Criminal Liability for Violation of Rules Protecting Cultural Property in Iraqi and Comparative Law

Hussein Hamzah Najari Bashi, Mahdi Khaghani Esfahani, Soodabeh Rezvani

**Article Info**

**Article History**
- Received: May 21, 2021
- Accepted: October 25, 2021

**Keywords:**
- Cultural Property
- Criminal Protection
- Crimes Against Heritage
- Armed Conflict

**Abstract**
The evolution of modern armed conflicts methods and acceleration pace of their occurrence has led to the violation of many provisions of international humanitarian law and customary Convention, not persons neither properties away were away from such abuses where the cultural properties -real estate or moveable, Faced many breaches, So it had to make legal rules concerned with providing protection for this heritage, because of its great intrinsic value to the international community. Thus, the efforts concluded to the Hague Convention of 1954 which is the first international document that specializes in the subject, and with the adoption of the Second Additional Protocol of 1999, which approved the principle of individual responsibility for violations of the protection's rules of the cultural property; It also supported by Article 8 of the Statute of the International Criminal Court. Which it has been applied through the accountability of the perpetrators of many of the cultural war crimes in the wake of the two world wars; where many trials had been taken place for this purpose as Nuremberg and Yugoslavia, while the responsibility of the state in this area remained as a legal person under the general rules of public law.

**Introduction**
With the high incidence of armed conflicts, extermination operations of civilizations, values, heritage and cultures have emerged, and armed conflicts are seen as an act that threatens the human entity, as the effects of these conflicts did not depend on harming the human being, whether in his personality or property, but rather extended to prejudice the cultural and civilizational heritage of peoples, and from Here the voices that called for the protection of the state’s heritage appeared as long as the international community was unable to stop the war, as it was one of the victims of armed conflicts. As a result, the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict of 1954 and its two protocols was signed, especially after making sure that it was difficult to compensate for the looting or destruction of cultural property in general after the Second World War.

**Controlling legal responsibility for violating the rules of protection of cultural property**
International responsibility in general is the relationship that arises between persons of international law as a result of violating customary rules or conventions, which are classified as grave violations of the provisions of this law, and consequent damage that must be redressed. Hence, legal responsibility for the violation of the rules for the protection of cultural property, especially in international armed conflicts, which arises in the field of international and domestic law rules for the protection of cultural property, when a person of international law violates those humanitarian obligations during an armed conflict.

**Establishing international responsibility for violations of the rules for the protection of cultural property:**
As is well known, the goal of each party in an armed conflict is to weaken the other conflicting party or parties, even if it requires the use of new and more destructive means and methods of combat, but the conflicting parties do not take into account the damage that may affect cultural property from that, and may invoke military necessity To prove the legitimacy of its actions in the event that error is proven when one of the parties to the conflict is responsible for exposure to tangible cultural property, and for the theory of risk as a basis for international responsibility, it means the international responsibility of a person of international law in the event of damage even if the act is legitimate, which is something that keeps pace with the developments taking place In the technical and military field, by arranging international responsibility for damage to cultural property, even if the objective is a legitimate military objective. As for the illegal international act as a basis for international responsibility, it means a breach of an international legal rule, regardless of its source, by convention or custom. The United Nations International Law Commission adopted the draft articles on the responsibility of states for illegal international acts on December 12, 2001 (Article 50). For the establishment of international
responsible, it is required that those violations be attributed to a person of international law, and thus the attack on material cultural property in an armed conflict and in any form whatsoever, is an internationally wrongful act on which the international responsibility of the violating party is established, regardless of the occurrence of damage or not, because the violation of the law International humanitarian law, according to the International Law Commission alone, is sufficient to justify the right of the victim party, as stated in the Second Additional Protocol to the Hague Convention of 1999.

**Contraindications to international responsibility for violating the rules for the protection of cultural property:**
The International Law Commission codifies a set of circumstances that exclude the legitimacy of violations of international humanitarian law and not consider them as reasons for permissibility, the most important of which are:

1. Acceptance (consent) No party to an armed conflict can accept the violation of humanitarian rules protecting cultural property, for example, that no special agreement may be concluded that would limit the protection afforded by the 1954 Hague Convention to cultural property and to the officials charged with its protection.
2. Legitimate defense Self-defence does not exclude the illegality of behavior in relation to the obligations imposed by international humanitarian law. Despite this, Israel has often justified its targeting of Palestinian cultural property under this circumstance.
3. Countermeasures, where draft articles 22 and (1/50/c) of the draft articles on State responsibility for illegal international acts prohibit reprisals or reprisals affecting obligations of a humanitarian nature that prohibit reprisals against cultural property.
4. Necessity, it does not motivate military necessity to evade adherence to the provisions of international humanitarian law, except in what these provisions expressly stipulate otherwise, as a kind of restrictions imposed on the conflicting parties so as not to undermine the human civilization of a people retroactively.

**Cases of assuming international responsibility for violation of the rules for the protection of cultural property:**
These cases are divided in terms of the type of responsibility placed on the shoulders of the persons of international law into:

**First: Individual international criminal responsibility.**
The idea of individual criminal responsibility was first adopted in 1474 in the trial of "Peter von Hagenbach" for war crimes as he trampled under his feet the laws of God and man. In the last century and after World War I, the 1919 Treaty of Versailles established under its Articles (227) and (228) the right of the Allied Powers to prosecute individuals responsible for "violations of the laws and customs of war", specifically the Emperor of Germany "Guillaume II" for a grave breach of morality. International and the sanctity of the treaties concluded, but the initiative failed as a result of the rejection of the government of the Netherlands, the petition for his extradition. The World War II trials of Tokyo and Nuremberg also produced the first implementation of the principle of individual international criminal responsibility, without any regard for immunity or the fact that a person had acted at government commission or by order of the President as a reason for exoneration or mitigation of punishment, and without distinguishing between those who committed crimes International damage to cultural property actually or indirectly through planning or incitement, which was endorsed by the United Nations General Assembly in its resolution of December 11, 1946, and consequently the judgments of the International Criminal Court of Nuremberg regarding the protection of tangible cultural property during armed conflict , has set a judicial precedent in this field, as the court considered that exposure to places of worship constitutes an international crime.

The International Criminal Tribunal for the former Yugoslavia also referred to the crime of willful destruction or damage to historical property through the continuous bombing of Dubrovnik. The reopening of the file in February 2001 was considered an important event. The Director-General of UNESCO, Koichiro Matsuura, announced his happiness with the court, saying: "This sets a historical precedent." He added: It is the first time since the Tokyo and Nuremberg rulings that an international court has issued a ruling on Crimes committed against cultural property, in addition to the presentation of the former Serbian President “Carazic” to the International Criminal Tribunal for Yugoslavia in July 2008, which led to the incitement of crimes that touched the material and cultural values of Bosnia, especially in the city of “Srebrenica”. As for the Rome Statute of the International Criminal Court in 1998, it established the international criminal responsibility of individuals on the basis of committing cultural war crimes, so that the jurisdiction of the Court is limited to natural persons, so that the person is responsible for the crimes in his personal capacity, whether he committed them personally or jointly with others or through another person. With reference to the text of Article (8) of the Rome Statute,
which includes punishable war crimes, its second paragraph, in the ninth point of item (b) thereof, specifically states that intentionally directing attacks against buildings designated for religious or educational purposes, Artistic, scientific, charitable, and historical antiquities are a war crime, provided that these properties do not constitute military objectives. The Rome Statute also reaffirmed that the aforementioned acts constitute grave violations of the Geneva Conventions of 1949, in the fourth and fifth points of clause (c) of the same paragraph, and thus the Statute of the International Criminal Court criminalizes any violation of cultural property, in all international and non-international armed conflicts on the Both.

Second: the international responsibility of states:
The responsibility of the state did not become absolute until after 1907, when jurisprudence distinguished between acts of sabotage committed by soldiers in the presence of their officers or upon their orders, and their perpetration of such acts in their absence, so the state is bound by civil responsibility, which includes:
1- Violations committed by state agencies, including its armed forces (Article 4 of the 2001 Convention on State Responsibility).
2- Violations committed by persons or entities authorized by the state to exercise some governmental authority, such as mercenaries and private military companies (Article 5).
3- Violations committed by persons or groups actually operating on the instructions of the State or under its supervision or control (Article 8).
4- Violations committed by persons or groups, recognized and adopted by the State as its actions, whereby the State bears responsibility if it does not take measures to prevent grave breaches of the rules protecting cultural property in an armed conflict by parties, whether they are individuals or entities affiliated with it; Its responsibility also arises from crimes affecting cultural property, or it has not compensated for the damage caused by the wrongful acts attributed to it. The Second Additional Protocol of 1999 stipulated under Article (38) thereof, which stipulated the following: (No provision in this Protocol relating to individual criminal responsibility shall affect the responsibility of States under international law, including the duty to provide compensation).

Legal qualification of the act of targeting cultural property through of armed conflict:
The act of targeting cultural property in an armed conflict is considered the basis for international responsibility as a violation of the rules of international humanitarian law related to the protection of cultural property, as these rules seem more clear with regard to grave violations against cultural property as an international crime.

Accordingly, the act of attacking cultural property in the context of an armed conflict is a war crime in the provisions of international humanitarian law, as stipulated in the fifth paragraph of Article (85) of the First Additional Protocol to the Geneva Convention of 1977. Serious violations of the conventions, and this protocol are considered war crimes, with Without prejudice to the application of these charters, and in accordance with international custom as well, which considers grave violations of international humanitarian law to constitute war crimes, and therefore the attack on tangible cultural property protected under this law is a cultural war crime, when the required elements are available in accordance with the elements of war crimes that Adopted by the Assembly of States Parties to the Rome Statute of the International Criminal Court at its first session, held in New York from 3 to 10 September 2002.

Serious violation:
It is the material element of the crime. There must be illegal behavior committed in contravention of the convention or customary humanitarian rules for the protection of cultural property, whether positive or negative, in the form of a violation or an attack on the protected interest. The rules of international humanitarian law that seem clearer regarding Crimes against cultural property, a definition of grave violations and distinguishing them from minor violations, as it contented itself with describing some of the violations by enumerating them. Article (4/85/d) of Additional Protocol I to the Geneva Convention of 1977 considered grave violations, attacks on historical monuments, places of worship and clearly identifiable works of art, which represent the cultural or spiritual heritage of peoples, and for which special protection was provided under certain arrangements, resulting in the massive destruction of such property, when there is no evidence of a breach by the adversary of Article 53, paragraph B, and these historical monuments, places of worship and works of art are not in direct proximity to military objectives, and through the Rome Statute The establishment of the International Criminal Court in 1998 for serious violations classified as war crimes, as all serious violations of the laws and customs applicable in international armed conflict, including intentionally directing attacks against buildings designated for religious, educational, artistic, scientific or charitable purposes and historical monuments, provided that they are not the targets military.
The most prominent development witnessed by this type of violations is what was stated in the Second Additional Protocol to the Hague Convention of 1999, which is currently the most important document to
provide protection for cultural property during armed conflicts. Article (15) of it defines acts that constitute grave violations against cultural property, and lists them in five violations as follows:

1. Attacking cultural property under enhanced protection.
2. The use of cultural property under enhanced protection, or its immediate vicinity, in support of military action.
3. Extensive destruction or appropriation of cultural property protected under the Convention and this Protocol.
4. Attacking cultural property protected under the Convention and this Protocol.
5. Committing theft, embezzlement or vandalism of cultural property protected under the Convention.

The violation is against a protected international interest or a fundamental human value of the international community:

It is the cornerstone of internationalism. The protected interest must be characterized as international or one of the major human values that the international community seeks to confer criminal protection upon.

Tangible cultural property is a fundamental common interest of the international community, taking precedence over the self-interests of the conflicting parties during an armed conflict. An attack on them, which are not military objectives during armed conflict, is an attack on a fundamental interest and a fundamental value of the international community. This is based on the idea of attacking the cultural rights of the human being as a natural person, as an international moral person has gradually begun to take root in international law. Cultural and religious human rights are guaranteed under the International Bill of Human Rights, which includes the Universal Declaration of Human Rights of 1948, and the two International Covenants on Human Rights of 1966. It was stated in the Final Document of the World Conference on Human Rights in Vienna in 1993 in Article (1/19) that: (Grave violations constitute an obstacle to the enjoyment of human rights, including cultural rights). As for cultural human rights, they are linked to the idea of preserving the common heritage of humanity, which means the human race is deprived of its belonging to one country or another, i.e., the whole world, where the relationship between humanity and the common heritage appears in the fact that humanity has a right to what falls within the heritage.

Violation knowingly and willfully:

It is the focus of the moral element, as the war crime or cultural crimes as an international crime assume that the act that constitutes it is issued by a person of international law with a legal will, that the perpetrator of this crime deliberately (criminal intent) to make the target of the attack a cultural property designated for religious or educational purposes Artistic, scientific, charitable, historical, or other monuments, provided that they do not constitute military objectives, and that the conduct takes place in the context of and is associated with an armed conflict so that the perpetrator is aware of the actual circumstances proving the existence of an armed conflict and is aware of the outcome that will occur in the context of The normal course of events, and the criminal intent of the perpetrator appears through the repetition of violations on a large scale without justification dictated by military necessities, or as it comes within the framework of an organized and systematic policy to target cultural property.

However, this is the condition of knowing the existence of an armed conflict and that the attack on cultural property in this context, although it can be considered in armed conflicts as a justification for attacking cultural property in the past, is not suitable for current armed conflicts, especially in light of the development of means of communication and transportation and the efforts made to spread knowledge of the provisions of international humanitarian law, especially among the armed forces. As for the will clause, the issue of sharing the burdens of responsibility between the superior and the subordinate arises here in the case in which the subordinate is ordered to carry out an order contrary to the rules for the protection of cultural property during an armed conflict, since the documents in question were not exposed to this even though the first draft Additional Protocol to the 1977 Geneva Convention contained this case. Accordingly, Professor Igor believes that any person who carried out the order given to him by his superior may be held accountable if it includes a flagrant violation of the rules of international humanitarian law. Whereas, with reference to Article (2/86) of Additional Protocol I to the 1977 Geneva Convention, both the superior and the subordinate bear the burdens of criminal and disciplinary responsibility.

In addition, in order to avoid the occurrence of such grave violations, decisions to target cultural property in an armed conflict under the justification of military necessity are made only by the commander of a military force equal in size or greater than a battalion of ten thousand soldiers, or a smaller force if circumstances do not permit otherwise. It is known that the training of commanders and officers in the field of international humanitarian law is of a higher level than that of ordinary soldiers, which makes it likely that cultural property will not be exposed during military operations or makes it a weak possibility, and other precautionary measures to protect cultural property in armed conflicts, especially the distinctive emblem system and the presence of qualified workers and legal advisers They received specialized education and training within the armed forces.
which allows knowledge of these properties and their purposes, and thus there is no excuse for ignorance of the nature of the property under attack and the legal rules regulating protection as an integral part of any military doctrine.

However, in reality, cultural property is often deliberately targeted in armed conflicts, where Some of this destruction occurs accidentally, and in other cases the conflicting parties have justified the destruction of cultural property on the grounds of military necessity. However, the acts of destruction are intentional in most cases. The destruction of monuments, places of worship or works of art aims to achieve a psychological victory by destroying the opponent’s identity and eliminating his history, culture and faith, in order to erase every trace of his existence. The cultural war crimes in Iraq do not appear to be an arbitrary occurrence or merely a byproduct of the war on terrorism or the spread of democracy and human rights, as he claimed. Rather, they come within the framework of a deliberate plan to destroy Iraq’s human civilization, which extends for more than six thousand years and its cultural identity, by looting and stealing Baghdad’s museums and burning its libraries. The bombing of its universities is nothing but the destruction of Iraqi cultural property.

Conclusion
The rules of international humanitarian law are concerned with the protection of objects and property that represent the spiritual and moral need of man as a cultural heritage. It has been established in public international law that every country in the world has a distinct cultural identity, and special cultural properties that are part of the components of its independent personality, embody its genius and represent the fruit of material creative production. and morale for its children throughout human history. Hence, the act of attacking protected cultural property in the context of an armed conflict is considered a cultural war crime, as it is a grave violation of the rules of customary and convention international humanitarian law in this field, and its subject is a protected international interest or an essential human value of the international community.

For the establishment of international responsibility, it is required that those violations be attributed to a person of international law, and thus the attack on material cultural property in an armed conflict and in any form whatsoever, is an internationally wrongful act on which the international responsibility of the violating party is established, regardless of the occurrence of damage or not, because the violation of the law International humanitarian law, according to the International Law Commission alone, is sufficient to justify the right of the victim party, although the harm is taken into account when assessing compensation. This is what was recognized by the Second Additional Protocol to the Hague Convention of 1999 in its article, when it did not focus on harm as a necessary condition for the establishment of international responsibility on the grounds that the harm The moral is always present even if there is no physical damage.

Therefore, the principle of universal criminal jurisdiction in violations of cultural property during armed conflicts must be strengthened, so that the national judiciary is not restricted only to crimes that affect cultural property and occur on its territory. While continuing to strengthen international cooperation and mutual assistance in the field of combating impunity for cultural war crimes, especially since they are not subject to the concept of statute of limitations. In addition to urging countries to ratify the statute of the International Criminal Court to ensure the effectiveness and credibility of the latter in the field of deterring violations of international humanitarian law and support the rules for the protection of cultural property, which reduces its targeting.

Reference
The Holy Quran
Amin Ahmed Al-Hudhaifi, Criminal Protection of Antiquities (a comparative study), Dar Al-Nahda Al-Arabiya, Cairo, 2007.
Raaafat Abdel-Fattah Halawa, Criminal Protection of Antiquities in the Light of Antiquities Protection Law No. (117) for the year 1983 (a comparative study with Islamic law), without publishing house and place, 2003.
Samir Alia, Explanation of the Penal Code, General Section (a comparative study), University Foundation for Studies, Publishing and Distribution, Beirut, Lebanon, 2002.
Counselor Ashraf El-Ashmawy, Legitimate Thefts (Tales about the theft and smuggling of antiquities in Egypt and attempts to recover them, The Egyptian Lebanese House, Cairo, 2012.
Counselor Sayed Hassan Al-Baghal, Aggravating and Mitigating Circumstances in the Penal Code, Jurisprudence and Judiciary, Dar Al-Fikr Al-Arabi, without publication year.
Ahlam Adnan Al-Jabri, Sub-sanctions (a comparative study), PhD thesis, College of Law, University of Baghdad, 1999.

<table>
<thead>
<tr>
<th>Author Information</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Hussein Hamzah Najar Bashi</strong></td>
</tr>
<tr>
<td>PhD Researcher in Criminal Law and Criminology at Kharazmi University, Tehran, Iran. (Correspondent Author)</td>
</tr>
<tr>
<td><strong>Mahdi Khaghani Esfahani</strong></td>
</tr>
<tr>
<td>Assistant Professor of Criminal Law &amp; Criminology, The Institute for Research and Development in the Humanities (SAMT), Tehran, Iran</td>
</tr>
<tr>
<td><strong>Soodabeh Rezvani</strong></td>
</tr>
<tr>
<td>Assistant Professor of Criminal Law &amp; Criminology at Kharazmi University, Tehran, Iran</td>
</tr>
</tbody>
</table>