

The destruction of cultural property by the Islamic State in Mosul and Palmyra: is International law the answer?

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ABSTRACT

Among countless atrocities, the Islamic State (IS) is responsible for wreaking cultural artifacts in Mosul and Palmyra. This paper enquire what actions Iraq and Syria could undertake under International Law to protect cultural property and to hold IS's fighters accountable for their crimes. After analyzing International Humanitarian law instruments, the rules on the use of force, the UNESCO Declaration on the Intentional Destruction of Cultural Heritage and the Statute of the International Criminal Court, it will be ascertained that several legal instruments could aid the two States. Why these issues are not addressed in practice will then be discussed.

Keywords

Islamic State, cultural property destruction, Mosul, Palmyra, International law.

INTRODUCTION

Baqiya wa tatamadad, lasting and expanding. This is the final objective of the Islamic State (IS): to recreate a Caliphate, covering the whole Earth, where the *Sharia*, the Law of Islam, will reign. In pursuance of this ambition, IS's fighters have systematically attacked cultural property in all the territories they conquered. In 2015, they destroyed ancient temples and museums in Mosul and Palmyra in an attempt to erase the identity and the historic memory of their enemies, of which cultural artifacts are a living testimony. But what actions could Iraq and Syria undertake under International law to protect their cultural property and to hold IS's fighters accountable for their conduct?

THE ISLAMIC STATE AND THE DESTRUCTION OF MOSUL AND PALMYRA

Despite its name, whether IS is a State under International law is a matter of debate. To answer this query, it is necessary to refer to the Montevideo Convention of 1933. Art. 1 prescribes that, in order to be classified as such, a

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state entity must possess a permanent population, a defined territory, a government and the capacity to enter into relations with other states. Considering that every successful battle for IS will extend the latter provinces while every *debacle* will reduce its territories, it seems that the second criteria of statehood is not fulfilled. As a consequence, IS constitutes a non-state entity under International law.

The legal nature of the attacks in Mosul and Palmyra

Generally, it can be stated that an armed conflict exists whenever there is a resort to armed forces. International Humanitarian law has traditionally distinguished among two types of armed conflicts, in accordance with the nature of the parties involved. Hence, if hostilities are carried out between two or more states they will be defined as constituting an international armed conflict; while a conflict between a state's armed forces and (at least) one non-governmental armed group, or between such groups exclusively, will be characterized as non-international or internal. Another important distinction is the one existing between internal conflicts and other less serious forms of violence, such as internal disturbances and tensions. Two are the criteria used to guide this differentiation. On the one hand the confrontation must reach a minimum level of intensity. On the other hand non-governmental group(s) involved in the hostilities must have been recognized as ‘*parties to the conflict*’: namely, they have to control their own, organized armed forces (Ronzitti, 2014, 137-150). Applying these rules to the destruction of cultural property in Mosul and Palmyra, it can be concluded that an armed conflict was taking place. For months IS had been fighting the Iraqi and Syrian governmental authorities with military forces, and the seize of Mosul and Palmyra themselves was accomplished due to the militants' resort to armed force. Being IS a non-state entity, the analyzed internal conflicts between the organization and the Syrian government on the one side and IS against Iraq on the other side can both be *prima facie* classified as possessing non-international nature. This hypothesis is confirmed when considering that the necessary threshold of confrontation for distinguish them from internal disturbances has been crossed. In fact, (i) both governments had to deploy their army to respond to IS's actions, and (ii) the Caliphate's military forces are well-organized, divided in hierarchical structure and capable of sustaining military operations.

Methodology

In the following Sections, a comprehensive analysis of applicable, international legal instruments which could help Iraq and Syria in protecting cultural property (Issue 1) and in holding IS fighters accountable for their actions (Issue 2) will be conducted. The same pattern of analysis is followed for each of them: first, their scope of application is tested. Secondly, their substantive content is examined. Thirdly, their suitability for addressing the issues at hand is discussed.

THE UNESCO DECLARATION CONCERNING THE INTENTIONAL DESTRUCTION OF CULTURAL HERITAGE OF 2003

In recent times, states feel the necessity to create an ever growing number of norms to ensure the protection of their cultural artifacts. Among these newly created legal tools, the Declaration concerning the Intentional Destruction of Cultural Heritage deserves a special mention. It was adopted on the 7th October 2003 by UNESCO, in an attempt to combat this increasingly widespread phenomenon (Preamble and Part III Declaration). The soft-law nature of this instrument must be underlined: its provisions are not formally binding neither upon the Parties to the Conference which have adopted it, nor upon any other state. Nevertheless, this Declaration deserves attention due to its significance: it is a sign of a new, emerging trend characterizing States' practices in this area (Milligan, 2008, 101-2). Therefore, this instrument may be important to ascertain how the customary law related to the protection of cultural heritage is currently developing. Among the measures suggested in order to contrast the destruction of cultural artifacts, the Declaration recommends the states to ratify the HC of 1954, its Protocols and the ones to the Geneva Conventions of 1949. Furthermore, states are invited to undertake all appropriate measures to protect cultural properties, and their accountability for the destruction of these objects, even if caused by a failure to act, is promoted (Part V and VI).

The importance of the Declaration for Mosul & Palmyra

As highlighted at the beginning of this Section, the UNESCO Declaration does not possess any binding power. As a consequence, it cannot be of fundamental importance in solving the issues of the destruction of cultural properties in Iraq and Syria: it neither provides for an efficient mechanism for holding IS's fighters accountable for their actions, nor gives a practical solution to the two States. Nevertheless, if the content of the Declaration was, in fact, legally binding, it would pose upon the two states the strict duty of protecting cultural property. Furthermore, it would make them responsible for destroying - or failing to prevent the destruction of - cultural heritage, hence further promoting the protection of cultural artifacts. Therefore, it would be desirable for the content of this instrument to become binding in nature: it could indeed be helpful in addressing the episodes of Mosul and Palmyra, as well as other similar cases. One

way this could happen is through States' practices – or *usus* - and the creation of an *opinio juris sive necessitatis*, namely the belief that such practice is required as a matter of law. In this way, the content of the Declaration would acquire status of Customary law, and therefore be binding upon every actor (*North Sea Continental Shelf* (Federal Republic of Germany v. Denmark), 1969, 3). Nevertheless, since this step has not yet been undertaken, it may be concluded that the UNESCO Declaration cannot (as yet) be suitable to address the issues presented in this paper.

INTERNATIONAL HUMANITARIAN LAW

International Humanitarian law (IHL) entails the so-called Law of The Hague, traditionally focused on regulating the conduct of hostilities, and the Law of Geneva, which mainly addresses the protection of victims of war (Bugnion, 2001, 907-908). In the following sub-sections, solely instruments which could address Issue 1 and 2 are analyzed.

The Hague Convention (HC) of 1954

This Convention aims at protecting, safeguarding and securing cultural properties in times of peace and in those of armed conflicts (Art. 18 HC). This protection extends over the devastations of Mosul and Palmyra, since:

- The HC formal scope of application (Art. 30-32) is fulfilled, being Iraq and Syria among its High Contracting parties;
- The same holds true for the temporal scope (Art. 33), the Convention having entered into force in 1956 and the discussed devastations having taken place in 2015;
- The material scope is satisfied as well (Art. 1), since the properties which IS damaged were of fundamental importance to the cultural heritage of every people.

Turning to the substantive content of the instrument, according to its Art. 19 the Iraqi and Syrian governments should try to conclude a deal with IS's fighters in order to enable a more effective protection of cultural properties. Nevertheless, this option is clearly not feasible in reality. Consequently, the HC does not result suitable in practice for addressing the destruction of cultural property which happened in Mosul and Palmyra.

The Second Protocol (SP) to the HC

Drafted so to strengthen the design of the HC and to address its main weaknesses, the SP was adopted in 1999. It is not applicable to the wrecking of Mosul and Palmyra, due to the fact that neither Iraq nor Syria are parties to the Second Protocol: as such, they are not subjected to its provisions, and hence the requirement of the formal scope of the instrument (Art. 40-42) is not fulfilled. As a consequence, the more comprehensive system of criminal responsibility and jurisdiction contained in Chapter 4 SP cannot be relied upon by Iraq and Syria. Therefore, this instrument is in practice neither useful for protecting cultural property in these situations, nor for holding IS accountable for its actions. It must be emphasised

that the main reason for such unsuitability is the two States' unwillingness to be bound by the legal instrument.

The Second Protocol to the Geneva Conventions of 1949 (SPGC)

This additional Protocol was adopted in 1977, so to ensure a 360° protection of victims of armed conflict by extending the most fundamental rules of the law of international armed hostilities to non-international ones (International Committee of the Red Cross, 2006). This instrument does not seem *prima facie* to be applicable to the happenings of Mosul and Palmyra, since its personal scope of application (Art. 20-22) is not fulfilled: in fact, both Iraq and Syria failed to ratify the Protocol. Nevertheless, having acquired status of Customary International law, the provisions of the SPGC are binding not only on the Parties which voluntarily ratified it, but also on all other States, including Iraq and Syria (Cassese, 1984, 55-118). Interestingly, Art. 16 forbids any act of hostility against cultural properties. Although this general prohibition against the damage and destruction of cultural artifacts indeed promotes the respect of cultural property, in practice it does not seem to be effective in holding IS's fighters accountable for their conduct in Mosul and Palmyra.

THE USE OF FORCE IN INTERNATIONAL LAW

Following the horror of the Second World War, Countries all over the world felt the necessity of creating a multilateral system which could promote and maintain international peace and security. This desire led to the drafting of the United Nation (UN) Charter in 1945. This legal instrument definitively abolished the States' freedom to resort to war, as well as any other military action falling short of war (Art. 2(4) Charter and Ronzitti, 2014, 25). The provisions of the Charter are applicable to the happenings of Mosul and Palmyra, since:

- Its formal scope (Art. 3, 4, 110) is satisfied, being Iraq and Syria among its High Contracting Parties;
- The same holds true for its temporal scope, being the Charter applicable to relevant situations occurred after the 24th October 1945 (Art. 110(3)).

The material scope of the instrument is fulfilled as well (Art. 1-2), since IS has accompanied the systematic devastation of cultural artifacts with the killing and gross violation of human rights of the Iraqi and Syrian populations. This type of conduct can be classified as a threat to international peace and security, as it has happened before in the past (UN International Criminal Tribunal for former Yugoslavia, 2016) and as required under the Charter material scope. Consequently, this legal instrument covers the happenings of Mosul and Palmyra.

The Prohibition on the Use of Force and the Exception of Invitation

As mentioned before, Art. 2(4) of the Charter poses a general prohibition to the unilateral use of force by UN Member States if '*inconsistent with the Purposes*' of the UN. These include the maintenance of international peace and security, as well as the achievement of international

cooperation (Art. 1). Nevertheless, exceptions to this general rules exist, both in the Charter itself and under International Customary law. Under the customary exception of invitation, the two states could request other UN Members to deploy their military forces in their territories. They could also authorise other states to resort to force in order to protect cultural property and to hold IS's fighters accountable for their actions: these would be considered as lawful purposes, which would not breach any international law or duty. Of course, the invitation would have to be issued by the legitimate Iraqi and Syrian sovereign authorities, such as their governments (Saranti, 2013, 185-187). Assuming that these requirements would be satisfied, Iraq and Syria could request other UN Member States to help them, by inviting them to dislocate their armies in the Iraqi and Syrian territories, so to engage in the use of force against IS. As a consequence, it may be concluded that the UN Charter (and the International Customary law related to the use of armed force) could aid the two States in protecting cultural property as well as in holding IS's militants accountable for the destruction of cultural artifacts in Mosul and Palmyra.

THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT (ICC)

Considered as one of most innovative and exciting development in international law since the creation of the United Nations, the ICC was established via the Rome Statute in 1998 and became fully operative on the first of July 2002 (Schabas, 2011, 20.) Having its roots in an international treaty, the Court will have to rely on the States' voluntary consent for being able to adjudicate a certain case. Neither Iraq nor Syria are Contracting Parties to the Statute: as a consequence, its formal scope (Art. 125) is not fulfilled and the aforementioned instrument will not be applicable to the happenings of Mosul and Palmyra. It is important to underline once again that this is a consequence of the two States unwillingness to ratify, and hence be bound by, the Statute. Nevertheless, according to Art. 12, Iraq and Syria could exceptionally accept the ICC jurisdiction over the specific happenings of Mosul and Palmyra. If this hypothetical situation would materialise, the Court would be able to adjudicate the cases since:

- The formal scope would be satisfied;
- This holds true for the temporal scope as well, since the wreaking of the two cities took place after 2002 (Art. 126 jo. 11 Statute);
- The material scope would be fulfilled as well (Art. 1, 5 jo. 8), since IS attacked buildings dedicated to religion, art and historical monuments -which constitute a war crime under the Statute.

If the Statute would then be applicable, under Art. 25 IS fighters would be accountable for the crimes which they committed jointly. Furthermore, Art. 28 would allow to hold IS's military and political leaders responsible for the events of Mosul and Palmyra, since it is inferable from IS *modus operandi* that the destruction of cultural property is encouraged, if not directly order, by them. Every State

Party to the Statute would have to cooperate with the Court in the investigation and prosecution of these crimes (Art. 86 and 89), and the ICC would be able to order the imprisonment of IS leaders and fighters (Art. 78). Therefore, it can be concluded that the Rome Statute is potentially suitable to protect cultural property and to address the destruction of the latter in Mosul and Palmyra, as well as for holding IS's fighters and leaders accountable for their own actions. Nevertheless, before this could happen in practice, Syria and Iraq need to accept the ICC jurisdiction over the matters: otherwise, the Court will not have the competence to adjudicate these cases.

CONCLUSION

Throughout this paper, it has been ascertained that there are several instruments at international level which could aid Syria and Iraq in addressing the destruction of cultural property undertaken by IS in Mosul and Palmyra. There are plenty of provisions, scattered in different Conventions and International Agreements, which could efficiently tackle these issues. Why then, is this not happening today? It does not seem to be an issue of *lacuna legis*, as much as a problem of States' willingness and practical difficulties. Despite the different tools provided by International law, in many instances the possibility of prosecuting the authors of the devastations is barred by the impossibility to exercise control on IS's militants. In other instances, such as the one of the Second Protocol to The Hague Convention of 1954 or of the Rome Statute, the instruments could have helped Iraq and Syria to address the issues presented. Nevertheless, the two States refused to ratify, and hence to be bound by, the international agreements. It is true that these have their own, intrinsic limitations and drawbacks. Nevertheless, in the cases at hand, it seems likely that if the two Government would consent to renounce to part of their sovereignty and transfer it to the relevant international institutions, such as the ICC, they would be able to successfully prosecute the destruction of cultural properties in the two cities. As a consequence, it may be concluded that there are several actions under International law which Iraq and Syria could undertake to redress the happenings of Mosul and Palmyra. Nevertheless, in order to ensure the protection of cultural property more in general and to hold IS's militants responsible for the demolitions of cultural property in these two cities in particular, the two States need to recognize their inability to deal with the Islamic State on their own. They should transfer part of their sovereignty to the competent international institutions via ratification of relevant international instruments.

Furthermore, together with the rest of the International Community, Iraq and Syria should promote the acquisition of the status of Customary law by the UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, being its content extremely useful for protecting cultural artifacts.

ROLE OF THE STUDENT

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