

# Destructive trends in contemporary armed conflicts and the overlooked aspect of intangible cultural heritage: A critical comparison of the protection of cultural heritage under IHL and the Islamic law of armed conflict

**Victoria Arnal\***

Victoria Arnal is a recent graduate of the LLM programme at the Geneva Academy of International Humanitarian Law and Human Rights Law. She holds an LLB (Honours) in Scots law, English law and European legal studies from the University of Aberdeen.

## Abstract

*The destruction of cultural heritage in armed conflicts has gained increasing political momentum and visibility over the last two decades. Syria, Iraq and Mali, among others, have witnessed the intentional destruction of their cultural heritage by non-State armed groups (NSAGs) that have invoked Islamic law and principles*

\* The author would like to thank Dr Ahmed Al-Dawoody for delivering the inspiring course “Introduction to the Islamic Law of Armed Conflict” and for his encouragement to produce this article.

to legitimize their actions. The response of the international community has predominantly focused on the material aspect, to the detriment of the significant impact on the associated intangible manifestation of cultural heritage in local communities. This article argues that several Islamic legal rules and principles may, more adequately than international humanitarian law, safeguard the intangible dimension of cultural heritage in certain contemporary armed conflicts in Muslim contexts. It aims to demonstrate the importance of drawing from multiple legal traditions in order to enhance the protection of intangible cultural heritage in armed conflicts and to strengthen engagement with the relevant NSAGs.

**Keywords:** deliberate destruction, protection of cultural heritage, intangible cultural heritage, international humanitarian law, non-international armed conflict, Islamic law.

⋮ ⋮ ⋮ ⋮ ⋮ ⋮ ⋮

## Introduction

The destruction of cultural heritage in armed conflicts has gained increasing political momentum and visibility over the last two decades. The proliferation of this destructive trend is correlated with the changing nature of armed conflicts. The primary motive for resorting to the use of force has taken on a substantial ethnic, religious and cultural dimension. Identity has become the overarching theme. In parallel, combat dynamics have evolved towards the urbanization of warfare, thus incidentally placing more cultural sites at greater risk of collateral damage. Additionally, the looting and illicit trade of cultural heritage has become a lucrative enterprise for certain armed groups.<sup>1</sup> Muslim-majority States have been particularly affected by the trend of deliberate attacks against cultural heritage as a policy or method of warfare. Syria, Iraq and Mali, among others, have witnessed the intentional destruction of many of their cultural sites by non-State armed groups (NSAGs).<sup>2</sup> These armed groups have invoked Islamic law and principles to legitimize their actions.<sup>3</sup> In the absence of a uniform definition of “cultural heritage” under international law, this term will be understood here as

1 Sigrid van der Auwera, “Contemporary Conflict, Nationalism, and the Destruction of Cultural Property during Armed Conflict: A Theoretical Framework”, *Journal of Conflict Archaeology*, Vol. 7, No. 1, 2012, p. 59.

2 Marina Lostal, Kristin Hausler and Pascal Bongard, *Culture Under Fire: Armed Non-State Actors and Cultural Heritage in Wartime*, Geneva Call, October 2018, p. 31; Alexander A. Bauer, “Editorial: The Destruction of Heritage in Syria and Iraq and its Implications”, *International Journal of Cultural Property*, Vol. 22, No. 1, 2015.

3 International Criminal Court (ICC), *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Case No. ICC-01/12-01/15-171, Judgment (Trial Chamber), 27 September 2016, paras. 36–37; Graciela Gestoso Singer, *ISIS’s War on Cultural Heritage and Memory*, UK Blue Shield, 2015; Sebastian A. Green Martinez, “Destruction of Cultural Heritage in Northern Mali: A Crime Against Humanity”, *Journal of International Criminal Justice*, Vol. 13, No. 5, 2016, p. 1094.

encompassing both tangible and intangible property that reflects the cultural and spiritual identity of a certain community.

This article will provide a critical analysis of the protection of cultural heritage under international humanitarian law (IHL) and the Islamic law of armed conflict (ILAC), with a particular focus on the often overlooked aspect of intangible cultural heritage.<sup>4</sup> The present author has relied on Islamic legal literature in English, and the chosen sources mainly address Sunni Islamic law since it represents the majority view in the three countries in focus. The article will first present a contextual assessment of the destructive trend and highlight the interconnectedness of tangible and intangible heritage. The following section will assess whether the relevant rules under IHL applicable to non-international armed conflicts (NIACs) sufficiently protect the intangible dimension of cultural heritage. The rules on the protection of cultural heritage under the ILAC will subsequently be comparatively analyzed. Finally, the article will reflect upon whether the ILAC and IHL can be approached as mutually reinforcing normative systems. The article will argue that several Islamic legal rules and principles may, more adequately than IHL, safeguard the intangible dimension of cultural heritage in certain contemporary armed conflicts in Muslim contexts. To this end, cross-cultural dialogue should be sought on the international scene with the aim of strengthening the protection of intangible cultural heritage and bolstering compliance with international norms through meaningful engagement with NSAGs.

## The destructive trend in contemporary armed conflicts

### Contextual assessment

In July 2012, fourteen historical and religious sites in the World Heritage town of Timbuktu in Mali were destroyed by Ansar Dine (“the Defenders of the Faith”) and Al-Qaeda in the Islamic Maghreb.<sup>5</sup> Similarly, Syria, frequently referred to as an “open-air museum”,<sup>6</sup> has been the theatre of destruction of numerous cultural and religious sites, with the attacks mainly being conducted by the self-proclaimed Islamic State (IS). Amongst those buildings, four were designated as

4 This paper acknowledges that there are numerous abuses in armed conflicts; the aim is not to compare the destruction of cultural heritage with the loss of human lives caused by armed conflicts. The author also notes that these were not the only cultural and religious buildings that have been targeted, and that the NSAGs mentioned throughout this paper are not the only perpetrators of such destruction. These NSAGs have been selected for their justifications of destruction grounded on Islamic principles. However, it cannot be stressed enough that violent extremism is not a phenomenon peculiar to Islam. The mentioned NSAGs’ actions and attitudes towards cultural heritage do not account for all NSAGs’ attitudes; for a different understanding of intangible cultural heritage by certain NSAGs, see M. Lostal, K. Hausler and P. Bongard, above note 2.

5 ICC, *Al Mahdi*, above note 3, para. 10.

6 Cheikhmous Ali, “Syrian Heritage Under Threat”, *Journal of Eastern Mediterranean Archaeology and Heritage Studies*, Vol. 4, No. 1, 2013, p. 351.

World Heritage Sites.<sup>7</sup> World Heritage Sites have also been the targets of deliberate attacks in Iraq.<sup>8</sup> Furthermore, several sites and shrines pertaining to the Yezidi ethno-religious minority have been besieged by IS in the Sinjar region.<sup>9</sup> Likewise, Christian, Shia and Sufi shrines in the Nineveh province have been intentionally destroyed.<sup>10</sup>

An essential common feature shared by the belligerent parties conducting these attacks is that they are leading ideological wars in which the destruction of cultural heritage is seen as a requisite step towards annihilating the enemy. The aforementioned NSAGs frequently invoked Islamic principles to justify their actions. Al Mahdi, the head of Ansar Dine, expressed that the targeted monuments were considered idolatrous and thus contrary to the group's radical understanding of Islam.<sup>11</sup> Similarly, in Syria, the destruction formed part of the Islamic State of Iraq and Syria's (ISIS) process of erasing the "the traces of 'infidel' cultural and religious heritage".<sup>12</sup> In Iraq, ethno-religious minorities were targeted for belonging to groups depicted as "devil worshipers" and "infidels".<sup>13</sup>

## The misplaced emphasis on World Heritage Sites

In light of the global impact of the rise of violent extremism, the protection of cultural heritage in wartime has sparked considerable political and legal interest. The *Al Mahdi* case was the first occasion on which the International Criminal Court (ICC) brought an action against a member of an NSAG exclusively based on cultural destruction charges.<sup>14</sup> In the same year, the prosecutor set the prosecution of destruction of cultural objects as a priority in case selection.<sup>15</sup> In *Al Mahdi*, the ICC considered that directing attacks against World Heritage Sites constituted an aggravating factor.<sup>16</sup> The 1972 Convention Concerning the

7 "Joint Statement of UN Secretary-General Ban Ki-moon, UNESCO Director-General Irina Bokova and UN and League of Arab States Joint Special Representative for Syria Lakhdar Brahimi: The Destruction of Syria's Cultural Heritage Must Stop", New York, 12 March 2014.

8 M. Lostal, K. Hausler and P. Bongard, above note 2, p. 40.

9 Benjamin Isakhan and Sofya Shahab, "The Islamic State's Destruction of Yezidi Heritage: Responses, Resilience and Reconstruction after Genocide", *Journal of Social Archaeology*, Vol. 20, No. 1, 2020, p. 3.

10 M. Lostal, K. Hausler and P. Bongard, above note 2, p. 40.

11 Mohamed Elewa Badar and Noelle Higgins, "Discussion Interrupted: The Destruction and Protection of Cultural Property under International Law and Islamic Law: The Case of Prosecutor v Al Mahdi", *International Criminal Law Review*, Vol. 17, No. 3, 2017, pp. 486, 502.

12 Marina Lostal, "Syria's World Cultural Heritage and Individual Criminal Responsibility", *International Review of Law*, Vol. 2015, No. 3, 2015, p. 4.

13 Birgül Acıyıldız, *The Yezidis: The History of a Community, Culture and Religion*, I. B. Tauris, London, 2012.

14 ICC, *Al Mahdi*, above note 3.

15 ICC Office of the Prosecutor, *Policy Paper on Case Selection and Case Prioritisation*, 15 September 2016. Several authors and NGOs have raised criticisms regarding the case priority selection at the ICC, in particular for failing to devote significant attention to charges of murder, rape and torture. See Brian Daniels, "Is the Destruction of Cultural Property a War Crime?", *Apollo*, 28 November 2016; Amnesty International, "Landmark ICC Verdict against Al-Mahdi Must Be First Step to Broader Justice in Mali Conflict", press release, 27 September 2016.

16 ICC, *Al Mahdi*, above note 3, para 80; ICC Office of the Prosecutor, *Situation in Mali: Art 53(1) Report*, 16 January 2013, paras 154–160.

Protection of the World Cultural and Natural Heritage established a system whereby cultural heritage considered to be of “outstanding universal value” is designated to be inscribed on the World Heritage List.<sup>17</sup> Nonetheless, the selective discourse of the international community, encompassing a misplaced emphasis on the “World Heritage” nature of the targeted sites, is dangerous for the identity of the targeted communities. World Heritage Sites only represent a small proportion of cultural heritage in a given country. Syria, Iraq and Mali have a rich national and local heritage, which is not necessarily recognized in the eyes of the international community. Yet these sites are testimonials to the diversity of the populations living in the respective territories. Whilst Syria, for instance, takes pride in having a “universal heritage”,<sup>18</sup> this should not obscure the fact that very often, national and local heritage contribute the most to one’s sense of identity.

### Targeting the intangible?

Inevitably, the material destruction of these sites severely threatens the various expressions of intangible cultural heritage in the territories involved. For instance, Sufism, a branch of Islam widely practiced in the region of Timbuktu in Mali, involves sacred rituals such as recitation of prayers and poems, dances and chants.<sup>19</sup> Similarly, one cannot ignore the prevalent intangible character of Yezidism. This religion is practiced by a minority primarily found in northern Iraq, and there are several contested theories over its origin;<sup>20</sup> it is nonetheless accepted that Yezidism “places less emphasis on conforming to specific beliefs and more on participation in certain intangible religious rituals and adherence to specific behaviours”.<sup>21</sup> The persecution and displacement of the Yezidis has strongly influenced, and strengthened, their links to various locations and buildings as places to freely manifest their spirituality.<sup>22</sup> Unfortunately, the dominant discourse concentrates on the visible effects of conflict, but when attacks materialize on a tangible element of cultural heritage, a similar destructive force affects the intangible dimension. Cultural practices associated with heritage and identity, such as skills, practices and traditions, are severely impacted and even lost through destruction, forced displacement or conflict-related deprivation. This can, in turn, hinder the

17 Convention Concerning the Protection of the World Cultural and Natural Heritage, 1037 UNTS 151, 16 November 1972 (entered into force 17 December 1975), Art. 11(2).

18 Emma Cunliffe, Nibal Muhesen and Marina Lostal, “The Destruction of Cultural Property in the Syrian Conflict: Legal Implications and Obligations”, *International Journal of Cultural Property*, Vol. 23, No. 1, 2016, p. 3.

19 Anna K. Zajac, “Between Sufism and Salafism: The Rise of Salafi Tendencies after the Arab Spring and Its Implications”, *Hemispheres*, Vol. 29, No. 2, 2014, p. 6.

20 Joseph Isya, *Devil Worship: The Sacred Books and Traditions of the Yezidiz*, Gorham Press, Boston, MA, 1919, pp. 89–137; Abraham Valentine Williams Jackson, *Persia, Past and Present: A Book of Travel and Research*, Macmillan, New York, 1906.

21 B. Isakhan and S. Shahab, above note 9, p. 10.

22 Adela Suliman, “Countries Urged to Protect Property in War to Save Culture, Identity”, *Thomson Reuters Foundation News*, 7 September 2019.

peace, reconciliation and reconstruction processes in post-conflict settings.<sup>23</sup> The preservation of all forms of cultural heritage in armed conflict is thus essential for the preservation of the identity of the communities involved.

## The protection of cultural heritage under IHL

### The Hague regime

Given the prevalence of the destruction of cultural heritage in contemporary armed conflicts, there is a pressing need to explore the rules of IHL governing the matter. The destruction of the aforementioned sites occurred in the midst of non-international armed conflicts. To trigger the applicability of the IHL of NIACs, there must be “protracted armed violence” between a State and an organized armed group or between such groups.<sup>24</sup> The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict represents a key development, since it was the first instrument to be devoted exclusively to the protection of cultural property in armed conflicts.<sup>25</sup> Not only does the Convention protect tangible cultural heritage from attacks, but it also prohibits the use of tangible cultural heritage in a way that would turn it into a military objective.<sup>26</sup> Such a protection is unprecedented for civilian objects. However, the Convention’s adoption in the aftermath of the Second World War justifies its State-centric approach. The onus is on States to *safeguard* their own cultural property in the event of an armed conflict.<sup>27</sup> Only one article provides that all warring parties, including non-State actors, shall be bound to apply, as a minimum, the provisions of the Convention which relate to *respect* for cultural property.<sup>28</sup> Thus, the Convention’s applicability in NIACs is rather limited.

Subsequent events such as the shelling of Dubrovnik or the burning of Sarajevo’s historic Vijećnica library during the war in Yugoslavia shed light on

23 Martyna Falkowska-Clarys and Lily Martinet, “Keeping the ‘Delicate Mosaic’ Together: Can the ICC Deal with Intangible Cultural Heritage?”, in Julie Fraser and Brianne McGonigle Leyh (eds), *Intersections of Law and Culture at the International Criminal Court*, Edward Elgar, Cheltenham and Northampton, MA, 2020, p. 82; Kalliopi Chainoglou, “The Protection of Intangible Cultural Heritage in Armed Conflict: Dissolving the Boundaries between the Existing Legal Regimes?”, *Santander Art and Culture Law Review*, Vol. 3, No. 2, 2017, p. 112.

24 International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 70; Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction*, International Committee of the Red Cross (ICRC), Geneva, 2016.

25 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 UNTS 215, 14 May 1954 (entered into force 7 August 1956) (1954 Hague Convention); Christiane Johannot-Gradis, “Protecting the Past for the Future: How Does Law Protect Tangible and Intangible Cultural Heritage in Armed Conflict?”, *International Review of the Red Cross*, Vol. 97, No. 900, 2015, p. 1255.

26 1954 Hague Convention, Art. 4(1); Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rules 38(b), 39, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1> (all internet references were accessed in September 2021).

27 1954 Hague Convention, Art. 2.

28 *Ibid.*, Art. 19(1).

the weaknesses of the legal regime in place.<sup>29</sup> In addition to reiterating the threat to cultural heritage in armed conflict, these events also evidenced the paradigm shift away from traditional inter-State wars. They prompted the international community to rethink its protection system. The 1999 Second Protocol to the 1954 Hague Convention was specifically drafted to apply to armed conflicts of both international and non-international character.<sup>30</sup> This instrument goes a step further than the parent Convention in enhancing protection since it no longer limits its application to *respect* for cultural property.<sup>31</sup> Furthermore, it provides an attempt to circumscribe the principle of military necessity.<sup>32</sup> The 1954 Convention did not contain a definition of what constituted a military objective, thereby leaving the application of the principle of military advantage largely to the armed group's discretion. The Second Protocol defines "military objective" and further narrows the scope of the waiver through the requirement that "there is no feasible alternative available to obtain a similar military advantage".<sup>33</sup> Nonetheless, the benefit of its application to NIACs and the circumscribed waiver on imperative military necessity is to be weighed against an essential consideration – namely, that the major drawback of the Hague regime remains its definition of "cultural property", which only refers to "movable or immovable property".<sup>34</sup> This one-faceted understanding regrettably fails to capture, and grant protection to, the immaterial dimension of cultural heritage in armed conflict.

Additional Protocol II to the 1949 Geneva Conventions (AP II) applies to NIACs taking place in the

territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.<sup>35</sup>

AP II prohibits direct attacks against "historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of the people".<sup>36</sup> This broad phrasing and the addition of the notion of spirituality could be

29 Marc Balcells, "Left Behind? Cultural Destruction, the Role of the International Criminal Tribunal for the Former Yugoslavia in Deterring It and Cultural Heritage Prevention Policies in the Aftermath of the Balkan Wars", *European Journal on Criminal Policy and Research*, Vol. 21, No. 1, 2015, p. 4.

30 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 2253 UNTS 172, 26 March 1999 (1999 Second Protocol), Art. 22(1).

31 *Ibid.*, Art. 5.

32 *Ibid.*, Art. 6. This article restates Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 52(2).

33 1999 Second Protocol, Arts 1(f), Art. 6(a).

34 1954 Hague Convention, Art. 1.

35 Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 1(1).

36 *Ibid.*, Art. 16.

understood as safeguarding intangible cultural heritage.<sup>37</sup> Nonetheless, the high threshold required for the Protocol's application, coupled with the lack of ratifications, means that for the purposes of this article it is relevant in the Malian context only.<sup>38</sup>

In the absence of a uniform definition of cultural heritage, each of the above-mentioned applicable instruments defines the components of cultural heritage that it protects.<sup>39</sup> Varying scopes of protection are afforded to cultural heritage, mostly based on the classification of the conflict and the importance conferred to the various categories of cultural heritage. This piecemeal and sectoral development of the protective regime has introduced a somewhat hierarchical element. The distinction between “peoples”,<sup>40</sup> “every people”<sup>41</sup> and “humanity”,<sup>42</sup> or between expressions such as “of great importance”<sup>43</sup> and “of the greatest importance”,<sup>44</sup> runs the risk of marginalizing a certain type of heritage and therefore certain communities.

### Redressing the shortcomings of the IHL of NIACs

The past decade has witnessed the emergence of a discourse framing the protection of cultural heritage as a human rights law issue. Karima Bennouna, the UN Special Rapporteur in the Field of Cultural Rights, has set the issue of the intentional destruction of cultural heritage as a priority in her mandate. She recognizes that tangible and intangible heritage are interconnected, and asserts that “[a] human rights approach assists in making these connections”.<sup>45</sup> To this end, the present article suggests that the shortcomings in the IHL of NIACs must be redressed by contemplating the protection of cultural heritage under international human rights law (IHRL). It should be noted that while it is largely uncontroversial that IHRL remains applicable in armed conflicts,<sup>46</sup> the issue of whether IHRL addresses non-State armed groups remains contentious.<sup>47</sup>

37 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, para. 4844.

38 Geneva Academy of International Humanitarian Law and Human Rights, “Non-International Armed Conflicts in Mali”, *RULAC*, available at: [www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-mali#collapse3accord](http://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-mali#collapse3accord).

39 Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, Cheltenham, 2019, p. 562; Christiane Johannot-Gradis, *Le patrimoine culturel matériel et immatériel: Quelle protection en cas de conflit armé?*, Schulthess, Geneva, 2013, pp. 109–116, 123–128, 201–213, 256–264.

40 AP II, Art. 16.

41 1954 Hague Convention, Art. 1; 1999 Second Protocol, Art. 1(b).

42 1999 Second Protocol, Art. 10 (enhanced protection).

43 1954 Hague Convention, Art. 1; 1999 Second Protocol, Art. 1(b).

44 1999 Second Protocol, Art. 10.

45 Karima Bennouna, *Report of the Special Rapporteur in the Field of Cultural Rights*, UN Doc. A/HRC/31/59, 3 February 2016, para. 47.

46 International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 105; ICJ, *Case Concerning Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, para. 216.

47 For academic debates on the matter, see Nigel Rodley, “Can Armed Opposition Groups Violate Human Rights Standards?”, in Kathleen E. Mahoney and Paul Mahoney (eds), *Human Rights in the Twenty-First*



In 2003, the United Nations Educational, Scientific and Cultural Organization (UNESCO) devised the Convention for the Safeguarding of the Intangible Cultural Heritage.<sup>48</sup> Intangible cultural heritage is defined 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 recognise as part of their cultural heritage”.<sup>49</sup> The Convention marks a much-praised shift from the predominantly tangible focus of prior instruments. Furthermore, it distances itself from the “outstanding universal value” paradigm or any hierarchical approach to cultural heritage. Unlike the 1972 Convention, whereby States submit sites to be inscribed on the World Heritage List, the 2003 Convention ensures that the custodians of intangible cultural heritage are involved in the nomination process.<sup>50</sup> Intangible cultural heritage is thus identified by reference to its significance for particular groups or communities, the rationale being that they are the ones “who can define what their intangible cultural heritage is and ensure its preservation into the future”.<sup>51</sup> The relevance of the 2003 Convention for the purposes of this article is bolstered by the fact that Mali, Iraq and Syria are parties to it. However, while promising, this human rights law instrument was not specifically concluded for armed conflicts. It lacks specific obligations binding on parties to contemporary conflicts and its level of protection is unclear. For instance, the Operational Directives of the 2003 Convention only provide for international assistance in the form of financial support when the heritage or its bearers are in an emergency situation, such as an armed conflict.<sup>52</sup>

## Protecting the transmission of intangible cultural heritage

It has thus far been established that the international regime governing the protection of cultural heritage suffers from structural gaps which hamper its application in NIACs as well as any form of engagement with the relevant actors. Nonetheless, one could argue that although the specific rules of IHL predominantly protect tangible cultural heritage, this body of law as a whole confers sufficient protection to the multidimensional character of cultural heritage.<sup>53</sup> Sassòli asserts that “[t]he general rules of IHL protect persons who *realize, transmit and participate* in the expression of intangible cultural heritage

Century, Martinus Nijhoff, Dordrecht and Boston, MA, 1993; Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford, 2006; Andrew Clapham, “Human Rights Obligations of Non-State Actors in Conflict Situations”, *International Review of the Red Cross*, Vol. 88, No. 863, 2006, pp. 494–507.

48 Convention for the Safeguarding of the Intangible Cultural Heritage, 2368 UNTS 3, 17 October 2003 (entered into force 20 April 2006) (2003 Convention).

49 *Ibid.*, Art. 2.

50 Lee Jing, “Exploring the Narrative of Heritage Through the Eyes of the Law”, *Kaijan Malaysia*, Vol. 35, Suppl. 1, 2017, p. 195.

51 K. Chainoglou, above note 23, p. 111.

52 UNESCO, *Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage*, 6 June 2018, Sec. I.14, para. 50.

53 C. Johannot-Gradis, above note 39.

from violations of their physical as well as mental integrity and dignity”.<sup>54</sup> Article 3 common to the 1949 Geneva Conventions is the only treaty provision applicable to NIACs. This article guarantees protection to all persons not taking active part in the hostilities, without any adverse distinction, from violations of their physical and mental integrity as well as their personal dignity.<sup>55</sup> The transmission argument is relevant since the protection granted to persons not taking active part in hostilities covers a broad category of individuals, naturally encompassing bearers and transmitters of intangible cultural heritage. Nonetheless, this provision does not guarantee an individual right to *perform* cultural functions. Under IHL, only the ability of ministers of religion to continue their functions is inviolable.<sup>56</sup> No mention is made of any other actor of intangible cultural heritage; the role of these actors is only protected under IHRL.<sup>57</sup> Therefore, the protection of intangible cultural heritage under IHL has not (yet) realized its full potential since recourse must be made to other instruments that are not specifically drafted for armed conflicts, and even less those of a non-international character.

Apart from the 2003 Convention, the IHL regime disproportionately focuses on the material manifestations of culture to the detriment of its indissociable intangible aspect. Overall, the protection of cultural heritage under IHL has resulted in a piecemeal and sectoral approach, partially supplemented by IHRL to address the intangible dimension. Furthermore, as the aforementioned treaties are only binding upon States, the lack of satisfactory protection of intangible cultural property in NIACs is manifest.

Although it is of the utmost importance to discuss international rules in contemporary armed conflicts, the destructions on which this article focuses took place in Muslim-majority States, with Islam invoked as a justification for the alleged violations. The following section will therefore evaluate the protection of cultural heritage under the Islamic legal tradition.

## The protection of cultural heritage under Islamic law

### The protection of property in Islamic law

As a starting point, it will suffice to look at the sources of Islamic law to demonstrate the importance that it places on the safeguarding of intangible cultural heritage. The sources themselves are testimonial to the sanctity of divine revelation. The primary sources of Islamic law are the Qur’an (which literally means “recitation” or “reading”), the Sunna (the traditions of the Prophet, the written account of which is termed “hadith”) and *ijma’* (consensus of the jurists). Secondary norms are

54 M. Sassòli, above note 39, pp. 566–567 (emphasis added).

55 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950), Art. 3.

56 *Ibid.*, Art. 24; AP I, Art. 15(5); AP II, Art. 9; ICRC Customary Law Study, above note 26, Rule 27.

57 M. Sassòli, above note 39, pp. 566–567.

mainly obtained through the use of *usūl al-fiqh*, a method of extracting and codifying rules from primary sources.<sup>58</sup> The codification of the traditions of the Prophet demonstrates a willingness and perseverance in preserving oral traditions. Moreover, Islamic scholars developed a number of sciences taught in schools to ensure the authenticity and reliability of the Prophet's traditions. This documentation and authentication are extremely significant, since this tradition serves as a source both of law and of ethical guidance for Muslims up to the present day.<sup>59</sup> Thus, *prima facie*, Islamic law seems to devote greater importance to the safeguarding of intangible cultural heritage.

Although no direct reference to the notion of “cultural heritage” as such is contained in any of the primary sources, the latter nonetheless contain several mentions of the notion of property. A Qur’anic verse states that “[w]hatever palm trees you have cut down, or have left them standing on their roots, it was with Allah’s permission”.<sup>60</sup> This reference appears irreconcilable with one of the ten commands later ordered by Caliph Abu Bakr, asserting: “Do not cut down fruit-bearing trees; do not destroy buildings; do not slaughter a sheep or camel except for food; do not burn down or drown palm trees.”<sup>61</sup> Despite these seemingly contradictory assertions, it can be derived that the principle which has guided the Islamic law of warfare since the seventh century AD has been the permissibility of attacks if required by military necessity. The principle of military necessity became evident in light of the Prophet’s prohibition against cutting down trees except those that would prevent Muslims from engaging in the fighting.<sup>62</sup> An allusion to the principle of military necessity can also be implied from the Qur’anic verse holding: “Fight in the cause of Allah those who fight you, but do not transgress limits; for Allah loveth not transgressors.”<sup>63</sup> Through this verse, one can infer that a Muslim’s action in cases of necessity must not be guided by impulse, but rather that “he is required to act without oppression and without deliberate transgression”.<sup>64</sup> This requirement therefore excludes the wanton destruction of enemy property. According to the renowned Syrian jurist al-Awzā’ī (d. 774), such an act constitutes a crime of “*al-fasād in the land*”

58 Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, Islamic Texts Society, 2005; Mashood A. Baderin (ed.), *International Law and Islamic Law*, Ashgate, Aldershot, 2008; Onder Bakircioglu, *Islam and Warfare: Context and Compatibility with International Law*, Routledge, London, 2014, p. 17.

59 Ayman Shabana, *Custom in Islamic Law and Legal Theory: The Development of the Concepts of Urf and Adah in the Islamic Legal Tradition*, Palgrave, New York, 2010.

60 Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations*, Palgrave, New York, 2011, p. 126; Mufti Taqi ‘Uṣmānī, *The Qur’an: With English Translation*, Maktaba-e-Darul-Uloom, Karachi, 1996, verse 59:5.

61 Karima Bennoune, “As-Salamu Alaykum: Humanitarian Law in Islamic Jurisprudence”, *Michigan Journal of International Law*, Vol. 15, No. 2, 1994, p. 626; Cherif Bassiouni, *A Manual on International Humanitarian Law and Arms Control Agreements*, Ardsley, New York, 2000, p. 9.

62 Ahmad ibn al-Ḥusayn ibn ‘Alī ibn Mūsā al-Bayhaqī, *Sunan al-Bayhaqī al-Kubrā*, ed. Muhammad ‘Abd al-Qādir ‘Atā, 3rd ed., Vol. 9, Dār al-Kutub al-‘Ilmiyyah, Beirut, 2003, pp. 154–155.

63 Abdullah Yusuf Ali, *The Qur’an: A Translation*, Elmhurst, New York, 2001, verse 2:190.

64 Ahmed Zaki Yamani, “Humanitarian International Law in Islam: A General Outlook”, *Michigan Yearbook of International Legal Studies*, Vol. 7, 1985, p. 192.

(destruction) and is strictly prohibited by the Qur'an.<sup>65</sup> The rationale behind the blanket prohibition of wanton destruction during the conduct of hostilities is that everything in the world belongs to God, and Muslims are entrusted with the responsibility of preserving His property and contributing to human civilization.<sup>66</sup> The reference to "everything in the world" provides for an infinite category of protected heritage. This expression also avoids any adverse distinction relating to heritage that is only worthy of protection if it is "of great importance" or "of outstanding universal value". If the notion that "everything in the world belongs to God" is accepted as corresponding to the "Islamic worldview",<sup>67</sup> one can therefore argue that all types of property are placed on an equal footing and are granted similar protection. Respect for property is thus cemented as an intrinsic part of religious commitment, essential to ensuring the continuity of civilization.

In addition to the absolute prohibition of wanton destruction during the conduct of hostilities, the Qur'an and the Sunna contain various references to the inviolability of religious sites. The first text in the Qur'an allowing Muslims recourse to armed force is in reference to defence against aggression. It reads that "had not God permitted people to defend themselves against [the aggression of] others, monasteries, churches, synagogues and mosques, wherein the name of God is off-mentioned, would be pulled down".<sup>68</sup> This verse strongly supports religious freedom since the protection of monasteries, churches, synagogues and mosques is given as a justification for defensive war, and the defence of religion against persecution almost becomes a duty.<sup>69</sup> Therefore, one of the early Islamic *jus ad bellum* rules is the protection of the practice of Christianity, Judaism and Islam. According to Bassiouni, "there is continuity among the Abrahamic religions, and, accordingly, Jewish, Christian, and Muslim religious and holy sites deserve recognition and respect by all three faiths".<sup>70</sup> This interpretation excludes religious sites belonging to non-Abrahamic faiths,<sup>71</sup> but it must be weighed against alternative theories advanced by Islamic scholars supporting the conclusion that the Islamic legal tradition adopts a universalist stance.<sup>72</sup>

65 Ahmed Al-Dawoody, "Islamic Law and International Humanitarian Law: An Introduction to the Main Principles", *International Review of the Red Cross*, Vol. 99, No. 3, 2017, p. 1007.

66 Ahmed Al-Dawoody, "IHL and Islam: An Overview", *Humanitarian Law and Policy Blog*, 14 March 2014, available at: <http://blogs.icrc.org/law-and-policy/2017/03/14/ihl-islam-overview/>.

67 A. Al-Dawoody, above note 65, p.1007.

68 Qur'an 22:39–40, cited in A. Al-Dawoody, above note 60, p. 58.

69 Christopher. G. Weeramantry, *Islamic Jurisprudence: An International Perspective*, Macmillan Press, Basingstoke, 1988, p. 162.

70 Cherif Bassiouni, *The Shari'a and Islamic Criminal Justice in Time of War and Peace*, Cambridge University Press, Cambridge and New York, 2014, p. 182.

71 *Ibid.*

72 Recep Şentürk, "Sociology of Rights: Inviolability of the Other in Islam between Universalism and Communalism", in Abdul Aziz Said, Mohammed Abu-Nimer, and Meena Sharify-Funk (eds), *Contemporary Islam*, Routledge, New York, 2006; Tareq Sharawi, "The Inviolability of the Non-Muslims in Islamic Law: A Comparative Reading of Modern and Classical Debates", *Afkār*, Special Issue No. 1, 2020.

According to Sharawi, the inclusion of non-Abrahamic religious groups, and thus the inviolability of their religious sites, has been accepted in classical *fiqh*.<sup>73</sup>

Similarly, in an exchange between the abbot of St Catherine's Monastery in Sinai and the Prophet, the latter is reported to have said that "[n]o one is to destroy a house of [the Christian] religion, to damage it, or to carry anything from it to the Muslims' houses".<sup>74</sup> This hadith seemingly confirms that Islamic law appreciates the value of religious and cultural objects of the adherents of other faiths. Moreover, the protection granted to cultural heritage is manifold: it concurrently encompasses destruction and damage as well as what could be considered looting or theft. The explicit mention by the Prophet of these three actions accentuates the multifaceted and "vital role that these objects play in shaping a community's identity".<sup>75</sup> Therefore, one can infer from the primary sources of Islamic law and subsequent interpretations by Islamic scholars that all religious buildings cannot be the targets of attacks, that the prohibition extends to the objects contained therein, and that this holds true for all civilizations. This is further reinforced by several allusions to diversity in the Qur'an which can be interpreted as protecting the heritage of all people.<sup>76</sup>

Furthermore, the Prophet stated that "[w]hen you are in Syria, you will meet those who remember God in their houses of worship. You should have no dispute with them and give no trouble to them."<sup>77</sup> An additional layer of protection can be deduced from this statement: it is not only the religious buildings that must be protected, but also "those who remember God in their houses of worship". These injunctions and obligations allude to the interdependence between tangible and intangible dimensions. Accordingly, the obligation to respect religious buildings is juxtaposed with the obligation to protect the bearers and transmitters of religious teachings.

## Regulating the use of force in internal conflicts

The ILAC also draws a distinction between conflicts of an international and a non-international character. The equivalent of NIACs in Islamic law would be internal conflicts between Muslims. This classification is further subdivided into four categories involving as a party to the conflict either rebels (*al-bughāh*), bandits,

73 T. Sharawi, above note 72, pp. 94–95.

74 John Andrew Morrow, *The Covenants of the Prophet Muhammad with the Christians of the World*, Angelico Press and Sophia Perennis, Tacoma, WA, 2013.

75 Fatimah Alshehaby, "Cultural Heritage Protection in Islamic Tradition", *International Journal of Cultural Property*, Vol. 27, No. 3, 2020, p. 313.

76 *Ibid.*, p. 297; Asma Afsaruddin, "Recovering the Core Values of Islam", *Muslim Democrat*, Vol. 4, No. 1, 2002. Several verses make reference to the principle of diversity. For a non-exhaustive list, see, for instance, A.Y. Ali, above note 63, including verses 5:48 ("O mankind! We created you from a single (pair) of a male and a female, and made you into nations and tribes, that ye may know each other (not that ye may despise (each other))") and 17:70 ("We have honoured the sons of Adam; provided them with transport on land and sea; given them for sustenance things good and pure; and conferred on them special favours, above a great part of our creation").

77 Bashīruddīn Maḥmūd Aḥmad and Mirza Tahir Ahmad, *Life of Muhammad*, Islam International Publications, 1988, p. 149.

robbers, terrorists (*al-muháribún*), apostates (*al-murtaddún*) or violent religious extremists (*al-khawárij*).<sup>78</sup>

The members of Ansar Dine or IS cannot be classified as *murtaddún* since this category has lost its relevance.<sup>79</sup> However, the regulation of the fight against *al-bugháh* finds support in the Islamic scriptures.<sup>80</sup> Most classical Muslim jurists conceded that there are three cumulative conditions to classify a group as *al-bugháh*.<sup>81</sup> Firstly, the group must have military power and organization (*shawkah*). Secondly, the group's fight must pursue a cause (*ta'wíl*) generally, in the form of a complaint about an injustice inflicted by the government or a violation of the Sharia; in this regard, a subjective belief by the group is considered sufficient. Finally, the group must resort to armed force (*khurūj*). As per the rules of engagement, attacks must be directed at legitimate targets with the aim of achieving the objective of the rebellion. Additionally, the victim's property cannot be seized, and fighters must not target civilians or cause any destruction that is not dictated by military necessity.<sup>82</sup> If the rules are complied with, the jurists unanimously agreed that both rebels and government forces cannot be held liable for any destruction caused during the course of the rebellion.<sup>83</sup> Applying these rules to ISIS and Ansar Dine, it appears that, while these groups demonstrated a relevant degree of organization, pursued a cause subjectively judged legitimate and resorted to force in furtherance of their cause, they did not respect the rules of engagement. Consequently, they cannot benefit from the absolution of liability for property destruction granted to *al-bugháh*.

*Khawárij* are usually described as pious worshippers with a very narrow understanding of Islam; the main difference between *al-khawárij* and *al-bugháh* is the deliberate targeting of innocent civilians.<sup>84</sup> The *khawárij* definition corresponds to the aforementioned NSAGs. The rules of fighting against *al-khawárij* have not been amply developed by classical Muslim jurists, and this eventually led to disagreements among the various schools.<sup>85</sup> For this reason, Al-Dawoody argues that "ISIS should be treated as *muháribún* as far as the rules of engagement and punishment are concerned".<sup>86</sup> Contrary to the previous categories, *muháribún* have no *ta'wíl*; they wilfully spread terror and intimidate the civilian population. The law of fighting against *al-muháribún* is also known as the law of *hirábah* ("terrorism"). It constitutes the most developed and least controversial form of internal conflicts.<sup>87</sup> It is rooted in Islamic scriptures, and

78 A. Al-Dawoody, above note 60, pp. 140–193.

79 Ahmed Al-Dawoody, "Non-International Armed Conflicts under Islamic Law: The Case of ISIS", in Tallyn Gray (ed.), *Islam and International Criminal Law and Justice*, Torkel Opshal Academic EPublisher, Brussels, 2018, p. 122.

80 A.Y. Ali, above note 63, verse 49:9.

81 A. Al-Dawoody, above note 79, p. 124.

82 A. Al-Dawoody, above note 60, pp. 167–168.

83 *Ibid.*

84 *Ibid.*, p. 151.

85 A. Al-Dawoody, above note 79, p. 133.

86 *Ibid.*

87 *Ibid.*; Sherman A. Jackson, "Domestic Terrorism in the Islamic Legal Tradition", *The Muslim World*, Vol. 91, No. 3–4, 2001, p. 300.

the verses relating to *hirábah* prescribe four punishments, including the most severe ones foreseen in Islamic law.<sup>88</sup> Perpetrators of terrorist acts are thus strictly liable for the damage they inflict on lives and property. The relevant Qur’anic verses, strengthened by the classical Muslim jurists’ intransigent approach to indiscriminate attacks meant to spread terror, provided a great contribution towards humanizing internal conflicts and, as a consequence, alleviating the suffering of victims.<sup>89</sup>

Thus, Islamic law regulating the use of force in internal conflicts demonstrates a certain degree of flexibility and an ability to adapt to contemporary contexts and challenges. Yet, it is also specific enough to sufficiently tackle the issue of destruction of cultural heritage. From an early stage, by encapsulating a strong accountability dimension for transgressors, Islamic law has demonstrated a keen interest in protecting the community from those who threaten it with violence and terror.

### Protecting the bearers and interpreters of intangible cultural heritage

The principle of distinction between combatants and non-combatants dates back to the Prophet’s lifetime.<sup>90</sup> However, some disagreements persist over who can benefit from non-combatant immunity. According to the minority opinion shared by al-Shāfi’ī (767–820) and Ibn Hazm (d. 994), anyone can be a lawful target, except women and children. Shafi’ī nonetheless adds that it is also impermissible to target the clergy who confines himself to worship and is not involved in acts of hostility.<sup>91</sup> This view is not shared by Ibn Hazm, who does not accept the authenticity of the hadiths that extend non-combatant immunity beyond women and children. The majority opinion, however, provides a list of five categories of non-combatants, including, in addition to women and children, the aged, the clergy (*rāhib*) and the *usafā* (those hired to perform non-combat services on the battlefield).<sup>92</sup> Based on the extended list of categories of people immune from targeting in war, one can assert that, along the same lines as IHL, the transmission of cultural heritage is guaranteed by ensuring the protection of those who do not take part in hostilities.

Furthermore, one could even contend that the protection afforded under Islamic law is greater because the protection of *usafā* has been extended by analogy to “craftsmen, wage earners, and farmers who do not do battle, or those who follow the army but do not participate in the hostilities, such as merchants”.<sup>93</sup> The rationale behind this immunity is that these people are

88 Ahmed Al-Dawoody, “Terrorism, Religious Violence, and the Shari’ah”, in Khaled Abou El Fadl, Ahmad Atif Ahmad and Said Fares Hassan (eds), *Routledge Handbook of Islamic Law*, Routledge, London and New York, 2019, p. 432; A.Y. Ali, above note 63, verses 5:33–34.

89 A. Al-Dawoody, above note 88, p. 438.

90 A. Al-Dawoody, above note 60, p. 111.

91 *Ibid.*

92 *Ibid.*

93 A. Z. Yamani, above note 64, p. 207.

“builders of prosperity” and “Islamic war does not have for its object the destruction or undermining of civilization and prosperity”.<sup>94</sup> While only religious ministers’ ability to perform their function is protected under IHL, such protection is conferred to a broader category of actors of intangible cultural heritage under the ILAC. Therefore, through the immunity of *usafā*, Islamic law ensures the preservation of creative expression, skills and traditions. Islam being one of the oldest legal traditions in practice, it is interesting to juxtapose the long-standing protection of craftsmen under Islamic law with the fact that the protection of traditional craftsmanship only came under the scope of international law through the 2003 Convention.<sup>95</sup>

The above analysis has demonstrated that the protection of cultural heritage is built around Islamic teachings and principles which fully embrace the intangible dimension of cultural heritage. Islamic law crystallized around the notion of divinity, as opposed to international law, which emerged out of States’ interests. To this end, the absolute prohibition of wanton destruction associated with a strong accountability mechanism was crucial to ensuring the prosperity of the Islamic civilization. Similarly, the protection conferred upon those who produce, enact and perpetuate cultural heritage, as long as they do not engage in hostilities, supports this argument. Additionally, the principle of diversity enables the protection of all places of worship, including objects and persons located inside such places, thereby reasserting protection beyond the mere architectural aspect, and regardless of one’s faith.

## Making room for cross-cultural dialogue?

### The double-edged sword of religion

Following the above analysis, one can appreciate that the selected Islamic rules and principles display a notable congruence with international humanitarian norms and can even appear more progressive with regards to safeguarding cultural heritage in armed conflicts. Indeed, the fundamental protection of intangible cultural heritage has existed since early Islam, whereas it is only now emerging as an important protected category in contemporary international law.<sup>96</sup> This view was shared by the prominent Syrian Islamic law professor Wahbeh Al-Zuhili (d. 2015), who stated that the prohibition of the destruction of cultural heritage is one of the fundamental principles prescribed since early Islam.<sup>97</sup> Therefore, if one takes the 2003 Convention as a breakthrough in acknowledging the “deep-seated interdependence”<sup>98</sup> between

94 *Ibid.*

95 2003 Convention, Art. 2(2)(e).

96 K. Bennoune, above note 61, p. 638.

97 Sheik Wahbeh Al-Zuhili, “Islam and International Law”, *International Review of the Red Cross*, Vol. 87, No. 858, 2005, p. 282.

98 2003 Convention, Preamble.



the tangible and intangible dimensions of cultural heritage, this shift had already happened centuries ago in Islamic law.

Nonetheless, there remains one outstanding concern: (mis)interpretation. The preceding section has pointed to the adaptability of the Islamic legal tradition; it should not be understood as a static or monolithic construct.<sup>99</sup> As such, Islamic jurists constantly need to re-engage with the primary sources in order to keep Islam’s message alive and to be responsive to contemporary needs. The resulting multiple, and sometimes conflicting, views of Muslim jurists are an unavoidable corollary of the lack of systematic codification of Islamic law. The case studies referred to throughout this article illustrate this concern. NSAGs have justified their deliberate destruction of heritage on the basis of the alleged prohibition of “idolatry” in Islam, and have removed the content of the Islamic sources from their historical and political context in order to further their military agenda. Thus, while this article’s selection of Islamic texts depicts the Islamic tradition as congruent with international norms, the same sources are also being used to violate international norms. In the words of Evans, religion is a “double-edged sword” since it can both undermine and support humanitarian law.<sup>100</sup> Upon reflecting on the accommodation of religious teachings to promote cross-cultural dialogue, the risk of (mis)interpretation raises the reasonable question of whether, once religion is used to support certain IHL rules, it may also be used to undermine others. Religion remains a “powerful weapon that should not be left to those who advocate violence in its name”.<sup>101</sup> To this end, dialogue is possible – and even necessary – to the extent that the harm inflicted in the name of religion can be countered by a “pragmatic partnership between people of good will working together from both religious and legal perspectives”.<sup>102</sup>

## Strengthening legitimacy and compliance

The aforementioned risk of religious (mis)interpretation is inevitably diminished by codified treaties of international law with identifiable consenting States Parties. However, this clarity and legal certainty must be balanced against the lack of ratification of relevant treaties and protocols. States remain the primary actors of international law, and only States can become parties to international treaties. The very terminology of “non-State actors” or “non-State armed groups” reasserts the centrality of States. However, contemporary dynamics have blurred the contours of the international scene and prompt us to challenge this positivistic approach to international law. The only visible attempt to depart from the State-centric approach in relation to the protection of cultural heritage came through the 2003 Convention. Nonetheless, well-established institutions such as

99 James Cockayne, “Islam and International Humanitarian Law: From a Clash to a Conversation between Civilizations”, *International Review of the Red Cross*, Vol. 84, No. 847, 2002, p. 597.

100 Carolyn Evans, “The Double-Edged Sword: Religious Influences on International Humanitarian Law”, *Melbourne Journal of International Law*, Vol. 6, No. 1, 2005.

101 *Ibid.*, p. 32.

102 *Ibid.*, pp. 28–29.

UNESCO—a focal point for the implementation of the protection of cultural heritage—are unable to engage directly with NSAGs because of entrenched restrictions within their mandate, or political limitations.<sup>103</sup> Unfortunately, the change in narrative towards a community-centred approach has not been accompanied by effective structural changes.

On the other hand, one can appreciate that Islamic law has more potential to strengthen legitimacy and compliance than international conventions to which NSAGs cannot become party and which usually offer limited protection in contemporary armed conflicts in Muslim contexts. Indeed, the peculiarity of the Islamic legal tradition lies in its spiritual foundation, which includes rules on worship, belief and morality. Islamic law is a self-imposed system of law, meaning that compliance with its regulations is perceived as an act of worship for Muslims.<sup>104</sup> Not only does this reinforce the fundamental aspect of intangibility as a core tenet of Islamic law, but this characteristic of Islamic law equally facilitates engagement with NSAGs.

Furthermore, echoing the pattern of World Heritage Site destructions, international law can be criticized for embodying Western values to the exclusion of Islamic traditions. According to Bennoune, “one of the greatest problems facing both IHRL and IHL is that they are considered to be Western concepts, descended from Western values and inspired by the Judeo-Christian tradition alone”.<sup>105</sup> Incorporating Islamic law into the international discourse can provide a partial solution to this issue. For Muslims, it adds moral legitimacy to the norms by recognizing them as part of one’s tradition rather being perceived as an outside imposition.<sup>106</sup>

## Towards reconciliation and harmonious interpretation

The reaction to the deliberate destructions in Muslim-majority States has often portrayed Islam as a threat to Western cultural values.<sup>107</sup> The aforementioned *Al Mahdi* case has even been referred to as a “clash of civilisations”.<sup>108</sup> Yet this article contends that this case could have provided the international community with the opportunity to engage in cross-cultural dialogue. Engaging with Islamic concepts, which could have potentially been raised as a defence by *Al Mahdi*, would not imply that the Court had to agree with such concepts. However, an inclusive approach would have come at a time when the ICC faced a defining

103 M. Lostal, K. Hausler and P. Bongard, above note 2, p. 6.

104 A. Al-Dawoody, above note 66.

105 K. Bennoune, above note 61, p. 641.

106 C. Evans, above note 100, p. 13.

107 Trinidad Rico and Rim Lababidi, “Extremism in Contemporary Cultural Heritage Debates about the Muslim World”, *Future Anterior: Journal of Historic Preservation, History, Theory and Criticism*, Vol. 14, No. 1, 2017, p. 97; Samuel P. Huntington, “The Clash of Civilizations?”, *Foreign Affairs*, Vol. 72, No. 3, 1993.

108 Mark Kersten, “Prosecuting the Destruction of Shrines at the ICC: A Clash of Civilizations?”, *Justice in Conflict*, 4 March 2016, available at: <https://justiceinconflict.org/2016/03/04/prosecuting-the-destruction-of-shrines-at-the-icc-a-clash-of-civilizations/>.

moment for its legitimacy. Incorporating Islamic norms and principles could have overcome criticisms of the ICC as a “Western colonial institution with an anti-African bias”.<sup>109</sup> Furthermore, seeking “additional attention on why cultural property is targeted by Islamist extremist groups is required in order to offer it better protection”.<sup>110</sup> Closer engagement with the Islamic legal tradition would thus have been beneficial for bolstering respect for IHL and, due to its well-developed principles on safeguarding intangible cultural heritage, could have potentially conferred greater protection. Finally, despite the international community’s reluctance to incorporate Islamic rules and principles, the case would have countered extremist views of Islamic law and provided alternative interpretations in line with international law.<sup>111</sup>

Unfortunately, the opportunity to seek clarification on the subject from Islamic law experts was not seized by the Trial Chamber.<sup>112</sup> This article has demonstrated that it is entirely possible to interpret Islamic law without compromising the fundamental norms of IHL and IHRL. The two legal systems should be seen not as incompatible, but as mutually reinforcing synergies.<sup>113</sup> Since it has been established that both legal traditions have a similar logic and common aspirations, and that Islamic law can be interpreted in conformity with the rules of international law, solutions to legal and structural gaps in one system should be sought in the other. International institutions such as the ICC should be able to become platforms for dialogue, but such dialogue should not be exclusively left in the hands of the ICC – it can, and should, take place at many levels.<sup>114</sup> It remains to be seen in the upcoming trial of the second Mali case to what extent the Court will be willing to engage with the Islamic legal tradition.<sup>115</sup>

## Conclusion

The selective discourse of the international community in response to the deliberate destruction of cultural heritage in contemporary armed conflicts has predominantly focused on the material dimension. However, the intangible cultural heritage of local communities is potentially as imperilled as its tangible counterpart in situations of armed conflict. Yet, safeguarding intangible cultural heritage in wartime is only now emerging as a pressing issue on the international scene. This article has established

109 M. E. Badar and N. Higgins, above note 11; Julie Fraser, “Exploring Legal Compatibilities and Pursuing Cultural Legitimacy: Islamic law and the ICC”, in J. Fraser and B. McGonigle Leyh (eds), above note 23, pp. 391–396.

110 M. E. Badar and N. Higgins, above note 11, pp. 515–516.

111 J. Fraser, above note 109, p. 393.

112 M. E. Badar and N. Higgins, above note 11, pp. 515–516.

113 Julie Fraser, “A Seat at the Table: Islamic Law’s Neglected Potential in Universalising International Humanitarian Law”, in Norman Weiss and Andreas Zimmermann (eds.), *Human Rights and International Humanitarian Law: Challenges Ahead*, Edward Elgar, 2021 (forthcoming).

114 J. Fraser, above note 109, p. 394.

115 ICC, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Case No. ICC-01/12-01/18-461-Corr-Red, Corrigendum to the Decision on the Confirmation of Charges, 13 November 2019.

that the current international legal framework remains ill-equipped to address the destruction of cultural heritage in NIACs. By contrast, although there is no direct reference to “cultural heritage”, well-founded Islamic principles uphold the interconnectedness between the tangible and intangible components of cultural heritage. The integrated approach in the Islamic tradition to the rules regulating property in armed conflicts, combined with Islamic law’s compatibility with fundamental human rights, confers substantial protection to intangible cultural heritage. In order to enhance respect for the rules, it is essential for the relevant actors to take global authorship of the norms; establishing the Islamic legal tradition as a common ground would inevitably enhance dialogue with NSAGs and can be an effective tool for increasing NSAGs’ respect for the protection of cultural heritage in armed conflicts in Islamic contexts. Moreover, as a self-imposed system of law, the regime would avoid being perceived as an imposition of Western values, which is what NSAGs seem to reject based on the pattern of destruction of World Heritage Sites. Nonetheless, as a very rich and complex legal tradition, Islamic law’s nature renders it vulnerable to abuse and misuse. The international community has demonstrated a certain reluctance to engage in cross-cultural dialogue incorporating the Islamic legal tradition, mainly because the justifications for the deliberate attacks are allegedly grounded in that legal tradition. This article contends that, in the face of such polarized discussions, it is essential to bridge the discourses between IHL and Islamic law in order to find mutual reinforcement. Only a thorough understanding of Islamic legal rules and principles will avoid misinterpretations and enable Islamic law to grant the special protection that it affords to all manifestations of cultural heritage.