

**LEGAL PROTECTION TOWARDS CULTURAL PROPERTY
IN ARMED CONFLICT IN THE EVENT
OF SYRIA WAR**

A THESIS



By

ANGGAVISCA N.A
Student Number: 11410378

INTERNATIONAL PROGRAM
FACULTY OF LAW
ISLAMIC UNIVERSITY OF INDONESIA
YOGYAKARTA
2017

**LEGAL PROTECTION TOWARDS CULTURAL
PROPERTY IN ARMED CONFLICT IN THE EVENT
OF SYRIA WAR**

A THESIS



Presented as Partial Fulfillment of the Requirements
to Obtain the Bachelor Degree at the Faculty of Law

By

ANGGAVISCA N.A

Student Number: 11410378
Department: International Law

INTERNATIONAL PROGRAM
FACULTY OF LAW
ISLAMIC UNIVERSITY OF INDONESIA
YOGYAKARTA

2017

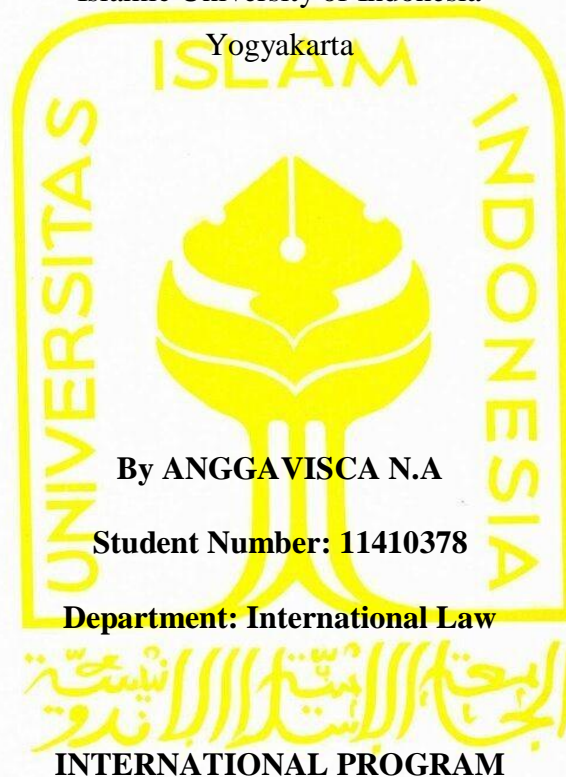
LEGAL PROTECTION TOWARDS CULTURAL PROPERTY IN ARMED CONFLICT IN THE EVENT OF SYRIA WAR

A THESIS

Presented as Partial Fulfillment of the Requirements to Obtain the Bachelor Degree at the
Faculty of Law

Islamic University of Indonesia

Yogyakarta



FACULTY OF LAW

ISLAMIC UNIVERSITY OF INDONESIA

YOGYAKARTA

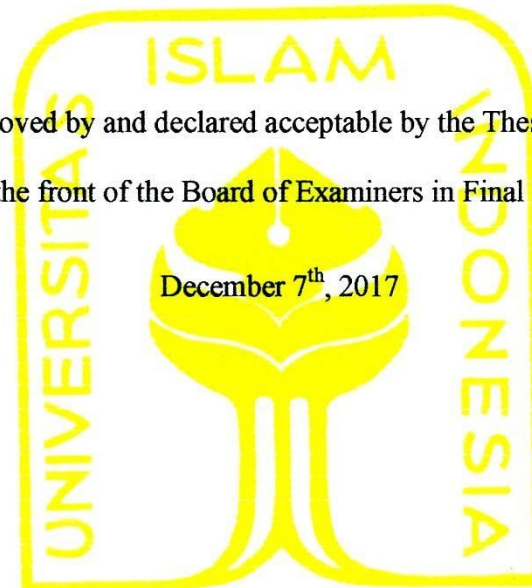
2017

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

A THESIS

**LEGAL PROTECTION TOWARDS CULTURAL PROPERTY IN ARMED
CONFLICT IN THE EVENT OF SYRIA WAR**

Has been approved by and declared acceptable by the Thesis Advisor to be
submitted in the front of the Board of Examiners in Final Examination on



December 7th, 2017

الجامعة الإسلامية
الاندونيسية

Yogyakarta, August 10th, 2017

Thesis Advisor

(Dr. Seffiani, S.H., M.Hum.)

NIP. 934100101

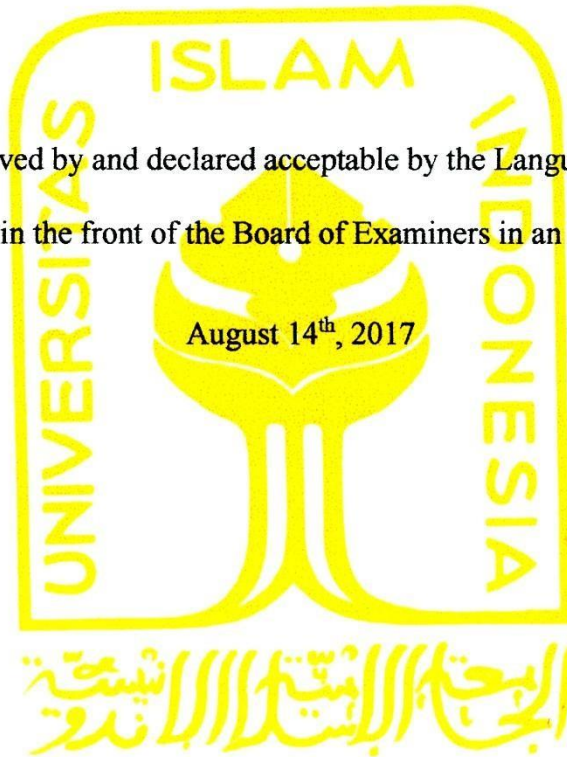
بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

A THESIS

**LEGAL PROTECTION TOWARDS CULTURAL PROPERTY IN ARMED
CONFLICT IN THE EVENT OF SYRIA WAR**

Has been approved by and declared acceptable by the Language Advisor to be
submitted in the front of the Board of Examiners in an oral exam on

August 14th, 2017



Yogyakarta, August 10th, 2017

Language Advisor

(Jessica M Simpson, M.A (TESOL/LOTE))



A THESIS

**LEGAL PROTECTION TOWARDS CULTURAL PROPERTY IN ARMED
CONFLICT IN THE EVENT OF SYRIA WAR**

Defended Before the Board of Examiners

On December 7th 2017
And Declared Acceptable

Yogyakarta, December 7th 2017

Examiners

- | | |
|----------------------|-------------------------------------------|
| 1. Chief of Examiner | : Dr. Sefriani, S.H., M. Hum. |
| 2. Examiner I | : Dra. Sri Wartini, S.H., M. Hum., Ph. D. |
| 3. Examiner II | : Dr. Drs. Yusdani, M.Ag. |

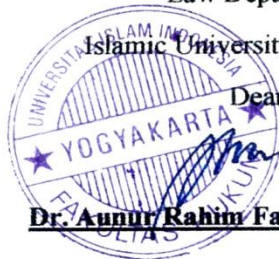
Signature

International Program

Law Department

Islamic University of Indonesia

Dean,



Dr. Aunur Rahim Faqih, SH., M.Hum.

NIK: 844100101

SURAT PERNYATAAN
ORISINILITAS KARYA TULIS ILMIAH BERUPA TUGAS AKHIR MAHASISWA FAKULTAS
HUKUM UNIVERSITAS ISLAM INDONESIA

Bismillahirrohman nirrohim

Yang bertanda tangan di bawah ini, saya:

Nama : ANGGA VISCA NUR ALI

No.Mahasiswa: 11.410.378

Adalah benar-benar mahasiswa Fakultas Hukum Universitas Islam Indonesia Yogyakarta yang telah melakukan penulisan Karya Tulis Ilmiah (Tugas Akhir) berupa Skripsi/Legal Memorandum/Studi Kasus Hukum dengan judul:

LEGAL PROTECTION TOWARDS CULTURAL PROPERTY IN ARMED CONFLICT IN THE
EVENT OF SYRIA WAR

Karya ilmiah ini akan saya ajukan kepada Tim Penguji dalam Ujian Pendadaran yang diselenggarakan oleh Fakultas Hukum UII.

Sehubungan dengan hal tersebut, dengan ini saya menyatakan:

1. Bahwa karya tulis ilmiah ini adalah benar-benar hasil karya saya sendiri yang dalam penyusunannya tunduk dan patuh terhadap kaidah, etika, dan norma-norma penulisan sebuah karya tulis ilmiah sesuai dengan ketentuan yang berlaku.
2. Bahwa saya menjamin hasil karya ilmiah ini adalah benar-benar asli (Orisinil), bebas dari unsur-unsur yang dapat dikategorikan sebagai pembuatan 'penjiplakan karya ilmiah (plagiat)'.
3. Bahwa meskipun secara prinsip hak milik atas karya ilmiah adalah milik saya, namun demi untuk kepentingan-kepentingan yang bersifat akademik dan pengembangannya, saya memberikan kewenangan kepada Perpustakaan Fakultas Hukum UII dan perpustakaan di lingkungan Universitas Islam Indonesia untuk mempergunakan karya ilmiah tersebut.

Selanjutnya berkaitan dengan hal di atas (terutama pernyataan butir 1 dan 2), saya sanggup menerima sanksi baik sanksi administratif, akademik, bahkan sanksi pidana, jika saya terbukti secara kuat dan meyakinkan telah melakukan perbuatan yang menyimpang dari pernyataan tersebut. Saya juga akan bersikap kooperatif untuk hadir, menjawab, membuktikan, melakukan pembelaan terhadap hak-hak saya, di depan 'Majelis' atau 'Tim' Fakultas Hukum Universitas Islam Indonesia yang ditunjuk oleh pimpinan Fakultas, apabila tanda-tanda plagiat disinyalir ada/terjadi pada karya ilmiah saya ini oleh pihak Fakultas Hukum UII.

Demikian Surat Pernyataan ini saya buat dengan sebenar-benarnya, dalam kondisi sehat jasmani dan rohani, dengan sadar serta tidak ada tekanan dalam bentuk apapun dan oleh siapapun.

Dibuat di : Yogyakarta

Tanggal : 10 Agustus 2017

Dibuat Pernyataan,

ANGGA VISCA N.A

Nama dan tanda tangan ybs

MOTTOS

“Verily, With Every Hardship There Is Ease”.

(QS Al-Insyirah 94:6)

“Every Action Has Reaction, Every Act Has Consequence, and Every Kindness Has Reward”.

“Even A Smile Is A Charity”

(Prophet Muhammad SAW)

“Stick to The TRUTH Even If The Truth Kills You..”

“Acquire Knowledge, and Learn Tranquility and Dignity”

(Umar Ibn Khattab)

“Never Give Up. Fall Down Seven Times, Stands Up Eight”

From the deepest of my heart, I dedicate this thesis to

My beloved Father Nur Ali,

My dearest Mother Alm.Mulyati.

FOREWORDS

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

AssalamualaikumWr. Wb

First of all, Alhamdulillahirabbil'alamin, in the name of Allah, The Lord of the Universe. A very great thanks for His blessing, so the author able to finish this thesis with title, **Legal Protection Towards Cultural Property in Armed Conflict in the Event of Syria War**. *Shalawat* and *Salam* to the messenger Muhammad SAW, that has guide us from Jahiliyah era into a time of enlightenment as we are enjoying in the present.

During the process of making this thesis, the author realizes that this thesis never finished without any contribution, assistance, guidance, and support from various parties. So, the author would like to extend gratitude to:

1. Mr. Aunur Rahim Faqih, SH., M.Hum., as the Dean of Faculty of Law Islamic University of Indonesia, for the permission to write this thesis.
2. Mr. Hanafi Amrani SH., MH., L.LM., Ph.D., as the Chief of Law Department of Law Faculty Islamic University of Indonesia, for the permission to write this thesis.
3. Mr. Masnur Marzuki, SH., L.LM., as the Chief of International Program of Law Faculty Islamic University of Indonesia, for the permission to write this thesis.
4. Dr. Sefriani, SH., M.Hum., who gives me guidance, motivation, discussion, lessons, references, and deadlines then I could finish this thesis. Thank you and sorry for my inconvenience during my thesis writing process. You are like a mother to me.
5. The lecturers of International Program Faculty of Law, Mr. Jawahir Thontowi, Mr. Nandang Sutrisno, Mr. Salman Luthan, Mr. Agus Triyanta, Mr. Mohd. Zaid, Mr. Zainal Abidin, Mr. Dodik Setiawan, Mr. Mahrus Ali, Mr. Masnur Marzuki, Mr. Ari Wibowo, Mr. Budi Santoso, Mr. Budi Agus, Mr. Yusdani, Mr. Anyoko, Mr. Kurniata Tampubolon, Mr. Nasrullah, Mr. Sulaiman Dufford, Mr. Khoiruddin Nasution, Mr. Artidjo Alkostar, Mr. Agus Subroto, Mr. Ricko, Mr. Eko Riyadi, Mr. Zairin Harahap, Mrs. Siti Anisah, Mrs. Sri Wartini, Mrs. Aroma, Mrs. Sefriani, Mrs. Surach Winarni, Ms. Inda Rahadiyan, Ms. Amalia Yustisia, Ms. Ika Riswanti for giving me knowledge and chances to get experience during my study.

6. Mr. Setiawan, thank you very much for your kindness, hospitality and sincerity in doing your duties to help in many academic things and always make it easier for all IP's students.
7. My lovely Language Advisor Jessica Simpson.
8. IP FH 2011, Ikbal, Petria, Nabhani, Dimas, Yasir, Irkham, Amar, Risky, Destri, Nadya, and Armeilia. Sorry for my silly action during our friendship. I truly miss our happiness when a class cancelled. See you in other happiness, guys.
9. Yogyakarta Climbing Team, thanks for the support and teach me how to keep moving, motivated, dedicated, commitment and as a place where I can train hard, compete and express my passion.
10. Everyone who I cannot mention one by one here. I'm not forgetting you, guys. Thank you so much.

Last but not least, this thesis will never been finished without help of many parties, I do apologize for my bad habit and my fault. Hopefully this thesis will help anyone and give benefits for me and others. For the better purpose, the writer accepts any criticisms and/or suggestions.

WassalamualaikumWr. Wb.

Yogyakarta, August 10th, 2017

(Angga Visca N.A)

ABSTRACT

In Syria, many cultural objects and cultural heritage have become the target of warfare. One of the many cultural objects affected includes world heritage sites, but unfortunately they have already been demolished because of the war in Syria. This Thesis comes as the conflict continues in Syria, bringing with it the extensive damage to, and destruction of, the country's cultural property. The provisions on the protection of cultural property during the period of armed conflict can be found in the Convention IV of respecting the Laws and Customs of War on Land, and Convention on the Protection of Cultural Property in the Event of Armed Conflict and the Two Additional Protocols. There are still many International Humanitarian Law instruments that contain the State's obligation to respect cultural objects in times of armed conflict. Some of the basic principles in it are recognized as International Customary Law.

TABLE OF CONTENTS

PAGE OF TITLE	i
ADVISOR APPROVAL PAGE	iv
LEGALIZATION PAGE	vi
MOTTO PAGE	vii
DEDICATION	viii
FOREWORDS	ix
TABLE OF CONTENTS	xiii
ABSTRACT	xiv
1. CHAPTER I	1
INTRODUCTION	
A. RESEARCH BACKGROUND	1
B. PROBLEM FORMULATION	6
C. RESEARCH OBJECTIVE	6
D. DEFINITION OF TERM	7
E. BENEFITS OF RESEARCH	10
F. THEORIETICAL FRAMEWORK	10
G. RESEARCH METHOD	23
2. CHAPTER II	25
THEORETICAL REVIEW ABOUT INTERNATIONAL HUMANITARIAN LAW	
2.1 Definition and the Development of Humanitarian Law	26
2.1.1 Definition of International Humanitarian Law	26
2.1.2 History and Development International Humanitarian Law	28
2.1.3 The Purpose of International Humanitarian Law	33
2.1.4 Sources of International Humanitarian Law	34
2.2 Type of Armed Conflict	41
2.2.1 International Armed Conflict	43
2.2.2 Non-International Armed Conflict	44
2.3 Principles of International Humanitarian Law	46
2.3.1 Humanity Principle	46
2.3.2 Military Necessity Principle	48

2.3.3	Chivalry Principle	48
2.3.4	Proportional Principle	49
2.3.5	Distinction Principle	50
2.4	The Protection of Cultural Property in the Perspective of International Humanitarian Law	55
2.5	Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954)	59
2.5.1	Enforceability Convention for the Protection of Cultural Property in the Event of Armed Conflict.....	61
2.5.2	The definition of “Cultural Property” and “Protection of Cultural Property”	63
2.5.3	State’s Obligation to Respect for Cultural Objects.....	65
2.6	The Distinction Principle for Protection of Civilian and Cultural Property in Islam	71
3.	CHAPTER III.....	78
	ANALYSIS	
3.1	Legal Protection Toward Cultural Property in Syria War Under International Humanitarian Law	78
3.1.1	Convention IV Respecting the Laws and Customs of War on Land (1907)	79
3.1.2	Convention IV related to the Protection of Civilian Persons in Time of War (1949).....	82
3.1.3	Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954).....	85
3.1.4	Protocols Additional to the Geneva Conventions of 12 August 1949 (1977)	87
3.1.5	Second Protocol to the Hague Conventions of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (1999)	89
3.1.6	Obligations on the Parties to the Conflict in Syria War.....	92
3.1.6.1	The State’s Obligation to Security of Cultural Objects	93
3.1.6.2	The State’s Obligation to Respect for Cultural Objects.....	95
3.1.6.3	The State’s Obligation of Protection of Cultural Property during the Occupation	97
3.2	The Sanctions Towards Against Cultural Property According to International Humanitarian Law	99
3.2.1	Condition of Cultural Property in Syria.....	101

3.2.2	Consequences of a Failure to Comply the Rules	102
4.	CHAPTER IV.....	109
	CLOSURE	
4.1	Conclusion	109
4.2	Recommendation	111
4.3	Literature.....	113

CHAPTER I

INTRODUCTION

A. Research Background

International Law or Public International Law, is now the popular term used for comparing the term of law of nations; as opposed to Inter-State Law. Both of those terms are starting to be used less often because they are considered not as suitable with the needs. According to Mochtar Kusumaatmadja, International Law (public) is all the norms and law principles which regulate all matters relating between states, which are not the character of Private Law.¹ From the explanation, it can be concluded that international relation is not the only relation conducted by states only, but it can also be done by state or non-state subjects with non-state subjects and vice versa.²

In international society life there will be interactions which can possibly to cause conflict. In the study of international relation, conflict and violation is an interesting topic to learn as one of the form of interactions between international actors. Conflict which happens in the international society can cause war or armed conflict, between state or even within itself which means the war of the government against their own citizens as a subject of war.

¹ As quoted by Sefriani, *Hukum Internasional Suatu Pengantar*, Rajawali Pers, Jakarta, 2011, p.2 in the book of Mochtar Kusumaatmadja, *Pengantar Hukum Internasional*, Book I General Chapter, Binacipta, Jakarta, 1982, p. 1

² *Ibid*

The war itself is one of dispute settlement with violence and a last resort taken by hostile states, even if it becomes one of the form of sovereignty of the state.³ That is why in the international society, law is needed to regulate so it will remain in order and humane, even if there is a war situation. International Law itself is a group of regulation or law which is applicable for all subjects of International Law, not only states, but it is also for International Organization, individual, transnational companies, Vatican, and belligerency which are the examples of non-state subjects.⁴

In International Law or International Regulation, there are rules concerning the procedures for war. So, International Humanitarian Law and International Law are International rules that have relevance.

Humanitarian Law as a branch of Public International Law, is not widely known by many communities⁵ and Humanitarian Law is an international agreement governing the procedures for fighting, formerly known as the law of war or the law of armed conflict, and is as old as human civilization. In general, the rules of war are contained in the rules of behavior, morals, and religion.⁶ When the war is not inevitable, then the parties shall be subject to the rules of humanitarian law.

One of the principles in Humanitarian Law is the Distinction Principle. This principle in Humanitarian Law distinguishes or splits the population of a country at

³ Huala Adolf, *Hukum Penyelesaian Sengketa Internasional*, Sinar Grafika, Jakarta, 2004, p.1

⁴ Sefriani, *op.cit*, p. 2

⁵ Haryomataram, *Pengantar Hukum Humaniter*, PT. Rajagrafindo Persada, Jakarta, 2012, p.1.

⁶ Arlina Permanasari, AjiWibowo, dkk, *Pengantar Hukum Humaniter*, International Committee of The Red Cross, Jakarta, 1999, p. 1

war, or those involved in armed conflict, into two major categories, namely combatants and civilian. Combatants are segments of the population whom are active in the battle, while the civilian population is a group of residents who are not entitled to participate in the battle.⁷ In addition to the distinction of the subjects (combatants and civilians), the principle of distinction is also used to distinguish objects that are divided into two categories as well, namely civilian and military objects.

The International Humanitarian Law which governed war and cultural property protection before, during and after war is explicitly explained in the Geneva Convention 1949 about law of war and civilian protection, as well as The Den Hague Convention 1954 which regulates cultural property.

In this thesis, the author will discuss cultural property in armed conflict, which occurred in Syria. Syrian conflict began with a number of protests, when the Syrian government announced a series of reforms, including a proposal to remove the state of emergency law that has been law since 1963. On March 29, 1963, the ruling government resigned, but President Bashar Al-Assad still remained in his position as President of Syria.⁸

The conflict which is happening in Syria, for more than 5 years, has created massive destruction and already destroyed many schools. Nearly 3 million children

⁷ Haryomataram, *Hukum Humaniter*, Rajawali Press, Jakarta, 1984, p. 63

⁸ Antara News, "Pemerintah suriah mundur, otri pejabat sementara".

<http://www.antaraneews.com/berita/251937/pemerintah-suriah-mundur-otri-pejabat-sementara> accessed on Friday, January 9 2015. 18:30.

have been forced to quit their studies as the war has destroyed their class rooms, and many families have been forced to flee the country.⁹

In addition, the Syrian conflict that never ends, has caused suffering to many civilians and destroyed many cultural properties. Based on satellite observations of the American Association for the Advancement of Science (AAAS), five of the six world heritage sites in the country show significant damage. Some of them even have been reduced to rubble, and the most severely damaged is in the Ancient City of Aleppo. Aleppo was designated as a world cultural heritage site by UNESCO in 1986.¹⁰

Many buildings which don't include military objects, such as cultural properties, have been destroyed by the impact of Non-International Armed Conflict in Syria. For example, The United Nations Institute for Training and Research (UNITAR) stated that there have been in total 290 cultural heritage locations affected in 5 years and can be divided into 4 categories, 24 destroyed, 104 severely damaged, 85 moderately damaged and 77 possibly damaged.¹¹ Whereas in International Humanitarian Law has been applying general principles which means that the whole country should be subject to the regulation.

⁹ Al-monitor, “<http://www.al-monitor.com/pulse/originals/2014/01/education-syria-decline-war.html#> “. Accessed on Tuesday, January 13 2015. 16:20

¹⁰ Tempo, “<http://www.tempo.co/read/news/2013/08/20/061505751/Ilmuwan-Mengintip-Perang-Suriah-Lewat-Satelit> “. Accessed on Tuesday, January 13 2015. 16:45

¹¹ UNITAR, *Satellite-Based Damage Assessment to Cultural Heritage Sites in Syria*, UNITAR-UNOSAT, 2014, p.8

Referring to the rules applicable in International Humanitarian Law, destruction of cultural property, including historical sites and cultural property in times of conflict is prohibited. Rome Statute has set out clear rules prohibiting attacks against civilian objects or buildings that are intended for religion, education, art, sciences or charitable purposes, as well as historic monuments which are not military objectives.¹²

The conflict or war` in Syria is still happening now, but the United Nations (UN) as a universal International Organization has the authority and power to create and maintain international peace and security, yet are still unable to reach a resolution.¹³ Based on the case description that has been explained, the author is interested and intends to analyze it further by doing research with the title “LEGAL PROTECTION TOWARDS CULTURAL PROPERTY IN ARMED CONFLICT IN THE EVENT OF SYRIA WAR”

¹² Sitanggang, Dyan, 2013, *Pengrusakan Tempat Bersejarah Dalam Perang Antarnegara Sebagai Pelanggaran Hukum Humaniter Internasional*, Lex et societatis, vol. I/No.2/Apr-Jun/2013

¹³ Mohd. Burhan Tsani, *Hukum Organisasi Internasional*, Universitas Gadjah Mada, Yogyakarta, 2012, p.109

B. Problem Formulation

Based on the case description that has been explained prior, the problems that are focusing of this study are as follows:

1. How does legal protection towards cultural property in wartime work under International Humanitarian Law?
2. What are the sanctions in International Humanitarian Law to the parties who are attacking cultural property in times of Syrian war?

C. Research Objective

The objective of this analysis is necessary to provide the direction further research. The objective of this research was conducted to determine:

1. To thoroughly analyze the legal protection towards cultural property in wartime under International Humanitarian Law; and
2. To thoroughly analyze the sanctions in International Humanitarian Law to the parties who attacking cultural property in times of Syria war as well as restriction of the military necessity.

D. Definition of Term

1. International Humanitarian Law

International humanitarian law (IHL) is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. International Humanitarian Law is also known as the law of war or the law of armed conflict.¹⁴

Besides the definition above there are other definition according to experts, there are:¹⁵

According to Jean Pictet, International Humanitarian Law in the wide sense is constitutional legal provision, whether written and customary, ensuring respect for individual and his well being.

According to Mochtar Kusumaatmadja, International Humanitarian Law Its part of law which regulate provision of protection towards victim of war, differed from the law of war which regulate the law itself and everything that related to the conduct of war itself.

¹⁴ Akram Mohd, *International Humanitarian Law*, Interntional Law Book Services, Malaysia, 2005, p.1

¹⁵ Arlina Permanasari, Aji Wibowo, and friends, *Pengantar Hukum Humaniter, International Committee of The Red Cross*, Jakarta, 1999, p.9

2. Cultural Property

International Humanitarian field has played a part in regulating about the protection of cultural property. According to The Hague Convention 1954 on the Convention for the Protection of Cultural Property in the Event of Armed Conflict Article 1 verse (1), the meaning of cultural property is defined as bellow:¹⁶

For the purposes of the present Convention, the term "cultural property" shall cover, irrespective of origin or ownership:

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

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a).

(c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as "centres containing monuments".

3. Armed Conflict

Armed conflict that occurs inside the territory of a state is called an internal armed conflict or non-international armed conflict. The provisions concerning non-

¹⁶ The Hague Convention 1954 on Convention for the Protection of Cultural Property in the Event of Armed Conflict.

international armed conflict is regulated in Article 3 the Geneva Convention 1949 and Additional Protocol I of 1977.¹⁷

Non-International Armed Conflict, according to Additional Protocol II of 1997 is armed conflict occurring in the territory of a State and it is between the armed forces of the country with rebel armed forces or other organized armed groups under responsible command. These commands carry out such control over a part of its territory as to allow the group to conduct continual military operation and unity, and it also applies the rules of International Humanitarian Law contained in Additional Protocol II 1977,¹⁸ which is said to be a battle or war involving countries that are against non-state armed groups.¹⁹

4. Syria War

In March 2011, pro-democracy demonstrations inspired by the Arab Spring erupted in the southern city of Deraa. The government's use of deadly force to crush the dissent soon triggered nationwide protests demanding the president's resignation. As the unrest spread, the crackdown intensified. Opposition supporters began to take up arms, first to defend themselves and later to expel security forces from their local areas. Syria's President Assad vowed to crush "foreign-backed terrorism" and restore state control. The violence rapidly escalated and the country descended into civil war

¹⁷ Arlina Permanasari, Aji Wibowo, and friends, *Pengantar Hukum Humaniter*, International Committee of the Red Cross, Jakarta, 1999, p. 3.

¹⁸ Tom Ruys, *The Syrian Civil War And The Achilles' Heel Of The Law Of Non-International Armed Conflict*, Board of Trustees of the Leland Stanford Junior University, 2014, p.60.

¹⁹ *Ibid.*,p. 53

as hundreds of rebel brigades were formed to battle government forces for control of the country.²⁰

E. Benefits of Research

The benefits expected from this research study have been conducted by the author, and theoretically can provide additional or contribute to the development of International Humanitarian Law, regarding the protection of cultural property during battles. The practical benefits of this research are:

1. This study is expected to be a contribution to improve protection for the parties involved in the dispute, especially the protection of cultural objects which have historical significance and contribute to the education for the future.
2. As an additional reference to the parties discussed issues related to the protection of cultural property in currently unresolved war, serve as a reference for future problems.

²⁰ BBC, "why is there a war in Syria?". <http://www.bbc.com/news/world-middle-east-35806229> accessed on Friday, June 2017. 21:00.

F. Theoretical Framework

1. Types of Armed Conflict

There are two types of armed conflict in the International Humanitarian Law those are International Armed Conflict and Non-International Armed Conflict. In the general term, the difference between International Armed Conflict with Non-International Armed Conflict under International Humanitarian Law was determined by the characteristic and the number of countries that are involved in the armed conflict.²¹ In the settlement of international disputes, there are already some methods known for resolving disputes by peacefully and avoiding war.²²

However, war is a method of dispute resolution that is still used until now, for example, in the case of Syria. Thus, International Humanitarian Law is required to provide restrictions or set procedures for fighting, but not to ban war. This is because from the point of view of International Humanitarian Law, war is a reality that can't be avoided. International Humanitarian Law tries to regulate and set limitations so the war can still uphold humanity values.²³

There are several goals of International Humanitarian Law, those are:²⁴

²¹ Ambarwati, Denny Ramdhany, Rina Rusman, *Hukum Humaniter Internasional: Dalam Studi Hubungan Internasional*, 3rd Edition, Rajawali Pers, Jakarta, 2012, p. 53.

²² Adolf, Huala. *Hukum Penyelesaian Sengketa Internasional*, Sinar Grafika, Jakarta, 2004, p. 24

²³ Arlina Permanasari, Aji Wibowo, and friends, *Op.Cit.*, p. 11.

²⁴ *Ibid.*, p. 12.

1. Provide protection against combatants and civilians from unnecessary suffering.
2. Ensuring human rights is fundamental for those who fall into enemy hands. Combatants who fall into enemy hands must be protected and hospitalized entitled to be treated as prisoners of war.
3. Prevent to commit a cruel war without limits. Here, the most important is the humanity principle.

In the international humanitarian law, there are two types of armed conflict, the international armed conflict and non-international armed conflict. Draper stated about international armed conflict that,²⁵ *any situation in which a difference between two states leads to the intervention of armed forces within the extended meaning conferred upon the later term by art. 4 of prisoners of war conventions*. From the opinion expressed by Draper about international armed conflict, it is understood that armed conflict can be said to be an international armed conflict if it involves two armed forces of different countries.²⁶

According to Article 1 (3) and Article 1 (4) of Protocol I to note that international armed conflicts are grouped into two, namely:

1. The armed conflict between states;
2. The armed conflict between the peoples against colonial domination, alien occupation and racist regimes (CAR Conflict) which often called as the war of national liberation.²⁷

²⁵ *Ibid.*, p. 139.

²⁶ Arlina Permanasari, Aji Wibowo, and friends, *Pengantar Hukum Humaniter*, International Committee of the Red Cross, Jakarta, 1999, p. 139.

²⁷ Additional Protocol I Article 1.3 – 1.4

In the international armed conflict, both parties have the same legal status, it is simply because both parties are state.²⁸ International Armed Conflict has been declared in the same provisions of Article 2 of the Geneva Conventions in 1949 as an armed conflict involving two or more countries.²⁹

While the Non-International Armed Conflict, according to Additional Protocol II of 1977 is an armed conflict that occurs in the territory of a State between the armed forces of the country by rebel armed forces or other organized armed groups under responsible command, exercise such control over a part of its territory that enables the group to unite and continue military operations. This also applies the rules of International Humanitarian Law which are contained in Additional Protocol II of 1977, so it is also can be said that a battle or war involving countries or states are against non-State armed groups.³⁰

Non-International armed conflicts are characterized by fighting between the armed forces of a country with resistance from a group of people or rebel forces. However, the conflict in an area of the country between the two ethnic groups can also be classified as a non-international armed conflict, as long as the conflict fulfills

²⁸ Permanasari, Arlina, *op.cit.*, p. 139

²⁹ Ambarwati, Denny Ramdhany, Rina Rusman, *Hukum Humaniter Internasional: Dalam Studi Hubungan Internasional*, 3rd Edition, Rajawali Pers, Jakarta, 2012, p. 56.

³⁰ *Ibid*, p. 60.

the necessary requirements such as the intensity of the conflict, the length or the duration of the conflict and people's participation in it³¹

For example, the conflict in Syria is categorized as a Non-International Armed Conflict because the parties involved in the dispute are the Syrian government itself and the rebels who are citizens of Syria.

In the Geneva Convention, the armed conflict that is not an international characteristic (conflict / non-international armed conflict or international conflict) was stipulated in Article 3 of the provisions of common articles of the Geneva Convention 1949 Article 3 verse (1), which stated:³²

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;

³¹ Arlina, "Apa Arti Konflik Bersenjata Non Internasional".
<http://arlina100.wordpress.com/2009/02/03/apa-arti-konflik-bersenjata-non-internasional/>,
Accessed on Tuesday , January 20, 2015, 14:04.

³² Geneva Convention 1949 Common Article 3 verse (1)

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

The third chapter reflects the existence of legal protection and is greatly against the group known as “*hors de combat*”. It also reflects that any provisions of the Convention at the same time accommodate the principles of Humanitarian Law, and it is about chivalry and humanity principles. People who are no longer able to carry out the attack, according to this verse, have rights which must be protected and treated humanely.

2. Cultural Property

The cultural property is really protected, the war in the international society is also give special protection about cultural property, and the cultural property is protected for both belligerents. It is was stipulated in the Roerich Pact 1935, Hague Convention 1954 and Additional Protocol I and II.

According to Roerich pact 1935 and the definition about cultural property:³³

Article 1

The historic monuments, museums, scientific, artistic, educational and cultural institution shall be considered as neutral and as such respected and protected by belligerents.

The same respect and protection shall be due to the personnel of the institutions mentioned above.

³³ Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact 1935) Article 1 – 2.

The same respect and protection shall be accorded to the historic monuments, museums, scientific, artistic, educational and cultural institutions in time of peace as well as in war.

Article 2

The neutrality of, and protection and respect due to, the monuments and institutions mentioned in the preceding Article, shall be recognized in the entire expanse of territories subject to the sovereignty of each of the Signatory and Acceding States, without any discrimination as to the State allegiance of said monuments and institutions. The respective Governments agree to adopt the measures of internal legislation necessary to insure said protection and respect.

According to Hague Convention 1954 and the definition about cultural property and its protection:³⁴

Article 1

For the purposes of the present Convention, the term "cultural property" shall cover, irrespective of origin or ownership:

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

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a).

(c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as "centres containing monuments".

³⁴ Hague Convention 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, Article 1 – 2.

Article 2

For the purposes of the present Convention, the protection of cultural property shall comprise the safeguarding of and respect for such property.

According to Additional Protocol I about protection of cultural objects and of places of worship:³⁵

Article 53

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:

- a) to commit any acts of hostility directed against the historic monuments, work of art or places of worship which constitute the cultural or spiritual heritage of peoples;
- b) to use such objects in support of the military effort;
- c) to make such objects the object of reprisals.

According to Additional Protocol II about Protection of cultural objects and of places of worship:³⁶

Article 16

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, it is prohibited to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort.

³⁵ Protocol Additional to the Geneva Convention 1949 and Relating to the Protection of Victims of International Armed Conflict (Protocol I) 1977, Article 53.

³⁶ Protocol Additional to the Geneva Convention 1949 and Relating to the Protection of Victims of Non-International Armed Conflict (Protocol II) 1977, Article 16.

In those Articles reflect that the cultural property that really has a very important position to be protected in times of peace and war. But unfortunately in the Syria war has ruined a lot of cultural property. Those objects are historical heritage of mankind that priceless. Therefore, cultural property that constitute the historical heritage of the human race must obtain international protection as they are not only valuable to a nation; but for all mankind and is a manifestation of cultural values that exist for human itself.³⁷

3. General Principles on International Humanitarian Law

In a rule there are general principles that act as a barrier of a legal instrument. In this regard, international humanitarian law also has general principles that must be adhered to in each country relating to humanitarian law. The general principles are:

a. Humanity Principle

Humanity principle interpreted as a prohibition on the means and methods of warfare which are not essential for the achievement of a real military advantage. Jean Pictet in his book *Development and Principle of International Humanitarian Law*, he interprets the meaning of humanity as follows:³⁸

“...the arrest precedence over injuring the enemy, and injuring the enemy is better than killing; that non-combatant should be keep out as far as possible from the

³⁷ Arlina, “Benda Budaya: Apakah hanya candi?”. <https://arlina100.wordpress.com/tag/cultural-property/>, Accessed on Tuesday, January 20, 2015, 17:10.

³⁸ Jean Pictet, *Development an Principle of International Humanitarian Law*, as caption in the book of *Pengantar Hukum Humaniter Internasional*, Arlina Permanasari dkk, ICRC, Jakarta, 2000, p.11.

battlefield; that the injured victim should be kept to a minimum injuries, so that they can be treated and cured; that the injuries that happen to be undertaken as small as possible causing pain.”

The humanity principle is intended to give respect and protect human existence.

b. Distinction Principle

One of the basic principles adopted in the law of war is the distinction between combatant and civilian. This distinction needs to be held firstly which is to find out who can / should be made the object of violence and who should be protected. In other words, the existence of the distinction principle can be known to anyone who may participate in hostilities that made the object of violence (killed), and who should be protected because they do not participate in hostilities.³⁹ This principle has been split into two groups, combatants and civilian. Combatants are group of the population which actively participating in hostilities, whereas the civilian is a group of people who do not participate in hostilities.⁴⁰

The distinction is aimed to find out which groups are engaged in hostilities that occurred, and also to determine which group can be made the object of violence and who should be protected because these groups is not participate in hostilities that occurred. Regarding this issue of *Manual of Military Law* for the United Kingdom

³⁹ Haryo Mataram, *Pengantar Hukum Humaniter*, PT. Rajagrafindo Persada, Jakarta.2012.p.75.

⁴⁰ Arlina Permanasari, Aji Wibowo, dkk, *Pengantar Hukum Humaniter*, International Committee of The Red Cross, Jakarta, 1999, p.73.

which quoted by Draper, said that the two group, namely combatant and civilian, each group having privileges duties disabilities. Furthermore, in that *manual* is said that one should choose in the group where they went, and they are not allowed to enjoy the privileges of two groups at a time.⁴¹ From these quotations have shown that each group, both combatants and civilians have the rights and obligation, for example, civilians are entitled to protection only if he did not take part in armed conflicts that occur.

Humanitarian law itself exists as it aims to keep applying humanity even in conditions of war. Because war is the last way to resolve a dispute, so that humanitarian law is necessary because it upholds the values of humanity in it. United Nations (UN) as a universal international organization that has the authority and power to create and maintain peace⁴², but they have maximum of the function and its role, for example the role of UN in non-international armed conflict occurring in Syria in recent years. UN efforts in reducing that conflict has not produced results, so that the conflict is still ongoing and more civilians be the object of violence.

In the Protocol I on article 48, which reads:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.⁴³

⁴¹ Haryo Mataram, *loc. cit*

⁴² Mohd. Burhan Tsani, *Op.cit.*, hlm. 109

⁴³ Additional Protocol I of 1977, Article 48

From the article explained that the existing distinction between combatants that can be used as an object in a war and civilians can't be the object of the war. But there needs to increase in the application of these regulations because the civilian population is still just a victim of war.

c. Necessity Principle

International humanitarian law has given the limitations and group or class of distinction that can be as the object to be attacked, the military objectives and military objects, but in international humanitarian law also regulates the provisions concerning civilian objects which "possible" can become a military object if it meets two requirements. Two of those conditions are:⁴⁴

1. These objects provide an effective contribution to enemy military actions.
2. The destruction action, seizure or neutralization of the object of military benefits.

In connection with necessity principle, there is also provision as follows: " If the choice was possible between several military objectives for obtaining a similar

⁴⁴ Additional Protocol I of 1977, Article 52.2

military advantage, then the target that will be selected is the target which is attacked can be expected to result in less danger to the lives of civilians and civilian objects.”⁴⁵

d. Proportionality Principle

In doing crackdown or attack, whatever tools and how, the hostilities party must referring to the proportional principle. According to the proportional principle, any offensive military operations must be preceded by measures to ensure that such attacks will not cause civilian casualties which following the form of loss of life, injuries, or property damage that is excessive in relation to the military advantage that directly as a result of the attack.⁴⁶ For example, in a non-international armed conflict in Syria, the hostilities parties is the Syria’s civilians with the Syria’s Government which is the military forces as part of government, seeing from that matters we can conclude and relating that the counter-attack among them is not balanced, because it is seeing from the weapon which is used and the victims that fell down among the civilian with the Syrian Government. The victory is always more easily obtained by the Syrian Government.

e. Chivalry Principle

⁴⁵ Ambarwati, Denny Ramdhany, Rina Rusman *Hukum Humaniter Internasional: Dalam Studi Hubungan Internasional*, Ctk. Ketiga, Rajawali Pers, Jakarta, 2012, p.43.

⁴⁶ Additional Protocol I of 1977, Article 57.2.iii

This principle implies that in war, the honestly shall be precedence. The use of tools that are not honored, the various wiles and ways that are betray is prohibited.⁴⁷

For example, in ancient times, before war began, the enemy will be given advance warning. Then to avoid excessive injuries so the arrow will not be directed to the heart and liver. And as soon as there were killed and wounded the battle will stop for 15 days.⁴⁸

G. Research Method

The method that used for writing this thesis is a normative legal research:

1. The Research Focus

The research focus conducted by the author which focuses on obtaining results and answers about the legal protection towards cultural property in the Syria war and the sanction to the parties who attacking cultural property which based on perspective of international humanitarian law.

2. Legal Material

⁴⁷ Arlina Permanasari, Aji Wibowo, dkk, *Pengantar Hukum Humaniter*, International Committee of The Red Cross, Jakarta, 1999, p.11.

⁴⁸ *Ibid.*p.13

- a. Primary Legal Material, is a legally binding material consisting of Geneva Convention 1949, Hague Convention 1954, Additional Protocol I and II of 1977, Rome Statute 1998.
- b. Secondary Legal Materials, defined as materials that are not binding the law, but to explain the primary legal materials that are processed or opinion of the expert or experts who study in a particular field, such as books, papers and scientific journals related to the object of research. Therefore, the author also use secondary legal material in the form of literature and journal literature on humanitarian law which has close links as well as support and help analyze the primary legal materials.

3. Legal Data Collection

Collection of legal data materials is done by:

- a. Library Studies, by reviewing journals, books on humanitarian law, and literature related to research problems.
- b. Study Documents, by reviewing legislation regarding sanctions for violators of the rules of war in the Geneva Conventions 1949, Hague Conventions 1954 , and Additional Protocol I and II of 1977.

4. Research Approach

A legal research should use a juridical approach, because in this case analyzed the problem in terms of the various sources of law that are the focus at the same time the main them of research. The approach used in this paper will be focused

on several conventions, the Geneva Convention 1949, the Rome Statute 1998, Hague Convention 1954, the general principles of international humanitarian law, as well as the rules and sources of other international law that have relevance.

5. Analysis of Legal Materials

Legal materials obtained from the results of the study were analyzed by normative descriptive qualitative, by collecting and selecting materials in accordance with the law of the problem under study, then can be generated description more objective and systematic accordingly which resulting the view the problems studied.

CHAPTER II

THEORETICAL REVIEW ABOUT INTERNATIONAL HUMANITARIAN LAW

2.1 Definition and the development of Humanitarian Law

2.1.1 Definition of International Humanitarian Law

As a new field of international law, there are a few opinions of experts on humanitarian law.⁴⁹ There is an opinion from Mochtar Kusumaatmadja, he argues that humanitarian law is part of the law governing the war itself and everything related to the conduct of war itself.⁵⁰ Meanwhile, according to Geza Herzegh found that international humanitarian law is the part of the rules of public international law which serve as the protection of the individuals in time of armed conflict. Its place is beside the norm of warfare it is closely related to them but must be clearly distinguish from these its purpose and spirit being different.⁵¹ Before known as humanitarian law, laws governing armed conflict is known as the law of war. Humanitarian law is the new name of the 'Laws of War'. There is one part of international law that addresses doctrine about 'just war'. The doctrine of humanitarian law divides into two parts,

⁴⁹ Arlina Permanasari, Aji Wibowo, dkk, Pengantar Hukum Humaniter, International Committee of The Red Cross, Jakarta, 199, p. 8

⁵⁰ Mochtar Kusumaatmadja, Hukum Internasional Humaniter dalam Pelaksanaan dan Penerapannya di Indonesia, 1980, p.5

⁵¹ Arlina Permanasari, op.cit, p.9

namely;⁵² a. *Ius ad bellum*, is the laws of war. b. *Ius in bello*, is the law that applies in the war.

Ius ad bellum discuss about ‘when’ or in a ‘what condition’ the state was justified to fight. Meanwhile, *ius in bello* is applicable provision in a war that is set in the sources of humanitarian law.⁵³

Jean Pictet in his book with the tittle, “The Principle of International Humanitarian Law” which humanitarian law in the sense that the broad sense, includes Geneva Convention, Hague Convention, and Human Rights Law. Otherwise Geza Herzegh has a narrow affiliations, according to him, humanitarian law is only covering by Geneva Convention. Meanwhile, Haryo Mataram has a middle stating that humanitarian law consists of the law of Geneva and Hague.⁵⁴ In various documents and literature, the term of IHL (International Humanitarian Law) is often used interchangeably with the term “humanitarian law” and “IHL applicable in armed conflict”. The latter term is a term that is the most complete and used in Additional Protocol I/1977 over the 1949 Geneva Convention in detail, the ICRC described the purpose of the terms contained in the Geneva Convention as follows:

“International Humanitarian Law means international rules, established by treaty or custom, specifically, are expected to address the humanitarian problems that arise directly from the disputes of

⁵² Haryo Mataram, Pengantar Hukum Humaniter, PT. Rajagrafindo Persada, Jakarta, 2012, p.2

⁵³ Haryo Mataram, *op.cit*, p.2

⁵⁴ Arlina Permanasari, *op.cit*, p.10

international and non-international armed, and for reasons of humanity, restrict the rights of the parties to the conflict to use the methods and tools of their choice or extending the war to protect people and their property which may be affected by the conflict”⁵⁵

From the definitions described above can be concluded that humanitarian law is a branch of international law which appears to regulate and provide limits in the war, including the rules, principles and international regulations in order to maintain human rights, human humanize, while upholding the values of humanity and respect for human dignity.

2.1.2 History and the Development International Humanitarian Law

Lately a new term arose in the repertoire of international law. The term is meant International Humanitarian Law or International Law of Humanitarian.⁵⁶

During its development, international humanitarian law has been amended at every age, but almost impossible to find documentary evidence of when and where the rules of humanitarian law were raised and more difficult to find out who is the “creator”.⁵⁷

⁵⁵ Ambarwati, Denny Ramdhany, Rina Rusman, Hukum Humaniter Internasional: Dalam Sturdi Hubungan Internasional, Ctk. Ketiga, Rajawali Pers, Jakarta, 2012, p.29

⁵⁶ Haryo Mataram, Hukum Humaniter, Rajawali Pers, Jakarta, 1984, p.1

⁵⁷ Arlima Permanasari, *op.cit.* p.12

Up to the present form, international humanitarian law has been progressing very much. In a very long time, has made efforts to humanize war. These efforts have obstacles and difficulties as well as divided into stages of the development of humanitarian law, following:⁵⁸

a. Ancient Times

At this time the military leaders ordered their forces to save the captured enemy, treat them well, save the enemy's civilian population and at the time of cessation of hostilities, the hostilities parties usually agree to treat prisoners well.⁵⁹

Even in the great civilizations during the years 3000-1500 BC's that efforts still continue to run as an example, Jean Pictet expressed as follows:⁶⁰

(1)At the time of the Sumerian civilization, the war was an organized institution, characterized by the first declaration of war, the possibility of holding arbitration, immune messenger enemy and the peace agreement.

(2)In Ancient Egypt, as described in "Seven Works of True Mercy", which describes the command to provide food and beverages, clothing and shelter to the enemy.

⁵⁸ *Ibid.*

⁵⁹ Arlina Permanasari, *op.cit*, p.13

⁶⁰ As quoted from Arlina Permanasari, Aji Wibowo and friends, Pengantar Hukum Humaniter, International Committee of The Red Cross, Jakarta, 1999, p. 14

(3) In the culture of Hattite's nation, war is also to be done in a humane manner.

They signed a declaration of war and treaties.

(4) In India, as stated in the epic Mahabharata and the laws of Manu, the knights are prohibited from killing enemies with disabilities, who surrendered, the wounded should be repatriated after they were treated. Even that set of laws on the use of toxic weapons and fire arrows.

b. Middle Age

In the middle ages, international humanitarian law is influenced by the teachings of Christianity, Islam and the chivalry principles. In Islam even been listed on the command concept of "fair war" of a just war, the rule is in the Al-Qur'an Q.S Al-Hajj

: 39

أَذِنَ لِلَّذِينَ يُقَتَّلُونَ بِأَنَّهُمْ
ظَلَمُوا وَإِنَّ اللَّهَ عَلَىٰ نَصْرِهِمْ
لَقَدِيرٌ ﴿٣٩﴾

(Al-Hajj : 39)

Which mean:

“Allowed to fight for the people (Muslims) who fought (by careless groups), because they are wronged and verily Allah Has a Power to help them (to victory)” (Al-Hajj:39)⁶¹

وَأَقْتُلُوهُمْ حَيْثُ ثَقِفْتُمُوهُمْ
وَأَخْرِجُوهُمْ مِّنْ حَيْثُ أَخْرَجُوكُم
وَالْفِتْنَةُ أَشَدُّ مِنَ الْقَتْلِ
وَلَا تُقَاتِلُوهُمْ عِنْدَ الْمَسْجِدِ الْحَرَامِ
حَتَّىٰ يَخْرُجُوا مِنْهُ فَإِن قَاتَلُوكُمْ
فَأَقْتُلُوهُمْ كَذَلِكَ جَزَاءُ الْكٰفِرِينَ

(Al-Baqarah : 191)

Which mean:

“And kill them (enemies who fight you) where ever you found them, and turn them out from where they have turned you and (remember that greedy) slander are worse than murder and don't you fight them around Masjid Al-Haraam so they fight you there. By that if they attack you (there) then slay them. That is the reward of those who disbelieve.” (Al-Baqarah:191)⁶²

c. Modern Age

⁶¹ Q.S Al-Hajj Verse 39

⁶² Q.S Al-Baqarah Verse 191

Decisive progress occurred from the 18th century and after the end of Napoleonic wars, especially in the 1850s until the outbreak of World War I. The practices of the country then becomes law and custom in war (*jus in bello*).⁶³

One important milestone in the development of international humanitarian law is the establishment of the Red Cross and the signing of the Geneva Conventions of 1864 at the same time in the United States President Lincoln asked to Lieber to draw up the rules which called Lieber Code which contain detailed rules at the time of war on land, acts of the true war, the treatment of certain groups of people such as prisoners of war, the wounded, and so on.⁶⁴

1864 Convention is the Convention for the Wounded Army Repair Situation in Battlefield, 1864 is seen as a convention that started the next Geneva Conventions relating to the protection of war victims. This convention is the first step to codify the provisions of war on land. Under this convention, the units and health personnel is neutral. The Convention introduces the sign of the Red Cross on a white base as identification for building and health personnel. Identification is as the emblem of International Committee of the Red Cross, formerly known as the International Committee for the Aid of The Wounded, which was founded by some citizens of Geneva and Henry Dunant in 1963.⁶⁵

⁶³ Arlina Permanasari, *op.cit*, p.16

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

2.1.3 The Purpose of International Humanitarian Law

Humanitarian law is a branch of international law governing the procedures in the war. The purpose of the humanitarian law itself is not to prohibit war, because from the perspective of humanitarian law, war is a difficult thing to be avoided so that it gives the boundaries of things or actions that are allowed and what is prohibited in the war. In humanitarian law, according to Mohammed Bedjaoui that the purpose of humanitarian law is to humanize war.⁶⁶

There are several goals of humanitarian law, as follows:⁶⁷

1. Provide protection against combatants and civilians from unnecessary suffering.
2. Ensuring human rights is a fundamental for those who fall into enemy. Combatants who fall into enemy must be protected and cared for and are entitled to be treated as prisoners of war.
3. Prevent doing cruel war without limits. Here is the most important is the humanity principle.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

2.1.4 Sources of International Humanitarian Law

A provision must have a legal source of both written and unwritten. Similarly with the international humanitarian law, in which there are also sources of law which are the basis of the rules of war. In the discussion of sources of humanitarian law, the author discusses the sources of written law contained in international humanitarian law. Humanitarian law can be found in the form of declarations, conventions, protocols and in other agreements. From several types of sources of law, and of course there is the main source of law used in international humanitarian law. As discussed above, that international humanitarian law has a major convention, the Hague Convention and the Geneva Convention and Additional Protocols. Below, will clarify the main sources of law related to international humanitarian law.

The main objective of the four Geneva Conventions of 1949 and their two Additional Protocols of 1977 is such instrument is to protect the victims of armed conflict. One of the basic principles of international humanitarian law, namely the right if belligerents to choose the weapon to injuring the enemy which is not unlimited. This principle flows from the principle of balance or proportionality and the distinction principle which aims to distinguish between military targets in civilian, and objects associated with the protected area.⁶⁸ As already described in the principles of international humanitarian law before.

⁶⁸ C. de Rover, *To Serve & To Protect Acuan Universal Penegakan HAM, ICRC-Geneve, 1998*, p. 406

The three main pillars which give contribution to the formulation of international humanitarian law. Those three pillars is the “Law of Geneva”, awarded by international conventions and protocols are established by International Committee of the Red Cross (ICRC) with a focus on the protection of victims of conflicts; “Law of The Hague”, based on the results of the Peace Conference on the capital of the Netherlands in 1899 and 1907, which in principle regulate the means and methods of warfare which allowed; and UN efforts to ensure respect for human rights in armed conflict and limit the use of certain weapons.⁶⁹

When the French and Australian armies fought in the battle of Solferini in northern Italy in June 1859, comes to the idea in the mind of Henri Dunant, a young Swiss citizen, on international measures to reduce the suffering of the sick and wounded army in the war.⁷⁰

a. Hague Law 1899 and Hague Convention 1907

Den Hague Convention done twice, The Hague Convention of 1899 is the result of the Peace Conference I in Den Hague,⁷¹ which is then carried out improvements in 1907. In the Hague Convention, more specifically regulate the tools and procedures for fighting. The first argument of principle or in this Convention

⁶⁹ Hukum Humaniter Internasional Dan Hak Asasi Manusia, *Kampanye Dunia untuk Hak Asasi Manusia*, Lembar Fakta No. 13, p. 3

⁷⁰ *Ibid.*

⁷¹ Ambarwati, Denny Ramdhany, Rina Rusman, *op.cit.*, p. 29

reads as follows: “*the rights of belligerents to adopt means of injuring the enemy is not unlimited.*”⁷²

Means that the restriction in the use of tools to fight. The Hague Convention of 1899 produced three conventions, namely:⁷³

1. Convention I about on International Dispute Peace Resolution
2. Convention II about Laws and Customs of War on Land
3. Convention III about adaptation Geneva Convention Principles of August 22, 1864 on the law of war at sea, and to produce three declarations, as follows:
 1. Prohibit the use of dum-dum bullets (the bullets that it is packaging is not perfectly cover the inside so that it can rupture and enlarged in the human body).
 2. The launching of projectiles and explosives from ballons, for a period of five years ending in 1905 are also prohibited.
 3. The use of projectiles that cause choking gases and toxic prohibited.⁷⁴

Then carried to the second conventions and this conventions is the result of II Peace Conference as a continuation of the I Peace Conference in 1899, as described above. Hague Convention of 1907 resulted in some convention as follows:⁷⁵

1. Convention I on International Peace Dispute Resolution;

⁷² Haryo Mataram, *Pengantar Hukum Humaniter*, *op.cit.*, p. 46

⁷³ Arlina Permanasari, *op.cit.*, p.24

⁷⁴ Arthur Nussbaum, *Sejarah Hukum Internasional*, Jilid I, Bina Cipta, Bandung.1970, p. 159.

⁷⁵ *Ibid.*

2. Convention II on Limitation of Violence Weapon In Debt Payment Demanding Originating Civil Agreement;
3. Convention III on How to Start a War;
4. Convention IV on Law and Customs of War on Land in Complete with Hague Regulations;
5. Convention V on the Rights and Duties of States and Citizens Neutral in War on Land;
6. Convention VI on the Status of Trade Ship Enemy at Startup/Beginning of war;
7. Convention VII on the Status of Trade Ship Becoming Warship;
8. Convention VIII on Automatic Mines Placement at Sea;
9. Convention IX on bombings by the Navy in Time of War;
10. Convention X on adaptation of principles of Geneva Convention on war at sea;
11. Convention XI on Certain Restriction Against Right of Arrest In Naval War;
12. Convention XII on the Court of Confiscated Goods;
13. Convention XIII on the Rights and Duties of States Neutral In War at Sea.

The Hague Convention is more concerned about the war which occurred in the sea, but there are also conventions governing war on land, which is on Convention IV. As an important note that in the Convention IV there is

“annex” which is referred to as the Hague Regulations, 1907,⁷⁶ in which the regulation that is the guideline until now.

b. Geneva Law

Geneva Convention 1949 and the rules of non-international armed conflict since 1945, Article 3 and Additional Protocol II have set regarding non-international armed conflict and had introduced a set of rules to protect the civilian population, as well as requiring humane treatment with regard to those who took part in the hostilities, including those hors the combat. It also regulates the Non-State Armed Groups (NSAGs) do not enjoy the privilege of combatants and can not claim protection as a POW (prisoner of war).⁷⁷

As with any other conventions, the Geneva Convention also contains two kinds of provisions, namely the general provisions and other provisions which merely regulate the implementation. The provisions of a general nature earlier load fundamental principles.⁷⁸

Geneva Convention 1949 is also referred to as the Red Cross Convention, because it governs the protection of war victims. The Geneva

⁷⁶ Haryo Mataram, *Pengantar Hukum Humaniter*, op.cit, p.48

⁷⁷ Tom Ruys , *The Syrian Civil War And The Achilles' Heel Of The Law Of Non-International Armed Conflict*, Board of Trustees of the Leland Stanford Junior University, 2014

⁷⁸ Haryo Mataram, *Pengantar Hukum Humaniter*, op.cit, p.53

Convention 1949 consists of four principal conventions or agreements, namely:

1. Convention on the improvement of the state of members of the armed forces are wounded and sick on the land of battlefield;
2. Convention on the improvement of the state of members of the armed conflict at sea which wounded, sick and shipwrecked;
3. Convention on the treatment of prisoners of war;
4. Convention on the protection of civilians in time of war.⁷⁹

Another matter with the Hague Convention, the Geneva Convention is more to the protection for those who are victims of war. Contained in the Geneva Convention and the Additional Protocol as a complementary of that convention.

c. Additional Protocol 1977

Additional Protocol aims to enhance the content of the Geneva Convention 1949 and not deleting the principles which contained in the Geneva Convention 1949, meaning that those principles is still valid.

⁷⁹ *Ibid.*

Special treatment is also given to medical personnel, whether civilian or religious and to transport equipment and medical supplies. In the 1977 Additional Protocol consists of two books, namely:

- Additional Protocol I, which contains the rules of war or armed conflict of an international character, namely and armed conflict where the parties to the dispute is the state.⁸⁰ Protocol I also used to protect the civilian population, as well as for civilians who fall into enemy sides. Parties involved in the dispute must always distinguish between civilians and combatants. Deliberately let the starving civilian, destruction of cultural property and natural environment is prohibited. There are some special efforts to protect women and children and journalists in dangerous task should be treated as civilians.⁸¹

- Additional Protocol II, which contains the rules of war or armed conflicts which are non-international aspect, which mean is armed conflict in region of one of the participant are among countries with rebel forces⁸². The same rules are also contained in Protocol II regarding the situation of internal

⁸⁰ Haryo Mataram, *Pengantar Hukum Humaniter*, *op.cit.*, p. 50

⁸¹ Hukum Humaniter Internasional Dan Hak Asasi Manusia, *Kampanye Dunia ...*, *Op.cit.*, p. 3

⁸² *Op.cit.*, p. 50

conflict. Protocol II contains rules relating to victims of non-international armed conflict, and thus completes the basic principles contained in Article 3 (Annex 1949 Convention).⁸³

Both that protocol further urges humane treatment of those who are not, or are no longer involved in the violence. Murder, torture, mutilation and corporal punishment was banned. There are some provisions about care for the sick, injured or stranded, and on the protection of the civilian population from acts or threats of violence, neglect as a tactic of war and force destruction. The act of destruction of historical monuments, works of art, or places of worship or abusive to support the interest of military is also prohibited.⁸⁴

2.2 Type of Armed Conflict

The law of war has changed in the use of the term, so that term of laws of war turned into a laws of armed conflict.⁸⁵ And regarding this one, Edward Kossoy said:⁸⁶

” The term of armed conflict tends to replace at least in all relevant legal formulation, the older notion of war. On purely legal consideration the replacement for war by ‘armed conflict’ seems more justified and logical.”

⁸³ Hukum Humaniter Internasional Dan Hak Asasi Manusia, *Kampanye Dunia ...*, *Op.cit.*, p. 3

⁸⁴ *Ibid.*

⁸⁵ Hans Peter Gasser, *International Humanitarian Law*, Henry Dunant Institute, 1993, p.3

⁸⁶ Arlina Permanasari, *op.cit.*, p.7

Armed conflict is a term to describe the origin of the conflict between the countries, the term armed conflict extended through the development of international law. Differences in armed conflict has historically drawn between international and internal conflict or non-international armed conflict, based on the difference between the inter-state relations, which is the right focus for international law and intra-state case that traditionally fall within domestic jurisdiction of the state and thus the principally immune to the rules of international law. In the field of humanitarian law can be seen in the gradual application of the rule to the internal armed conflict or non-international.⁸⁷

During it's development, the term armed conflict back to change, becoming international humanitarian law. International humanitarian law set two types of armed conflict, namely international armed conflict and non-international armed conflicts. From the broadly speaking, the difference in international armed conflict with non-international armed conflict under international humanitarian law with non-international armed conflict under international humanitarian law lies in the nature and the number of countries that are parties to the armed conflict.⁸⁸ In the settlement of an international dispute is basically already known some methods of resolving

⁸⁷ Haryo Mataram, *Refleksi dan Kompleksitas Hukum Humaniter*, Pusat Studi Hukum Humaniter dan HAM, FH Usakti, Jakarta, 2012, p.3

⁸⁸ Ambarwati, Denny Ramdhany , Rina Rusman, *Hukum Humaniter Internasional: Dalam Studi Hubungan Internasional*, Ctk. Ketiga, Rajawali Pers, Jakarta, 2012, p. 53.

disputes peacefully.⁸⁹ But war is a dispute resolution method that is still used, for example in the case of Syria.

In international humanitarian law known and set in it regarding the two types of armed conflict, namely international armed conflicts and non-international armed conflict. The author will explain more detail on the definition of each type of armed conflict.

2.2.1 International Armed Conflict

Draper stated that:

“International armed conflict as any situation in the which a difference between two states leads to the intervention of armed forces within the extended meaning conferred upon he later term by art.4 of prisoner of war conventions.”

From the opinion expressed by Draer regarding international armed conflict, it is understood that armed conflict can be said to be an international armed conflict if it involves two armed forces of different countries.⁹⁰

According to Article 1 Paragraph (3) and Article 1 Paragraph (4) of Protocol I to note that the international armed conflict are grouped into two, namely:

1. The armed conflict between states;

⁸⁹ Huala Adolf, *op.cit.*,p. 26

⁹⁰ *Ibid.*

2. The armed conflict between the peoples against colonial domination, alien occupation and racist regimes (CAR Conflict) which is commonly called the war of national liberation.⁹¹

In international armed conflict, both sides have the same legal status, because both of them is the state or country.⁹² International armed conflict that has been expressed in the same provisions of Article 2 of the Geneva Conventions in 1949 as armed conflict involving two or more countries.⁹³

2.2.2 Non-International Armed Conflict

In the historical record has been drawn distinction between international armed conflict with non-international armed conflict. The difference is based on the difference between the inter-state relations, which became the focus of international relations and affairs intra-state relations which traditionally includes the jurisdiction of the countries, so that in theory are not affected by the rules of international law. But in recent decades, this difference fades. Seen rules in the realm of international law entered into force gradually to non-international armed conflict.⁹⁴ Normative framework governing non-international armed conflict has grown considerably, both as a result of the application of Additional Protocol II of 1977, and as a result of the emergence and crystallization of international customary law in this area. In addition,

⁹¹ Additional Protocol I, Article 1.3 – 1.4

⁹² ArlinaPermanasari, *op.cit.*,p. 139.

⁹³ Ambarwati, Denny Ramdhany , Rina Rusman, *op.cit.*, p. 56

⁹⁴ Malcolm N. Shaw, *Hukum Internasional*, Fakultas Hukum Universitas Leicester, 2008, p. 1197

with the development of international criminal law and the advent of the International Criminal Court (ICC), the prospect of enforcement violations in non-international armed conflict have improved. Along with that, academic attention has increased because some books are now involved in non-international armed conflict in depth.⁹⁵

Non-international armed conflict, according to Additional Protocol II of 1997 is armed conflict occurring in the territory of a State and it is between the armed forces of the country with rebel armed forces or other organized armed groups under responsible command, carry out such control over a part of its territory so as to allow the group to conduct continuously military operation and unity and its also applying the rules of international humanitarian law contained in Additional Protocol II 1977,⁹⁶ can be said as a battle or a war involving countries that are against non-state armed groups.⁹⁷

A non-International armed conflicts are characterized by fighting between the armed forces of a country with resistance from a group of people or rebel forces. However a conflict in an area of the country between the two ethnic groups can also be classified as a non-international armed conflict as long as the conflict meets the

⁹⁵ Tom Ruys , *The Syrian Civil War And The Achilles' Heel Of The Law Of Non-International Armed Conflict*, Board of Trustees of the Leland Stanford Junior University, 2014

⁹⁶ *Ibid.*,p. 60

⁹⁷ *Ibid.*,p. 53

necessary requirements such as the intensity of the conflict, the old or the duration of the conflict and people's participation in the conflict.⁹⁸

For example, the conflict in Syria are categorized in non international armed conflicts, because of the conflict parties to the dispute is the Syrian government itself with the rebels who are has nationality as Syrian.

2.3 Principles of International Humanitarian Law

Humanitarian law has principles that act as a barrier to taking action in situations of war. In these principles, must be obeyed by all countries associated with international humanitarian law. These principles, namely:⁹⁹

2.3.1 Humanity Principle

The humanity principle is interpreted as prohibitions on the means and methods of warfare which are not essential for the achievement of a real military advantage. Jean Pictet in his book with the title "Development and Principle of

⁹⁸ Arlina, "Apa Arti Konflik Bersenjata Non Internasional". <http://arlina100.wordpress.com/2009/02/03/apa-arti-konflik-bersenjata-non-internasional/>, accessed on Monday 9 March 2015, 23.20.

⁹⁹ Arlina Permanasari, *op.cit.*, p. 11

International Humanitarian Law”, he interprets the meaning of humanity as follows:¹⁰⁰

“...The arrest is more precedence over injuring the enemy, and injuring the enemy is better than killing him; that non combatant should be kept as far as possible from the battlefield; that the victims were injured must be kept to a minimum level, so that they can be treated and cured; that the injuries that happen to be cultivated lenient painless.”

The humanity principle insists on treatment for the parties to the dispute to continue to give respect for human dignity. That mean, although in a state of war, the disputing parties are prohibited from doing acts that are likely to cause suffering to the enemy. From the principle of humanity, it is known that humanitarian law is not merely gave the restrictions on the war, but also pay attention to the values of humanity.¹⁰¹

The humanity principle is intended to pay respect and to protect the existence of human life.

¹⁰⁰ Jean Pictet, *Development an Principle of International Humanitarian Law*, as quoted in the book of *Pengantar Hukum Humaniter Internasional*, Arlina Permanasari dkk, ICRC, Jakarta, 2000

¹⁰¹ Arlina Permanasari, *op.cit.*, p. 11

2.3.2 Military Necessity Principle

This principle allows parties to use violence to subdue opponents to achieve the goals and the success of the war.¹⁰² Although international humanitarian law has established that the battle could be targeted only on military targets, but did not rule out a civilian object can be used as a military target if meet certain requirements. Thus, this military necessity principle is the provision which stipulates that a civilian object can only be used as military target if it has to meet certain requirements.¹⁰³

2.3.3 Chivalry Principle

Honesty is very important in all circumstances, including in a war situation. This chivalry principle implies that the use of tools that are not honored, various kinds of cheating and wiles are prohibited in war situation..

In the implementation, that those three principles above shall be implemented in a balanced way, as stated by Kunz:¹⁰⁴

“Law of war, to be accepted and to be applied in practice, must strike the correct balance between, on the hand the humanity principle, and chivalry, and on the other hand, military interest (necessity)”

¹⁰² Arlina Permanasari, *op.cit.*, p.11

¹⁰³ Ambarwati, Denny Ramdhany, Rina Rusman, *Op.cit.* p. 43

¹⁰⁴ As quoted by Arlina Permanasari, Aji Wibowo, dkk, *Pengantar Hukum Humaniter*, *ibid.*, p.11

2.3.4 Proportional Principle

In doing crackdown or attack, whatever tools and how, each party to the dispute must do so by adhering to the proportional principle. According to the proportional principle, any offensive attack of military operations must be preceded by measures that ensure that such attacks will not cause civilian of loss of life, injuries, or property damage were excessive compared to the military advantage that directly as a result of the attack.¹⁰⁵

This proportional principle turned out to be used as one of the consideration by the International Court of Justice when it gives an opinion on the validity of the threat or use of nuclear weapons.¹⁰⁶ International Court of Justice to give an opinion that for any country that intends to use the weapons for the sake of self-defense, then the country must ensure first that the weapons would be used not violate the proportional principle. The opinion given in 1996, with the given explanations regarding nuclear weapons that would be used assessed to be a risk that impacts cause excessive incidental damage, then that risk factor has turn down the possibility of the fulfillment of the proportional principle.¹⁰⁷

Proportional principle is also stipulated in the Al-Qur'an in Surah Al-Baqarah verse 190, which reads:

¹⁰⁵ Additional Protocol I/1977, Article 57.2.iii

¹⁰⁶ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion July 8, 1996, ICJ Rep. 1996

¹⁰⁷ Ambarwati, Denny Ramdhany, Rina Rusman, *Op.cit.* p. 45

others rooted in customs of war, it is meant here is the habit of war in the western area.¹¹⁰

One of the basic principles adopted in the law of war is the distinction between combatants and the civilian population. This distinction should be held first to find out who may or may not be made the object of violence and who should be protected. In other words, the existence of the distinction principle can be known who is allowed to participate in hostilities so that made the object of violence (killed), and who should be protected because it does not participate in combat.¹¹¹ This principle has been split into two groups, namely combatant and civilian. Combatants are groups of population that are actively participating in the hostilities, whereas the civilian population is the group of population that is not participating in hostilities.¹¹²

The distinction is aimed to find out where the groups involved in the hostilities are occurring, and also to determine which groups can be made the object of violence and who should be protected as such group which is not participate in hostilities that occurred.

Regarding this issue, the Manual of Military Law of the United Kingdom and quoted by Draper, said that the two parties, namely combatant and civilians, each having privileges duties disabilities. Furthermore, in the Manual said that one must

¹¹⁰ *Ibid.*

¹¹¹ Haryo Mataram, *Pengantar Hukum Humaniter, op.cit.*, p.75.

¹¹² ArlinaPermanasari, AjiWibowo, dkk, *Pengantar Hukum Humaniter*, International Committee of The Red Cross, Jakarta, 1999, p.73

choose in the group where he went, and he was not allowed to enjoy the privileges of two classes at once.¹¹³ From the quotations have shown that each group, combatants and civilians have the rights and obligations, for example, civilian are entitled to protection only if he does not participate and engage in armed conflict.

In Protocol I Article 48, which reads:

In order to be guaranteed the respect and protection of the civilian population and civilian objects, the parties to the dispute shall at all times distinguish civilians from combatants and between civilians objects and military objectives and accordingly shall direct their operations only against military targets only.¹¹⁴

From the article explained above that the existing distinction between combatants that can be used as an object in a war and civilians and cultural property that must not be made the object of war. However, the need for improvement in the implementation of these regulations because the civilian population is still only become victims of war.

From the description above, the authors have mentioned that the division of classes in the distinction principle, then the author will be more fully explain that two class which is also has relation with cultural property.

¹¹³ Haryo Mataram, *Pengantar Hukum Humaniter*, loc. cit.

¹¹⁴ Additional Protocol I of 1977, Article 48

b. Definition of Combatant

According to the Hague Convention of 1907, particularly the ‘Hague Regulations’, those who actively participated in the war could be called as combatants, namely:¹¹⁵

- Armies
- Militia and volunteer corps (need specific requirements)
- Lieve en masse

There is a note that in some forces are termed as non-combatants. The term does not mean including in civilians, but part of the armed force who are not helped in war (military doctors and religion person/monk/clergy). Although they do not contribute to fight, if they are caught by the enemy, they are also entitled to POW status.¹¹⁶ In Geneva Convention also mentions a new category into the combatant groups, from the population of group called the Organized Resistance Movement. They are the people who are part of the parties who participated in war and perform operations both inside and outside their territories although the territories they had occupied, as long as they meet the requirements as follows:¹¹⁷

- (1) Led by the person that is responsible for his subordinates;

¹¹⁵ Haryo Mataram, *Pengantar Hukum Humaniter, op.cit.*, p.78

¹¹⁶ Frits Kalshoven, *Constraints on the Waging of War*, ICRC, edisi kedua, 1987,p. 28

¹¹⁷ Haryo Mataram, *Hukum Humaniter,Op.cit.*, p. 70

- (2) They have a certain mark or symbol that can be recognized from a distance;
- (3) They carry arms openly;
- (4) They are in operation is comply or follow with the laws and customs of war.

c. Civilians

International humanitarian law has been set regarding the protection of the civilian population. According to Additional Protocol I Article 50 Paragraph (1), the notion of civilians are as follows:¹¹⁸

A civilian is any person who does not belong to one of the classifications persons referred to in Article 4A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. If there is doubt whether a person is a civilian, then it should be considered as a civilian.

Which belonged to in Article 4A (1), (2), (3), and (6) is as follows:¹¹⁹

1. Members of the armed forces of a party to the dispute.
2. Members of other military or other volunteer unity.
3. Members of regular armed forces.

¹¹⁸ Additional Protocol I Article 50

¹¹⁹ Arlina Permanasari, Aji Wibowo, dkk, *Pengantar Hukum Humaniter*, International Committee of The Red Cross, Jakarta, 1999, p.78

4. L'aveuglement de masse

In this case, civilians were among those entitled to be protected because they are not the target of war. In addition to the civilian population, civilian objects, cultural property are also included in the protected means and should not be made the object of attack. Civilian objects themselves are all objects which are not military objectives as defined in Additional Protocol Article 52 Paragraph 2.¹²⁰ The example of cultural objects, places of worship, as well as objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for food production, crops (plantations and livestock), livestock, drinking water installations and supplies, irrigation, as long as it is not used as a means of supporting life for the armed forces or any direct support for military action. Attacks are also forbidden to buildings, installations and power plants which contain dangerous forces, such as dams, and nuclear power plants.¹²¹

2.4 The Protection of Cultural Property in the Perspective of International Humanitarian Law

Talk about the situation in the war, could not be separated with the discussion of the protection obtained by the cultural property that basically it is not a place which can be used as a military object so this cultural property does not participate in the fighting that is going on. Thus, international law through international humanitarian

¹²⁰ Additional Protocol I of 1977 Article 52 verse 2

¹²¹ Malcolm N. Shaw, *Op.cit.*, p. 1195

law tries to provide restriction, rules and explanations regarding proper protection obtained by objects in the perspective of international humanitarian law itself.

If we look at an understanding of cultural objects from the juridical aspect, in this case the provisions of humanitarian law that Additional Protocol I of 1977. The provisions of Article 52 paragraph (1) of Protocol I states that “civilian objects are all objects which are not military objects”. This norm seems very simple and easy to understand. However, the provisions of paragraph (1) is then still to be clarified again with the provisions of paragraph (2). Paragraph (2) adds that the definition of military targets are all objects which because of: its nature, location, purpose or usefulness can make an effective contribution to the military operations and if (the objects) destroyed either entirely or in part, controlled or neutralized, in a situation that occurred at that time, then it can provide a definite military advantage.¹²²

Regarding attacks on cultural property set in rule 38 in ICRC report on international customary law in the field of humanitarian law.¹²³ The rules require the parties to follow two things that related to the attack, with doing special treatment in military operations. To avoid damage to cultural property and not an attack against cultural property. Part A of the rule 38 (ICRC) states:

¹²² Arlina, “*Benda Budaya: apakah objek sipil?*”. <https://arlina100.wordpress.com/2008/12/20/benda-budaya-apakah-objek-sipil/>, accessed on Thursday 11 June 2015, 23.44.

¹²³ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, p.127

“Special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives.”¹²⁴

Rule 38 relating to the distinction and prudence principle in international humanitarian law. Has been regarded as a customary international law that a party to an armed conflict must always distinguish between civilian objects and military objectives, and attacks can only be directed at military targets and not to civilian object.¹²⁵ In conducting attack, the parties shall take steps to avoid injury to civilian objects,¹²⁶ including cultural objects which are essentially has civil characteristic. Protection of cultural property can be found in various international treaties, including the Hague Regulations of 1907,¹²⁷ and was considered as the part of customary international law in armed conflict both international armed conflict and non-international armed conflict.¹²⁸ Under this provision, the states shall recognize the necessity to provide special treatment for cultural property in terms of conducting military operations during armed conflict in order to avoid to cultural property. This requirement outlined in military guide in various state.¹²⁹

¹²⁴ ICRC Rule 38

¹²⁵ Jean-Marie Henckaerts and Louise Doswald-Beck, *op.cit.* p.25

¹²⁶ *Ibid.*, p. 51

¹²⁷ Regulations Respecting the Laws and Customs of War on Land (Annex to Convention IV respecting the Laws and Customs of War on Land, Article 27.

¹²⁸ Roger O’Keefe, “Protection of Cultural Property,” p. 448.

¹²⁹ United States of America, Instructor’s Guide (1985), p.13.

However, like other civilian objects, the protection of cultural property will lost his character when the object being military objectives.¹³⁰ In military manual guidance of states, the loss of the protection of cultural property in the context referred to as objects that are “used for military purposes” or an object that is “used for military action”.¹³¹

Regarding to the attacks on cultural property, Rule 38 part B states that:

“Property of great importance to the cultural heritage of every people must not be the object of attack unless imperatively required by military necessity”

It can be seen from the foregoing that in addition to the requirement that a cultural property can only be attacked if it had become a military objective, the legality of the attacks on cultural property is also limited to cases where the outstanding towards the interests of imperative military reasons. These exceptions can be found in the Hague Convention of 1954.¹³² Although it is not ratified by all countries in the world, the fundamental principles in the protection and preservation of cultural property in the convention is regarded as a reflection of international customary law.¹³³ One of that fundamental principle is a matter of attacks on cultural

¹³⁰ Jean-Marie Henckaerts dan Louise Doswald-Beck, Customary International Humanitarian Law Volume I: Rules, p. 29

¹³¹ See: :Australia, Commanders“ Guide (1994), Belgia, Law of War Manual (1983), p. 29

¹³² Convention for the Protection of Cultural Property in the Event of Armed Conflict, Article 4(2)

¹³³ United Nations Educational, Scientific and Cultural Organization, “Resolution 3.5,” dalam Records of the Twenty-Seventh Session of the General Conference Volume I (Paris: United Nations Educational, Scientific and Cultural Organization, 1993), p. 40.

property. Offensive actions against cultural property, other than stipulated in various international treaties, is also cursed by international organizations.¹³⁴ That prohibited conduct when it's war is also listed in military guides by many countries,¹³⁵ including countries that who are not constitute the participating or members countries of the Hague Convention of 1954,¹³⁶ and attacks on cultural property without justification of imperative military necessity is a crime where the perpetrator can be sentenced.¹³⁷

2.5 Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954)

In 1946, UNESCO established to, among other things, maintain and spread the knowledge to ensure the protection of world heritage in the form of books, works of art and historical monuments, and recommend to the international countries which involved in the conventions is really necessary.¹³⁸ Aware about this, it is not amaze us if immediately after its founding, UNESCO revive the idea to establish a multilateral treaty specifically designed to protect cultural property during armed conflict, an effort that had been stopped due to the outbreak of World War II. The idea eventually led to Hague Convention of 1954 which was adopted by the Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict

¹³⁴ United Nations Security Council, Resolution 1265, 17 September 1999; United Nations Commission on Human Rights, Resolution 1989/2, 17 Februari 1989

¹³⁵ See: Belgia, Law of War Manual (1983), German Military Manual 1992, Indonesia, Air Force Manual 1990

¹³⁶ See: Kolombia, Basic Military Manual 1995, UK, Military Manual 1958

¹³⁷ See: Argentina, Code of Military Justice (1951), Article 746(2) and 746(3), Italia, Wartime Military Penal Code (1941), Article 187

¹³⁸ United Nations, Constitution of the United Nations Educational, Scientific and Cultural Organization, U.N. Treaty Series Vol. 4152, 16 November 1945, Article 2(1)(c)

("Hague Conference of 1954") on March 14, 1954. Along with the Hague Convention of 1954, also adopted Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict ("Hague Regulations of 1954") and the Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict ("First Protocol of 1954"). The Committee is finalizing the draft of the Hague Convention of 1954 seeks to create a concept that is considered realistic and balance between maximum participation with maximum protection.¹³⁹

The adoption of the Hague Convention of 1954 is very important because it focused all the provisions regarding the protection of cultural property during armed conflict within a single legal instrument. This is different from what happened in the past where the provisions regarding the protection of cultural property during armed conflict are separated in various legal instruments which is about the armed conflict. In addition, the Hague Convention of 1954 is the first international convention to use the term "cultural property", in contrast or different with other conventions which specify objects that should be given protection, but they do not use the term "cultural property".¹⁴⁰ A few years after the adoption of the Hague Convention of 1954, the

¹³⁹ United Nations Educational , Scientific and Cultural Organization, Records of the Conference convened by the United Nations Educational, Scientific and Cultural Organization held at The Hague from 21 April to 14 May 1954 (Den Haag: Staatsdrukkerij-en Uitgeverijbedrijf, 1961), hlm. 101-103

¹⁴⁰ As the example is The Hague Convention IV of 1907, where the reference towards cultural property can be found in the Article 56 paragraph 2. That article give protection to specific objects, the institution which dedicated to religion, social and education, arts and science, cultural heritage monument.

convention is recognized as the most important conventions in terms of international protection to the cultural heritage of mankind from impact armed conflict.¹⁴¹

Hague Convention of 1954 set, in outline, four related state obligations regarding cultural objects. These obligations are the obligation of the state to be the rescue of cultural property, the state's obligation will be respect for cultural property, the obligation of the state of occupation, and obligations the state of the armed forces. In addition, the Hague Convention of 1954 also includes a mechanism for the transfer of cultural objects move to dissuade the cultural property from the effects of war and sanctions of violation of the convention.

2.5.1 Enforceability Convention for the Protection of Cultural Property in the Event of Armed Conflict

Enforceability Hague Convention of 1954 set out in Article 18 and Article 19. Article 18 was taken almost the whole of Article 2 of the Geneva Conventions of 12 August 1949.¹⁴² Based on that article, the provisions of the Hague Convention of 1954 there were in effect at the peace time¹⁴³ and also can be applicable in times of

¹⁴¹ Resolution 20 on the Protection of Cultural Property from Diplomatic Conference of Geneva of 1947-1977 which said, "The Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Additional Protocol, signed at The Hague on 14 May 1954, constitutes an instrument of paramount importance for the international protection of the cultural heritage of all mankind against the effects of armed conflict... Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, "Resolution 20 on the Protection of Cultural Property, "in Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts Geneva (1974-1977) Volume I (Bern: Federal Political Department, 1978), p.213

¹⁴² Jiri Toman, The Protection of Cultural Property in the Event of Armed Conflict, p.195-196

¹⁴³ *Ibid.*, p.42

armed conflict between two or more countries participating Hague Convention of 1954. For the provisions which applicable in times of armed conflict, is not necessary for a formal declaration of war of hostility parties, or the recognition of a conflict as armed conflict. The conduct of hostilities significantly enough to enact the Hague Convention of 1954.¹⁴⁴ The Hague Convention of 1954 also applies when the occupation by a country to the territory of other countries despite the absence of an official statement from the state who perform the occupation or act of hostility directed against the region which occupied.¹⁴⁵ If one of the parties in an armed conflict is not a participant countries Hague Convention of 1954, the parties to the conflict that the participating countries of the Hague Convention of 1954 remain bound by the convention in relation among them.¹⁴⁶ The parties also be bound by the Hague Convention of 1954 in relation to a country which is not a participant as Hague Convention of 1954 if the country which is non-participants receive the provisions of the Hague Convention of 1954 and apply it.¹⁴⁷

In addition to the armed conflict involving two or more countries, Hague Convention of 1954 also applies to the armed conflict that which is not international. The first paragraph of article 19 of the Hague Convention of 1954 requires

¹⁴⁴ *Ibid.*, p.196. See also: Jean Pictet, ed., Commentary on the Geneva Conventions of 12 August Volume IV: Geneva Convention relative to the Protection of Civilian Persons in Time of War, p. 32.

¹⁴⁵ *Ibid.*, p.197.

¹⁴⁶ Convention for the Protection of Cultural Property in the Event of Armed Conflict, Article 18(3).

¹⁴⁷ Convention for the Protection of Cultural Property in the Event of Armed Conflict, Article 18(3)

participating countries to impose the provisions of the Hague Convention of 1954 related to respect for cultural property during non-international armed conflict.¹⁴⁸

2.5.2 The definition of “Cultural Property” and “Protection of Cultural Property”

The definition of cultural objects used in the Hague Convention of 1954 which is stated in Article 1. In its formation, the participants of Hague Conference of 1954 considering the definitions used in national legislation and achieve the average standard of acceptable and enforced by majority states by comparing the various definitions that exist.¹⁴⁹ The proposals of the participating countries shows that in general, the states considers that have the greatest culture interest that should be regarded as cultural objects.¹⁵⁰ The opening sentence and sub-paragraph (a) of the Article 1 of Hague Convention of 1954 states as follows:

“For the purposes of the present Convention, the term ‘cultural property’ shall cover, irrespective of origin or ownership: (a) moveable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works

¹⁴⁸ The term of respect towards cultural property is based on the state’s responsibility to do not to do certain action that prohibited, Hague convention of 1954, Article 4.

¹⁴⁹ Jiri Toman, *The Protection of Cultural Property in the Event of Armed Conflict*, p. 47-48.

¹⁵⁰ Records of the Conference convened by the United Nations Educational, Scientific and Cultural Organization held at the Hague from 21 April to 14 May 1954, p. 125-126.

of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above...”¹⁵¹

After stating the definition of cultural objects that are used in Convention, Article 2 Hague Convention of 1954 explains the scope of protection of cultural property as stipulated in the convention. Article 2, which stated:

“For the purposes of the present Convention, the protection of cultural property shall comprise the safeguarding of and respect of such property.”¹⁵²

Can be seen from the quotation above that the definition of protection under the Hague Convention of 1954 includes two aspects, called as the safety aspect (safeguarding) of cultural property and reverence (respect) against cultural property. Securing cultural property includes all measures designed to ensure the protection of cultural property from the effects of armed conflict. On the other hand, respect for cultural property is the state’s obligation not to undertake certain actions which are

¹⁵¹ Convention for the Protection of Cultural Property in the Event of Armed Conflict, Article 1(a).

¹⁵² *Ibid.*, Article 2.

prohibited, such as causing endangerment of cultural property in an armed conflict of cause damage to cultural property.¹⁵³

2.5.3 State's Obligation to Respect for Cultural Objects

Respect for cultural property provided for in Article 4 of the Hague Convention of 1954 contains four forms of respect for cultural property to be pay attention more by the participating countries during the armed conflict. The fourth form of respect is imperative for not using cultural property and surrounding area for purposes that may expose cultural objects to the destruction or damage; must not perform any acts of hostility towards cultural property; duty to prohibit, prevent, stop the theft, looting, and vandalism against cultural property; and do not make cultural objects as object of retaliation (Reprisal).

The first form of respect, is the necessity for not using cultural property and surrounding area for purpose that may expose cultural objects to destruction or damage, stated in the first part of Article 4(1) Hague Convention of 1954. Under these provisions, any use of cultural property is prohibited if such action is likely to result in a material deterioration of cultural property in question or exposure to vandalism. Included in the action that is prohibited is the use of cultural objects with passively or indirectly, might lead to the cultural property being attacked.¹⁵⁴

¹⁵³ Stanislaw Edward Nahlik, "Protection of Cultural Property" in *International Dimensions of Humanitarian Law* (Paris: Henry Dunant Institute, 1987), p. 207.

¹⁵⁴ Karl Josep Partsch, "Protection of Cultural Property", in *The Handbook of Humanitarian Law in Armed Conflicts*, edition. 1, (Oxford: Oxford University Press, 1995), p. 385.

Effectively making cultural objects as part of the defensive line is also prohibited,¹⁵⁵ as well as military aircraft parked in the surrounding area of cultural objects¹⁵⁶ and use of cultural objects as military base or barrack.¹⁵⁷ A ban on the use of cultural property for purposes that could harm it does not only apply when the armed conflict; The provision applies also in peacetime when its use at that time would jeopardize the cultural property that concerned.¹⁵⁸

The form of respecting for the cultural property based on Article 4 Hague Convention of 1954 is imperative or obligation to not commit any acts of hostility towards cultural property. The use of term “any act of hostility” means not only an attack against cultural property which is prohibited, but also the destruction by using explosives or condemnation machine.¹⁵⁹

Against the two forms of respect above, there is one exception to the obligation of the participating countries associated with it. The exception is the “imperative military necessity”. Hague Convention of 1954 adheres to a conservative view regarding the use of military necessity that imperatively, while the principle of imperative military necessity is never implied and can only be enforced if it is

¹⁵⁵ That action ever happened in World War II by German which using a Church in Monte Carlo into Gustav Line. Roger O’Keefe, “Protection of Cultural Property”, in *The Handbook of Humanitarian Law in Armed Conflicts*, edition. 2, (New York: Oxford University Press, 2008, p. 451

¹⁵⁶ A. P. V. Rogers, *Law on the Battlefield*, Edition. 2, (Manchester University Press, 2004), p. 146.

¹⁵⁷ Roger O’Keefe, “Protection of Cultural Property”, p. 451.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.* p. 449 and also see: Jiri Toman, *The Protection of Cultural Property in the Event of Armed Conflict*, p.136.

expressly stipulated in the written law.¹⁶⁰ Regarding to the Hague Convention 1954 explicitly setting regarding the reason of using imperative military necessity related obligation of respecting towards cultural property specified in Article 4(1) and expressed in Article 4(2). As a consequence of the strict exception, related to the form of respect for the cultural property is the first, if it is seen from the military standpoint is a must imperatively to use cultural property and the area around it for purpose that could jeopardize cultural objects are concerned, such kind of using the imperative military necessity is become not prohibited. However, it needs to be remember that the circumstances in which the use of cultural property for military purposes must be extremely rare.¹⁶¹

The use of cultural property for military purposes does not necessarily absolve the enemy of their obligation not to attack the object.¹⁶² It relates to an exception based on imperative military necessity to respect cultural property in the form does not commit an act of hostility against him, especially in the form of assault. Although the cultural property is used for purposes that are prohibited in the first part of Article 4(1), the cultural property may be attacked only if the using which is prohibited make such cultural objects become military targets, in accordance with

¹⁶⁰ Records of the Conference convened by the United Nations Educational, Scientific and Cultural Organization held at The Hague from 21 April to 14 May 1954, p. 264.

¹⁶¹ Roger O'Keefe, "Protection of Cultural Property", p. 451.

¹⁶² Convention for the Protection of Cultural Property in the Event of Armed Conflict, Article 4(1).

customary international law regarding the targeting of an object as a military targets.¹⁶³

The third form of respecting for cultural property by Hague Convention of 1954 can be found in Article 4(3). This article is requiring participating countries to stop, prevent, and if necessary, to stop the theft, looting, and vandalism against cultural property. This obligation applies not only to the armed forces of a country, but also intends to include the actions taken by the local population, as well as the armed forces of the enemy that remains.¹⁶⁴

Furthermore, Article 4(4) is prohibition to make cultural property as the object of retaliation (reprisal).¹⁶⁵ Different with the two form of the first respecting the cultural property, both for the form of respecting cultural property for this fourth part or the third that there is no exception on it. This means that its provisions are absolute and the reason of imperative military necessity can not be used.¹⁶⁶

The fourth form of respect to cultural property above is provided to all cultural objects that explain within the definition of cultural property under Article 1 of the Hague Convention of 1954 without having to do any kind of registration by the state in which the object is located.¹⁶⁷ For certain cultural objects that are considered

¹⁶³ Op.Cit., p. 443

¹⁶⁴ *Ibid.* p. 453.

¹⁶⁵ Andrew D. Mitchell, "Does One Illegality Merit Another? The Law of Belligerent Reprisals in International Law", *Law of Reprisals* (2001), p. 156.

¹⁶⁶ *Ibid.*, p. 450 and 453.

¹⁶⁷ Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict*, p. 100.

very important (cultural property of very great importance), there is an additional protection to that objects in conjunction with the general protection as set out in Article 4 Hague Convention of 1954.¹⁶⁸ This protection is called “special protection”. Special protection can only be granted to a sanctuary that is intended to accommodate the moving objects, which contain centers of historical monuments and other immovable cultural objects that meet two strict criteria as set out in Article 8 Hague Convention of 1954. Then, the special protection apply only the two criteria are met and respected. The first criteria is that the cultural objects located at a considerable distance¹⁶⁹ from any large industrial center or any military target is vulnerable point.¹⁷⁰ The second criteria is that the cultural property is not used for military purposes.¹⁷¹ If it meets all of the above elements, to gain special protection, a cultural property must be registered in the International Register of Cultural Property under Special Protection.¹⁷²

Article 9 of the Hague Convention of 1954 governing the treatment of cultural property under special protection to ensure immunity against it. Immunity is meant here is the immunity of cultural property to be used for purposes that may harm and any act of hostility. A party which violates the immunity can not use the excuse of ignorance of the existence of special protection to a cultural property, because of the

¹⁶⁸ Convention for the Protection of Cultural Property in the Event of Armed Conflict, Article 8.

¹⁶⁹ Jiri Toman, *The Protection of Cultural Property in the Event of Armed Conflict*, p. 101.

¹⁷⁰ Convention for the Protection of Cultural Property in the Event of Armed Conflict, Article 8(1)(a).

¹⁷¹ *Ibid.*, Article 8(1)(b).

¹⁷² *Ibid.*, Article 8(6).

publicity that followed gave special protection of cultural property in question and the distinctive mark of cultural objects attached to it.¹⁷³

Respect for cultural property under special protection is not absolute. Imperative military necessity is an exception from the state's obligation to ensure the immunity of cultural property under special protection. However, military necessity exception which applies to cultural property under special protection more strict than those that apply to cultural property under general protection. The second paragraph of Article 11 is the essence of the withdrawal of immunity of cultural property under special protection. The article states that immunity may be waived in exceptional cases where there are imperative military necessity that can not be avoided (unavoidable military necessity).¹⁷⁴ Exceptions for using the reasons of military necessity that can not avoided can only be expressed by the commander of an army division.¹⁷⁵

Another situation that can override the immunity of cultural property is regulated in first paragraph Article 11 Hague Convention of 1954. Under this provision, a party is released from an obligation to ensure the immunity of cultural property under Article 8 if the opponent violated the immunity first.¹⁷⁶ These provisions describe the nature of the reciprocity of special protection, and therefore,

¹⁷³ Jiri Toman, *The Protection of Cultural Property in the Event of Armed Conflict*, p. 139.

¹⁷⁴ Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict*, p. 158.

¹⁷⁵ *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, Article 11(2).

¹⁷⁶ This exception is only valid during breaking of the immunity by the enemy ongoing, and no more. *Ibid.*, Article 9(1).

the principle of *inadimplenti non est adimplendum* will be applied.¹⁷⁷ However, the release of the obligation to ensure the immunity of cultural property does not mean that the release of the obligation to respect for cultural property pursuant to Article 4 Hague Convention of 1954. The official impact of Article 11(1) only to allow a party to use a standard military necessity which is more lower as set out in Article 4(2) and not standard of military necessity which is higher as set out in the Article 11(2).¹⁷⁸ So, because the absence of the imperative military necessity, even though the enemy has violated the immunity of cultural property under special protection, a country still had an obligation to respect cultural property as set out in Article 4 Hague Convention of 1954.

2.6 The Distinction Principle for Protection of Civilian and Cultural Property in Islam

Humanitarian law known as one of the branches of international law governing the procedures for fighting to keep it protected the dignity and pay tribute to the man. In this case, the protection afforded not only to the parties to the dispute, but also for the civilian population. Has been discussed above, that international humanitarian law recognized the distinction principle. From this principle, it must distinguish between combatants and the civilian population which aims to protect civilians so that can be targeted only military combat and military objects.

¹⁷⁷ Jiri Toman, *The Protection of Cultural Property in the Event of Armed Conflict*, p. 144.

¹⁷⁸ Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict*, p. 160-161.

Not only in international humanitarian law are known about the distinction between combatant and civilians, but Islam has much in advance governing the distinction principle and the protection of civilians in Al-Qur'an. Prophet also prohibits to attack the children, the women, but if women are directly involved in a war, then she is allowed to be targeted,¹⁷⁹ as well as the elderly.¹⁸⁰ There is a note that there is classification of old people, they are those that govern warfare with views and planings. They should be killed on the battlefield because it was considered as a soldier with the opinions and plans. For example, the Prophet had ordered killed Duraid bin Shammah in Hunain War, although he was very old, but he has opinions and conscious. Then the second group it is prohibited to attack, namely those who do not have the idea or opinion of the war, therefore, should not be killed.¹⁸¹ In the battle, the Muslims should not make war target is not focused directly involved in the war.¹⁸² Among the hadith narrated by Imam Ahmad, Muslim, Ibn Majah and Al-Tirmidzi from Sulaiman bin Buraidah path of his father. The Prophet said:¹⁸³

“...Go travel in the name of Allah, you fight in fi sabilil-lah (in the way of Allah) against those who disbelieve in Allah, do you betray the agreement, do you cheat (take the spoils before distribution), do not

¹⁷⁹ Ahmad Azhar Basyir, *Ihtisar Hukum Internasional Islam*, Yogyakarta, UII Press, 1981, p. 43

¹⁸⁰ Abdul Ghani Abdul Hamid Mahmud, *Perlindungan Korban Konflik Bersenjata Dalam Perspektif Hukum Humaniter dan Hukum Islam*, Jakarta, ICRC, 2008, p. 55

¹⁸¹ Abu Zahrah, *Hubungan Internasional Dalam Islam*, Jakarta, Bulan Bintang, 1973, p. 126

¹⁸² Ahmad Azhar Basyir, *Op.cit.*, p. 43

¹⁸³ Abdul Ghani Abdul Hamid Mahmud, *Op.cit.*, p. 55

you undermine the bodies, don't you kill children and the people who inhabit the place of worship.”

In a hadith narrated by experts of hadith that six in addition to Imam al-Nasa'i reported that Ibn' Umar used to say:

“...In the battle, the Prophet ever found a woman who was killed, the Prophet forbids killing women and children.”¹⁸⁴

Thus, Islam has been set regarding the protection of civilians during the war with the aim of giving respect, especially for women to be protected from their abusive actions. Islam also prohibits civilian objects for attack.

In line with the nature of Islam as a religion that teaches that human beings socially created an atmosphere of peace. Therefore, Islam obliges Muslims to spread to anyone in a peaceful way. In the case of Muslims preach Islam but f faced with hostility and resistance weapons, then Muslims justified break resistance and hostility it by force of arms as well,¹⁸⁵ because a believer can not justify destroying what has been built by Allah SWT. But Islam also seem to justify the war after the real symptoms of slander or assault had actually occurred.¹⁸⁶ It is also arranged on the prohibition of all forms of military action that could undermine cultural objects and worship places. In the Islamic perspective, damaging these objects is considered as a

¹⁸⁴ *Ibid.*, p. 57

¹⁸⁵ Ahmad Azhar Basyir, *Op.cit.*, p. 6

¹⁸⁶ Abu Zahrah, *Op.cit.*, p. 119

form of mischief which is prohibited by religion. The leader Abu Bakar al-Shiddiq RA been give an advice to Yazid bin Abi Sufyan, among others, in order not to damage the building. The word “building” is meant includes cultural objects and places of worship and buildings alike.¹⁸⁷

About the protection of Cultural Property in Islam is also regulated in the Islamic Shari'a. Islamic Shari'ah is a regulation of life that comes from Allah SWT that He is the guide of life for all mankind. As a life guide he has a primary goal that is acceptable to all mankind. The purpose of the Islamic Shari'a is for the good of all mankind. In the scope of ushul fiqh this goal is called *maqashid as-syari'ah* namely the purpose and goal of the decrease of Islamic Shari'a.

The term of *maqashid syari'ah* consists of two words namely *maqashid* and *syari'ah*. *Maqashid* means intentional or purpose, *maqashid* is the form of *jama'* from *maqsud* derived from the syllable of *Qashada* which means wanting or meaning. *Maqashid* means the things desired and intended.¹⁸⁸

The provision of Allah and His Messenger contained in the Qur'an and the authentic books of hadith, we can immediately know the purpose of Islamic law. It is often formulated that the purpose of Islamic law is for the happiness of human life in this world and in the hereafter, by taking (all) the useful and preventing or rejecting the harmful that is not useful for life.

¹⁸⁷ Abdul Ghani Abdul Hamid Mahmud, *Op.cit.*, p. 63

¹⁸⁸ Ibnu Mandzur, *Lisaan Al-'Arab Jilid I*, Kairo: Darul Ma'arif, tt, p. 3642.

In other words, the purpose of Islamic law is the benefit of human life, both spiritual and physical, individual and social. That benefit is not only for the life of this world but also for eternal life in the hereafter. Abu Ishaq al-Shatibi formulates five objectives of Islamic law:

1. Hifdz Ad-Din (Maintaining Religion)
2. Hifdz An-Nafs (Maintaining the Soul)
3. Hifdz Al'Aql (Maintaining Intellect)
4. Hifdz An-Nasb (Maintaining Heredity)
5. Hifdz Al-Maal (Maintain Property)

These five objectives of Islamic law in the literature is called al-maqasid al-shari'ah. The purpose of Islamic law can be seen from two aspects, (1) the aspect of Islamic Law, Allah and His Messenger. And (2) the human aspect that became the executor of Islamic law. When viewed from the Islamic lawmakers the purpose of Islamic law is: To maintain the basic human life needs, secondary, and tertiary, which in the Islamic legal literature respectively called the term *daruriyyat*, *hajjiyat* and *tahsniyyat*.

Primary needs are the main needs that must be protected and maintained as well as possible by Islamic law so that the benefit of human life really can be realized. Secondary needs is a necessary need to achieve primary life, such as independence, equality, which is supportive of the existence of the primary needs. Tertiary needs is the needs of human life other than those that are primary and

secondary that need to be held and maintained for the good of human life in society, such as clothing, food, housing and others.

By this point we can conclude that cultural building is also can be included as primary needs, because in cultural building consist a lot of background story which can be used for research and educational matters. It is also because knowledge is give benefit of human life.

Islam believes that all the treasures of this world belong to Allah SWT, man has the right to use them. Yet Islam also recognizes the privacy of a person. Because human beings are very greedy to material goods, so want to reach it in any way, so Islam arranges to avoid clashes between each other. For this Islam prescribes rules on *muamalah* such as buying and selling, leases, mortgage pawn, and so on, and prohibits fraud, usury and obliges to those who damage the goods of others to pay for it, the property destroyed by the children under dependents, even those damaged by his pets.

The protection of Islam over one's possessions is reflected in His word:

أَكْذِبْنَ عَمَزُوا لَ نَأْكُلُوا أَمْوَالَكُمْ بَيْزِكُمْ بِأَبْطَلِ إِذْ لَ أَنْ نَكُونِ نَجْرَةَ عَنْ نَرِاضِ مَرْكَمْ وَ لَ نَقُولُوا أَرْسَلَكُمْ إِنْ أَلَّ كَانِ نَأْهَآ

بِكَمْ رَحِيمِ

“O believer, do not eat one another's treasures in a vanity way, except by way of commerce that applies equally among you, and do not suicide. Allah is Most Merciful to you.” Q.S. An-Nisa: 29-32.

Prohibition also mentioned destruction is not allowed to perform the cutting of the trees have fruits and palm trees, firmly in the messages of the Prophet, but if such destruction is an interest in the war, for example is that place is used for enemy as a hiding place or assault or defense against the Muslims, in a case like this, it is allowed to cut the trees and the destruction of buildings.¹⁸⁹

Thus, we can know that Islam also has set up concerning the protection of the civilian population with the prohibition against military action that could undermine civilian objects and civilians, including children, women, religious leaders and the elderly. Murder can only be committed against people who actually participate in the war.¹⁹⁰

¹⁸⁹ Abu Zahrah, *Op.cit.*,p. 128

¹⁹⁰ *Ibid.*,p. 131

CHAPTER III

ANALYSIS

3.1 Legal Protection Toward Cultural Property In Syria War Under International Humanitarian Law

Hague Convention II of 1899 is an instrument that codifies the provisions of the relevant laws of war on land in general,¹⁹¹ as well as the first serious attempt at an international level to protect the cultural property of all nations.¹⁹² Preamble of Hague Convention II of 1899 is equally stated that the words of the treaty are inspired by the desire of the international community to regulate warfare that has international aspect. In particular, the preamble is underlined that the provisions of the convention are motivated by the desire to eliminate the evils of war to the extent permitted by imperative military necessity.¹⁹³ The ugliness of the war in this context includes the confiscation, destruction and willful destruction of cultural property.¹⁹⁴ The desire is

¹⁹¹ Sasha P. Paroff, "Another Victim of the War in Iraq: The Looting of the National Museum in Baghdad and the Inadequacies of International Protection of Cultural Property," *Emory Law Journal* (Fall 2004), p. 2030

¹⁹² Mathew K. Steen III, "Collateral Damage: The Destruction and Looting of Cultural Property in Armed Conflict", can be accessed through http://works.bepress.com/matthew_steen/1/, accessed on November 3rd 2015, p.10

¹⁹³ "According to the views of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with inhabitants." Convention IV respecting the Laws and Customs of War on Land, Paragraph V on Preamble, Paragraph VI on Preamble of Convention II with Respect to the Laws and Customs of War on Land.

¹⁹⁴ Sasha P. Paroff, "Another Victim of the War in Iraq: The Looting of the National Museum in Baghdad and the inadequacies of International Protection of Cultural Property," p. 2031

expressed in several articles in the Hague Convention II of 1899 and the Hague Convention IV of 1907.

3.1.1 Convention IV respecting the Laws and Customs of War on Land (1907)

Review of the provisions of the Hague Convention of 1907 relating to the protection of cultural property during armed conflict (more precisely in the annex Hague Convention of 1907 namely the Hague Regulations of 1907) can be divided into two parts according to the systematic division of international agreements. The provisions concerning cultural property first appears in Part II of Hostilities of the Hague Regulations of 1907, and then in Part III of the Military Authority over the territory of the Hostile State.¹⁹⁵

3.1.1.1 Hostility

The relevant Article in Part II of hostility in the Hague Regulations of 1907 is article 23 and article 27. Article 23 states:

“In addition to the prohibitions provided by special Conventions, it is especially forbidden... (g) To destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war...”¹⁹⁶

This article sets broad prohibition against the destruction of all enemy property, and also stated imperative military necessity approach adopted in the Hague

¹⁹⁵ Hague Regulations of 1899, Section I, Section II, Section III, Section IV and Comparing to Hague Regulations of 1907.

¹⁹⁶ James Brown Scott, ed., *The Reports to the Hague Conferences of 1899 and 1907* (Oxford: Clarendon Press, 1916), p. 145

Regulations of 1907.¹⁹⁷ In addition to the general prohibition in Article 23, Hague Regulations of 1907 define more specifically the protection of cultural property, particularly in terms of attack and bombardment, in Article 27, which consists of two paragraphs.

Article 27 in its first paragraph states that measures must be taken to save as much as possible of cultural property in the event of an attack or bombardment.¹⁹⁸ The presence of the words “as far as possible” in these paragraphs impose limits on the protection of cultural objects¹⁹⁹ and implies that the reason for imperative military necessity may override the foregoing and justify the destruction of enemy property.²⁰⁰ The first paragraph of Article 27 also requires that in order to obtain protection of a property, the property should not be used for military purposes. If the conditions are not met, then the protection under Article 23 are considered missing.²⁰¹

Furthermore, the second paragraph of that article requires the threatened attack or bombardment of the effort to give an indication of the existence of cultural property and should be protected. This is referred to in the first paragraph of Article

¹⁹⁷ Matthew K. Steen III, “Collateral Damage: The Destruction and Looting of Cultural Property in Armed Conflict,” p. 10

¹⁹⁸ Regulations Respecting the Laws and Customs of War on Land (Annex to Convention IV respecting the Laws and Customs of War on Land), Article 27 paragraph. 1.

¹⁹⁹ Patty Gerstenblith, “From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century,” *Georgetown Journal of International Law* (Winter 2006), p. 256

²⁰⁰ Matthew K. Steen III, “Collateral Damage: The Destruction and Looting of Cultural Property in Armed Conflict,” p. 10

²⁰¹ Patty Gerstenblith, “From Bamiyan to Baghdad: Warfare and the Perservation of Cultural Heritage at the Beginning of the 21st Century,” p. 256

27 of the enemy before the attack or bombardment carried out.²⁰² The practice of marking property as protected, is referred to in the second paragraph of Article 27 and is still implemented until now.²⁰³

3.1.1.2 Military Authority over the Territory of the State Hostility

In the Part III of the Military authority over the territory of the warring states of the Hague Regulations of 1907, the provisions relating to the protection of cultural property during armed conflict are outlined in article 46, article 47, and article 56. These articles relate to confiscation, looting and destruction of cultural property in the region of belligerents.

The second paragraph of Article 46 states ban against confiscation of property that is private (private property)²⁰⁴, and the first paragraph of Article 56 states that cultural property, although it is state-owned, is considered private property and therefore can not be confiscated.²⁰⁵ Furthermore, Article 47 directly prohibits looting of any object, including cultural property.²⁰⁶ With regard to the destruction of cultural

²⁰² Regulations Respecting the Laws and Customs of War on Land (Annex to Convention IV respecting the Laws and Customs of War on Land), Pasal 27 paragraph 2.

²⁰³ Marking on all the world heritage UNESCO with the UNESCO's Symbol to show the status. United Nations Education, Scientific and Cultural Organization, "About World Heritage," <http://whc.unesco.org/en/about>, accessed on November 3rd 2015.

²⁰⁴ Regulations Respecting the Laws and Customs of War on Land (Annex to Convention IV respecting the Laws and Customs of War on Land), Article 46 paragraph 2.

²⁰⁵ Regulations Respecting the Laws and Customs of War on Land (Annex to Convention IV respecting the Laws and Customs of War on Land), Article 56 paragraph 1.

²⁰⁶ Regulations Respecting the Laws and Customs of War on Land (Annex to Convention IV respecting the Laws and Customs of War on Land), Article 47

property. Regarding the destruction of cultural property, a ban against it is contained in the second paragraph of article 56. The paragraph states:

“All seizure of, destruction of wilful damage done t institutions [dedicated to religion, and education, the arts and sciences], historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.”²⁰⁷

Different with the Article 27 of the Hague Regulations of 1907 which only protects immovable cultural property in the form of artwork. Applied simultaneously, article 27 and article 56 provide complete protection buildings, such as museums and other similar buildings.²⁰⁸ Different with article 27, the obligation to protect cultural property both moveable or immovable is the absolute absence of imperative military necessity exception.²⁰⁹

3.1.2 Convention IV relative to the Protection of Civilian Persons in Time of War (1949)

Geneva Convention of 1949 generally includes international humanitarian law relating to the protection of civilians during armed conflict. In it, there are only two chapters that are relevant to the protection of cultural property during armed conflict, that is article 27 and article 53. The first sentence of Article 27 states:

²⁰⁷ Regulations Respecting the Laws and Customs of War on Land (Annex to Convention IV respecting the Laws and Customs of War on Land), Article 56 para. 2.

²⁰⁸ Sasha P. Paroff, “Another Victim of the War in Iraq: The Looting of the National Museum in Baghdad and the Inadequacies of International Protection of Cultural Property,” p. 2031-2032.

²⁰⁹ Patty Gerstenblith, “From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century,” p. 256-257

“Protected persons are entitled, in all circumstances, to have respect for their persons, their honour, their family rights, their religious convictions and practice, and their manners and customs.”²¹⁰

The article above does not specifically provide protection to cultural property during armed conflict, but can be used to protect cultural symbols (including cultural objects) as far as an expression of religious or cultural values.²¹¹ The Article in the Geneva Convention IV of 1949 that is relevant to the protection of cultural property during armed conflict is Article 53. The Article states that:

“Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the States, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.”²¹²

The provisions of Article 53 merely reinforces the principle that prohibits making civilian populations the target and properties as stipulated in the Hague Convention of 1899 and the Hague Convention of 1907, in particular Article 46 and Article 56 which include governing respect to civilian property and cultural objects.²¹³ Article 53 of Geneva Convention IV of 1949 can also be compared with Article 23 Hague Regulations of 1907 which prohibits the destruction of enemy property. The similarity in the two articles lies in its provisions concerning the respect for property during armed conflict and the exceptions of the existence of imperative

²¹⁰ Convention IV relative to the Protection of Civilian Persons in Time of War, Article 27.

²¹¹ United Nations Educational, Scientific and Cultural Organization, Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention of 1954), UNESCO Doc. CLT.93/WS/12, 1993, p. 38.

²¹² Convention IV relative to the Protection of Civilian Persons in Time of War, Article 53.

²¹³ Jean Pictet, ed., Commentary on the Geneva Convention of 12 August Volume IV: Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva: International Committee of the Red Cross, 1958), p. 301.

military necessity. That exceptions are causing an occupying force, based on Article 53 of the Geneva Convention of 1949, and can perform partial or total destruction of property in occupied territory when required by military necessity.²¹⁴ The difference between Article 53 and Article 23 of the Geneva Convention Hague Regulations of 1907 is its scope. The scope of Article 53 of Geneva Convention IV of 1949 is limited to damages caused by the actions of the occupying power during the occupation time. On the other hand, Article 23 Hague Regulations of 1907 states that under the “hostilities” it covers all of the property involved in the war, and hence, its scope is much broader than article 53 of the Geneva Convention of 1949 which only regulates property located in occupied territory.²¹⁵

Seeing the discussion above, it can be seen that the Geneva Convention IV of 1949 did not have a lot of settings relating to the protection of cultural property during armed conflict and merely strengthens the existing regulations. Therefore, the Geneva Convention IV of 1949 itself is considered as not strengthening the regime of protection of cultural property during armed conflict.²¹⁶

²¹⁴ Ibid., p. 302

²¹⁵ Ibid., p. 301

²¹⁶ James A. F. Nafziger, “Protection of Cultural Heritage in Time of War and Its Aftermath,” <http://www.ogiek.org/indepth/protect-cult-herit.htm>, accessed on November 3rd of 2011.

3.1.3 Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954)

In 1949, UNESCO was established, among other things, to maintain and disseminate knowledge to ensure the protection of world heritage in the form of books, works of art and historical monuments, and recommended that countries sign the International Conventions required.²¹⁷ Remembering this moment, it is not surprising that soon after its founding, UNESCO revived the idea of establishing a multilateral agreement that is specifically designed to protect cultural property during armed conflict, an effort that had been halted by the intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict (“Hague Conference of 1954”) on March 14, 1954. Concurrent with the Hague Convention of 1954, it also adopted Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (“First Protocol of 1954”). The Committee that finalized the draft of the Hague Convention of 1954 sought to create a concept that is considered realistic and balance between maximum participation with maximum protection.²¹⁸

Adoption of the Hague Convention of 1954 is very important because it focused all the provisions concerning the protection of cultural property during armed

²¹⁷ United Nations, Constitution of the United Nations Educational, Scientific and Cultural Organization, U.N. Treaty Series Vol. 4 I 52, November 16, 1945, Article 2(1)(c)

²¹⁸ United Nations Educational, Scientific and Cultural Organization, Records of the Conference convened by the United Nations Educational, Scientific and Cultural Organization held at The Hague from 21 April to 14 May 1954 (Den Haag: Staatsdrukkerij-en Uitgeverijbedrijf, 1961), p. 101-103.

conflict within a single legal instrument. This is different from what happened in the past where the provisions regarding the protection of cultural property during armed conflict are scattered in various legal instruments pertaining to armed conflict. Besides, the Hague Convention of 1954 is the first international convention to use the term ‘cultural property’,²¹⁹ in contrast to other conventions that specify objects that should be given protection, but do not use the term ‘cultural property’. Several years after the adoption of the Hague Convention of 1954, the convention is recognized as significant in terms of international protection to the cultural heritage of mankind from the effects of armed conflict.²²⁰

Hague Convention of 1954 set, in outline, four points concerning the state’s obligation related to cultural objects. Those obligations are as follows, the state is to be the rescuer of cultural property, the state’s obligation to respect cultural property, liability when occupying state, and the state’s obligation to its armed forces. Besides, the Hague Convention of 1954 also includes a mechanism for the transfer of cultural objects by avoiding the effects of war and sanctions of violation of the convention.

²¹⁹ Hague Convention IV of 1907, Article 56 para. 2.

²²⁰ Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts Geneva (1974-1977) Volume I (Bern: Federal Political Department, 1978), p. 213.

3.1.4 Protocols Additional to the Geneva Conventions of 12 August 1949 (1977).

In 1971, a conference was held that aimed to affirm and develop international humanitarian law applicable in the presence of armed conflict.²²¹ At the conference, there are proposals relating to the protection of cultural property in times of armed conflict from several countries.²²² However, because only a few countries considered it important having their provisions comprehensively in the Hague Convention of 1954, the ICRC did not include a chapter on cultural property in the draft protocol submitted to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts in 1974-1977.²²³

Nevertheless, in the development of the conference, various countries agreed to include a chapter on cultural property into the draft protocol to be adopted at the end of the conference.²²⁴ The end result of such article is Article 53 of the Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) in 1977 ("Additional Protocol of 1977").

²²¹ Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts which held in Geneva 24th May – 12nd June 1971.

²²² Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Report on the Work of the Conference (Geneva: International Committee of the Red Cross, 1971), p. 98.

²²³ Jiri Toman, The Protection of Cultural Property in the Event of Armed Conflict, p. 382.

²²⁴ Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts Geneva (1974-1977) Volume III (Bern: Federal Political Department, 1978), p. 214.

Another article that became the result of a discussion regarding cultural property in the diplomatic conference in 1974-1977 is Article 16 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) in the year the same ("Additional Protocol II of 1977").

Article 53 of Additional Protocol I of 1977, entitled "Protection of cultural objects and of places of worship" reads as follows ":

“Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:

- (a) to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
- (b) to use such objects in support of the military effort;
- (c) to make such objects the object of reprisals.”²²⁵

Meanwhile, article 16 of Additional Protocol II of 1977, which has the same title with the article 53 of Additional Protocol I of 1977, states as follows:

“Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, it is prohibited to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort.”²²⁶

²²⁵ Protocol Additional I of 1977, “Protection of cultural objects and of place of worship” Article 53.

²²⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol III), Article 16.

Comparing two quotes above, it can be seen that Article 54 of Additional Protocol I of 1977 and article 16 of Additional Protocol II of 1977 is almost identical. Therefore, the discussion of the two will be done simultaneously by analyzing four aspects relating to these provisions. The fourth aspect is the applicability of the Protocols Additional to the Geneva Conventions of 12 August 1949 and the reference to the Hague Convention of 1954, given the cultural property protection provided by these two protocols; prohibition in the second protocol of attacks against cultural property, the use of cultural property to support the military effort, and the use of cultural property as the object of retaliation and exclusion from the implementation of the provisions in the protocol.

3.1.5 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (1999).

In a 1992 report to the Executive Board 140th Session, Director-General of UNESCO stated that the Hague Convention of 1954 no longer needs the protection of cultural property in times of armed conflict.²²⁷ He stated the reason is, among other things, the ratification of which is slow, not the large amount of cultural property be registered in the International

²²⁷ United Nations Educational, Scientific and Cultural Organization, Report by the Director-General on the Reinforcement of UNESCO's Action for the Protection of the World Cultural and Natural Heritage, 140/EX/13, 4 September 1992, p.3.

Register of Cultural Property under Special Protection,²²⁸ complicated procedures, and the lack of assistance from UNESCO.²²⁹ In the above report, there are three proposals to overcome these problems, the revisions of the Hague Convention of 1954, the adoption of a protocol, and the adoption of specific practical measures.²³⁰ Some of the views expressed in the report of the Director-General of UNESCO were developed by the Dutch government.²³¹

After the emergence of the statement of the Director General of UNESCO and the Dutch government, the two parties are requested to Professor Patrick Boylan to perform in-depth analysis of the issues related to the provisions of the Hague Convention of 1954. The analysis produced a document that examines the purpose of the Hague Convention of 1954 and the results of the implementation of Hague Convention of 1954, as well as ways to improve the effectiveness of the Hague Convention of 1954.²³² In the end, many of the recommendations of Professor Patrick Boylan were made to the

²²⁸ United Nations Educational, Scientific and Cultural Organization, International Register of Cultural Property under Special Protection, UNESCO Doc. CLT/CIH/MCO/2008/PI/46,2000.

²²⁹ Report by the Director-General on the Reinforcement of UNESCO's Action for the Protection of the World Cultural and Natural Heritage, p. 3.

²³⁰ Ibid.

²³¹ Review of the Application of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 14 May 1954), UNESCO Doc. 140 EX/26, 11 September 1992)

²³² Analysis by Profesor Patrick Boylan, Document of United Nations Educational, Scientific and Cultural Organization. Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention of 1954), UNESCO Doc. CLT.93/WS/12, 1993.

Second Protocol of 1999.²³³ The Second Protocol of 1999 itself, adopted by the Diplomatic Conference on the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, took place from 15 until March 26, 1999.

As indicated by Article 2 of the Second Protocol of 1999, the Second Protocol of 1999 was in addition to the Hague Convention of 1954.²³⁴ The Hague Convention of 1954 remains the principal text for the participating countries, and no country can become a participant of the Second Protocol of 1999 without being a participant of the Hague Convention of 1954.²³⁵

The war happen in Syria can be concluded that the cultural property protection policy has failed. At this point, however, it is essential to draw back from the statement itself and examine exactly what is intended by its assertion. As already described, the cultural heritage of Syria is threatened by various modalities of destruction ideological, military, and commercial.

²³³ Patty Gerstenblith, "From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century," p. 267.

²³⁴ Diplomatic Conference on the Draft Second Protocol to the 1954 Hague Convention, Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 9 March 2004, Article 2.

²³⁵ Jiri Toman, *Cultural Property in War: Improvement in Protection* (Paris: United Nations Educational, Scientific and Cultural Organization, 2009), p. 55.

3.1.6 Obligations of the Parties to the Conflict

The obligations of the parties to the conflicts derive from both treaty and customary international law. The most relevant treaty, to which are adopted by Syrian and other parties, is the 1954 Cultural Property Convention.²³⁶ Many states involved in the airstrikes in Syria and Iraq, excluding United Arab Emirates and the UK, are not parties to the Convention.²³⁷ The Convention extends, as a minimum, the core rules “respect” for cultural property to non-international armed conflict; moreover, article 19(1) makes clear that those obligations apply equally to State and organized armed groups.²³⁸ The 1999 Second Protocol to the Cultural Property Convention (Second-Protocol), which is applicable in its entirety to both International Armed Conflict and Non-International Armed Conflict, introduces a far more comprehensive protection framework, together with a more detailed and fully developed criminal sanctions regime.²³⁹

The Cultural Property Convention can be distinguished from previous legal instruments concerned with protecting cultural property in armed conflict in that it requires States to take peacetime protective measures to

²³⁶ Both States are also parties to the First Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S 358

²³⁷ Notwithstanding the fact that some States are not parties to the 1954 Cultural Property Convention, the key provisions pertaining to “respect” are binding on all parties to the conflicts by virtue of customary international law.

²³⁸ 1954 Cultural Property Convention, art. 19, on “Conflicts Not of an International Character.”

²³⁹ Second Protocol of 1954.

safeguard cultural property in war.²⁴⁰ To meet their treaty obligations, States are expected not only to take measures in peacetime to “safeguard” property of “great importance to the cultural heritage of every people” situated within their own territory against the foreseeable effects of conflict,²⁴¹ but also are required in armed conflict “to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties.”²⁴²

The requirement to take such measures in peacetime, coupled with the extension of the core obligations to Non-International Armed Conflict, effectively entrenches into international law the idea that States have a “public duty” to protect cultural property within their own territory.²⁴³

The Convention defers to State to determine what peacetime measures are necessary to perform their obligations in war.²⁴⁴ In retrospect, it is far too easy to criticize the Syrian authorities charged with the protection of cultural property for having failed to be fully prepared both on a normative and practical level for war. Reports submitted to UNESCO, together with statements made by the head of Directorate-General of Antiquities and

²⁴⁰ 1954 Cultural Property Convention art. 26(2).

²⁴¹ 1954 Cultural Property Convention art. 3.

²⁴² 1954 Cultural Property Convention art. 4.

²⁴³ 1972 World Heritage Convention, art. 4.

²⁴⁴ UK Ministry of Defence, *The Joint Service Manual or The Law of Armed 5.26.7 (2004)* [hereinafter *British Manual*].

Museums (DGAM), indicate that the authorities did take some preventative measures prior to the outbreak of war.²⁴⁵

3.1.6.1 The State's Obligation to Security of Cultural Objects

The Hague Convention of 1954 does not provide an extensive explanation of the steps to be taken in order to secure cultural objects in peacetime, the Second Protocol of 1999 provides examples of possible actions. Article 5 Second Protocol of 1999 states that the safeguarding of cultural objects may include inventory of cultural objects, emergency action plans for protection from fire or structural collapse, the preparation of moving objects of cultural property or provisions which provide adequate protection against cultural objects in place, and the appointment of the authorities For the protection of cultural objects.

The provisions of the Second Protocol of 1999 above do not alter the content of the provisions of article 3 of the Hague Convention of 1954 which allows the parties to decide for themselves the actions to be taken to safeguard cultural property within its territory.²⁴⁶ The purpose of article 5 Second Protocol of 1999 is to assist its parties in identifying actions in the safeguarding of cultural objects by providing examples that can be done. The action chosen should help protect cultural objects from the predictable impact

²⁴⁵ *The New Syrian Law on Antiquities, in Trade In Illicit Antiquities: The Destruction of The World's Archaeological Heritage* p.111 (Neil Brodie et al., eds., 2001).

²⁴⁶ Jiri Toman, *Cultural Property in War: Improvement in Protection*, p.81.

of armed conflict. In order to determine appropriate action, participating countries may make judgments based on experience, both from the country itself and those experienced by other countries.²⁴⁷ Although the participating countries of Second Protocol of 1999 have the freedom to choose the steps to be taken, the participating countries shall still have the obligation to adopt measures to safeguard cultural property.²⁴⁸

3.1.6.2 The State's Obligation to Respect for Cultural Objects

The provisions concerning respect for cultural substances in the Second Protocol of 1999 contained in article 6 supplement the rules of respect for cultural property in article 4 of The Hague Convention 1954. In particular, the matters set forth in article 6 of the Second Protocol of 1999 are respect for objects Culture (2) of the Hague Convention of 1954. Article 4 (2) does not define "imperative military interests", and article 6 of Protocol II of 1999 seeks to clarify the term and its applicability to two forms Respect for cultural objects. As discussed earlier, there are only two forms of respect for cultural objects that can be exempted by imperative military interests, namely the prohibition of the act of changing hostility to cultural objects in the first chapter 4 (1) of the Hague Convention of 1954 and the prohibition to use cultural objects for Objectives that may harm the object in the second chapter

²⁴⁷ Ibid., p.82.

²⁴⁸ Second Protocol of 1999, Article 5.

of article 4 (1) of the same convention. Clarify the limitations of the imperative military interest for the first form in article 6 (a), while clarification for the second form of things in article 6 (b).

The provisions of article 6 (a) of the Second Protocol of 1999 shall apply to those who attack cultural property. Under article 6 (a), the party carrying out an attack on a cultural object must be filled with two conditions cumulatively in order to strike legitimately. The first condition is that the attacked cultural object has been the target of the military because of its function,²⁴⁹ and the second condition is that no alternative is possible to gain military advantage similar to the military advantage generated by the building of the cultural object concerned.²⁵⁰

Still related to cultural respect, the Second Protocol of 1999 has a special regime for certain cultural objects, similar to the special regime given to certain cultural objects in the 1954 Hague Convention. The special mandatory regime in Protocol II of 1999 is called enhanced protection. The protection is given to the cultural heritage of the greatest importance for humanity,²⁵¹ and unlike the rules of The Hague Convention of 1954, applies

²⁴⁹ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, pasal 6(a)(i).

²⁵⁰ Ibid., Article 6(a)(ii)

²⁵¹ Jiri Toman, Cultural Property in War: Improvement in Protection, p.190.

to archives, libraries, museums and other cultural objects.²⁵² There are two criteria that must be met in order to be added.

The first criteria are the existence of moderate legal and administrative actions. The purpose of this criterion is in accordance with the prevailing cultural traits at the national level before a country wants a level at the national level.²⁵³ The second criterion is a cultural object which can not be used for military purposes or as a shield from a military site, and a state which has power over cultural objects made is incompatible with this way.²⁵⁴

3.1.6.3 The State's Obligation of Protection of Cultural Property during the Occupation

Article 9 Second Protocol of 1999 regulates the obligations possessed by the party occupying the territory. The first obligation of those who engage in the occupation under that article are prohibited and prevent any illegal exports, transfers, and transfer of ownership Cultural objects of the occupied territory.²⁵⁵ Furthermore, there is an obligation to prohibit and prevent excavation of archaeological sites, excepting excavations done to secure,

²⁵² Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Article 10(b).

²⁵³ Jiri Toman, *Op.Cit.*, p.195.

²⁵⁴ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, *Op.Cit.*, Article 10(c).

²⁵⁵ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Article 9(1)(a).

record, or preserve a cultural object.²⁵⁶ Finally, the occupying party is obliged to prohibit and prevent changes to and alteration of the use of cultural objects intended to hide or destroy cultural, historical, or scientific evidence.²⁵⁷

For the excavation of archeological sites and changes to the permissible cultural objects, occupying parties shall exercise them along with the national bodies of the occupied territories, unless circumstances are not possible.²⁵⁸ The obligations of the occupying party in the Second Protocol of 1999 relate to the provisions that govern similar matters in the Hague Convention of 1954. Article 5 of the Hague Convention of 1954 requires only the occupying party to provide assistance to the occupied national agency as far as it is possible. As discussed earlier, the assistance of the occupying party is limited and in the party's discretion. Article 9 Second Protocol of 1999 corroborates article 5 of the Hague Convention of 1954 by affirming the responsibilities of those occupying the occupied territory.²⁵⁹

²⁵⁶ *Ibid.*, Article 9(1)(b).

²⁵⁷ *Ibid.*, Article 9(1)(b).

²⁵⁸ *Ibid.*, Article 9(2).

²⁵⁹ Jiri Toman, *Op.Cit.*, p. 152

3.2 The Sanctions Towards Against Cultural Property According to International Humanitarian Law.

The following are sanctions against violations of the provisions of the Hague Convention of 1954 stipulated in Article 28 of the convention. Under article 28, each of the participating countries take steps themselves to punish and sanction criminal or disciplinary sanctions to those who violate or ordered for the violation of the provisions of the Hague Convention of 1954. Thus, pursuant to article 28, concerning sanctions violations Hague Convention of 1954 governed by national law.²⁶⁰

A review was conducted on the Hague Convention of 1954 expressing dissatisfaction with the system of sanctions provided for in Article 28, a provision which is considered too weak to make a contribution to the protection of cultural property. Therefore, regarding the sanctions renewed its settings in the Second Protocol of 1999. Based on the Second Protocol of 1999, the participating countries have two different sets of obligations related sanctions. The first involves doing a serious violation of the provisions of the Second Protocol of 1999, and the second is related to other violations.

Related to serious violations, the participating countries have an obligation to adopt the measures necessary to make it a criminal offense under its domestic law the measures considered as a serious offense, and to make the

²⁶⁰ Jiri Toman, *The Protection of Cultural Property in the Event of Armed Conflict*, p. 293.

perpetrators of serious offenses can be sentenced.²⁶¹ Serious breach itself consists of five acts, two of which relate to cultural property under enhanced protection. Both of these serious offenses make cultural property under enhanced protection the object of attack and using cultural property under enhanced protection or the surrounding area to support military action.²⁶² Three other serious violations result in extensive destruction, making cultural property protected object of assault, and theft, looting, or vandalism against cultural property.²⁶³

For other violations, the Second Protocol of 1999 requires participating countries to adopt legalization, legal instruments, or other measures to suppress violations in addition to the five serious violations committed deliberately. Other violations referred to in this context are the use of cultural property that violates the provisions of Hague Convention of 1954 and the Second Protocol of 1999, as well as all exports, relocate, or transfer of ownership of cultural property in violation of the provisions of Hague Convention of 1954 and the Second Protocol of 1999.²⁶⁴ The serious violations of the participating countries are required to make a serious violation as a criminal act against another violation of the participating

²⁶¹ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Article 15(2).

²⁶² *Ibid.*, Article 15(1)(a) and Article 15(1)(b)

²⁶³ *Ibid.*, Article 15(1)(c), Article 15(1)(d), and Article 15(1)(e).

²⁶⁴ *Ibid.*, Article 21.

countries are allowed, but not required, to make other offense as a criminal offense.²⁶⁵

3.2.1 Condition of Cultural Property in Syria

Based on satellite observations of the American Association for the Advancement of Science (AAAS), five of the six world heritage sites in the country show significant damage. Some of them even have been reduced to rubble, and the most severely damaged is in the Ancient City of Aleppo. Aleppo was designated as a world cultural heritage site by UNESCO in 1986.²⁶⁶

Many buildings which don't include military objects, such as cultural properties, have been destroyed by the impact of Armed Conflict in Syria. For example, The United Nations Institute for Training and Research (UNITAR) stated that there have been in total 290 cultural heritage locations affected in 5 years and can be divided into 4 categories, 24 destroyed, 104 severely damaged, 85 moderately damaged and 77 possibly damaged.²⁶⁷

In June 2016, Syrian and International Experts agree on emergency measures to safeguard Syria's heritage. Some 230 Syrian and international experts joined conference in a two-day meeting to assess damage to cultural heritage sites in Syria,

²⁶⁵ Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict*, p. 287.

²⁶⁶ Tempo, "<http://www.tempo.co/read/news/2013/08/20/061505751/Ilmuwan-Mengintip-Perang-Suriah-Lewat-Satelit>". Accessed on Tuesday, July 12 2017. 16:45

²⁶⁷ UNITAR, *Satellite-Based Damage Assessment to Cultural Heritage Sites in Syria*, UNITAR-UNOSAT, 2014, p.8

develop methodologies and define priority emergency safeguarding measures for the country's heritage. The expert meeting, held in Berlin from 2 to 4 June, was organized by UNESCO and Germany.²⁶⁸

Referring to the rules applicable in international humanitarian law, destruction of cultural property, including historical sites and cultural property in times of conflict is prohibited. Rome Statute has set out clear rules prohibiting attacks against civilian objects or buildings that are intended for religion, education, art, sciences or charitable purposes, as well as historic monuments which are not military objectives.²⁶⁹

3.2.2 Consequences of a Failure to Comply the Rules

Although the establishment of a mandatory regime to criminalize breaches of the Cultural Property Convention was one of its main aims, the treaty has never served as a basis for prosecution, primarily due to the lack of clearly delineated criminal offences.²⁷⁰ This lack was addressed with the

²⁶⁸ World Heritage Convention, <http://whc.unesco.org/en/news/1505>. Accessed on Tuesday, July 12 2017. 16:45.

²⁶⁹ Sitanggang, Dyan, 2013, *Pengrusakan Tempat Bersejarah Dalam Perang Antarnegara Sebagai Pelanggaran Hukum Humaniter Internasional*, Lex et societatis, vol. I/No.2/Apr-Jun/2013

²⁷⁰ Roger O'Keefe, *Protection of Cultural Property under International Criminal Law*, 11 Melbourne Journal of International Law p. 339, 360 (2010).

adoption of the Second Protocol, which sets forth a list of specific offences.²⁷¹ Since Syria is not a party to the Protocol, only those war crimes recognized under customary international law as applicable to Non-International Armed Conflict can be considered.²⁷² What is immediately apparent is that, notwithstanding the prohibition on the use of cultural property, a violation of the prohibition does not incur individual criminal responsibility in customary international law.²⁷³ That said, there is now a well-settled body of international criminal law whereby individuals can be held accountable for the unlawful destruction, damage and appropriation of cultural property due in large measure to the establishment of international criminal tribunals.

Two comments are merited. First, it should be noted that this body of law has evolved on the basis of what constitutes cultural property as set forth in the 1907 Hague Regulations rather than as defined under the 1954 Convention. Consequently, protection is not limited to objects that are “of great importance to the cultural heritage of every people” but afforded more broadly to “institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science”²⁷⁴ or “buildings dedicated to religion, education, art, science or charitable purposes

²⁷¹ 1954 Cultural Property Convention, art. 28.

²⁷² The possibility of crimes against humanity.

²⁷³ Second Protocol on “enhanced protection”

²⁷⁴ Statute of the International Criminal Tribunal for the former Yugoslavia art. 3(d), S.C. Res. 827 (May 25, 1993), adopting The Secretary-General Report Pursuant to Paragraph 2 of Security Council Resolution 808.

and historic monuments.”²⁷⁵ Second, to constitute a war crime, the destruction of cultural property must have some correlation to the armed conflict. In other words, the existence of the conflict must, at a minimum, play “a substantial part in the perpetrator’s ability to commit the crime, his decision to commit it, the manner in which it was committed or the purpose for which it was committed.”²⁷⁶ Since the international criminal law standard is not always contiguous with the Law of Armed Conflict standard, the criminalization of an act may not necessarily fully capture the scope of the underlying prohibition.

The war crime of unlawful attacks against cultural property is a well-established offence under customary international law and applicable to both International Armed Conflict and Non-International Armed Conflict.²⁷⁷

It is hard to control about the one who responsible commit the attacks to cultural property by intentionally, because the criminal responsibility attached to parties intentionally directing attacks to cultural property which is not a military objective.²⁷⁸

As in all armed conflict, there are easy cases but many that are less so, as implicitly acknowledged in the text of the 2015 General Assembly

²⁷⁵ Rome Statute, art. 8(2)(e)(iv).

²⁷⁶ Prosecutor v. Kunarac, Case Nos. IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment, 58 (Int’l Crim. Trib. for the former Yugoslavia June 12, 2002).

²⁷⁷ Prosecutor v. Hadžihasanović, Case No. IT-01-47-AR73.3, Interlocutory Appeal of Trial Chamber Decision, 44–48 (International Crim. Trib. for the former Yugoslavia Mar. 11, 2005).

²⁷⁸ Prosecutor v. Brđanin, Case No. IT-99-36-A, Appeals Chamber Judgment (International Criminal, Trib. for the former Yugoslavia Apr. 3, 2007).

resolution on “Saving the cultural heritage of Syria”. This text affirms that “attacks intentionally directed against building dedicated to religion, education, art, science or charitable purposes, or historic monuments, may amount to war crimes.”²⁷⁹ The only clear cut incidences of intentional attacks directed at protected property, which were unequivocally not military objectives, are those involving the deliberate destruction of property by opposition.

In contrast to the war crime of unlawful attacks, it remains unclear as to whether intentionally launching an attack in the knowledge that it will cause incidental damage to civilian objects, including cultural property, which is excessive in relation to the concrete and direct military advantage anticipated (in other words, incidental damage to cultural property), does give rise to individual criminal responsibility in Non-International Armed Conflict. No decisions by international tribunals are available to shed any light on the matter.²⁸⁰ Excessive incidental damage in International Armed Conflict is expressly criminalized in the Rome Statute but no offense is listed for Non-International Armed Conflict, despite the fact that such conduct is prohibited in Non-International Armed Conflict.²⁸¹

²⁷⁹ G.A. Res. 281, p.5 (May 28, 2015).

²⁸⁰ ICTY Case Law Database, United Nations Mechanism For The International Criminal Tribunals, <http://www.unmict.org/en/cases/ictr-icty-case-law-database> (last visited Sept. 23, 2015).

²⁸¹ Rome Statute, art. 8(2)(b)(iv).

Individual criminal responsibility for unlawful acts of hostility other than attacks against cultural property is recognized to constitute a war crime in International Armed Conflict and Non-International Armed Conflict.²⁸² As O’Keefe notes, such acts are treated in the Rome Statute “under the general rubric of the customary war crime of destroying (which is taken to cover the damage) the enemy’s property, unless such destruction (or damage) is imperatively demanded by the necessities of war.”²⁸³

In the case of opposition in Syria, the armed conflicts have certainly enabled the militants to carry out their campaign of destruction. Moreover, a significant proportion of property that has been destroyed appears to have been targeted on the basis of constructed divides that correspond closely to the conflicts. In other words, at times, the conflict has collapsed into a Shia-Sunni divide, which in turn has often played a substantial part in the decision of ISIS to specifically target religious and cultural property associated with groups other than the Sunni community.²⁸⁴

In principle, all persons involved in the kind of destruction and lootings of archeological sites and of museums in Syria can be held individually liable and charged with the war crime of pillage.

²⁸² Prosecutor v. Katanga et al, Case No. ICC-01/04-01/07, Decision on the Confirmation of the Charges, p.324 (Sept. 30, 2008).

²⁸³ Rome Statute, art. 8(2)(e)(xii)

²⁸⁴ Martin Chulov, *ISIS Kills Hundreds of Sunnis from Albu Nimr Tribe in Anbar Province*, The Guardian (Oct. 30, 2014), <http://www.theguardian.com/world/2014/oct/30/mass-graves-hundreds-iraqi-sunnis-killed-isis-albu-nimr>.

According to the Customary International Humanitarian Law Rule no.158;

“States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.”

The Geneva Conventions and Additional Protocol I make clear that grave/rule breaches must be punished. However they do not themselves set out specific penalties nor do they create a tribunal to try offenders. Instead they expressly require States to enact criminal legislation to punish those responsible for grave breaches. States are also required to search for persons accused of grave breaches, and either to bring them before their own courts or to hand them over for trial in another State.²⁸⁵

In general, a State's criminal law only applies to acts committed within its territory or by its own nationals. However international humanitarian law goes further. It requires States to search for and punish all those who have committed grave breaches regardless of the nationality of the perpetrator or where the crime was committed. This principle, called universal jurisdiction, is a key element in ensuring the effective repression of grave breaches.²⁸⁶ So it is mean that in the case of Syria's War, if the State wants to punish the perpetrator, Syria's State should take an action that the State must enact national legislation prohibiting and punishing grave breaches - either adopting

²⁸⁵ ICRC, Penal Repression:Punishing War Crimes, 2014.

²⁸⁶ *Ibid*

a separate law or by amending existing laws. Such legislation must cover all persons, regardless of nationality, committing grave breaches or ordering them to be committed and including instances where violations result from a failure to act when under a legal duty to do so. It must cover acts committed both within and outside the territory of the State itself.

However, despite the fact that the theft of objects from archeological sites may indeed constitute the war crime of pillage, the illegal excavations of the sites represent far more than just the theft of ancient artifacts. This is because archeology today is not about collecting objects, but rather about collecting contextual data. It is because the illegal excavations are destroying that information, and the harm done exceeds pillage and more closely represents the destruction of heritage.²⁸⁷

²⁸⁷ Adel Yahya, *Looting and "Salvaging" the Heritage of Palestine*, Present Pasts (Aug. 17, 2010), <http://www.presentpasts.info/articles/10.5334/pp.26/>.

CHAPTER IV

CLOSURE

4.1 Conclusion

1. Legal protection of cultural property in wartime which granted by International Humanitarian Law as already sufficient, is set in Hague Convention(Hague Regulation 1907), The Geneva Convention 1949, The Hague Convention 1954, Additional Protocol 1977 and Second Protocol of 1999. But in practice it is not maximized enough, since law enforcement depends on its national law, International Humanitarian Law gives an obligation to the State to adopt and implement its national law, but the awareness is still very low. In the case of Syria's War, Syria has ratified those International Conventions and made National Law on Cultural Heritage 1963, but Syria's is not upholding the law yet, because the war is still on going.

2. The sanctions in International Humanitarian Law to the parties who breach the rules and attack cultural property in times of war can be punished for war crimes. The sanctions are:

- a. Imprisonment and fine
- b. Termination of diplomatic relations
- c. Reduced or Termination of economic aid
- d. Reduced or Termination levels of cooperation
- e. Economic Embargo

In the case of Syria's War, if Syria wants to punish the perpetrator, they must enact National Law. Syria already made National Law on Cultural Heritage 1963, Regarding the sanctions about damaging, destroying and distorting the moveable or immoveable cultural property as mentioned in Article 58, which is a penalty of 5 to 10 years imprisonment and fines of SP 25,000 to 500,000 (equal to IDR 300 Millions).

4.2 Recommendation

Based on the conclusions that have been described, the author can give advice as follows:

1. It is really important to give a stern action against Syria opposition and other countries which involve over war crimes as a violation of customary international law. If protection power cannot be applied to armed conflicts internationally, the United Nations should adopt a resolution to conduct humanitarian intervention on the basis of human values and protection of heritage buildings, as well as to stop the conflict that is happening, in hopes to stop violations occurring as well as casualties.
2. Each state government needs to promote the national law regarding the necessity of education on conscious culture in the community, through the local Governmental Institutions. This is so that people will be much more respectful of the cultural objects they have, and feel obliged to maintain the cultural objects around them. Each state needs to be certain about the sanctions or punishment for the offenders of destruction of cultural property in their National Law.
3. War crimes against cultural property can only be prosecuted if the international tribunal occurs during the armed conflict. The author suggests that the understanding or the authority of the international court of crimes against cultural property, should be expanded so that crimes against cultural property that occur during the armed conflict can be

prosecuted as a crime or a violation of international law, even if only by a fine or penalty that rebuilding of cultural sites should also be enforced, or demanded as a consequence of the destruction.

4.3 Literature

A. Books

Sefriani, *Hukum Internasional Suatu Pengantar*. Jakarta:Rajawali Pers. 2011.

Adolf, Huala, *Hukum Penyelesaian Sengketa Internasional*. Jakarta:Sinar Grafika. 2004.

Mataram, Haryo. *Pengantar Hukum Humaniter*. Jakarta:PT.Rajagrafindo Persada, 2012.

Permanasari, Arlina. *Pengantar Hukum Humaniter*. Jakarta:International Committee of The Red Cross, 1999.

Ambarwati, Denny Ramdhany , Rina Rusman, *Hukum Humaniter Internasional Dalam Studi Hubungan Internasional*, Jakarta:Rajawali Pers, 2012.

Tsani, Mohd. Burhan, *Hukum Organisasi Internasional*, Yogyakarta:Universitas Gadjah Mada, 2012.

Mohd, Akram, *International Humanitarian Law*. Malaysia: International Law book Services. 2005

Tsani, Mohd. Burhan, *Hukum dan Hubungan Internasional*. Yogyakarta:Liberty, 1990.

Permanasari, Arlina, *Pengantar Hukum Humaniter Internasional*, Jakarta: International Committee of The Red Cross. 2000

Kusumaatmadja, Mochtar. *Hukum Internasional Humaniter dalam Pelaksanaan dan Penerapannya di Indonesia*, 1980.

Mataram, Haryo. *Hukum Humaniter*, Jakarta:Rajawali Pers, 1984.

- Rover, C. de. *To Serve & To Protect Acuan Universal Penegakan HAM*, Geneve:ICRC, 1998.
- Nussbaum,Arthur. *Sejarah Hukum Internasional*, Jilid I, Bandung:Bina Cipta, 1970.
- Gasser, Hans Peter. *International Humanitarian Law*, Henry Dunant Institute, 1993.
- Mataram, Haryo. *Refleksi dan Kompleksitas Hukum Humaniter*, Pusat Studi Hukum Humaniter dan HAM, Jakarta:FH Usakti, 2012.
- Shaw, Malcolm N. *Hukum Internasional*, Leicester:Fakultas Hukum Universitas Leicester, 2008.
- Kalshoven, Frits. *Constraints on the Waging of War*, ICRC, edisi kedua, 1987.
- O’Keefe, Roger. *Protection of Cultural Property*. New York:Oxford University Press, 2008.
- Henckaerts, Jean-Marie. *Customary International Humanitarian Law VolumeI:Rules*, 2006.
- Toman, Jiri. *The Protection of Cultural Property in the Event of Armed Conflict*, Brookfield:Dartmouth Publishing Company, 1996.
- Nahlik, Stanislaw Edward. *Protection of Cultural Property in International Dimensions of Humanitarian Law*, Paris: Henry Dunant Institute. 1987. Partsch, Karl Josep. *Protection of Cultural Property*, in *The Handbook of Humanitarian Law in Armed Conflicts*, edition 1, Oxford: Oxford University Press. 1995.
- Rogers, A.P.V. *Law on the Battlefield*, Edition 2. Manchester: Manchester University Press 2004

Basyir, Ahmad Azhar. *Ihktisar Hukum Internasional Islam*. Yogyakarta: UII Press. 1981.

Mahmud, Abdul Ghani Abdul Hamid. *Perlindungan Korban Konflik Bersenjata Dalam Perspektif Hukum Humaniter dan Hukum Islam*. Jakarta: ICRC. 2008.

Zahrah, Abu. *Hubungan Internasional Dalam Islam*. Jakarta: Bulan Bintang. 1973.

Scott, James Brown. *The Reports to the Hague Conferences of 1899 and 1907*. Oxford: Clarendon Press. 1916.

Toman, Jiri. *Cultural Property in War: Improvement in Protection*. Paris: United Nations Educational, Scientific and Cultural Organization. 2009.

B. International Instrument

Geneva Convention 1949

Hague Convention 1954

Additional Protocol I and II

Syria's Law on Antiquities 1963

UN Charter

Rome Statute 1998

Kovenan Internasional Hak-Hak Sipil dan Politik 1966

Konvensi Anti Diskriminasi dalam Pendidikan 1960

Konvensi tentang Hak-hak Anak 1989

British Manual

Dod Law of War Manual

C. Journal and Article

Jillian Blake, Aqsa Mahmud, *A Legal 'Red Line'?: Syria And The Use Of Chemical Weapons In Civil Conflict*, UCLA Law Review, 2013

UNITAR, *Satellite-Based Damage Assessment to Cultural Heritage Sites in Syria*, UNITAR-UNOSAT, 2014

Sitanggang, Dyan, 2013, Pengrusakan Tempat Bersejarah Dalam Perang Antarnegara Sebagai Pelanggaran Hukum Humaniter Internasional, *Lex et societatis*, vol. I/No.2/Apr-Jun/2013

Tom Ruys , *The Syrian Civil War And The Achilles' Heel Of The Law Of Non-International Armed Conflict*, Board of Trustees of the Leland Stanford Junior University, 2014

Frits Kalshoven, *Constraints on the Waging of War*, ICRC, 2nd Edition, 1987

Andrew D. Mitchell, "Does One Illegality Merit Another? The Law of Belligerent Reprisals in International Law", *Law of Reprisals* (2001)

Sasha P. Paroff, "Another Victim of the War in Iraq: The Looting of the National Museum in Baghdad and the Inadequacies of International Protection of Cultural Property," *Emory Law Journal* (Fall 2004)

Patty Gerstenblith, "From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century," *Georgetown Journal of International Law* (Winter 2006)

Arimatsu Louise and Choudhury Mohububa, *Protecting Cultural Property in Non-International Armed Conflicts: Syria*, International Law Studies Volume 91 2015.

Geoffrey S. Corn, *Snipers in the Minaret—What is the Rule? The Law of War and the Protection of Cultural Property: A Complex Equation*, 28 THE ARMY LAWYER 37 (2005).

Prosecutor v. Kunarac, Case Nos. IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment, ¶ 58 (Int'l Crim. Trib. for the former Yugoslavia June 12, 2002).

Prosecutor v. Hadžihasanović, Case No. IT-01-47-AR73.3, Interlocutory Appeal of Trial Chamber Decision, 44–48 (Int'l Crim. Trib. for the former Yugoslavia Mar. 11, 2005)

ICC Prosecutor Opens Investigation into War Crimes in Mali, ICC (Jan. 16, 2013)

Prosecutor v. Ahmad Al Faqi Al Mahdi, Case No. ICC-01/12-01/15, Warrant of Arrest, Public Redacted Version (Sept. 28, 2015)

Al Rikaz Department of ISIS Licenses Excavation Works in Exchange for Monetary Per-centage, ASSOCIATION FOR THE PROTECTION OF SYRIAN ARCHAEOLOGY (2015).

D. Internet

Antara News, “Pemerintah suriah mundur, otri pejabat sementara”.
<http://www.antaraneews.com/berita/251937/pemerintah-suriah-mundur-otri-pejabat-sementara> accessed on Friday, January 9 2015. 18:30

Al-monitor, “ <http://www.al-monitor.com/pulse/originals/2014/01/education-syria-decline-war.html#> “. Accessed on Tuesday, January 13 2015. 16:20

Tempo, “ <http://www.tempo.co/read/news/2013/08/20/061505751/Ilmuwan-Mengintip-Perang-Suriah-Lewat-Satelit> “. Accessed on Tuesday, January 13 2015. 16:45

Arlina, “Apa Arti Konflik Bersenjata Non Internasional’.
<http://arlina100.wordpress.com/2009/02/03/apa-arti-konflik-bersenjata-non-internasional/>, Accessed on Tuesday , January 20, 2015, 14:04.

Arlina, “Benda Budaya: Apakah hanya candi?”.
<https://arlina100.wordpress.com/tag/cultural-property/>, Accessed on Tuesday , January 20, 2015, 17:10.

Arlina, “Apa Arti Konflik Bersenjata Non Internasional”.
<http://arlina100.wordpress.com/2009/02/03/apa-arti-konflik-bersenjata-non-internasional/>, accessed on Monday 9 March 2015, 23.20.

Arlina, “Benda Budaya: apakah objek sipil?”.
<https://arlina100.wordpress.com/2008/12/20/benda-budaya-apakah-objek-sipil/>, accessed on Thursday 11 June 2015, 23.44.

Mathew K. Steen III, “Collateral Damage: The Destruction and Looting of Cultural Property in Armed Conflict”, can be accessed through

http://works.bepress.com/matthew_steen/1/ , accessed on November 3rd 2015, p.10

Marking on all the world heritage UNESCO with the UNESCO's Symbol to show the status. United Nations Education, Scientific and Cultural Organization, "About World Heritage," <http://whc.unesco.org/en/about>, accessed on November 3rd 2015.

James A. F. Nafziger, "Protection of Cultural Heritage in Time of War and Its Aftermath," <http://www.ogiek.org/indepth/protect-cult-herit.htm>, accessed on November 3rd of 2015.

http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Statement_FINAL_ENG.pdf. , accessed on February 10 2017.

http://www.unesco.org/new/fileadmin/MULTIMEDIA/FIELD/Amman/pdf/20130322_Report_Syria_workshop_FINAL_01.pdf. accessed on February 10 2017.

<http://www.dgam.gov.sy/index.php?d=314&id=1773>. accessed on February 10 2017.

<http://www.aljazeera.com/news/2015/03/full-story-isil-takeover-mosul-museum-150309053022129.html>. accessed on February 10 2017.

<http://www.ohchr.org/EN/HRBodies/HRC/IIICISyria/Pages/Documentation.aspx>. accessed on February 10 2017.

http://portal.unesco.org/en/ev.php-URL_ID=17718&URL_DO=DO_TOPIC&URL_SECTION=201.html.

http://www.unesco.org/new/en/mediaservices/singleview/news/the_director_general_of_unesco_condemns_airstrikes_damaging_the_maarrat_al_numaan_museum_in_syria#.Vcr9JMvbLIU accessed on February 10 2017.

<http://www.icc-cpi.int/iccdocs/PIDS/publications/AlMahdiEng.pdf>. accessed on February 10 2017.

<http://www.unmict.org/en/cases/ictr-icty-case-law-database> accessed on February 10 2017.

<http://www.aljazeera.com/indepth/opinion/2015/03/isil-history-destroying-history-150302122351267.html>. , accessed on February 12 2017.

<http://apsa2011.com/apsanew/al-rikaz-department-of-isis-licenses-excavation-works-in-exchange-for-monetary-percentage/>. accessed on February 12 2017.

http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Prot_arch_objects_en.pdf. accessed on February 12 2017.

http://www.unesco.org/new/en/mediaservices/singleview/news/unesco_director_general_welcomes_un_security_council_resolution_to_step_up_protection_of_cultural_heritage_in_syria_and_iraq#.VZPF1svbLIU . accessed on February 12 2017.