Salvador Declaration on Comprehensive Strategies for Global Challenges: Crime Prevention and Criminal Justice Systems and Their Development in a Changing World, on April 2010.
- UNODC, General Ass. Resolution 2010/19, Crime prevention and criminal justice responses to protect cultural property, especially with regard to its trafficking, on 20 April 2010.
- General Assembly, A/63/677, Implementing the Responsibility to Protect, 12 2009.
- ECOSOC Resolution 2008/23 Protection against trafficking in cultural property, on 24 July 2008.
- ECOSOC Resolution 2004/34 Protection against trafficking in cultural property, on 21 July 2004.
- General Assembly, A/Res/60/1, 2005 World Summit Outcome.
- S/RES/2233 (2015), Adopted by the Security Council at its 7495th meeting, on 29 July 2015.
- S/RES/2199 (2015), Adopted by the Security Council at its 7379th meeting, on 12 February 2015.
- S/RES/2253 (2015), Adopted by the Security Council at its 7587th meeting, on 17 December 2015.
- S/RES/2170 (2014), Adopted by the Security Council at its 7242nd meeting, on 15 August 2014.
- S/RES/1566 (2004), Adopted by the Security Council at its 5053rd meeting, on 8 October 2004.

- S/RES/1483 (2003), Adopted by the Security Council at its 4761st meeting, on 22 May 2003, Preamble.

European Law

- Council Regulation (EC) No. 116/2009, adopted on December 18, 2008.
- Conclusions of the Council and of the Representatives of the Governments of the Member States of 16 December 2008, meeting within the Council, on the promotion of cultural diversity and intercultural dialogue in the external relations of the Union and its Member States.
- Treaty on the Functioning of the European Union, 2007.
- Council of Europe, Convention on the Prevention against Terrorism, Warsaw, 2005.
- Council common position 2003/495/CFSP, adopted on July 7, 2003, on Iraq and repealing Common Positions 96/741/CFSP and 2002/599/CFSP.
- Repeals Council Regulation (EEC) No. 3911/92 of 9 December 1992 on the export of Cultural Goods OJ L 395.
- Council Directive 93/7/EEC/ of 15 March 1993
- Council of Europe, European Convention on Offenses Related to Cultural Property, Delphi, June 1985.
- European Cultural Convention CETS No. 018, Paris, 19 December 1954, in force 5 May 1955.
- European Convention for the Protection of the Architectural Heritage, CETS No.121, 3 October 1985, in force 1 December 1987

Domestic law

- The “Protection of Cultural Property Act” of the Montenegrin State, July 27, 2010.
- Loi sur la liberté de la création, de l'architecture et du patrimoine, Art. L. 111-10
- Constitution of the Republic of Iraq, 15 October 2005.

- Iraqi Law Prohibiting the Smuggling of Antiquities No.40 of 1926
- Iraqi Antiquities Law No. 59 of 1936 and the two Amendments (No. 120 of 1974 and No. 164 of 1975)
- Iraqi Antiquities and Heritage Law No. 55 of 2002

CASE LAW

- *Kozacioğlu v. Turkey* ([GC], no. 2334/03, 19 February 2009).
- *Debelianovi v. Bulgaria* (no. 61951/00, 29 March 2007).
- *Mayagna Awas Tigni Community v. Nicaragua*, (Inter American Court of Human Rights, 2001).
- *Beyeler v. Italy* ([GC], no. 33202/96, ECHR 2000-I).
- ICTY, *The Prosecutor v. Dusko Tadic*, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995).
- *Commission c. Italie* (aff. 7-68, Rec., CJCE, 10 décembre 1968).

SECONDARY SOURCES

DOCUMENTARIES

- SCHWARZ Geraldine ; “Du Moyen-Orient à l'Europe, un vaste trafic d'oeuvres d'art”, info.arte.tv, 2014, available at <http://bit.ly/1wXYhPx>
- BOLZINGER Romain, “Speciale Investigation; Traffic d'art, Le Trésor de Guerre du terrorisme”, 20 juin 2011, canal +, Tac presse, available at : <https://www.youtube.com/watch?v=AVCdW8VlsfU>

ONLINE RESOURCES

Online articles

- BACQUE Raphaëlle, EVIN Florence, “A Palmyre : Ils ont tué l'archéologue !”, 24.08.2015, *Le Monde*, available at : http://www.lemonde.fr/proche-orient/article/2015/08/24/ils-ont-tue-l-archeologue_4734717_3218.html (consulted on 13 April 2016).
- BOKOVA Irina, UNESCO, « Director-General Irina Bokova firmly condemns the destruction of Palmyra's ancient temple of Baalshamin, Syria », speech 24.08.2015, available at : <http://en.unesco.org/news/director-general-irina-bokova-firmly-condemns-destruction-palmyra-s-ancient-temple-baalshamin> (consulted on 03 April 2016).
- BOWCOTT Owen , « ICC's first cultural destruction trial to open in The Hague », *The Guardian*, Sunday 28, February 2016, available at : <https://www.theguardian.com/law/2016/feb/28/iccs-first-cultural-destruction-trial-to-open-in-the-hague> (consulted on 28 February 2016).
- CURRY Andrew, “Here are the Ancient sites ISIS has damaged and destroyed”, *National Geographic news*, Sept. 2015, available at : <http://news.nationalgeographic.com/2015/09/150901-isis-destruction-looting-ancient-sites-iraq-syria-archaeology/> (consulted on 8 March 2016).
- DRENNAN Justine, “The Black Market Battleground”, *Foreign Policy*, October 17, 2014, available at : <http://foreignpolicy.com/2014/10/17/the-black-market-battleground/> (consulted on 20 April 2016).
- GERSTENBLITH Patty, “The Case for Change in International Law in the Aftermath of the 2003 Gulf War.” Conference on Protecting Cultural Heritage: International Law after the War in Iraq, Chicago, 2006, available at : <http://culturalpolicy.uchicago.edu/papers/2006-protecting-heritage/Gerstenblith.paper.pdf> (consulted on 10 April 2016).
- LEVITT Matthew, « Terrorist financing and the Islamic State », Testimony submitted to the House Committee on Financial Services, November 13, 2014, available at : <https://www.washingtoninstitute.org/uploads/Documents/testimony/LevittTestimony20141113.pdf> (consulted on 5 March 2016).

- LOSTAL Marina, “The first of its kind: the ICC opens a case against Ahmad Al Faqi Al Mahdi for the destruction of cultural heritage in Mali”, October 2, 2015, *Global Policy Forum*, available at : <https://www.globalpolicy.org/component/content/article/163-general/52814-icc-opens-a-case-for-the-destruction-of-cultural-heritage-in-mali.html> (consulted on 28 February 2016).
- MACKENZIE Simon and DAVIS Tess, “Temple Looting in Cambodia: Anatomy of a Statue Trafficking Network », *British Journal of Criminology Advance Access published*, June 13, 2014, available at : <http://bjc.oxfordjournals.org/content/early/2014/06/13/bjc.azu038.full.pdf+html> (consulted on 13 May 2016).
- MARTINEZ Jean-Luc, *Cinquante Propositions Françaises pour protéger le patrimoine de l'Humanité*, Rapport au Président de la République sur la protection du patrimoine en situation de conflit armé, November 2015, p.34., available at : <http://www.elysee.fr/assets/Uploads/Cinquante-propositions-francaises-pour-protoger-le-patrimoine-de-lhumanite.pdf> (consulted on 30 November 2015).
- MEIGNAN Géraldine, “Trafic d'antiquités: l'ombre de Daech sur le marché de l'art”, *L'Express*, online journal, posted on 28.08.2015, available at : http://www.lexpress.fr/culture/art/trafic-d-antiquites-l-ombre-de-daech-sur-le-marche-de-l-art_1709720.html (consulted on 20 October 2015).
- TOMAN Jiri, *Cultural Property in War : Improvement in Protection ; Commentary on the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, Unesco pub., World Heritage series, Paris, 2009, available at : <http://unesdoc.unesco.org/images/0018/001864/186496e.pdf> (Consulted on 14 March 2016).
- Unknown, “Danti’s Inference: The Known Unknowns of ISIS and Antiquities Looting,” posted on CHASING APHRODITE, November 18, 2014, available at : <https://chasingaphrodite.com/2014/11/18/dantis-inference-the-known-unknowns-of-isis-and-antiquities-looting/> (consulted on 10 February 2016).
- VERNER Robin, “L’islam et le crépuscule des idoles (ou pourquoi Daech détruit aveuglément ses racines)”, *Slate magazine*, 1st October, 2015, available at : <http://www.slate.fr/story/107193/islam-le-crepuscule-des-idoles> (consulted on 1st October 2015).
- WYNDHAM Constance, “The National Museum of Afghanistan”, in *Culture*

and Conflict online, available at :
<http://www.cultureandconflict.org.uk/projects/the-national-museum-of-afghanistan/> (consulted on 06 June 2016).

Online Legal Documents

European legislation

- CECOJI-CNRS, “Study on preventing and fighting illicit trafficking in cultural goods in the European Union”, UMR 6224 Contract No. Home/2009/ISEC/PR/019-A2 Final Report – October 2011, available at : http://ec.europa.eu/home-affairs/doc_centre/crime/docs/Report%20Trafficking%20in%20cultural%20goods%20EN.pdf (consulted on 1st May 2016).
- ECHR Research Division, “Cultural Rights in the case-law of the European Court of Human Rights”, January 2011, available at : http://www.echr.coe.int/Documents/Research_report_cultural_rights_ENG.pdf (consulted on 10 March 2016).
- European Commission, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS, Towards an Integrated approach to Cultural Heritage of Europe, 2014, available at : http://ec.europa.eu/culture/library/publications/2014-heritage-communication_en.pdf (consulted on 28 April 2016).
- European Commission website, « Trafficking of cultural goods » section in Culture> Policy> Culture Sector Support, available at : http://ec.europa.eu/culture/policy/culture-policies/trafficking_en.htm (consulted on 29 April 2016).
- European Commission, Annex I of the Commission Implementing Decision on the 2013 Special Measure for the Syrian population and the host communities in Jordan “Helping the Syrian population cope with the effects of the crisis and prepare for early recovery”, October 10, 2013, CRIS number: ENPI/2013/024-892, available at :

http://ec.europa.eu/europeaid/documents/aap/2013/af_aap-spe_2013_jor.pdf
(consulted on 29 April 2016).

- European Committee on Crime Problems, Memorandum on the Revision of the 1985 European Convention on Offences relating to Cultural Property, 7 April 2015, available at :

[http://www.coe.int/t/dghl/standardsetting/cdpc/Bureau%20documents/CDPC%20\(2015\)%206%20-%20e%20-%20Memorandum%20on%20the%20revision%20of%20the%201985%20European%20Convention%20on%20Offences%20Relating%20to%20Cultural%20Property.pdf](http://www.coe.int/t/dghl/standardsetting/cdpc/Bureau%20documents/CDPC%20(2015)%206%20-%20e%20-%20Memorandum%20on%20the%20revision%20of%20the%201985%20European%20Convention%20on%20Offences%20Relating%20to%20Cultural%20Property.pdf) (consulted on 03 May 2016).

- European Parliament, Opinion of the Committee on Culture and Education, on the role of the EU within the UN – how to better achieve EU foreign policy goals (2015/2104(INI)), available at :

<http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&reference=PE560.704&format=PDF&language=EN&secondRef=03> (consulted on 28 April 2016).

International legislation and documents

- ICOM, The Emergency Red List of Iraqi Antiquities at Risk, 2015 available at :

http://icom.museum/fileadmin/user_upload/pdf/Press_Releases/Red_List_Iraq_EN_2015.pdf (consulted on 02 March 2016).

- INTERPOL Database for stolen works of art, available at :

<http://www.interpol.int/notice/search/woa> (consulted on 02 March 2016).

- OHCHR Website, “Intentional destruction of Cultural Heritage as a Violation of Human Rights”, available at :

<http://www.ohchr.org/EN/Issues/CulturalRights/Pages/IntentionalDestructionofCulturalHeritage.aspx> (consulted on 08 April 2016).

- UN, Report of the independent expert in the field of cultural rights, Farida Shaheed, A/HRC/17/38, The right of access to and enjoyment of cultural heritage, Statement at the 17th session of the Human Rights Council, available

at :

<http://www.ohchr.org/EN/Issues/CulturalRights/Pages/AnnualReports.aspx>
(consulted on 25 February 2016).

- UN, Consultation organized by the Independent Expert in the field of cultural rights, Ms. Farida Shaheed, Palais des Nations, Room XXI, 10 February 2011 (consulted on 25 February 2016).
- United Nations General Assembly, Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, Sixth session, (28 January – 1 February 2002), Annex II, art. 2.1., available at : <http://www.un.org/documents/ga/docs/57/a5737.pdf> (consulted on 12 May 2016).
- UNESCO, “Heritage and Cultural Diversity at Risk in Iraq and Syria,” News release, December 3, 2014, available at :
<http://unesdoc.unesco.org/images/0023/002325/232562e.pdf> (consulted on October 2015).
- UNODC, Open-ended intergovernmental expert group meeting on protection against trafficking in cultural property, Vienna, Austria, 24-26 November 2009, report available at : <http://www.unodc.org/unodc/en/organized-crime/trafficking-in-cultural-property-expert-group-2009.html> (consulted on 13 February 2016).
- UNESCO, « Impunity for war crimes against cultural heritage must stop », September 26, 2015, available at : <https://en.unesco.org/news/impunity-war-crimes-against-cultural-heritage-must-stop> (consulted on 28 February 2016).
- UNESCO Report on the Implementation of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Two Protocols, 2005–2010,
http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/periodic_report_2011_en.pdf (consulted on 05 March 2016).
- UNESCO, Information Kit, “The fight against the illicit trafficking of cultural objects ; the 1970 Convention Past and Future”, 15 March 2011, available at : <http://unesdoc.unesco.org/images/0019/001916/191606E.pdf> (consulted on

15 April 2016).

- UNESCO Website, “Unanimously adopting UN Resolution 2199 (2015), Security Council condemns trade with Al Qaida associated groups, Threatens further targeted sanctions”, 12 February 2015, available at : <http://www.un.org/press/en/2015/sc11775.doc.htm> (consulted on October 2015).
- UNESCO database of National Cultural Heritage Laws, available at : <http://www.unesco.org/culture/natlaws/> (consulted on 02 March 2016).
- UNESCO, “Why is the UNESCO-WCO Model Export Certificate needed ?”, available at : <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/legal-and-practical-instruments/unesco-wco-model-export-certificate/faqs/#c163827> (consulted on 10 May 2016).
- United Nations General Assembly, Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, Sixth session, (28 January – 1 February 2002), Annex II, art. 2.1., available at : <http://www.un.org/documents/ga/docs/57/a5737.pdf> (consulted on 08 June 2016)

AUDIO

- HARDY, S A and Adams, P. 2015: “Conflict antiquities: Tracing the profits of doom”. Late Night Live [ABC], 29th July. [[mp3](#)]