

**Legal study on the protection of cultural heritage  
through the resolutions of the Security Council of the United Nations**



***Cultural heritage through the prism of  
resolution 2199 (2015) of the Security Council***



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Resolution 2199 (2015), adopted by the Security Council on 12 February 2015, is structured around three pillars:

- The reinforcement of measures aimed at cutting off sources of funding of the Islamic State in Iraq and the Levant (ISIL), as well as the Al Nusra Front (ANF) and all other persons, groups, undertakings and entities associated with Al-Qaida (AQ);
- The condemnation of the destruction of cultural heritage in Iraq and Syria, committed in particular by ISIL and the Al Nusra Front, and the call to Member States to take necessary measures to prevent the trade in cultural property illegally removed from Iraq since August 1990 and from Syria since March 2011;
- The prevention of kidnappings and hostage-taking perpetrated by terrorist groups and the prohibition of ransom payments and political concessions.

**I. Normative affiliations of resolution 2199 (2015)**

The issue of the destruction and dispersion of cultural heritage, which is part of a broader intention of sanctions against terrorism, follows two rationales: as a follow-up to the normative action of UNESCO dedicated to the protection of cultural heritage (a) and, in the wake of the previous resolutions of the Security Council aimed at the fight against terrorism (b).

***a) The general interest of humanity in protecting and safeguarding cultural heritage***

Despite their diversity, the legal instruments adopted by UNESCO for the protection of cultural heritage are all structured around the fact that the protection and safeguarding of cultural heritage is of general interest to humanity. The premises of this tenet are to be found in the Treaty of 15 April 1935 concerning the protection of artistic and scientific institutions and historic monuments<sup>1</sup>, known as the Roerich Pact. It is continued with Articles 47 and 56 of the Regulations of the Hague Conventions of 1899 and 1907<sup>2</sup>, which today fall under international customary law. The perception

<sup>1</sup> The preamble refers to the need to "preserve in any time of danger all nationally and privately owned immovable monuments which form the cultural treasure of peoples".

<sup>2</sup> Convention II concerning the customary laws and customs of war, adopted in the Hague on 29 July 1899;

and acknowledgement of this general interest by States may vary in intensity, depending on the types of standards that implement and organise the protection of cultural heritage – sector-based protection depending on the kind of property, tangible or intangible, cultural or natural, movable or immovable etc., and according to the context linked to conflicts or crises. In addition, or alongside conventional instruments, aimed at linking the collective responsibility of States towards the protection of the cultural heritage of the people, other standards have a more informal scope and are not legally restrictive.

In the normative area contained within these two poles, the Convention for the Protection of Cultural Property in the Event of Armed Conflict, with its regulation for the execution, and the first Protocol, adopted in The Hague on 14 May 1954, combined with the second Protocol, adopted in the Hague on 26 March 1999, are the strongest expressions of international obligations to States to protect cultural heritage during armed conflicts. Conversely, the Declaration concerning the intentional destruction of cultural heritage, adopted in Paris on 17 October 2003, during the 32<sup>nd</sup> session of the UNESCO General Conference, is a document with no legally binding wording, and expresses only a relative normativity. The limited scope of this Declaration, which was the response to a context of crisis and not armed conflict, by laying down a set of principles aimed at preventing and discouraging the intentional destruction of cultural heritage by States in their peacetime activities and in the event of armed conflict<sup>3</sup>, is a symptom of the limitations of UNESCO's normative action<sup>4</sup>, which is concentrated, in its most complete form on the formulation of a concerted international law. Declarations of unilateral international laws, the guarantee of the precedence of international law on national laws does not fall within UNESCO's scope.

The general interest of humanity in protecting and safeguarding cultural heritage are entrenched in international law. The ICTY therefore states that, over and above the damage and loss suffered by a people, affected in its culture and religious identity, "it is all of humanity that is injured by the destruction of a unique religious culture and its concomitant cultural objects"<sup>5</sup>. With regards to the

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Convention IV concerning the laws and customs of war, adopted in the Hague on 18 October 1907.

<sup>3</sup> Doc. UNESCO 32C/25, 17 July 2003, Appendix II, p. 2.

<sup>4</sup> Although it is inspired by the UNESCO Conventions – in particular, the 1972 Convention concerning the Protection of World Cultural and Natural Heritage and the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, – and other international instruments – the 1977 additional protocol to the Geneva Conventions of 1949 for the protection of victims of international armed conflicts, the Statute of the International Criminal Tribunal for the former Yugoslavia and the Statute of Rome of the International Criminal Court – the Declaration is "a soft-law text and is not intended to modify existing obligations of States under international agreements in force for the protection of cultural heritage. Its main purpose is threefold: (i) to state basic principles for the protection of cultural heritage specifically against intentional destruction in peacetime and wartime; (ii) to raise awareness of the growing phenomenon of intentional destruction of this heritage; and (iii) to encourage indirectly the participation of States not yet party to the 1954 Hague Convention, its two Protocols, the 1977 Additional Protocols and other agreements protecting cultural heritage [Doc. UNESCO 32C/25, 17 July 2003, Appendix II, § 6, p. 2].

<sup>5</sup> Judgement of the ICTY, 26 February 2001, Prosecutor v. Dario Kordic and Mario Cerkez, Case No. IT-95-14/2-T, Sections 206 and 207: "This act [destruction and deterioration of buildings dedicated to religion, A/N] is similar to the "destruction or wilful damage to institutions dedicated to religion", which is a violation of the laws and customs of war set out in Article 3D)of the Statutes [Statutes of the International Criminal Tribunal for the former Yugoslavia, A/N]. Consequently, this act has already been qualified as a crime by virtue of customary international law and in particular, the Statute of the international tribunal. Furthermore, the International Military Tribunal of Nuremberg, , the case law of this International Tribunal, and the Report of the International Law Commission (ILC) of 1991, among others, have all considered that the destruction of institutions dedicated to religion was unequivocally an act of persecution within the meaning of crimes against humanity. When it is perpetrated with the required discriminatory intention, this act is equivalent to an attack against the religious identity of a people. As such, it is a practically perfect

definition of the act of persecution as envisaged by the International Law Commission, it extends this framework principle by adding the cultural dimension: "Persecution may take many different forms, for example [...] the systematic destruction of buildings or monuments representative of a particular social, religious, cultural or other group."<sup>6</sup> Even though the principle established by UNESCO, according to which "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world."<sup>7</sup>, has progressively been established as a matrix of international law on cultural heritage, its enforceability mainly depends on whether States want to adhere to it or to abstain from it. Nevertheless, this principle also raises the question of imperative law and the increasing role of custom in the creation of an international cultural public order<sup>8</sup>.

### ***b) Cultural heritage through the prism of the fight against terrorism***

Since 2001, the United Nations Security Council has increased the production of standards aimed at fighting terrorism. Although preoccupation is not something new for the Security Council, the terrorist attacks of 11 September 2001 marked a turning point in their wording of the Security Council's resolutions. In the 1990s, the Security Council regularly treated issues of terrorism by prescribing sanctions against countries suspected of having links with terrorist acts: Libya (1992), Sudan (1996) and the Taliban (1999). Initiatives against terrorism were intensified in 1999: resolution 1269<sup>9</sup> called upon all States cooperate to prevent and suppress terrorist attacks and, in particular, "exchange information in accordance with international and domestic law and cooperate on administrative and judicial matters to prevent the commission of terrorist acts"<sup>10</sup>. This resolution set off a movement that intensified the Security Council's action to fight against terrorism, which was amplified after 11 September 2001.

Organic initiatives – creation of specialised Committees such as the one established by resolution 1373<sup>11</sup> – raised the level of involvement of States in the fight against terrorism. States now have to report on measures taken to prevent terrorist activities and to criminalise the various forms of terrorism, as well as promote cooperation among States, whom can also receive technical assistance to support them in these tasks<sup>12</sup>.

This comprehensive and multifaceted approach, promoted by the Security Council, and the

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example of the concept of "crimes against humanity", because it indeed humanity as whole that is injured by the destruction of a unique religious culture and its concomitant cultural objects. This Chamber therefore concludes that the wilful destruction or damage to Muslim institutions dedicated to religion or education may constitute an act of persecution if they are perpetrated with a discriminatory intent."

<sup>6</sup> Report of the International Law Commission, 43<sup>rd</sup> session, 29 April-19 July 1991, Supplement A/46/10. The draft code of crimes against the peace and security of mankind, p. 260 et seq.; in particular p. 292.

<sup>7</sup> Preamble of the UNESCO Convention for the protection of cultural property in the event of armed conflict, adopted in the Hague on 14 May 1954. See also UNESCO/RES/31C/26 (2001), Acts constituting a crime against the common heritage of humanity.

<sup>8</sup> V. UNESCO/RES/27C/3.5 (1993): "... the fundamental principles that are the protection and preservation of cultural property in the event of armed conflict could be considered as being part of customary international law, [...] the universal acceptance of the Hague Convention of 1954 and its protocol is an essential condition for the efficient protection of cultural property in periods of armed conflict".

<sup>9</sup> S/RES/1269 (1999) of 19 October 1999.

<sup>10</sup> This recommendation of international cooperation at the administrative and judicial level so as to prevent terrorist acts, in accordance with international law, may be (could have been?) interpreted as favouring the conclusion of bilateral agreements based on the Article 9 of the UNESCO Convention of 1970 concerning the measures to take to prohibit and prevent the illegal import, export and transfer of cultural goods.

<sup>11</sup> S/RES/1373 (2001) of 28 September 2001.

<sup>12</sup> S/RES/1535 (2004) of 26 March 2004.

reinforcement of cooperation within the international community led to a shift in the fight against terrorism, which cannot be fought only through military means and by coercive measures, towards handling the conditions that favour the spread of terrorism. In the wake of this, the Security Council emphasized that "continuing international efforts to enhance dialogue and broaden understanding among civilizations, in an effort to prevent the indiscriminate targeting of different religions and cultures, can help counter the forces that fuel polarization and extremism, and will contribute to strengthening the international fight against terrorism"<sup>13</sup>.

A first reference to culture and heritage was made in 1999, in resolution 1267 on the situation in Afghanistan<sup>14</sup>, in which the Security Council "affirmed [...] its strong commitment to the sovereignty, independence, territorial integrity and national unity of Afghanistan, and its respect for Afghanistan's cultural and historical heritage."

The climax of this integration process of cultural dialogue and the preservation of cultural heritage in the challenges and means of fighting terrorism was reached in resolution 1483 on the situation in Iraq<sup>15</sup>. After having called on "all parties concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907"<sup>16</sup>, in the 7<sup>th</sup> point of the resolution, the Security Council focused on the issue of cultural property removed from Iraqi institutions:

*The Security Council,*

*[...]*

*Acting by virtue of Chapter VII of the United Nations Charter,*

*[...]*

*7. Decides that all Member States shall take appropriate steps to facilitate the safe return to Iraqi institutions of Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from the Iraq National Museum, the National Library, and other locations in Iraq since the adoption of resolution 661 (1990) of 6 August 1990, including by establishing a prohibition on trade in or transfer of such items and items with respect to which reasonable suspicion exists that they have been illegally removed, and calls upon the United Nations Educational, Scientific, and Cultural Organization, Interpol, and other international organizations, as appropriate, to assist in the implementation of this paragraph;*

## **II. The inclusion of the safeguarding of culture heritage in the normative power of the Security Council**

Resolution 1483 (2003) inspired the measures that resolution 2199 (2015) of 12 February 2015 is deploying to reinforce the protection of Iraqi and Syrian cultural heritage. Points 15 to 17 of the resolution express the substance of the resolution:

*15. Condemns the destruction of cultural heritage in Iraq and Syria particularly by ISIL and Al*

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<sup>13</sup> Declaration of the President of the Security Council, 27 September 2010; S/PRST/2010/19.

<sup>14</sup> S/RES/1267 (1999) of 15 October 1999.

<sup>15</sup> S/RES/1483 (2003) of 22 May 2003.

<sup>16</sup> Note that the Hague Regulations of 1907 is that of Convention IV concerning the laws and customs of war, adopted in The Hague on 18 October 1907. Article 47 of the Regulations specifies that "pillage is formally prohibited", while the second paragraph of Article 56 specifies that "All seizure of, destruction or wilful damage done to institutions of this character, *[institutions dedicated to religion, charity and education, the arts and sciences]*, historic monuments, works of art and science, is prohibited, and should be made the subject of legal proceedings."

*Nusra Front, whether such destruction is incidental or deliberate, including targeted destruction of religious sites and objects;*

*16. Notes with concern that ISIL, Al Nusra Front and other individuals, groups, undertakings and entities associated with Al-Qaida, are generating income from engaging directly or indirectly in the looting and smuggling of cultural heritage items from archaeological sites, museums, libraries, archives, and other sites in Iraq and Syria, which is being used to support their recruitment efforts and strengthen their operational capability to organize and carry out terrorist attacks;*

*17. Reaffirms its decision in paragraph 7 of resolution 1483 (2003) and decides that all Member States shall take appropriate steps to prevent the trade in Iraqi and Syrian cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from Iraq since 6 August 1990 and from Syria since 15 March 2011, including by prohibiting cross-border trade in such items, thereby allowing for their eventual safe return to the Iraqi and Syrian people and calls upon the United Nations Educational, Scientific, and Cultural Organization, Interpol, and other international organizations, as appropriate, to assist in the implementation of this paragraph;*

Resolution 2199, in particular paragraph 17, and before that paragraph 7 of resolution 1483, compare the protection of cultural heritage with unilateralism, in a field traditionally covered by a normative action of UNESCO focused on the formulation of concerted international legislation<sup>17</sup>.

The dual normative relationship between paragraphs 15 to 17 of resolution 2199 – relationship with UNESCO's normative action in the field of the protection of cultural heritage and the previous Security Council resolutions aimed at fighting against terrorism – brings the international protection of cultural heritage into the Security Council's normative sphere. Nevertheless, this paradigm shift, which has replaced a unilateral peremptory norm with concerted international legislation, remains constrained by the Security Council's scope of intervention under Chapter VII of the United Nations Charter. This substantial conversion of the international law on cultural heritage places the onus of responsibility for the general interest of humanity in the protection and safeguarding of cultural heritage on the Security Council, which had up until now been the matrix of UNESCO's heritage standards and it was practically its exclusive domain. The Security Council does not act *in abstracto*, it is bound by an *in concreto* qualification process of a situation that is detrimental to the maintenance of international peace and security.

This taking over of the general interest of humanity in the protection and safeguarding of cultural heritage is based on Chapter VII – articles 39 to 51 of the United Nations Charter, which authorises the Security Council to impose enforcement measures with the sole aim of the maintenance of international peace and security. On the basis of Article 39, the Security Council can observe "the existence of any threat to the peace, breach of the peace, or act of aggression", and after observing and qualifying the facts, shall make recommendations (Article 40) or use measures not involving the use of armed force (Article 41) or involving the military action (Article 42) necessary to "maintain or restore international peace and security"<sup>18</sup>.

Resolutions 1483 and 2199 are based on Articles 39 and 41 of Chapter VII.

#### *Article 39*

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<sup>17</sup> See above.

<sup>18</sup> According to Article 24 of the United Nations Charter, Member States "confer on the Security Council primary responsibility for the maintenance of international peace and security." It is not "an exclusive responsibility that the Charter confers to this end to the Security Council"; ICJ, 26 November 1984, *Nicaragua v. United States of America*, section 95. This function is of a political nature; ICJ, 26 November 1984, *prev.*

*The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.*

#### *Article 41*

*The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.*

The Security Council has discretionary powers to assess the qualification of the facts, which guarantees its freedom to determine decisions and means of response. This discretionary jurisdiction determines the range of powers that the Security Council holds, the power to act or not to act, via the power of the least action. Although the reference to Chapter VII is often considered to indicate the mandatory nature of a resolution, the terminology used reveals the change in intensity the obligations that the Security Council imposes on Member States. In this case, in relation to the safeguarding of cultural heritage, only paragraph 7 of resolution 1483 and paragraph 17 of resolution 2199 forge the collective responsibility of Member States to fight against the dispersion of Iraqi and Syrian cultural property and to facilitate their restitution. In these two paragraphs, the use of "decides" in the present tense does not express a wish or an intent, but an obligation, the primacy of which, granted by Chapter VII, is imposed on Member States.

By requiring that measures be taken to prevent the sale of Iraqi and Syrian cultural property, assuming a ban on transnational trade in these objects and their restitution, the Security Council imposes on all Member States obligations by which they were previously not bound. Like an international law-maker, the Security Council, by the normative power that it exerts, imposes a mandatory model of conduct on a specific issue, the issue of the looting and illicit trafficking of cultural property, which are linked to the financing and development of terrorism.

The scope of such an obligation may be challenged in the light of the UNESCO conventions of 1954<sup>19</sup> and 1970<sup>20</sup>. These conventions set a general framework: one on the protection of cultural property during armed conflicts, the other on the prevention of looting and the illicit trafficking of cultural property, as well as their return to the country of origin. Although the provisions of these conventions can be implemented in the Iraqi and Syrian contexts, as they are qualified by the Security Council, their effectiveness continues to be conditional upon the acceptance of Member States to comply with them, formally expressed by their adhesion or ratification. Unless it is considered and proven that there is a customary law obligation, incorporated into international law, prescribing a ban on the trade in cultural property from conflict zones and a general obligation to return cultural property from such zones, paragraph 7 of resolution 1483 and paragraph 17 of resolution 2199 create a new peremptory norm for Member States. Where an international treaty takes effect only after the consent of the Parties, a resolution of the United Nations Security Council is a unilateral act the international legality of which is established through its adoption by the competent body and for which the primacy of the measures prescribed result from Chapter VII<sup>21</sup>.

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<sup>19</sup> UNESCO Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict.

<sup>20</sup> UNESCO Convention of 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.

<sup>21</sup> In this sense, the order of the ICJ of 14 April 1992, specifies, concerning the obligations generated by a resolution of the Security Council on the basis of Chapter VII, that "the obligations of the Parties in that respect prevail over their obligations under any other international agreement"; ICJ, 14 April 1992, *Libya v.*

### III. The commitments of Member States to cultural heritage with respect to the decisions of the Security Council

The conditions of Member States to enforce the Security Council's decisions and hence, those relating to Iraqi and Syrian heritage, are set out in Article 48 of Chapter VII.

#### *Article 48*

1. *The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.*
2. *Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.*

Public international law, under which fall the major UNESCO agreements, dedicated to the protection of cultural heritage requires States that they continue to adhere to their international commitments but allow them more or less the freedom to choose the means of executing the resulting international obligations. Article 48 of the United Nations Charter strengthens this requirements, and makes the Member States directly responsible for the enforcement<sup>22</sup>, and therefore the full effectiveness of the decisions of the Security Council. Compliance with the Security Council's decisions, under Chapter VII, is a strict requirement. To leave Member States with the capacity to interpret or assess these decisions would reduce, or even cancel the impact of these decisions. It would mean indirectly reintroducing the principle of consent of Member States, which by nature, is not required in the unilateral enactment of a peremptory norm. It would diminish the primacy of the unilateral act on the treaties<sup>23</sup>.

Without the capacity to interpret or assess the peremptory norm, in accordance with the measures prescribed by paragraph 7 of resolution 1483 and paragraph 17 of resolution 2199, the Member State is obliged to transcribe into domestic law, the conditions giving effect to the peremptory norm. The same requirements weigh on a regional integration institution such as the European Union, whose prerogatives replace the remit of Member States in regulating the trade and circulation of property and goods.

In Europe, Council Regulation (EC) No 1210/2003 of 7 July 2003 concerning certain specific restrictions on economic and financial relations with Iraq, imposes rules that bind the 28 Member States of the European Union. Article 3 of this Regulation specifically deals with the protection of Iraqi cultural property as set out in resolution 1483 of the Security Council.

#### *Article 3*

1. *The following shall be forbidden:*

- a) *the import of or the introduction into the territory of the Community;*
- b) *the export of or removal from the territory of the Community of, and*

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*United Kingdom, § 39.*

<sup>22</sup> This is not the case of the regulations adopted by the World Health Organisation, which are directly applied into the domestic legal order of Member States. Article 22 of the Constitution of the World Health Organisation provides that "Regulations adopted [...] shall come into force for all Members after due notice has been given of their adoption by the Health Assembly except for such Members as may notify the Director-General of rejection or reservations within the period stated in the notice.

<sup>23</sup> See ICJ, 14 April 1992, *prev.*

c) the dealing in, Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific and religious importance including those items listed in Annex II, if they have been illegally removed from locations in Iraq, in particular, if:

i) the items form an integral part of either the public collections listed in the inventories of Iraqi museums, archives or libraries' conservation collection, or the inventories of Iraqi religious institutions, or

ii) there exists reasonable doubt that the goods have been removed from Iraq without the consent of their legitimate owner or have been removed in breach of Iraq's laws and regulations;

2. These prohibitions shall not apply if it is shown that either:

a) the cultural items were exported from Iraq prior to 6 August 1990; or

b) the cultural items are being returned to Iraqi institutions in accordance with the objective of safe return as set out in paragraph 7 of UN Security Council resolution 1483 (2003).

These rules are mandatory in all their provisions: Member States of the European Union are bound to implement them as they have been defined<sup>24</sup>. They are directly applicable in the domestic legal order of Member States and are binding on all subjects as of law - private individuals, art market professionals, Member States, museums, institutions, etc. – without the need for any transcription of this regulation, projecting the prescriptions of paragraph 7 of resolution 1483 into the domestic law of EU member States.

Other Member States have incorporated the obligations set out by paragraph 7 of resolution 1483 into their domestic law.

In Switzerland, the Order of 7 August 1990 implementing economic measures against Iraq, states in its first article:

*Article 1a – Cultural property*

1. The import, transit, export, trade, brokerage, acquisition and any other form of transfer of Iraqi cultural property stolen from the Republic of Iraq, taken away from the control of beneficiaries in Iraq or otherwise lost against the will of the owner, or illicitly exported out of the Republic of Iraq since 2 August 1990.

2. The illegal export of Iraqi cultural property is presumed to have taken place when it can be established that it was still in the Republic of Iraq after 2 August 1990.

In the United States, the *Emergency Protection for Iraqi Cultural Antiquities Act of 2004* specifies:

*H.R. 1047, TITLE III--IRAQI CULTURAL ANTIQUITIES*

*SEC. 3001. SHORT TITLE.*

*This title may be cited as the 'Emergency Protection for Iraqi Cultural Antiquities Act of 2004'.*

*SEC. 3002. EMERGENCY IMPLEMENTATION OF IMPORT RESTRICTIONS.*

*(a) AUTHORITY- The President may exercise the authority of the President under section 304 of the Convention on Cultural Property Implementation Act (19 U.S.C. 2603) with respect to any archaeological or ethnological material of Iraq without regard to whether Iraq is a State Party under that Act, except that, in exercising such authority, subsection (c) of such section shall not apply.*

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<sup>24</sup> Article 288 of the Treaty on the Functioning of the European Union

*(b) DEFINITION- In this section, the term 'archaeological or ethnological material of Iraq' means cultural property of Iraq and other items of archaeological, historical, cultural, rare scientific, or religious importance illegally removed from the Iraq National Museum, the National Library of Iraq, and other locations in Iraq, since the adoption of United Nations Security Council Resolution 661 of 1990.*

The implementation by the United States of resolution 1483 is underpinned by the Convention on Cultural Property Implementation Act of 12 January 1983 which implements the provisions of the 1970 UNESCO Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property. The possibility of such a linkage between the prescriptions of paragraph 7 of resolution 1483 and the 1970 UNESCO Convention results from Iraq's position as a State Party to the Convention, with respect to which it entered into force on 12 February 1973.

In the wake of resolution 1483, Australia adopted a Regulation No. 97 in 2003 – Iraq (Reconstruction and Repeal of Sanctions) Regulations 2003 – which stipulates in particular:

*Regulation 7 provides that a person must not transfer an item of cultural property that was illegally removed from a place in Iraq (including the Iraq National Museum or the National Library of Iraq) after the adoption of Resolution 661, or that the person ought reasonably to suspect had been so removed;*

*Regulation 8 provides that a person who is in possession or control of an item of cultural property mentioned in regulation 7 must, as soon as practicable, give the property to:*

- a) a member of the personnel of the United Nations; or*
- b) a member of the Defence Forces; or*
- c) a representative of the Authority mentioned in Resolution 1483; or*
- d) a representative of the Iraq National Museum or the National Library of Iraq; or*
- e) a representative of the place from which the item was removed, or is reasonably suspected of having been removed; or*
- f) a member of the Australian Federal Police, or of a police force of a State or Territory;*

In another case, to apply resolution 1483, dealing with the circulation of property, including financial assets in the same way, on 19 October 2010, Canada implemented a *United Nations Iraq Regulation*, where Article 5.1 (a) "*prohibits all persons in Canada and all Canadians outside of Canada, [...] to knowingly, deal directly or indirectly, in any transaction concerning property in Canada that, as the case may be: (i) was owned and continues to be owned by the previous Iraqi Government or any public entity identified by the Committee on 22 May 2003, (ii) is owned or controlled by or held on behalf of any individual or entity identified by the Committee.*"

Although the final responsibility of compliance with the requirements of the Security Council resolutions lies with Member States, the meeting of requirements on the ban on the trade in Iraqi antiques and cultural property as well as their return, defined by resolution 1483, presents differences in normative intensity, that the wording of the resolution, under chapter VIII should not allow.

#### **IV. Proposals of the normative implementations of paragraph 17 of resolution 2199 (2015)**

The differences in the implementation of Security Council decisions on the ban on the trade in Iraqi cultural property removed or transferred illegally after 6 August 1990 affects the effectiveness of the resolution.

##### ***a) Embargo and moratorium***

International law offers specific measures that are liable to relay and impose the bans set out in resolution 1483 more broadly, such as the embargo and the moratorium.

Traditionally presented as a means of exerting pressure, which consists in restricting or prohibiting the exchange or trade in property, the embargo is more often a counter-measure. The Institute of International Law has thus defined the embargo "*As a safeguard measure in the event of a violation of a right, the embargo may be imposed by way of reprisals*"<sup>25</sup>. The Security Council gives it this same meaning as a collective sanction or counter-measure<sup>26</sup>. The embargo decision pronounced by the Security Council thus prevails over "all rights or obligations conferred or imposed by all international agreements of contracts signed, as well as all licences or permits granted, before the date of the [...] resolution"<sup>27</sup>.

The moratorium is the product of a consensus. It takes the form of an agreement, the objective and challenge of which is to suspend activities in a specific domain or to postpone the settlement of claims, over a given period that may be renewed.

The proclamation of an embargo or moratorium, on the trade in cultural property from Iraq after 6 August 1990 and Syria after 15 March 2011, is only the reiteration and normative intensification of the prescriptions set out in paragraph 7 of resolution 1483 and paragraph 17 of resolution 2199. The embargo could be the reflection of the targets of resolution 2199, while the moratorium may seem more appropriate to the framework and temporality of resolution 1483. In both cases, the Security Council is responsible for the proclamation of these measures. They have the advantage of emphasising the level of requirements on compliance with the prescriptions of paragraph 7 of resolution 1483 and paragraph 17 of resolution 2199, to harmonise their implementation and guarantee their primacy.

Conversely, they may be perceived as the implicit acknowledgement of a weakness in the implementation by the State of these prescriptions and would therefore change the impact of resolutions 1483 and 2199, with respect to the system in place to protect cultural property.

#### **b) Model provisions sent to Member States**

The meeting of the requirements of protection and safeguarding of cultural heritage may be reinforced by assistance provided to Member States to ensure that they fully comply with paragraph 7 of resolution 1483 and paragraph 17 of resolution 2199. This support could take the form of guidelines or model provisions sent to the States, who will insert their obligations into their domestic laws.

The guidelines of the Association of Art Museum Directors (AAMD) provide a theoretical framework for creating such model provisions to reinforce national legislation to ensure compliance with the requirements of the ban on the trade in Iraqi and Syrian cultural property as well as their restitution. The *Guidelines on the Acquisition of Archaeological Material and Ancient Art (revised 2013)* are based on the 1970 UNESCO Convention to prescribe a ban on acquisition and the nature of the obligation to carry out due diligence on the origin of the cultural and archaeological property<sup>28</sup>.

The use of the 1970 UNESCO Convention is an ethical principle that positions the Convention as the lock that will found a new international order for controlling the circulation of cultural property and the return to their country of origin. In the wording of paragraph 7 of resolution 1483 and paragraph

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<sup>25</sup> IIL, Resolution of 23 August 1898, *Annuaire*, 1898, vol. 17, p. 284.

<sup>26</sup> See in particular: S/RES/917 (1994) of 6 May 1994.

<sup>27</sup> S/RES/757 (1992) of 30 May 1992, on the embargo on the former Socialist Federal Republic of Yugoslavia. Resolution cited by way of example; Security Council resolutions concerning economic and trade sanctions comprise provisions of this kind.

<sup>28</sup> "*Member museums normally should not acquire a Work unless provenance research substantiates that the Work was outside its country of probable modern discovery before 1970 or was legally exported from its probable country of modern discovery after 1970.*"

17 of resolution 2199, this lock is of a different kind. Given the risks of dispersion to which Iraqi and Syrian cultural property are more particularly exposed because of conflicts, it is based on the 6 August 1990 for Iraq and 15 March 2011 for Syria, as specified in chapter 17 of resolution 2199.

Drawing on paragraph 7 of resolution 1483 and paragraph 17 of resolution 2199, the model provision below could be sent to Member States to be used in drafting or revising national laws and regulations:

*No museum or heritage institution must acquire Iraqi or Syrian cultural property unless a thorough search on the origin of the property establishes without doubt that:*

- *the cultural property was outside the country of origin – a country where, either it was updated, or had been kept or identified- before 6 August 1990 for Iraq and 15 March 2011 for Syria, or*
- *that the cultural object was legally exported outside its country of origin – a country where, either it was updated, or had been kept or identified- after 6 August 1990 for Iraq and 15 March 2011 for Syria.*

Such a provision must be linked with the 1970 UNESCO Convention in order not to be interpreted as a liberalisation of the market of cultural and archaeological objects that were outside the country of origin, before 6 August 1990 for Iraq and 15 March 2011 for Syria, in contradiction with the obligations of the 1970 UNESCO Convention, to which both Iraq and Syria are parties. It is also a question of preventing an interpretation of these resolutions that would push aside the 1970 UNESCO Convention<sup>29</sup>, and keep only the provisions of chapter 7 of resolution 1483 and chapter 17 of resolution 2199 and their chronological references. The impact over time of the obligations imposed on other Member States with respect to Iraq and Syria needs to be resolved. As such, the legal situation of cultural objects outside Iraq before 6 August 1990 and Syria before 15 March 2011 must continue to be governed by the provisions of the 1970 UNESCO Convention as from its entry into force on 12 February 1973 for Iraq and 21 February 1975 for Syria<sup>30</sup>. This situation could be included in the model provision below:

*When the cultural object was outside the country of origin, before 6 August 1990 for Iraq and 15 March 2011 for Syria, the museum or heritage institution must verify and ensure, by all means possible before the acquisition, that the cultural object had been legally exported after 12 February 1973 for Iraq or 21 February 1975 for Syria.*

The scope of these provisions may be extended by an *ad hoc* provision, to art market professionals. Another option could consist in adopting an impersonal formulation to encompass all transactions regardless of the buyer, whether an institution or a private individual.

### ***c) Monitoring Committee of paragraph 7 of resolution 1483 and paragraph 17 of resolution 2199***

The monitoring of the implementation of paragraph 7 of resolution 1483 and paragraph 17 of resolution 2199 could be entrusted to a specialised committee, established in accordance with Article 28 of the rules of procedure of the Security Council. Such a prospect would reinforce the subjection of Member States to the prescriptions and requirements of these resolutions, in their mechanisms for implementing the protection of cultural property. The principle of a committee specifically dedicated to the implementation of paragraph 7 of resolution 1483 and paragraph 17 of resolution 2199, should place the emphasis on the crucial issue of the protection of cultural property during armed conflicts and crises and during post-conflict periods, and should thus make it possible to avoid the dilution of this issue in the undifferentiated regulation on the transfer of property as provided in

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<sup>29</sup> On the issue of the primacy of the obligations derived from a Security Council resolution on an international treaty: ICJ, 14 April 1992, *Libya v. United Kingdom*, paragraph 39; See *above* note 21.

<sup>30</sup> See in the appendix, the UNESCO Conventions that concern Iraq and Syria.

the Canadian legislation of 2010<sup>31</sup>. The mandate of such a committee should be coupled with the obligation of Member States to present, at a determined frequency, the measures they will have taken, or are planning to take, to enforce paragraph 7 of resolution 1483 and paragraph 17 of resolution 2199.

## V. Conclusions

Resolution 2199, and in particular paragraph 17 of said resolution, which reiterates the decisions of paragraph 7 of resolution 1483 on Iraqi cultural property, formulates new obligations to preserve Syrian cultural heritage, underpinned by the fight against terrorism. These resolutions instil a collective discipline, which, far from relieving Member States from their own responsibility, should channel their individual actions and promote the unanimous support of subjects of law for the general interest to humanity of the protection and safeguarding of the cultural heritage of the people.

This collective discipline, laid down by paragraph 17 of resolution 2199 reinforces the customary law dimension of the obligation to respect the heritage of the people – a normative projection of the general interest to humanity – and consolidates the *erga omnes* nature of this obligation. The impact of this customary law standard must be assessed against the principles on the international responsibility of Member States as they result from the project to codify the State's responsibility for internationally illicit acts adopted by the International Law Commission<sup>32</sup>. Article 48, which covers the invocation of the responsibility by a State other than an injured State, specifies that "any State other than an injured State is entitled to invoke the responsibility of another State, if [...] the obligation breached is owed to the international community as a whole."

25 March 2015

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<sup>31</sup> See *above*.

<sup>32</sup> Resolution 56/83 adopted on 12 December 2001 by the General Assembly of the United Nations [A/RES/56/83 (2001)] "Takes note of the articles on responsibility of States for internationally wrongful acts, presented by the International Law Commission [...] and commends them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action."

## Appendix: UNESCO Conventions that concern Iraq and Syria

<b>Normative instruments</b>	Date of entry into force	
	<b>Iraq</b>	<b>Syria</b>
Convention for the protection of cultural property in the event of armed conflict, with its implementing regulation, adopted in the Hague on 14 May 1954.	21 December 1967	6 March 1958
Protocol of the Convention, adopted in the Hague on 14 May 1954	21 December 1967	6 March 1958
UNESCO Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property, adopted in Paris on 14 November 1970.	12 February 1973	21 February 1975
Convention on the protection of world, cultural and natural heritage. Paris, 16 November 1972	5 March 1974	13 August 1975*
Convention for the safeguarding of intangible cultural heritage, adopted in Paris on 17 October 2003	6 January 2010	11 March 2005
Convention on the Protection and promotion of the diversity of cultural expressions, adopted in Paris on 20 October 2005	22 July 2013	5 February 2008

\* During the accession of Syria to the 1972 UNESCO Convention, Syria made reservations including the one below: *"The Government of the Syrian Arab Republic views that the international cooperation system stipulated in Article 7 binds the Member States to exert all possible aid to the State part of whose territories is occupied for the sake of preserving heritage."*