THE TWO-WAY PROTECTIVE REGIME OF INTANGIBLE CULTURAL HERITAGE IN ARMED CONFLICT

—*Shivesh Saini*[*]

Abstract—The destruction of property has been dealt with in different conventions across International Humanitarian Law. However, in the light of evolving warfare, certain aspects of warfare demand evolution. One such aspect is the protection of digital intangible assets in several forms of armed conflict. The existing protection conferred to intangible assets is questionable and has been very little addressed in light of international law. Therefore, the paper seeks to demonstrate the enforceability of existing principles over intangible assets. In addition, there is explicit dependability of protection of these intangible cultural assets on cyber security. The cyber technology of contemporary times is capable of adversely affecting the opponent's social and cultural assets. Recognising the paradigm shift, the paper entails the comprehensive efforts that should be realised to expand the applicability of international law.

Keywords: International Humanitarian Law, Intangible assets, cultural heritage, cyber warfare, cultural property.

INTRODUCTION

The emergence of Intangible property, along with the evolution of warfare, stress regulation to much extent. However, the fact that humanitarian regulations were conceived and drafted long before the advent of offensive cyber warfare creates considerable uncertainty as to their pertinency. The conventions were framed in the context of two world wars, primarily attentive to saving the lives of individuals and cultural property, particularly from the

[*] Student, University School of Law and Legal Studies, GGSIPU.

revulsions of kinetic warfare.[434] Although this foundation will not lose its relevance in the coming future, considering the military complexity of today's age, it is imperative to add dimension to this ever-developing legal arena.

In this regard, the ICC charged Ahmad Al Faqi Al Mahdi, an Islamic scholar for destroying cultural property.[435] He was the first person to be charged with destroying cultural heritage and monuments of historical importance in Mali. It is vital to trace the jurisprudence of this case as it could set up a potential example for prosecuting the offenders for the destruction of Intangible assets. The destruction could be caused by cyber-attacks which pose an inescapable hazard to this new form of heritage. This note principally suggests the active applicability of existing humanitarian laws on digitalised assets that should be considered as archives. Countries in contemporary times are making active efforts to digitalise their cultural heritage to confer them protection from terrorist attacks, natural disasters, and any other aggression.[436] In light of the malicious cyber intent in the last few years, the article seeks to initiate a new deliberation centred around the existing norms on state-led cyber occurrences aimed at destroying the cultural traditions of the adversary. The article further undertakes that the regulations of IAC and NIAC do not vary significantly (in the case of Non-state actors) as to constitute liability; therefore, the suggestions could be functional in both situations of armed conflict.

Against this background, it intends to convey the delinquencies in accommodating modern-day warfare with age-old regulations framed in an altogether different context. For this reason, the article presents possible scenarios and interpretations to bridge the gap between the two and allow for better regulation of present-day cyber warfare.

This article aims to frame the issue to serve as the starting point for a more in-depth conversation among interested parties about clarifying current rules that are required or creating new frameworks. To achieve this, the article presents some hypothetical scenarios in which state-led cyber operations conducted during armed conflict interfere with activities critical to the functioning of modern interconnected societies in order to first map the current cyber threat landscape.

The following section explores whether and to what extent the currently in place legal structures are adequate to safeguard society against the repercussions of potential cyber conflict. While international humanitarian law (hereinafter, 'IHL') will be the main topic, the article also looks at how International Criminal Law may apply and be relevant in armed conflict circumstances. The

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[434] Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 216 (UNESCO).

[435] *Prosecutor v Ahmad Al Faqi Al Mahdi* ICC-01/12-01/15.

[436] Alonzo C Addison, *New Heritage: New Media and Cultural Heritage* (Routledge 2007) 27-29.

final section offers potential future directions based on these results to serve as a jumping-off point for in-depth talks with all pertinent stakeholders.

THE APPLICABILITY OF EXISTING LAWS ON INTANGIBLE ASSETS

International Humanitarian Law is the prime set of regulations that could regulate the emerging frequent cyber-attacks on Intangible cultural assets. It is guided by the maxim of Article 35 of Additional Protocol 1 (AP I), which illustrates that the right of the parties to choose the conflict must not be unlimited but should be limited and regulated.[437] The prime focus of such a principle is to avoid alleviating suffering, particularly for civilians. This can be inveterate by several principles, such as - (a) proportionality (b) distinction, and (c) military necessity. Given the inspiration for these fundamental principles of IHL, it is not difficult to argue that disproportionate cyber-attacks on the intangible cultural property of public concern are prohibited and forbidden, regardless of the nature of the conflict.

It should be understood that the international protection regime concerning Intangible Cultural Heritage (hereinafter, 'ICH') will be more complex and challenging than the traditional notion that was confined to cultural property only. This means that international law mainly deals with eminent monuments and movable objects with a distinctly religious character.[438] The protection of ICH has been undertaken under UNESCO's Convention on Safeguarding Intangible Cultural Heritage of 2003. It has been defined under Article 2(1) of the convention as practices, representations, expressions, knowledge, skills, and instruments that might be related to any community or a person. This heritage generally passes through generations to consolidate their identity and maintain the continuity of their rituals and customs.[439]

By examining the definition thoroughly, one could conclude that the majority of ICH could fall into the domain of recognised groupings already recognised under previous Geneva and Hague conventions of 1949 and 1954, respectively, as it includes musical instruments, sacred groves, forms of dances and other spiritual assets. Besides, even though some assets are intangible, they satisfy some material elements that justify the applicability of previous conventions on these assets as they both are interconnected and dependent on each

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[437] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977) 1125 UNTS 3 (ICRC) art 35.

[438] AF Vrdoljak, 'Minorities, Cultural Rights and the Protection of Intangible Cultural Heritage' (2005) ESIL <www.esil-sedi.eu/wp-content/uploads/2018/04/Vrdoljak09-05.pdf> accessed 6 February 2023.

[439] Convention for the Safeguarding of the Intangible Cultural Heritage (adopted on 17 October 2003) 2368 UNTS 1 art 2(1).

other for their existence. For example, the traditional dance in the Royal place of Vietnam or the progression of Lord Jagannatha from the Shree Jagannatha temple. In conclusion, the fortification of buildings of cultural heritage will ultimately and indirectly lead to the protection of such heritage.[440] The article emphasises that an integrated approach shall be taken regarding their protection and administration. The Istanbul Declaration of 2002 even highlighted that there exists a dynamic link and close interaction between tangible and intangible cultural assets. Traditional forms of cultural property, such as monuments, holy sites, archaeological digs, and digitalised forms of cultural property, have been revolutionised by the emergence of the internet and the expansion of digital technologies. This development also gave rise to a new form: digital cultural property, also known as "born-digital cultural heritage."

Regarding the legal regulations of IHL, the initial question arises whether the definition of 'attack' in Additional Protocol (hereinafter, 'AP1') could be appropriately applicable to cyber-attacks that are meant for destroying ICH. The threshold can be satisfied by signifying that any systematic act that foresees the obliteration of injury to a person or an object shall qualify as an 'attack' under Article 49(1).[441] However, the question remains as to what happens if the cyber-attack only impairs the functionality of an attacked object instead of destroying it completely. The majority of experts in this regard maintained that it would amount to an attack if the affected system demands restoration in any way. The ICRC, on the same lines, supported the broader interpretation of the definition of 'attack'. It maintains that the object and purpose of IHL are to assure the protection of civilians and the reprisal of their objects in armed conflict. Therefore, they seek the enforceability of Article 31 of the Vienna Convention on Law of Treaties, which preserved that the treaty shall be interpreted in the light of its objects, purposes and its ordinary meaning.[442]

This definition of attack can act as a default rule for constituting the liability of an aggressor under other relevant conventions. Another relevant recourse is the *Nicaragua* judgement to determine whether the act in question can be said to be an 'attack' on ICH. The ICJ stipulates that the 'scale' and 'effect' shall be considered to determine the nature of an act.[443] They are the shorthand threshold which deals with the qualitative and quantitative factors to analyse

[440] Laurent Gisel, Tilman Rodenhäuser and Knut Dörmann, 'Twenty Years on: International Humanitarian Law and the Protection of Civilians Against the Effects of Cyber Operations During Armed Conflicts' (September 2020) International Review of the Red Cross.

[441] Michael N. Schmitt, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (2nd edn, Cambridge University Press 2017) 417.

[442] International Committee of the Red Cross, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (31 October 2015) <https://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts> accessed 30 November 2022.

[443] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)* (Merits) Judgment [1986] ICJ rep 14 [195].

the act in question.[444] Therefore, it can be concluded that if the cyber-attack successfully institutes the required scale and effect compared to non-cyber operations, then it should be qualified to be an attack, and there would be no rational basis to exclude such cyber operations within the scope of an attack. Hereafter, if a state or any non-state entity providing formal training to a group of hackers against any state shall amount to an attack within the meaning of Article 49(1).

As the definition of attack is the initial phase in constituting liability, it will be easier to comprehend the liability in the context of other conventions of IHL. The Brussels Convention of 1874 asserts that annihilating traditional works of science, Art, and history must constitute accountability before the competent legal tribunal.[445]

Similarly, Article 56 of the Hague Convention,1907 affirms that the property of Municipalities, religious establishments, Works of science, and state property shall be treated as a private estate that shall not be subjected to the opponent's aggression.[446] Article 27 of the same convention stipulates that all the necessary measures must be taken about sparing the building of religious and scientific characteristics, and these protected buildings should be demarcated.[447] Article 46, in an identical way, held that:- Family honours and rights, individual lives and private property, as well as religious convictions and practices, must be respected at all costs, and private property cannot be confiscated in any manner.[448]

The same declaration has also been given in Articles 75 and 4(1) of Additional Protocols 1 and 2 of the Geneva Conventions respectively.[449] These articles, which shelter the physical and intellectual possessions, should be read collectively with UNESCO Convention 2003.

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[444] ibid.

[445] DB, 'The Brussels International Declaration of 1874 Concerning the Laws and Customs of War' 14 (164) International Review of the Red Cross' <https://international review.icrc.org/sites/default/files/S002086040001860Xa.pdf > accessed 30 November 2022.

[446] International Conferences (The Hague), Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 October 1907 (entered into force 26 January 1910) art 56.

[447] International Conferences (The Hague), Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 October 1907 (entered into force 26 January 1910) art 27.

[448] International Conferences (The Hague), Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 October 1907 (entered into force 26 January 1910) ibid art 46.

[449] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977) 1125 UNTS 3 (AP1) art 75; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted on 8 June 1977) 1125 UNTS 609 art 4(1).

The specific words 'practice and customs' in the context of the UNESCO convention relate to oral traditions and knowledge.[450] It refers implicitly to the custom of passing knowledge from generation to generation for the continuation and perseverance of knowledge. Such cultural practices are also entitled to protection under ILO Convention No. 169 and the United Nations Declaration on the Rights of Indigenous People.[451] Thus, it is mandatory to deconstruct the importance of 'preservation' and 'transmission' for its bearers and their generations. The protection of ICH is not just essential for a few individuals of concerned individuals, but it is obligatory for the existence of a 'nation' itself.

The Hague Protocol of 1954 and its additional protocols are *lex specialis* that aim to protect the tangible cultural heritage in warfare. It seeks to protect cultural property of great importance to people. There is an absence of common ground as to the threshold of importance. Regarding this, the prevailing view of scholars is that it shall be the state's responsibility to determine the monuments of its national status.[452] The additional protocols of 1977 strengthened the protection mechanism of cultural property. However, a little delinquency persists as additional protocols refer to the protection of 'cultural and spiritual heritage',[453] which is disparate to the notion of the 1954 Hague convention that is concerned with 'the object of great importance'.[454]

To this end, the ICRC upheld that the rudimentary idea is the same. The 2003 UNESCO Convention is more similar to the 1954 Hague Convention as appropriate protection was given to cultural property while preparing nominations for the 2003 UNESCO Representative List of the Intangible Cultural Heritage of Humanity that is of significant importance to the people.[455] The list was identical to the 1954 Hague Convention list and the 1972 World UNESCO lists, which serve as a guide for state forces to follow in the case of tangible cultural heritage.[456] The cultural sites on these two lists are protected by Article 85(4)(d) of AP1, which prohibits violations of provisions related to cultural heritage conservation because there is a symbiotic relationship between tangible and intangible heritage. Due to the similarities between

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[450] Christoph Antons and Willian Logan, *Intellectual and Cultural Property and the Safeguarding of Intangible Cultural Heritage* (Routledge 2018).

[451] United Nations Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) UNGA Res 61/295.

[452] Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 216 (UNESCO).

[453] J Blake, 'Introduction to the Draft Preliminary Study on the Advisability of Developing a Standard-Setting Instrument for the Protection of Intangible Cultural Heritage' (*UNESCO*, 2001) <www.ich.unesco.org/doc/src/05358-EN.pdf> accessed 6 February 2023.

[454] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977) 1125 UNTS 3 (AP1) arts 53 and 85(4)(d).

[455] Convention for the Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003) 2368 UNTS 1 [285].

[456] ibid.

Hague Conventionand lists, it could be argued that similar protection should be accorded to cultural properties enshrined in the 2003 UNESCO Representative List of Humanity's Intangible Cultural Heritage. Such a conclusion can be supported by the fact that both lists contained the same historical monuments of public importance.

Similarly, the world heritage committee introduced a new list of cultural landscapes which incorporated within itself the few forms of Intangible cultural heritage within its protection.[457] The list was in response to the criticism from indigenous societies, which held that the natural and cultural heritage should be distinguished as it will be an inappropriate construct in the context of Non-western societies.[458] Since tangible and intangible assets are typically coterminous, the Hague Convention of 1954 shall apply to ICH. This would strengthen the legal regime over the same set of cultural properties, irrespective of whether they are tangible or intangible. As argued, destroying a particular material object will also harm its intangible side, which could impede the community's cultural and customary customs. This eradication of culture will be termed 'cultural cleansing', and culpability should be enforced correspondingly.

A. The Interrelation of Intangible Heritage and Cyber Attacks

The conservation of ICH and the cyber protection mechanism of a state are two aspects of the same coin and are directly correlated. Like almost everything, the digital revolution has revolutionised the arena of ICH. Now, states, for their convenience, can convert tangible or intangible heritage into digitalised information such as – 3D Visuals, Scanned texts and chronicles and audio recordings. The platforms such as YouTube act as the largest collection of moving photographs with the nature of 'continuing value'. Similarly, Wikipedia can be called a digital storehouse of information that has cultural importance. Additionally, examples such as CyArk is a digital archive created after the destruction of the Bamiyan Buddhas of Afghanistan to digitally store documents related to the world's most spectacular cultural places. Motion capture technology has enabled the digitisation of traditional Japanese dances, allowing master performers to study their craft in a new way and enabling the preservation of cultural artefacts.

Iso Huvila developed participatory archives by using MediaWiki software to convert the digital archives of two Finnish cultural heritage sites, the Saari

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[457] 'Cultural landscapes' (UNESCO, 2015) <https://whc.unesco.org/en/culturallandscape/#5> accessed 7 February 2023.

[458] United Nations Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) UNGA Res 61/295 [6].

Manor in Mietoinen and Kajaani Castle, into participatory spaces for archive users.[459]

The Huvila model is an appropriate example of how digital archives can engage future generations in their cultural roots. Likewise, digital protection of China's intangible cultural heritage has developed rapidly, with great success and numerous accomplishments, such as the digital protection of the Silk Road cultural heritage project in 2004, the research project of the world intangible cultural heritage protection in cooperation with Samsung galaxy Co., Ltd. in 2004, and the 'Memory of the World in Lijiang, China' project in 2005.As it evolves, however, this heritage is also threatened by cyber threats that aim to destroy these values based on their religious and political beliefs. Therefore, the law of armed conflict shall necessarily apply in both non-international and international armed conflicts. For this purpose, cyber-attacks shall be incorporated under the definition of armed conflict. Even in the case of the absence of any concrete regulation, consideration shall be given to Marten's clause of the Geneva Conventions and its Additional Protocols.[460]

Marten's clause specifies that even without any complete code, the belligerents and civilians shall be protected by the principles and regulations of nations recognised by civilised society and driven through public conscience.[461] Consequently, the Martens clause reflects customary international law that ensures nothing shall take place in a legal vacuum.

Although the digitalised cultural assets and cyber-attacks could fall within the domain of IHL, the question persists as to what obligations it will have on perpetrators. The obligations will become more critical where the cultural asset is present in its intangible form. For example, YouTube contains traditional Mongolian throat singing and traditional American- Indian dance. The answer rests on the nature of the armed conflict whether it is of an international character or a non-international nature. As far as the Armed disputes of international nature are concerned, there should be the involvement of two or more states as opponents as per common Article 2 of the Geneva Conventions.[462] Besides, there shall be the presence of sophisticated and organised armed groups which should be under the command of one of the states engaged in hostility. However, delinquency persists regarding whether non-state

[459] Kozaburo Hachimumura, *Digital Archives of Intangible Cultural Properties* (IEEE 2017) 55.

[460] Frits Kalshoven, *Constraints on the Waging of War* (Martinus Nijhoff Publishers 1987) 14.

[461] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949) 75 UNTS 31 art 63; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949) 75 UNTS 85 art 62; Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949) 75 UNTS 135 art 142; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949) 75 UNTS 287 art 158.

[462] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949) 75 UNTS 287 art 2.

armed groups acts can be accredited to the state. Concerning this, ICTY in the *Tadic*case originated the 'overall control' test to ascertain whether the Bosnian Serbs were under the control of the Federal Republic of Yugoslavia.[463]

The tribunal concluded that there existed sufficient influence of the state, which confirmed the existence of International armed conflict in that case.[464] Applying a similar test in cyber warfare, it could be ascertained that if the state authorities exercised a certain level of influence on hackers who destroyed and caused significant damage to ICH, then the regulations pertaining to the international armed conflict could be applied as it could amount as an attack under Article 53 of additional protocol 1 and Hague convention of 1954.

Regarding the Armed conflict of non-international nature (hereinafter, 'NIAC'), there shall be hostility between government forces and non-governmental organised armed groups that are not affiliated with the state.[465] However, mere disturbances, riots and tensions will not render the situation of non-international armed conflict.[466] Going by the stance, intermittent and erratic cyber-attacks would not cause the situation of NIAC.

On the threshold question, ICTY in the *Tadic* case held that there should be a protracted conflict between organised insurgent groups.[467] Therefore, the standards regarding the NIAC involve two elements – (a) Intensity and (b) organised armed groups.[468] Regarding the threshold of intensity as a criterion, ICTY in the past considered factors such as displacement of people,[469] recurrence and gravity[470] and the types of weapons employed.[471] For cyber-attacks to be categorised as NIAC, the organisation must be well-armed and have a command structure that is sophisticated enough to execute extended military operations. Even individuals functioning "collectively" but not "cooperatively" cannot be said to be under proper direction and organisation if this is the case.

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[463] *Prosecutor v Dusko Tadic* (Judgement in Appeal) ICTY-94-1-A (15 July 1999) [131], [145], [162].

[464] ibid [131], [140], [145].

[465] *Prosecutor v Dusko Tadic* (Decision on the Defence Motion for Interlocutory Appeal) ICTY-94-1-AR72 (2 October 1995) [67]-[70].

[466] Christoph Antons and Willian Logan, *Intellectual and Cultural Property and the Safeguarding of Intangible Cultural Heritage* (Routledge 2018); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 art 1(2).

[467] *Prosecutor v Dusko Tadic* (Decision on the Defence Motion for Interlocutory Appeal) ICTY-94-1-AR72 (2 October 1995) [70].

[468] *Prosecution v Slobodan Milosevic* (Judgement) ICTY-IT-02-54-A-R77.4 (13 May 2005) [16]-[17]; *Prosecution v Furundzijia* (Judgement) ICTY-IT-95-17/1-A 21 (21 July 2000) [59].

[469] *Prosecution v Haradinaj* (Judgement) ICTY-IT-04-84-A (19 July 2010) [49].

[470] *Prosecution v Mile Mrksic* (Judgement) ICTY-IT-95-13/1-A (5 May 2009) [419]; *Prosecution v Fatmir Limaj et al* ICTY-IT-03-66-A (27 September 2007) [135].

[471] *Prosecution v Mile Mrksic* (Judgement) ICTY-IT-95-13/1-A (5 May 2009) [419]; *Prosecution v Fatmir Limaj* ICTY-IT-03-66-A [39]-[40].

The majority of these groups act digitally with a degree of anonymity rather than physically executing the attack.

Therefore, it is impossible to determine whether the group in issue meets the NIAC standard, as the mere fact that they are targeting the state is insufficient to trigger the application of humanitarian law. Additional issues, such as the reluctance of states to acknowledge the occurrence of a non-international armed conflict and the anonymity of rebels, will make it difficult to apply the law. Besides, Additional Protocol II cannot be applied in conflicts consisting of two non-state actors and it mandates the control of some territory.[472] The control of cyber activities alone cannot equate to territorial control. To date, only one provision of the Hague Agreement requires non-state entities to respect cultural heritage during conflict.[473]

In addition to these limitations, the exclusion of Military necessity further restricts the application of humanitarian law within the NIAC. The deficiencies can be remedied using International Criminal Law.[474] Despite the fact that ICL applies to armed conflict and non-state armed actors, its applicability to cyber operations that target intangible assets remains contested and disputed. Nonetheless, it is the greatest solution for imposing accountability on rebels in non-international armed confrontations.

B. Protection of Intangible Cultural Assets under International Criminal Law

After World War II, efforts were made to make criminally liable the perpetrators who were engaged in the destruction of public and private estates. The Nuremberg trials marked the beginning of such efforts when the Nazis were sentenced for plundering and destroying cultural property.[475] The resort to International Criminal law is essential as the present relevant conventions do not enumerate special offences that could hold the perpetrator criminally liable in a proportionate manner.

In pursuance of establishing adequate accountability, Article 3(d) of ICTY criminalises the act of destruction or damage to the institutions of religion,

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[472] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 art 1(1).

[473] Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954, art 19.

[474] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (adopted 8 August 1945) 82 UNTS 279 (EAS).

[475] UNSC 'Statute of the International Tribunal for the Protection of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991' (25 May 1993) UN Doc S/RES/827.

charity, art, and science.[476] The provision was added considering the bombardment of the famous UNESCO heritage site old town of Dubrovnik. To this end, the Rome statute defines the war crimes that could assist in imposing liability in cases related to cultural property. But further examination suggests that the current regime under the Rome statute is still unsatisfactory, and even the term 'cultural property' is not defined. It simply borrowed the terms from the previous Geneva and Hague Conventions. In accordance with Article 8(2)(b)(ix) of the Rome Statute, hospitals and schools have been designated as protectors of cultural property. This protectorate status is not an upgraded level of protection, as hospitals and schools lose their protection status when their services are no longer required. In contrast, cultural property must be safeguarded despite these external circumstances. Similarly, the UNESCO convention did not hold perpetrators accountable for their actions and lacked enforcement tools. The appropriate response under these circumstances is to prosecute the perpetrator for crimes against humanity.

The recent precedents of ICTY held that the destruction of cultural heritage amount to persecution on religious grounds.[477] Therefore, there is no justification for excluding intangible cultural assets from the definition of "cultural legacy" if they have been destroyed for religious or political reasons. Article 15(1) of the International Covenant on Economic, Social, and Cultural Rights, which states that everyone has the right to participate in cultural life and be associated with cultural 'goods'.[478]

To this end, even the trial chamber in the famous Al-Mehndi trial held that satisfactory attention should be paid to the symbolic value of an asset destroyed in the conflict.[479] The trial chamber determined the severity of the offence committed based on the emotional distress caused to Timbuktu's residents. This similar nexus between the cultural property (tangible or Intangible) and persecution had been established in Blaskic and Kordic's judgement, where the perpetrator had the requisite intent.

The term 'persecution' has been defined as the deprivation of one's rights because of his identity.[480] However, the sole crime of persecution cannot be prosecuted in ICC as it has to be in conjoint with other offences. For this purpose, it can be in conjunction with the crimes of "other inhuman acts caused causing great suffering" that have been enshrined under Article 7 (1) (k).[481]

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[476] Rome Statute of the International Criminal Court (adopted 17 July 1988, *entered into force* 1 July 2002) 2187 UNTS 90 (ICC).

[477] *Prosecutor v Ahmad Al Faqi Al Mahdi* ICC-01/12-01/15.

[478] CESCR 'General Comment 21' E/C12/GC/21 (2009), s 15(b).

[479] *Prosecutor v Ahmad Al Faqi Al Mahdi* CC-01/12-01/15 [79].

[480] Rome Statute of the International Criminal Court (adopted 17 July 1988, *entered into force* 1 July 2002) 2187 UNTS 90 (ICC) art 7(2)(g).

[481] Rome Statute of the International Criminal Court (adopted 17 July 1988, *entered into force* 1 July 2002) 2187 UNTS 90 (ICC) art 7(1)(k).

This enduring provision could hold the perpetrator liable for willfully destroying intangible heritage. Another such legal innovation could be found in the al-Mehdi case, where the perpetrator argued that the destruction of cultural property does not satisfy the gravity threshold that is necessary for the admissibility of dispute in ICC. Nevertheless, the court understood the 'gravity' and held the perpetrator liable under Article 8(2)(e)(iv) of the Rome Statute.[482] The then prosecutor of ICC, Mr. Fatou Bensouda, even held that – 'what is at stake here is not walls and bricks, those mausoleums were important from a religious and identical point of view too'.[483] The prosecution highlighted the destruction of intangible heritage in Mali at the vital stage of proceedings. This precedent is crucial since it is the only instance in which the culprit is prosecuted with crimes against cultural property and not against a person. However, to impart the requirement under Article 7(1)(k) for crimes against Humanity, the prosecution must prove that additional inhuman acts exist to inflict considerable suffering to mental or bodily health.

This expression, 'other inhuman Acts', was enshrined in the ICTR[484] charter and is part of the Customary International law. As per the ILC and ICTY in Tadic, the act shall have an adverse consequence to be classified as an inhuman act.[485] The act that has been enacted to inflict mental pain, which also includes moral agony, does not need to be rape or murder, and it could also be the act of apartheid or discriminatory legislation within its domain.[486] The act would be said to be the 'Inhuman Act' even if it would cause temporal unhappiness or humiliation. Applying the same test to the destruction of any sort of cultural heritage would certainly hold the perpetrator liable, which could be inferred from the al-mehndi case where the witnesses were crying when they saw the destruction of the holy gate, which caused them mental suffering in the form of 'temporal humiliation'.

An additional method of conferring criminal liability can be traced to Article 25 of the Rome statute, which entails Individual criminal responsibility for wrongful acts.

The war crimes violation of customary international law entails individual criminal responsibility. As mentioned above, the acts committed online through cyber-attacks could constitute liability regardless of the nature of the conflict. The individuals could also entail liability for cyber operations provided they shall possess the required Mens Rea under Article 30.[487] The crimes

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[482] *Prosecutor v Ahmad Al Faqi Al Mahdi* ICC-01/12-01/15.

[483] ibid.

[484] UNSC Statute of the International Criminal Tribunal for Rwanda (as amended) art 3(i).

[485] *Prosecutor v Katanga and Ngudjolo Chui* (Pre-trial) ICC-01/04-01/07-717(30 September 2008) para 450.

[486] *Prosecution v Delalicet al* (Judgement) ICTY-IT-96-21-I (21 March 1996) [511].

[487] Rome Statute of the International Criminal Court (adopted 17 July 1988, *entered into force* 1 July 2002.) 2187 UNTS 90 (ICC) art 30.

committed with more volition element shall be liable under *dolusdirectus* of I or II degrees whereas crimes committed with recklessness or negligence with more cognitive component shall be liable under dolus eventualis enshrined under Article 30 of Rome statute.[488] In the case of organised destruction of intangible assets through cyber-operations, the group of hackers shall be accountable for acting under the joint or common plan.

The ICTY[489] and ICC[490] have already evolved their jurisprudence to entail crimes of joint nature or cooperation. Moreover, for accountability, certainly, the required contribution would also include the planning and preparation, and the perpetrator doesn't need to be present during the crime as long as he has control over it.[491] This means that the plantation of malware and DDoS attacks to attack intangible assets would entail criminal responsibility.

Criminal responsibility can also arise where the perpetrator acts under a third person's command.[492]

In such cases, these commanders and superiors too cannot escape their liability just because of the reason that they did not commit any act that constitutes a war crime by virtue of Article 28 of the Rome statute.[493] In a cyber-war context, the responsibility could be imposed on the military commander or cyber operations head of the state who ordered the commission of an act amounting to the destruction of intangible cultural property. Even a subordinate commander who conforms to the commander's order will not be absolved of the responsibility in any manner.[494] This regulation is in confirmation of articles 86 and 87 of Additional Protocol 1, which ensures that the superiors shall take steps to investigate war crimes.

Additionally, it is not even mandatory that the individual need not be the 'commander' or have military status.[495] The said rule is appropriate for the cyber-attack, which the hacker generally administers without any military

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[488] Sarah Finnin, 'Mental Element under Article 30 of the Rome Statute of International Criminal Court: A Comparative Analysis' [2012] ICLQ 325.

[489] Sarah Finnin, 'Mental Element Under Article 30 of the Rome Statute of International Criminal Court: A Comparitive Analysis' [2012] ICLQ 345-354.

[490] *Prosecution v Thomas Lubanga Dyilo* (Judgement) ICC-01/04-01/06 (14 March 2012) [326].

[491] *Prosecution v Thomas Lubanga Dyilo* (Judgement) ICC-01/04-01/06 (14 March 2012) [1005].

[492] *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Judgement) ICC-01/04-01/07 (30 September 2008) [495]-[499].

[493] ibid.

[494] UNSC 'Statute of the International Tribunal for the Protection of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991' (25 May 1993) UN Doc S/RES/827 art 7(4)(a).

[495] UNSC 'Statute of the International Tribunal for the Protection of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991' (25 May 1993) UN Doc S/RES/827 art 28(b); Sarah Finnin, 'Mental Element Under Article 30 of the Rome Statute of International Criminal Court: A Comparitive Analysis' [2012] ICLQ 239-254.

position. These regulations act as a default rule that needs to be in conjunction with other articles. Article 8(2)(e)(iv) can be implemented in conjunction with articles 25 or 28 of the Rome Statute, as was done in the Al-mehndi case. It must be ensured, however, that the agony and suffering of the human population shall be relevant for calculating liability for the destruction of intangible assets. Instead, it shall be treated as a separate offence, with no additional requirement to meet the severity standard. To accomplish this, the definition of the offences should be reconsidered, and their reach should be expanded with immediate effect.

CONCLUSION

The Contemporary debates centering around the digital Intangible cultural heritage and its protective regime, acknowledged by the 2003 UNESCO Convention, posed substantive questions to International Humanitarian Law that focused on the cultural property of Material aspect. The present humanitarian regulations, as they stand, are unable to confer adequate protection alone. It has to act in conjunction with the Rome statute and Tallinn Manual. This 'legal grey zone' gained further prominence in the pandemic and beyond due to this era of digital culture and data storage. This digital emergence raised questions regarding the intersection of digital Assets with humanitarian regulations. As proven above, the regulations, particularly in the sphere of NIAC, need the assistance of International Criminal and Human Rights law that could bolster the protection and prevent the destruction of intangible assets, as happened in Iraq in 2003. The questions over sovereignty, proportionality and freedom of expression can only be answered through the IHL, Rome Statute and Human Rights treaty combined. Their scope and applicability could be the promising subject for future research owning to the 'grey zones' in NIAC conflicts and doubts regarding the extra-territorial applicability of the human rights treaty.

This article concludes that the rise of digital cultural property brings up additional intriguing issues about international human rights law, cultural heritage, and cyberspace. Since access to the internet is a fundamental human right and because cultural life results in a human right to cultural heritage, protections for digital cultural property may also be derived from international Criminal law in addition to international humanitarian law. More so than international humanitarian law, the use of Criminal regulations framework could strengthen safeguards for digital cultural resources in times of peace, posing intriguing issues about personal privacy, national security, ownership of intellectual property, freedom of expression, and the application of human rights.